

27 December 1946

UNITED STATES

vs

Case No. 12-1576

Julius BODENSTEIN and
Edmund KUERSCHNER, German
Nationals.

REVIEW AND RECOMMENDATIONS

1. TRIAL: The accused were tried at Dachau, Germany, between 27 June 1946 and 1 July 1946, before a General Military Government Court appointed by Special Orders No. 147, paragraph 15, Headquarters, Third United States Army, APO 403, dated 14 June 1946.

2. FINDINGS: The offenses involved were:

	<u>Pleas</u>	<u>Findings</u>
FIRST CHARGE: Violation of the Laws of War.	NG.	NG.

Particulars: In that Julius BODENSTEIN, a German national, did, at or near Schweina, Germany, on or about 20 July 1944, wrongfully commit an assault upon 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 hitting him on the face, the head and the body with a rubber stick.

NG. NG.

SECOND CHARGE: Violation of the Laws of War.

NG. G.

Particulars: In that Julius BODENSTEIN, and Edmund KUERSCHNER, German civilians, did, at or near Schweina, Germany, on or about 21 July 1944, willfully, deliberately and wrongfully encourage, aid, abet and participate in the killing of 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.

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 BODENSTEIN to life imprisonment commencing forthwith at such place as may be designated by competent military authority and Edmund KUERSCHNER to be imprisoned for a term of 20 years commencing the 25th of June 1945 at such place as may be designated by competent military authority. The record of trial has been forwarded to the Commanding General, United States Forces, European Theater, for final action (Paragraph 3d, 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:

a. Accused BODENSTEIN is a German national 47 years of age, is married and is a civilian (R 3). He has been a member of the motorized SS since 1934, and a member of the Nazi Party since 1937. At the time of the offense of which he was found guilty he was a police official in Schweina and has been active in the police since 1923. He was a soldier in the first World War from 1916 to 1921, and was in the hospital from the end of the war until 1921 because of a leg injury (R 75, 76).

b. Accused KUERSCHNER is a German national, 58 years of age, is married and has four children. He was taken prisoner on the 4th of May 1945 while serving in the Germany Army and was discharged from the Army on the 24th of June 1945 (R 3, 4). He has been a member of the Nazi Party since January 1942, served in the first World War from 1914 to 1917 and was a non-commissioned officer in the Infantry at the time of discharge. At the time of the offense of which he was found guilty he was a home guard leader and had held that position since 1943 (R 141, 142).

5. RECOMMENDATION: That the sentence of the Military Government Court as to each accused be approved by the Theater Judge Advocate under the provisions of paragraph 8d of the letter referred to in paragraph 3, supra.

6. EVIDENCE:

a. For the Prosecution: The case for the prosecution is based on affidavits and the testimony of one witness.

According to the statements of the two accused, ^{copy} three American flyers jumped from planes during an air raid over Schweina, Germany, on 20 or 21 July 1944. One of the flyers was killed in landing, and the other two were captured and after interrogation locked in cells in the local jail. One of the two surviving flyers was killed by a guard who reported that the flyer was shot while attempting to escape. At about 2300 hours on the 20th or 21st of July the accused BODENSTEIN and KUERSCHNER and the ^{last} surviving American flyer transported the bodies of the two dead flyers to the cemetery in a cart. An undertaker, Adam

PFEIFFER, was present at the cemetery. Accused BODENSTEIN indicated to the flyer that he was to remove or assist in the removal of the bodies from the cart into a wooden house. The flyer hit BODENSTEIN who fell to the ground. The flyer then fled into the wooden house. BODENSTEIN pursued him, gun in hand, shot and killed him. KUERSCHNER followed BODENSTEIN into the house and at the order of BODENSTEIN fired one bullet into the body of the dead flyer. The bodies of the other dead flyers were carried into the house and the two accused left the cemetery. The following day a report of the shooting was made to higher headquarters, and later the bodies of the three flyers were buried in the local cemetery (P-Ex 7 and 8).

