

DEPUTY THEATER JUDGE ADVOCATE'S OFFICE  
 7706 WAR CRIMES GROUP  
 UNITED STATES FORCES, EUROPEAN THEATER  
 APO 178

20 December 1946

UNITED STATES	}	
	}	
vs	}	Case Number 13-1783
	}	
Josef SCHIEDHERING and	}	
Rudolf MUTZECK, German	}	
Nationals.	}	

REVIEW AND RECOMMENDATIONS OF THE  
 DEPUTY THEATER JUDGE ADVOCATE  
 FOR WAR CRIMES

1. TRIAL: The accused were tried on 7 May 1946 at Ludwigsburg, Germany, by a General Military Government Court appointed by paragraph 3, Special Orders No. 100, Headquarters, Third United States Army, APO 403, US Army, dated 20 April 1946.

2. FINDINGS: The offense involved was:

CHARGE: Violation of the Laws of War.

Particulars: In that Josef SCHIEDHERING and Rudolf MUTZECK, German Nationals, did, at or near Giessen, Germany, on or about 11 December 1944, wilfully, deliberately, and wrongfully encourage, abet and participate in the killing of an unknown member of the Allied Forces who was then an unarmed, surrendered prisoner of war in the custody of the then German Reich.

	<u>Plea:</u>	<u>Findings:</u>
SCHIEDHERING: Charge:	NG	G
Particulars:	NG	G
MUTZECK: Charge:	NG	NG
Particulars:	NG	NG

3. SENTENCE:

The court by at least a two-thirds vote of the members present at the time the vote was taken concurring sentenced the accused Josef SCHIEDHERING to imprisonment for a term of thirty (30) years, commencing 10 May 1946, at such place as may be designated by competent authority. 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 SCHIEDHERING is a German National, 50 years old and a resident of Weisbaden. He is married and the father of two boys, both of whom had been killed in the present war. He is a carpenter by trade and was a member of the German Armed Forces from 1914 to 1918.

The accused MUTZACK is a German National, 57 years old and also a resident of Weisbaden. He is married and the father of four children, one of whom was killed in the present war. He was a member of the staff of the Amtsgericht (County Court) during the war.

5. RECOMMENDATION: It is recommended that the sentence of the Military Government Court as to accused SCHIEDHERING be approved by the Theater Judge Advocate, as provided in 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.

6. EVIDENCE:

a. Evidence for the Prosecution:

(1) The first witness for the prosecution was Gustav ALBRECHT (R. 12). He was a German National, 64 years old and a member of the Party work detail which was used for various forms of civilian relief and rescue work during Allied air raids (R. 14). On 10 December 1944 the detail arrived at Giessen from its headquarters in Wiesbaden and on the following day it went into action on the university buildings which had been hit by incendiaries (R. 15, 22). While guarding some material outside the building, this witness was told a negro had been shot inside. He entered the building and saw the victim in a pool of blood and asked the accused SCHIEDHERING who

had done this. SCHIEDHERING admitted he had done it because the negro tried to attack him (R 15). Witness described further details of SCHIEDHERING's actions, and presumed the victim was an American (R 17). A report was then made to MUTZECK (R 18), who was a platoon leader (R 14, 19-21).

(2) Franz ASMUS was the next prosecution witness (R 35). He was 47 years old, and by occupation a laborer (R 35). He correctly identified the two accused (R 35). He corroborated the testimony already given relative to the organization of the work detail and its purpose, and said that accused MUTZECK was in charge of one group (R 36). During the course of his duties he saw a wounded colored soldier on the floor. A Hitler Youth stepped up and fired two shots at him at close range. Accused SCHIEDHERING then fired another shot at him, and then continued about his business (R 37, 38). On cross-examination he admitted he had not seen MUTZECK during the shooting and didn't know where he was (R 40). Details of the incident were also brought out (R 40-49).

