DEPUTY JUDGE ADVOCATE'S OFFICE
War Crimes Group
EUROPEAN COMMAND

23 April 1947

UNITED STATES

vs.

Siegfried UTERMARK,
a German national

Case No. 12-1813

REVIEW AND RECOMMENDATIONS

1. TRIAL DATA:

Tried at Dachau, Germany
Date: 14-18 October 1946
General Military Government Court appointed by Par. 35, SO 284, U.S. Forces, European Theater, dated 11 October 1946.
Sentence: Life imprisonment

ACCUSED

Married, 4 children ranging from 4 to 12 years
Age 36
En Commander at end of war, German Armed Forces
Group Leader, Labor Service, considered part of German Army

	Pleas	Findings
CHARGE: Violation of laws of War	NG	G
PARTICULARS: In that Siegfried UTERMARK, a German national, did, at or near GOEDDENSTEDT, Germany, on or about 18 March 1945, wilfully, deliberately and wrongfully kill a member of the United States Army, believed to be Harold E. CHURCHILL, ASN 16115914, who was then unarmed and in the act of surrendering himself to the then German Reich, by shooting him with a machine pistol.	NG	G

2. RECOMMENDATIONS: That the findings of the Court be approved and that the sentence be reduced to imprisonment for a period of twenty years commencing 1 June 1945.

3. STATEMENT OF FACTS: On Palm Sunday, March 18, 1945, about 13:30 in the afternoon, a flyer parachuted to earth in the GOEDDENSTEDT community, Kreis Uelzen (R 8, 61). A search was organized from where

the parachute was found in a neighboring field and foot prints were followed leading into a forest. The accused arrived in a car (R 8, 61) and took charge of the search through the thick patch of woods (R 62) first arming himself with a machine pistol from his car (R 8). About in the middle of the wood, three bursts of 6 to 7 shots each (R 67), in rapid succession (R 10, 11), fired by the accused (R 172), were heard, the first unobserved, the second while the flyer was seen lying on the ground, and the third a moment thereafter. The accused and another came up to the flyer who expired about that time (R 17), after which he was carried and dragged to the road at the edge of the wood (R 70), placed upon the front of the accused's car, and taken away for burial (R 175).

4. EVIDENCE:

For the Prosecution: While a search through a forest was being made for a parachuted aviator, a line of persons, consisting of 10 to 12 youths (R 36), adult civilians, and several policemen about 20 meters apart was formed, of perhaps 150 meters in length (R 66, 132), including the accused, witnesses BEHN, GROTE, OTTE and GERHUR. The wood is described as consisting of 14 to 15 year old fir trees, 45 to 50 centimeters distance from each other, planted in rows 1 meter and 50 centimeters apart, the lowest needles, which were approximately 70 to 80 centimeters above the ground, making it possible to look within the rows, a distance of about 30 meters, and at right angles to the rows, perhaps 10 to 12 meters except where places less dense made vision possible from 15 to 20 meters (R 66). After having advanced into the wood about 150 meters (R 132), witness BEHN, who was on the left of the accused, testified that the accused, without challenge or warning, fired a burst from his machine pistol (R 10, 11) remarking "Here he is" (R 14). Then a moment later, and while witness BEHN saw the flyer twisting and turning on the ground on his left side, with his both arms stretched straight over his head, loudly calling something,

the accused fired another burst, and then another, all in rapid succession (R 10, 11, 12, 16). After the second burst the flyer continued to move as described with his hands still outstretched over his head, but his movement gradually decreasing (R 14). Witness testified that when the body was searched, the accused found identifying tags indicating the body to be that of one Harry CHURCHILL (R 18), that from the first time he saw the flyer, he never saw him make any attempt to crawl forward (R 21). The manner and nature, the intervals and incidents accompanying the fire, were substantially corroborated by the testimony of the witness Count GROTE, the owner of the forest which was the scene of the occurrence, who stated that about in the middle of the wood, three bursts of 6 to 7 shots each, of machine pistol fire (R 67), all in the space of about 3 to 6 seconds (R 68), were heard, which were fired by accused (R 172); that the accused and witness BEHN came up to the flyer who expired about that time (R 17), after which he was carried and dragged out to the road (R 170), placed upon the front of the accused's car and taken away for burial (R 173). At the time that the witness Count GROTE came up to the accused, the body was at the edge of the wood near the road. The witness Count GROTE asked the accused "Why did you shoot him right away?" and the accused answered "Because he wanted to crawl away", upon which the accused turned away from the witness (R 70, 175); that he had asked this question because he had heard no challenge or warning (R71); that the only words he heard were either "here", or "here he is", or "here he lies" (R 74). There is testimony that upon arrival of police Sgt. GEHRKE at the edge of the wood before the search line was formed, the accused, after learning from police Sgt. GEHRKE that a flyer was captured in the nearby town of DALLAHN, asked GEHRKE, in the presence of thw witness GROTE (R 62) "Is he still alive?" (GROTE, R 138, 111) then "and didn't he attempt to escape yet?" (GROTE, R 123). That witness Alois GEDIG