There are discrepancies in the statements concerning the method of capture of the airmen. Accused KUERSCHNER stated that acting under orders from BODENSTEIN to search for crashed flyers, his platoon of sixteen men found two flyers alive and one dead (P-Ex 7). Another affiant, Marie GAERING, stated that a flyer was brought to the community office by a soldier (P-Ex 4A). Accused BODENSTEIN declared that he arrested an American flyer who landed in Schweina on 20 July 1944 and locked him up with another pilot in the local jail (P-Ex 8). The statement of accused BODENSTEIN is corroborated by the sworn statement of Anton BEDNAREK, a Pole, who related that while he was working in a field around noon on 20 July 1944 he saw two flyers come down, from a distance of 300 meters saw accused BODENSTEIN kick the body of one flyer who was killed in landing, and then go to the other flyer as he came down and beat the flyer with a rubber stick before the parachute was removed (P-Ex 5).

There is a conflict in the statements of the two accused concerning the transportation of the bodies. KUERSCHNER stated that the undertaker, Adam PFEIFFER, was present at the cemetery, while BODENSTEIN stated that PFEIFFER aided in transporting the bodies to the cemetery (P-Ex 7 and 8).

The affidavits of the two accused differ in telling the story of the events in connection with the alleged attempted escape of the flyer. The statement of BODENSTEIN relates that affiant fired one shot at the flyer as the flyer reached the steps of a wooden house after the flyer had failed to halt when so ordered; that the flyer kept on running into the house after the shot and was lying on

the floor when BODENSTEIN and KUERSCHNER entered the building together; that BODENSTEIN fired only one shot; that he does not know whether KUERSCHNER fired any shots and does not remember ordering KUERSCHNER to fire a bullet into the body (P-Ex 8).

An entirely different story is related by KUERSCHNER. According to his statement, BODENSTEIN, after having been knocked down by the flyer got up, drew a pistol and ran behind the flyer as he fled into the house. Three shots were heard at a distance of 20 meters and the flyer was dead with two bullet holes in his head when KUERSCHNER arrived in the house. Affiant stated that BODENSTEIN, who was not sure that his gun was working properly, ordered KUERSCHNER to fire a shot at the flyer; that KUERSCHNER under protest fired one shot from his gun into the flyer's head, and that in answer to KUERSCHNER's protest BODENSTEIN had said that the man was already dead and that it did not make any difference (P-Ex 7).

The statement of Otto WOLFRAM introduces a different story concerning the events immediately prior to the shooting of the flyer. He states that he asked BODENSTEIN if this was true that a parachutist had been shot and that BODENSTEIN answered that the flyer had resisted; that in answer to his question as to what happened BODENSTEIN said "he jumped at my throat" (P-Ex 6A).

The story of the incident as told by BODENSTEIN is corroborated generally by the testimony of Friedrich SALZMANN, police official superior to BODENSTEIN who testified concerning a report made by BODENSTEIN at the time of the incident (R 22, 23, 24).

The affidavit of Captain Keene Saxon, CMP, was introduced to show that duress was not used in obtaining statements of the two accused, Prosecution Exhibits 7 and 8, and that of Friedrich SALZMANN, Defense Exhibit 1 (P-Ex 9).

b. For the Defense: Friedrich SALZMANN, a police official, superior to accused BODENSTEIN, and the only witness for the prosecution, testified as the first witness for the defense as follows:

A gendarme such as BODENSTEIN was equipped with a carbine and a pistol, but the gendarmes had not been equipped with rubber clubs since the end of 1933, when the clubs were collected and turned in (R 42). A rural policeman who

carried or used a rubber stick would have been punished and BODENSTEIN was not the type to violate regulations (R 44). BODENSTEIN was a quiet, efficient, and considerate official (R 42, 43). Accused KUERSCHNER was rural police leader subordinate to BODENSTEIN (R 46), and such leaders were selected for the job only if they had the confidence of the local population and the rural police (R 47). The people in SALZMANN's district were easily incited because of the fact that they were forced to remain in cellars day and night because of airplanes passing. An order came down that the police were to protect enemy flyers (R 48). In the area in which witness lived there were a large number of people who had been bombed out of other regions and those people were easily aroused, making it necessary for the police to maintain a firm attitude when enemy flyers came into their hands (R 49). In accordance with custom three investigations were made of the shooting of the American flyer, and BODENSTEIN was declared free of any suspicion of incorrect use of arms (R 50-51).

Defense Counsel introduced Exhibit D-1, a statement signed by SALZMANN, for the purpose of determining the authenticity of statements in Prosecution's Exhibits 7 and 8 (R 53). It was suggested by Counsel that the witness and the two accused were interrogated at about the same time and the procedure was not correct (R 55). Witness testified that his statement did not correctly reflect his pre-trial testimony (R 57, 58, 64).