(3) Wilhelm HOLSWIRTH was the next witness (R 49). He was a resident of Wiesbaden, 44 years old, and a laborer (R 49). He identified accused MUTZECK as a platoon leader in his work detail (R 50). After preliminary details he described the events heretofore in evidence. After the raid and in pursuit of his duties in the burning building, he saw a negro lying in a pool of blood on the floor (R 52). He then described how the Hitler Youth and accused SCHIEDHERING then fired into the prostrate victim as heretofore shown (R 52-53). Witness' memory was not very good as to accused MUTZECK's being present, but he believed he was (R 53). He also believed the entire group of negro prisoners of war were Americans (R 53). He reported accused SCHIEDHERING as saying that night that the victim's corpse had been thrown down a shaft where it had burned (R 54). Accused SCHIEDHERING was also reported as having said he shot a negro because the latter had attacked him with a knife

(R 54). On cross-examination (R 54-54) witness described the shooting in further detail and stated that accused MUTZECK was merely a bystander and the shooting took place before witness could interfere. He also denied that MUTZECK was in a position of any authority in the work detail (R 55).

(4) Else WIRTH then took the stand for the Prosecution (R 54). She was an employee of the university, residing at Giessen and was 45 years old (R 54). She described seeing a group of negroes working during the fire which resulted from the air raid (R 55). Two days later she saw the burned, nude body of a negro in a ruined air shaft (R 55). She noticed a round hole in the forehead (R 56). She said on cross-examination that she had been under the impression that the negroes were Senegalese (R 56).

Prosecution's Exhibit No. 1 was introduced into evidence at this time (R 59). It was an interrogation of the accused Rudolf MUTZECK taken at Wiesbaden 25 September 1945.

b. Evidence for the Defense:

(1) The accused Rudolf MUTZECK took the stand in his own defense (R 73). After preliminary examination he testified that he had charge of the transport of the work detail from Wiesbaden to Giessen but upon arrival his authority ceased, and they became the charge of the local Kreisleiter (R 73). On 11 December 1944, the groups were put to work and MUTZECK circulated among them (R 74). A map of the scene of the alleged crime was introduced as Defense Exhibit A (R 75). He described how he had seen the corpse lying in the hall of the school (R 75). He saw the Kreisamtleiter approach the corpse and fire two shots (R 75). MUTZECK then left. He did not see accused SCHIEDHERRING fire any shots (R 76). He then reported the incident to the Kreisleiter (R 76). His cross-examination brought only the above story in greater detail (R 77-78, except for a strong reiteration of his not having seen anybody but the Kreisamtleiter shoot the victim (R 83, 84-86).

(2) The accused Josef SCHIEDHERING then took the stand in his defense (R 88). He said he was 50 years old, a carpenter, and a resident of Wiesbaden (R 88). He told in great detail of the work that morning, 11 December, in clearing the burning building of furniture and wounded and the arrival of the negro prisoners of war (R 88-92). He said the Kreisamtleiter had placed him in charge of the detail (R 40). He described how, in directing the negroes, one turned on him and appeared about to attack him. Some Hitler Youth members and SS officers appeared and one shot the negro (R 92). A Hitler Youth member fired two more shots at the negro as he fell downstairs (R 92). Accused also said he didn't see accused MUTZCK during the episode, and also disclaimed ever having fired a shot at the victim (R 93, 102). The corpse was later taken to a lavatory and the other negroes were delivered to the Police (R 94).

(3) The next defense witness was Gustav DITTENBERGER (R 100). He was 36 years old, a resident of Wiesbaden and a tool-maker by trade (R 105). He described how he became a member of the work detail which was at Giessen on 11 December 1944 and the work in which it was engaged (R 106). He further described the arrival of the negroes at the burning building (R 106). He said he was outside the building when he heard several shots from within. Upon entering he saw a negro lying in a pool of blood. SCHIEDHERING and a Hitler Youth leader were in the surrounding crowd (R 106).

#### 7. JURISDICTION:

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 Allied Forces at a time when a state of war existed between the German Reich and the Allies. It was contended by the defense that the court was without jurisdiction since this was an American court and it was not definitely proven that the victim was an American national. In the conduct of hostilities the efforts of the several Allies are joined for the accomplishment of a common

purpose. The situation is analogous to the law concerning partnership wherein one partner is authorized agent for the other severally or for the partnership. The United States is here acting for its Allies in prosecuting the alleged violator of the laws of war. The victim was either an American (R 94) or a Senegalese (R 66), an allied national. We, therefore, do not believe the contention has merit. (See US vs Alfons KLEIN et al, DTJAWO, 1 Feb. 1946).