testified he was in the Labor Service under the accused (R 90); that he cleaned the machine pistol at the accused's request after the shooting described (R 90); that he overheard part of the conversation the accused had with one KUENNER, wherein accused stated he had shot a flyer adding by way of explanation "I saw something in the bushes that was moving or moved around, or something like that and upon that I fired" (R 92, 103). Walter MUELLER, witness for Prosecution, unable to appear by reason of ill-health, made a pre-trial statement, admitted into evidence as Ex. P-4 (R 116) which stated that while in the vicinity of the wood, on the day in question, he heard shots and somebody said "Finished", corroborated by witness GEHRKE (R 109), that shortly thereafter, accused and another Labor Front man emerged from the wood carrying a corpse and he heard accused say "He is dead, I shot him because he tried to flee". It was testified that—although accused had given strict orders to treat captured flyers according to the rules of warfare, and to be careful to use firearms only in the event of resistence or attempt to escape (Ex. P-7, R 121), corroborated by Prosecution witness GEDIG (R 98)—that when one KUEHNE, who was an Unterfeldmeister in the Labor Service, under accused's orders, had told the accused that he shot a flyer, the accused had not asked any questions or done anything about it but had merely replied "I too" (R 102, 103). That an autopsy was performed by a British Medical Officer, Major William M. DAVIDSON, RAMC, at BOSCHE, Kreis Uelzen, Germany, on 11 August 1945, on a body to which were attached identification tags showing it to be that of Harold M. CHURCHILL, ASN 16115914 — T-4344, and it showed two bullets to have passed through the body, one on the left side of the chest through the tip of the heart, and the other on the left side of the back in lumbar region from which tracks lead through the body; and that death was due to the laceration of the heart caused by one of the bullets (Ex. P-6a).

For the Defense: The first defense witness was Kurt OTTE, who was chauffeur for the accused on 18 March 1945. He described how he drove the accused to the scene of the homicide (R 131). A line of searchers was formed as heretofore described. After advancing about 150 meters into the woods he heard the accused shout something he could not understand. This was followed by some shots. He ran in the direction of the shots and saw his superior standing over a fallen victim. The accused felt his pulse and pronounced him dead. A thorough search failed to produce anything but the usual emergency materials carried by aviators. No weapons were found. The corpse was then carried to the road (R 132), loaded on a fender of the car and transported to ROSCHE (R 133). On cross-examination he admitted to hearing two bursts of machine pistol fire (R 137).

Kurt JOACHIM, witness for defense, a former subordinate of the accused stated that the accused had ordered all his subordinates to treat captured flyers and other prisoners of war as humanely as possible and not to use weapons except in the event of attempted escape (R 150). At a leaders' meeting on 17 March 1945, the possibility of paratroop landings in the area were discussed (R 157).

The accused, testifying in his own defense, described how he received information reporting the landing of parachuted flyers, and how he left for the scene of the alleged landings (R 168). He found a number of civilians milling around the area, whom he organized into a search line and began to comb the wood as previously described (R 169). He stationed three or four adults with rifles on the flanks of the wood in the event the quarry might be flushed. The accused stationed himself in the center of the line. His chauffeur OTTE (age 18) was to the right, a "little boy" (actually 17 years old) that he assumed was BEHN was on his left. After advancing about 100 meters into the wood, he saw the

flyer on the ground between two rows of trees. He appeared to be in the position of a runner awaiting the starting gun. The accused challenged the flyer saying, "hands up, stand up". The flyer looked over his shoulder and started crawling away as quickly as possible (R 171). The accused fired a warning shot from his pistol but the flyer continued to crawl away. The accused got into a better firing position while the flyer continued crawling away from him. He fired a second burst without aiming at anything in particular. At the second burst, the flyer appeared to be raising himself to a standing position (R 182). The flyer fell to the ground, moved a few times and lay still. He and OTTE, the chauffeur, carried the body to the road (R 172), searched it, and no weapons were found. The body was taken to his headquarters upon the request of a local policeman (R 173), and accused ordered it decently buried. At the time they were under a state of alarm with the front line at HANNOVER and that was the reason he had called a meeting the day before to formulate defense plans for ULZEN, which was considered an important point because it contained five munitions factories, a number of important training camps, and was also the last remaining rail connecting point in northern Germany (R 174).