The accused Julius BODENSTEIN elected to testify in his own behalf in substance as follows: Toward 1300 hours in the afternoon of 20 July, following an air combat over Schweina (R 76), BODENSTEIN went to the spot in a field where the body of the crashed flyer had been found by a farmer (R 77, 78). He had no stick but carried a pistol in a holster (R 79, 107). After looking at the dead flyer and ordering several home guard men at hand to protect the body against a large crowd that had gathered, BODENSTEIN returned to the office (R 80). A community laborer was sent to bring the corpse to the town hall. The laborer reported that he had a difficult time on the way seeing to it that the corpse was not damaged. BODENSTEIN ordered the door leading to the courtyard blocked so that the crowd that had gathered could not approach the corpse (R 80, 81). A living American flyer was brought to the Community House by

civilians (R 81) and a second flyer was brought in by KUERSCHNER who reported that the prisoner had been handed over to him by some civilians (R 83). KUERSCHNER reported that he had passed fairly large crowds on his way to the town hall with the prisoner and that there was insulting talk (R 86). BODENSTEIN reported to the Landrat at Meiningen and requested that he immediately be notified when the two flyers would be called for. In taking the prisoners to arrest cells, BODENSTEIN chose a route which would subject the prisoners to the least possible danger from the crowd of approximately 300 people outside the building, and posted guards so to avoid any attacks (R 87-90). That same evening, after 1900 hours, Sergeant of the Guard MUELLER reported to BODENSTEIN that one of the flyers had been shot while trying to escape and that the corpse had been returned to the cell (R 93, 95). The record gives in detail the chain of events on the 20th leading up to the report of the death of one flyer after 1900 hours; then the statements is made without explanation of the apparent discrepancy, that there are now two dead and one living flyers and it is now the 21st of July (R 89-96). At about 2100 hours on 21 July it was arranged that BODENSTEIN, KUERSCHNER, and the living American flyer would transport the two dead bodies to the cemetery at about 2300 hours, so as to avoid the population's doing any harm to the prisoners. No other people were available and the home guard men were busy at their posts (R 97). MUELLER was at one of the road blocks (R 130). BODENSTEIN could not pull, and the way leading to the cemetery was very steep (R 98). There was a law in Schweina that dead people had to be taken to the burial house and were not permitted to remain in homes overnight (R 97), and an ordinance that all foreigners were to be transported and buried after dark (R 107). BODENSTEIN paid little attention to the body of the first flyer during the night of the 20th because he had received an official call to intercept a limousine, arrest the occupants, and secure the automobile, which it necessary for him to establish road blocks (R 93, 127).

At the entrance to the cemetery the custodian (PFEIFER), who had been notified by BODENSTEIN to be there, joined the transport and went along to the burial hall. When the party stopped BODENSTEIN indicated by a motion of the hand to the flyer that he should help carry the corpses into the burial hall, the door of which was open (R 99). The flyer hit BODENSTEIN on the left cheek

and BODENSTEIN fell over the tongue and over the cart. BODENSTEIN got up, yelled "Halt" and in the meantime having put a bullet in the magazine fired at the flyer who was on the first or second step leading to the burial room, a distance of approximately 4 meters (R 100). After the first shot was fired the flyer continued to run into the hall, which was made of stone, and BODENSTEIN followed him (R 101). As a result of the blow BODENSTEIN had several teeth loose, his cheek was swollen, and he consulted a dentist to determine whether or not his jaw was broken (R 102). KUERSCHNER and PFEIFFER were standing at the back end of the cart when the flyer hit BODENSTEIN (R 131). BODENSTEIN does not know what PFEIFFER and KUERSCHNER were doing during the short period he was semi-conscious (R 131). On redirect examination BODENSTEIN testified:

KUERSCHNER told BODENSTEIN that after striking BODENSTEIN the flyer ran almost to the fence, and then back. The fence was about 10 meters from the cart (R 132) and 3 meters high (R 138). The windows and the door of the burial hall were open, and when BODENSTEIN saw the flyer coming back it came to his mind that it would be possible for the flyer to escape from the windows and continue his escape from there, which was the reason for his shooting (R 132, 133). When questioned by the Court, witness said that a wrought iron gate to the cemetery was left open, and answered "yes" when asked whether the flyer could have gone out of the gate if he had gone in that direction. BODENSTEIN also agreed to a long statement by Defense Attorney to the effect that after the flyer ran to the fence, and could not jump, he had to come back because of the location of the fence, the cart, and the burial hall as shown in Defense Exhibit 4 (R 134-139).