#### 8. DISCUSSION:

There is ample evidence to sustain the finding of "guilty" as to the accused SCHIEDERER. There is in the record evidence from which the court was justified in finding that accused fired at least one shot into the body of a prisoner of war while his victim was still alive. While it is true that the prisoner had already received two or more bullet wounds from other unidentified persons, the fact remains that he was still living; accused's act, if it did nothing else, hastened his death. It is well settled law that until the actual moment of death, no person has the right to hasten it by any unlawful act, (See Opinion of this office in the case of United States v. Justus GEMSTENBERG, DTJAWO, June 1946), and therefore accused bears a share of guilt equal to that of the other participants in this offense. Accused likewise claimed to have acted in self defense of an alleged knife attack upon him by his victim. Assuming for the sake of argument that this was true, there is evidence in the record that he himself provoked the attack by his treatment of the prisoners. Furthermore, the evidence also points to the fact that the victim had already been rendered harmless by the other shots. There was no longer any reasonable need for accused to act as he did.

The evidence itself was conflicting, but the Court showed by its finding that it chose to believe the evidence as presented by the prosecution rather than that of the defense. In the absence of any outstanding irregularities or errors it should be allowed to

stand. No such errors or irregularities are apparent as would affect the substantial rights of this accused. The trial was held with impartiality and adequate opportunity was given to the accused to present any matters he might desire. The petition for review presents no questions that were not decided by the court upon the hearing of the evidence presented. Two-thirds of the members of the court concurred in the findings and the sentence.

It is further noted that no law member was appointed to the court. This question was fully discussed in the opinion in the case of United States v. Wilhelm HENNE and Wilhelm MATTHAEI (DVAWO, December 1946), in which it was held that no error prejudicial to any substantial right of the accused resulted from such an omission. There were no circumstances in the trial of the present case which render inapplicable the principles there established.

A General Military Government Court may impose any lawful sentence, including death or life imprisonment in proper cases. In the instant case the court, by its sentence, evidently had some doubt as to the elements of murder being present and chose to consider the crime more in the light of manslaughter. The action thus taken does not appear to be unwarranted under the circumstances and the sentence imposed appears to be adequate.

A petition for review has been filed on behalf of the accused SCHIEDHERING by this attorney, Dr. Richard WACKER, dated 15 May 1946. In it the accused reiterates his denial of guilt. He also alleges that the victim was dead at the time the alleged shooting took place. He also states that there were extenuating circumstances and that the victim had acted obstinately. In the last place an allegation was made that the trial was not an open public one.

It is believed that all the grounds for reversal except the last were passed upon by the court during the course of the trial and that the rights of the accused were not jeopardized in any way.

With regard to the last ground, there is no evidence other than this unsupported allegation that the trial was not conducted openly and publicly. It must also be remembered that while the right of a speedy public trial is one guaranteed under the United States Constitution, it is not necessarily extended to those persons charged under the occupation of Germany. Furthermore, even in the United States attendance of trials is limited by capacity of the court room, security and other considerations.

9. OBSCURITY:

The offense of which the accused SCHIEDHERING stands convicted is a war crime. All war crimes are subject to the death penalty, although a lesser penalty may be imposed (war 357 FM 27-10, Rules of Land Warfare). While it was not shown that SCHIEDHERING was a particularly brutal man, there is, nevertheless, no legal or moral justification for his act in the present case. Under the evidence the court may well have sentenced the accused to death.

As heretofore stated it is believed that the petition for review raises no questions of law or fact not disposed of in the previous section of this opinion. No extenuating circumstances are disclosed in the record and no clemency is recommended.

10. CONCLUSION:

It is accordingly believed that the sentence of the court should be approved by the Theater Judge Advocate under the provisions of 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. A form of action prepared to accomplish this result is attached hereto.

/s/ David P. Harvey  
DAVID P. HERVEY  
attorney  
Post Trial Section

Having examined the record of trial, I concur:

/s/ C. E. Straight  
C. E. STRAIGHT  
Colonel JAGD  
Deputy Theater Judge Advocate  
for War Crimes