Dr. Wilhelm LOEFFLAR was the next defense witness. He described himself as a prisoner of war and a physician, having studied medicine at the Universities of Munich and Konigsberg, and in Vienna (R 225). He was a surgeon in the German Army and had practiced privately subsequent to 1930 (R 226).

When asked if a man with wounds such as described in the pathologist's report could have been standing erect, he answered, "No" (R 228). When asked if a human target who stood with his right side toward an MP-40 pistol could receive a wound as described in the report he likewise answered in the negative (R 229, 230). When asked a like question relative to a target lying on his left side on the ground the answer was also, "No", and he explained

the answer by saying that the entrance wound on the left side would be impossible under these conditions. When asked if such a wound could have been made when such a target was falling the answer was "Yes, very well". The same result would have occurred if the target were rising (R 230). He explained that the exit wounds were on a higher plane than the entrance wounds and consequently could have occurred only when the target was in a rising or falling position (R 231). He explained that the entrance to the wound was in the left groin, the projectile then ranged upward (R 130) and made its exit in the lower right chest (R 131).

6. COMMENTS: The case presents no question as to the facts of the accused having shot the flyer. The testimony of the witnesses, and the surrounding circumstances would have established it as an indisputable fact independently of the accused's admission. The question remains, however, where under circumstances such as existed here, a search was being made for an enemy flyer, in territory that might be considered a strategic landing place for parachute troops, whether or not the homicide was justifiable. The accused testified that he fired a warning shot (R 172) before actually firing at the flyer, and that at the same time called upon the flyer to surrender. The testimony presented on behalf of the prosecution, would indicate, however, an exact opposite conclusion, namely, that the instant the flyer was seen by the accused, the accused shot at him without any warning or giving him any opportunity to surrender. The story told by the accused as to his actions at the crucial moment is directly at variance with the testimony of the witnesses, PENN and GROTE. The accused testified that when he first saw the flyer he was lying within a row of fir trees in a position somewhat similar to that assumed by a runner when ready to start, with both palms about the height of his shoulders, his left leg out-stretched and his right leg drawn up slightly, and that he challenged the flyer with a double

challenge, "hands up, stand up", and that when the flyer did not obey (R 171) he pulled up his machine pistol and fired a warning shot. Here is the first divergence. None of the witnesses heard any separate challenge or time interval between the first time the accused's voice was heard and the first burst of fire (6 or 7 shots; R 67), described by the accused as a warning shot (R 172), but, on the contrary, both witnesses' testimony left no doubt that the first time the accused's voice was heard was after the fire (BEHN R 14; GROTE R 68), and it is easily demonstrable that pulling up a machine pistol from the hip to a firing position at the shoulder involving the use of both hands as described by the accused (R 186) would have required a distinct and perceptable interval of time, however short. Proceeding further, the next act of the accused as he described it was that the flyer gave no signs of surrender but rather continued crawling; that he was no longer able to see him and he therefore jumped about two paces between the row of trees because he assumed the flyer would comply with his warning shot. However, since he had already determined that the flyer was not following his order but was crawling on hands and knees and about to jump up and run off, he fired at that instant (R 172). Here is another divergence. The testimony of witness BEHN is clear that he was present and saw the flyer at the second burst of fire and that at no time did he see the flyer attempting to crawl in any direction (R 21); on the contrary, he described him as lying on his left side, turning and twisting and calling (supra). Furthermore, during the time interval for all of the activities described by the accused from the first so-called warning shot to moving into another place, getting into firing position and actually shooting the second burst, if the story told by the accused is to be believed, it would seem that all this activity would require the lapse of a reasonable length of time. Here is another divergence. The testimony of witness Count GROTE is clear

that there were three bursts of fire with an interval of time between them at least long enough to make it possible to distinguish them as being separate (R 85), so that the entire discharge from the machine pistol consisting of the 3 separate bursts of fire took no more than from 6 to 9 seconds (R 87). This description would almost be consonant with continuous fire. Herein would seem to lie the crux of the question. Was the accused's act, shooting the flyer, devoid of any malicious or homicidal intent? Is the record barren of any evidence that might throw some light upon the intent of the accused or show any innocent or malicious idea or emotion that might control or motivate his purposes at the crucial moment? Although not binding on Military Government Courts, Anglo-Saxon jurisprudence may afford excellent guidance in helping to correctly chart the application of long-standing, fair legal principles to doubtful fact situations. Thus, it is a well settled principle of law, that intent may be an important element of proof in homicide cases.