The statements of the witness concerning the events in the burial hall are conflicting. On direct examination the record reads as follows:

- A: "As I entered the burial hall the flyer jumped at me and grabbed me by my throat with his right hand and I fired two shots at him without aiming."
- Q: "Can you clearly remember these occurrences?"
- A: "Because of the blow that I received in front of the cart, I was so confused that I am, I was unable to remember details."

Q: "Since it was between 11 and 1 o'clock at night, it must have been dark inside the hall; did you clearly see the flyer approaching towards you or did you only find it out when he had his hands on your throat?"

A: "Only after I had shot I noticed that I had been strongly pressed at the throat."

Q: "So that you saw something shadowy coming toward you and fired?"

A: "Yes." (R 101).

On redirect examination after a long explanation from Defense Counsel concerning what happened in the burial hall, the witness said, "The American moved backward and I shot at him twice." (R 137). After two shots were fired the prisoner collapsed to the left side in front of accused BODENSTEIN (R 101). KUERSCHNER came running into the burial hall; KUERSCHNER and BODENSTEIN examined the flyer and determined that two shots had penetrated behind the right ear and that the flyer was dead (R 102).

BODENSTEIN then told KUERSCHNER to fire one shot at the dead flyer, using KUERSCHNER's pistol and BODENSTEIN's ammunition, because after BODENSTEIN's first shot the flyer was still able to continue running and BODENSTEIN wanted to examine his ammunition (R 103). KUERSCHNER shot one bullet into the head of the dead flyer. The bullet emerged in front. The two shots which BODENSTEIN had fired from a short distance had not emerged. PFEIFFER, KUERSCHNER and BODENSTEIN carried the other two bodies into the burial hall (R 104). The next day a detail from the Air Force arrived for the prisoners and the officer in charge determined that BODENSTEIN had made correct use of his weapon (R 105). Three competent authorities determined that BODENSTEIN had made correct use of his weapon (R 106). The signature on Prosecution's Exhibit No. 8 was acknowledged to be that of witness BODENSTEIN. BODENSTEIN testified that the document was not read to him, but that he signed it because he trusted the interrogating officer to put down everything he had stated. BODENSTEIN was never shown a German interpretation of Prosecution's Exhibit No. 8 (R 108). The statements of Prosecution's Exhibit No. 8 which are in conflict with BODENSTEIN's testimony were not made by him. KUERSCHNER has a good reputation in Schweina, is conscientious and reliable (R 108, 109). BODENSTEIN was put under pressure to make a statement (R 122, 123, 124, 125).

Accused Edmund KUERSCHNER elected to testify in his own behalf as follows:

He was in charge of the home guard in Schweina, and had 32 home guard men under his command (R 142). BODENSTEIN was his immediate superior. On 20 July 1944, a flyer who had landed with a parachute was turned over to KUERSCHNER by civilians, at about 5 kilometers from Schweina in a wooded area. KUERSCHNER was armed with a pistol and an Italian Gendarmerie rifle with a bayonet (R 143, 145, 146, 147). On the way to the Community House with the flyer, it was necessary for him to protect the flyer from three separate crowds of people (R 148-153). If KUERSCHNER had desired to kill the flyer he could have done so in the wooded area (R 154). KUERSCHNER did not see BODENSTEIN carry a rubber stick (R 156). A big searching party was formed on the morning of the 21st of July for the purpose of intercepting a cabriolet with a number of high police officials which search lasted several days (R 157, 158). At about 2100 hours on 21 July 1944, KUERSCHNER was told by BODENSTEIN that during BODENSTEIN's absence one of the flyers had been shot by Sergeant of the Guard MUELLER, while trying to escape, and that the two corpses were to be transported to the cemetery during the night. BODENSTEIN told KUERSCHNER that there was an order that all foreigners were to be transported by night, but KUERSCHNER did not know the origin of the order (R 159). The main reason for transporting these people to the cemetery by night was to withdraw them from public interference. BODENSTEIN ordered KUERSCHNER to return at 2300 hours and told the prisoner to help with the transport (R 160). The body of the flyer killed in the crash landing was in a cart in the court yard, covered with a sheet. KUERSCHNER was told that on the previous day BODENSTEIN had ordered the doors locked to the court yard and had ordered a crowd to leave (R 161). Two or three home guard men from the office got the flyer and the corpse from the cells (R 161, 162, 163) and placed the second corpse on the cart with the first corpse. BODENSTEIN, the flyer and KUERSCHNER departed on the way to the cemetery (R 164). It was not possible for two men to transport the corpses on a hand cart to the cemetery because of steep slope (R 165, 166). The home guard men were not ordered or requested to assist because they had other duties to perform (R 160, 190).

PFEIFFER, the cemetery custodian, was waiting at the gate of the cemetery and helped to push the cart into the cemetery (R 168). It was possible to see that the windows were open in the burial hall, which is a stone building (R 169). KUERSCHNER and PFEIFFER were supposed to lift the corpses from the cart. PFEIFFER said, "Let's pick them up." BODENSTEIN motioned to the American that he should help pick up the dead bodies (R 170). KUERSCHNER did not see the flyer hit BODENSTEIN but he heard a thud, looked up, and saw that BODENSTEIN had fallen. The flyer was running away in the direction of the fence, and immediately before getting to the fence he turned and ran back because he could not jump it. KUERSCHNER was a little confused. He looked at BODENSTEIN, and the flyer, and jumped a little to the side to make escape that way impossible (R 171). The fence around the cemetery is made of meshed wire with a barbed wire top. There is an iron post every 3 meters and these posts are bent at a 30° angle toward the cemetery and a barbed wire runs from post to post (R 167). There are three or four strands of barbed wire. It is not possible to see the meshed wire at all because the hedge surrounds the posts on both sides (R 168). KUERSCHNER does not know whether PFEIFFER moved. While the flyer was running BODENSTEIN yelled "Halt!", and the flyer did not stop; BODENSTEIN fired. The flyer continued jumping. BODENSTEIN went after him into the burial hall and shouted something which may have been "Get back!", and immediately thereafter two shots were heard (R 172).

On redirect examination it was brought out that it was at the most two or three seconds from the time KUERSCHNER saw BODENSTEIN fall on the cart before the flyer went toward the fence and came back. Then the flyer disappeared in the doorway. BODENSTEIN fired the first shot at the moment the flyer entered the door. It was then as long as two seconds before BODENSTEIN took after him up the stairway (R 195), and it was two seconds after BODENSTEIN disappeared in the room before KUERSCHNER heard two shots (R 196). The moment KUERSCHNER heard the shots he jumped into the burial hall and PFEIFFER followed him (R 197). When KUERSCHNER and PFEIFFER entered the burial hall the flyer was lying on the ground with two bullet wounds on the left back side of his head. KUERSCHNER could see the blood flow. BODENSTEIN had his pistol in one hand and he used

one other hand to wipe the perspiration off his face (R 172, 174).

When questioned by the court KUERSCHNER said that the flyer was lying approximately in the center of the burial room, of which the dimensions were approximately 7 x 7 meters; that the room was not illuminated but that it was a bright night (R 193). When KUERSCHNER arrived in the room BODENSTEIN said, "This bastard would almost have choked me if I had not acted rapidly." (R 173). On examination of the body the accused determined that the bullets fired by BODENSTEIN had not emerged. KUERSCHNER was absolutely sure the man was dead (R 174). BODENSTEIN wanted to fire a shot to determine whether his ammunition was bad or whether his pistol was not functioning properly (R 175). BODENSTEIN gave KUERSCHNER a bullet out of his pistol and KUERSCHNER loaded his pistol with it. When KUERSCHNER hesitated BODENSTEIN said, "Go ahead and shoot, no damage will be caused." KUERSCHNER fired a shot into the back of the head of the flyer and it emerged near the zygome. The experiment showed that the pistol of BODENSTEIN was no longer any good (R 176). PFEIFFER, BODENSTEIN, and KUERSCHNER took the two corpses into the burial hall and put them side by side. They were not covered (R 177). BODENSTEIN had a swollen jaw and told KUERSCHNER that he went to the dentist.