> "....there is perhaps no better indication of what a defendant intended to do than an admission to that effect which tends to incriminate him. It is accordingly held that an admission is competent to prove intent." Wharton's Criminal Evidence, Vol. 2, Section 650: People v. Storer, 329 Ill. 536, State v. Detloff, 201 Iowa, 159.

A scrutiny of the record discloses testimony of the most important relevance bearing on the question of the accused's intent at the time of the homicide. Two independent witnesses testified that the accused, before the line of search was formed, upon having been told by another that in the nearby town of DALLAS a flyer had been captured (admitted by accused, R 169), asked in the presence of another witness, "Is he still alive?" (GEHKE, R 111), and immediately after the words "Is he still alive?", the accused was heard to ask "Didn't he attempt to escape yet?" (GROTE, R 123). That these words were spoken was partially admitted by the accused (R 178, 179). Here is testimony of the highest importance on the

question of the accused's intent. An analysis of this colloquy makes it clearly apparent that when the accused was told of the capture of an enemy flyer in the town of DALLAHN and he asked "Is he still alive?" followed by "Didn't he attempt to escape yet?" (supra), there would appear to be no doubt that the accused thought the flyer should have been killed, the justification for which was by means of the classic "attempt to escape" and that a more callous, merciless and criminal homicidal attitude could hardly have been more strikingly displayed. There was afforded at that moment a penetrating glimpse into the mind of the accused, disclosing a pre-formed malevolent attitude toward captured enemy flyers that boded ill for such enemy flyers as fell into his hands. The logical, inescapable inference flowing from this disclosed attitude need not be labored since it is manifestly obvious that should any flyer be so unfortunate as to fall into the hands of one so minded his fate would be sealed. So, at least, the court could have reasoned if the testimony of the witnesses presenting this evidence was believed. The accused on his own admission answering witness GROTE's question, "Why did you shoot him right away?", said, "He tried to crawl away" (R 71), and repeated "Something was crawling or moving in the brush and thereupon I shot" (R 92, 100), the statement made to Walter HUMMEL Ex. P 4 (R 116) "He is dead, I shot him because he tried to flee", and his attitude of vouchsafing no further explanations when he turned away from witness Count GROTE upon being asked by GROTE why he shot the flyer (R 75, 76), in the light of the pre-formed intent thus disclosed, would seem to lend support to the view that the element of deliberate purposive malice was present when the shooting took place; that it was not the simple act of hostile warfare where the shooter was engaged in attempting to capture an enemy airman whose status had not been reduced to that of a prisoner of war, but on the contrary, that he was not so engaged,

and that his purpose was not to capture but to kill, and that he made sure of killing him by firing 3 bursts of perhaps 18 to 21 shots at the flyer the moment he saw him without challenging or giving the flyer a chance to surrender.

So far as the medical testimony regarding the position and path of the bullets in the body is concerned, it would appear that this could be interpreted either favorably or unfavorably depending upon the point of view, and the admissions of the witness for the defense, Dr. LOEFFLAR, that an interpretation of the report of the autopsy would require the opinion of a ballistics expert to determine the position of the body and the position of the firer (R 228, 234) would seem to render the entire testimony valueless. Thus, it would appear that the record contains sufficient credible evidence to support the findings of the Court.

7. CLEMENCY: The following communications have been received relative to the extension of clemency to this accused:

1. Letter from Col. Ernest F. Boruski, U.S.A., Court Member, 22 October 1946.
2. Petition for Review filed by defense counsel, Mr. Nathan Machasi, 28 October 1946.
3. Letter from Johann Meyn, Burgomeister, 22 October 1946.
4. Letter from Walter Eggelnig, 23 October 1946.
5. Letter from Wilhelm Weiberg, 24 October 1946.
6. Letter from Otto Utermark, 21 October 1946.
7. Letter from Ray Holtz, 24 October 1946.
8. Letter from Otto Apitz, 28 October 1946.
9. Letter from Mrs. Gretl Ohm, 23 October 1946.
10. Letter from Franz Dittmer, 22 October 1946.
11. Letter from Erika Utermark, 26 October 1946.
12. Letter from Gertud Mischer, 27 October 1946.
13. Letter from Wilhelm Scheel, 24 October 1946.
14. Letter from Hermann Dittmar, 22 October 1946.