Witness was only interrogated one time on the 31st of October 1945 (R 178). The officer made no notes during the interrogations (R 179) and left after giving the dictation. Witness signed the statement without the officer's being present. The signature is genuine. KUERSCHNER was not forced or threatened. The statement was not read to him (R 180) and an oath was never mentioned (R 101).

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. Clemens WIEGAND*; *United States v. Richard DRAUS*.)

8. DISCUSSION:

The record of trial discloses confusion and conflict throughout in the statements and testimony of the two accused, but the confusion is especially noticeable concerning events at the cemetery immediately prior to the shooting of the flyer. The evidence presented by the defense is such as to warrant the belief that much of the testimony was fabricated to explain away as nearly as possible the several pre-trial statements which were presented by the prosecution.

The two accused testified that they took the victim from his cell in the middle of the night for the purpose of aiding in the transporting of the bodies of two dead flyers from the jail to the cemetery. This action may justifiably be looked on with suspicion and the explanation given by the accused concerning the necessity for such action does not lessen such suspicion. It does not appear reasonable that the two top ranking police officials in a town would undertake to transport two dead bodies on a hand cart up a steep slope to a cemetery at night, or that all of the 32 home guardsmen and all the regular police contingents were engaged in establishing road blocks. No explanation is given as to why PFEIFFER or the laborer who originally brought the corpse to the courtyard could not have been used, and BODENSTEIN's pre-trial statement avers that PFEIFFER did aid in the transport. The explanation given as to why the home guard men who placed the body on the cart could not be used is very weak. BODENSTEIN stated that there was a law in Schweina requiring that dead bodies be taken to the burial hall and not allowed to remain in the homes overnight, an ordinance requiring that all foreigners be buried at night, and an order that all foreigners were to be transported at night; but he testified at the same time that the body of at least one flyer was left in the courtyard of the jail overnight. There is no evidence that the flyer made any attempt to escape before arrival at the cemetery; however, it is alleged that he tried to escape at the cemetery, by first attempting to jump a fence and then by running into a house, when by admission of accused BODENSTEIN he could have escaped by going out of the gate of the cemetery.

The capture of the flyers by civilians; the necessity of protecting the flyers from civilian crowds; the attempt of the flyer to escape by jumping a fence, the

semi-conscious state of BODENSTEIN, and the attempt of the flyer to choke BODENSTEIN are not mentioned in the pre-trial statements of the two accused; however, it is noted that the sworn statement of Otto WOLFRAM states that BODENSTEIN told him that he shot the flyer when the latter jumped at his throat. Examples of testimony which warrant disbelief in the stories told by the two accused is the testimony that KUERSCHNER and the cemetery custodian merely stood and watched the flyer run to a fence 10 meters away and back, and on into a house while BODENSTEIN was in a semi-conscious state; that BODENSTEIN, though knocked unconscious recovered sufficiently in two or three seconds to shoot at the flyer and follow him into the house; that the flyer while trying to choke BODENSTEIN grabbed him by the throat with only one hand; that KUERSCHNER on entering the unlighted room at night could see perspiration on the face of BODENSTEIN and blood on the head of the dead flyer yet BODENSTEIN in the same room could only see a shadowy form approaching when he shot. Further, the testimony of BODENSTEIN on the witness stand gives several versions of the shooting of the flyer in the burial room and in each version the testimony indicates that the flyer was facing BODENSTEIN at the time he was shot; however, one accused testified that the bullet wounds were in the left rear portion of the head, and the other testified that the wounds were behind the right ear.

9. SUFFICIENCY:

The evidence presented by both the Prosecution and the Defense establishes beyond a reasonable doubt that the two accused are guilty of the Second Charge and Particulars. Both of the accused in statements presented in evidence by the Prosecution and in testifying in their own defense admitted participation in events resulting in the killing of an unknown American flyer; accused BODENSTEIN admits that he shot and killed the flyer, and accused KUERSCHNER admits that he fired one bullet into the body of the flyer. Both of the accused allege that the flyer was shot while attempting to escape but the court was fully justified in not giving credence to the testimony of the accused concerning the manner in which the killing was accomplished.

The sworn statement of an army officer affirms that the statements of the two accused presented by the Prosecution were obtained without duress. The

admission of statements obtained by an officer officially appointed to investigate war crimes is authorized by a letter from the Deputy Theater Judge Advocate for War Crimes, file AG 000.5, subject: "Admissibility of Reports of Investigation in the Trial of Suspected War Criminals", dated 6 October 1945. The evidence presented by the Defense that the statements of the two accused were not obtained correctly is not sufficient to discredit the statements.

The court acquitted BODENSTEIN of the first charge and the particulars thereof, which alleged that he assaulted an unknown American prisoner of war near Schweina on the same day on which the murder took place. The only testimony offered to support this allegation was that of a witness who was a substantial distance from one spot at which the assault was supposed to have taken place. It is apparent that the court chose to disbelieve the accuracy of his powers of identification at such a distance. There is also testimony in the record that the Gendarmerie did not, at the time the assault is alleged to have occurred, carry clubs of the type with which the attack was supposed to have been made.

The proceedings satisfied all the requirements of a fair trial. The accused were provided with military counsel, and two German attorneys were present as defense counsel; competent interpreters were used; challenges for cause were allowed; and a vote of two-thirds of the members of the court present was required for conviction and sentence.

There were no errors or irregularities which affected 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 JAG-AGO, subject: "Trial of War Crimes", dated 14 October 1946, and letters superseded thereby, and with pertinent Military Government directives and instructions. There was substantial compliance with the general principles of International Law recognized as applicable to the trial of such cases.

10. 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.

11. CLEMENCY:

Accompanying the record of trial is a letter dated Schweina, 22 July 1946, signed by Paul Weber, Church-music-conductor, asking for clemency on behalf of accused KUERSCHNER. The letter states that Weber was a former teacher of KUERSCHNER who was a quiet, orderly pupil; that KUERSCHNER was educated religiously in his youth, that he was a polite and diligent worker who lived only to do his duty.

A Petition for Review in behalf of accused KUERSCHNER dated July 18, 1946 was filed by German Defense Counsel Dr. ARBNER in which he pointed out that there were no eye-witnesses presented to the court; that the scene of the crime was located in the Russian Occupied Zone and that all efforts to get in touch with Schweina in order to bring PFEIFFER before the court were in vain; that according to the evidence of both accused KUERSCHNER took no part in the killing of the flyer and only fired one shot into the dead body of the flyer under orders from BODENSTEIN; that KUERSCHNER had captured an American flyer 5 kilometers outside of Schweina and had brought the flyer into the police station after protecting him several times from the population, and that if KUERSCHNER had desired to kill the flyer he could have done so before bringing him to the police station; and that although there were bullets in the magazine of the weapon carried by KUERSCHNER at the cemetery, that the pistol was not loaded. Counsel petitioned for clemency on the basis that even though KUERSCHNER was found guilty of the charge and particulars the sentence imposed was too hard for the part that he played in the killing.

A Petition for Review dated July 20, 1946 was filed by German Defense Counsel Dr. BUERGER on behalf of accused BODENSTEIN. It was pointed out that there were no eye-witnesses who testified and that the sentence can be based only on the testimony of the accused; that BODENSTEIN was knocked down by the pilot and was shot by BODENSTEIN while trying to escape; that BODENSTEIN was a policeman in the service and according to regulations had a right to use his weapon under the circumstances. He presented the argument that as long as the guard of the cemetery was not present to testify the testimony of the defendants should have

been considered in their favor; and petitioned that the reviewing authorities grant the defendant a limited right of self-defense and mitigate the sentence on account of the confusion, fear or fright of BODENSTEIN caused by the blow received.

The Petition for Clemency filed on behalf of KUELSCHNER presents no new evidence and therefore affords no ground upon which a recommendation for clemency may be based. With respect to the Petitions for Review filed on behalf of both accused all points brought out by Defense Counsel were presented to the court and have been discussed elsewhere in this review. None of the clemency material appears to offer any reason for recommending a change in the findings or sentence and no clemency is recommended.

12. CONCLUSION:

It is recommended that the findings and sentences be approved as to each accused. Forms of action designed to carry the foregoing recommendation into effect, should it meet with approval, are submitted herewith.

NORA G. SPRINGFIELD
1st Lt., WAC
Reviewer

Having examined the record of trial I concur.

C. E. STRAIGHT
Colonel, JAGD
Deputy Theater Judge Advocate
for War Crimes