15. Letter from Fritz Ohm, 22 October 1946.

16. Letter from one Mueller, former Gendarmerie Captain, 22 October 1946.

17. Letter from one Farina, former Burgmeister, 23 October 1946.

18. Letter from one Fehlhaber, Police Captain, 23 October 1946.

The letter from Colonel BORUSKI (Item 1), a member of the Court, is viewed as of unusual importance and has been considered very carefully. Its content would appear to have definitely placed Colonel BORUSKI on the dissenting side of the findings arrived at by the Court, which is by no means uncommon in capital cases. However, this has never prevented the prevailing view as represented by the majority of the Court, even where there are powerful dissents based upon strong legal grounds, from being carried into execution (Application of Yamashita, 66 S. Ct. 340). It is, of course, well settled law that no court may impeach its own verdict once the same has been rendered and it is not conceived that this is what is here being attempted. The most that can be said for such dissents are that they sometimes present a strong basis for the exercise of executive clemency. Colonel BORUSKI's communication is thus in the nature of a Petition for Clemency and is so treated.

The petition for review filed by the accused's counsel has been, as far as it does not repeat the testimony before the Court contained in the record, carefully considered, and makes two major points that were thought to have seriously and injuriously affected the substantial rights of the accused; first, that the introduction into the evidence of the Report of Investigation of Major SHIRLEY contained matter that should not have been before any member of the Court, and that the Law Member read it and might have been prejudiced thereby. The same is true regarding the reference as to the wife of the accused having possibly influenced the testimony of some of the witnesses.

Of even greater significance than these points perhaps is the stress laid in the petition upon the fact that because the accused was charged with wilful, deliberate and wrongful killing and found guilty without the supreme penalty being imposed, that the Court did not believe him guilty of murder and compromised by giving him life imprisonment, the reason given being that in time of war, if a person is found guilty on such a charge, the penalty should be and must be death, or to use the words in the petition "The sentence, on such a finding could be in time of war, just one, namely, the extreme penalty of death". The Court arrived at its findings by at least a two-thirds vote of the members present at the time the vote was taken concurring, and it was within the power of the Court, if it saw fit, to condemn the accused to death. The circumstances of this case, where the Court chose to sentence the accused to life imprisonment, is in no way different from thousands of criminal cases where defendants are sentenced to life imprisonment when charged with capital crimes--wherefore any one or number of a variety of reasons, the Court did not see fit to impose the death penalty, but instead imposed the penalty of life imprisonment. No doubt the Court, in sentencing the accused to life imprisonment instead of imposing the death penalty, took into consideration the circumstances and conditions existing at the time the crime was committed, namely, the country being at war, and the fact that the accused could have committed the crime with impunity knowing that no inquiry, so far as his own superiors or government were concerned, would ever be instituted, or that if by any remote possibility such an inquiry were made, his own government could completely exonerate him. Since there was sufficient evidence before the Court to support its findings, it was entirely a matter for the Court, and within its proper competence and discretion, whatever the considerations prompting the Court's judgment, to assess whatever penalty it felt was justified

under the circumstances, and unless the Court, in doing so, abused its discretion or fell into error, it would appear that no ground was presented upon which to disturb the sentence. Thus, the argument that the sentence was based upon compromise would seem to be entirely devoid of validity. The reviewer has, it is believed in the reasons set forth above, demonstrated the fallaciousness of such a view, and is unable to find sufficient merit in the other contentions advanced by the defense to overcome the actual evidence properly before the court; or that the court---in permitting the reading by the law member of the report of Major SHIRLEY or hearing the remarks regarding the alleged Defense attempt to influence witnesses---prejudiced the rights of the accused by allowing these matters to influence it in arriving at its judgment.

The petition of the accused assuming (and thus deciding the case) as it must, the truth of the accused's story, skillfully marshals all favorably proven and doubtful evidence so as to present the story of the accused in the best possible light. Strong further support is given by the petition of Colonel SOKUSKI which sets forth a clear, rational and logical exposition of all the intangibles, for the most part, present in favor of the accused.

There are also present in this case certain extenuating circumstances which when considered in conjunction with the acts of the accused would indicate that some mitigation of the sentence is appropriate. The country was in a state of war. Air raids were apparently daily occurrences and the entire area was considered a highly strategic one where the landing of parachuted flyers was always feared (R 84) and a constant state of alarm existed. The front lines were not far away. High excitement existed among the populace (R 173, 174). The accused, although of the high rank equivalent to a Lieutenant Colonel in the Labor Service Group of the Army (R 82, 93), was apparently not too experienced. Even if his own story were believed---that he had already determined the

flyer had not obeyed his order, but was attempting to flee (R 173) ——the accused showed a lack of sound judgment in hazarding the flyer's life, in view of the untenable situation in which the flyer found himself where escape would have been impossible. There existed, as a part of the background of the occurrence, the high tension and nervous excitement of the whole mixed group of police, civilians and children attendant on their quest for the flyer, and the obviously slight familiarity of the accused with the weapon he was handling (R 210). All of these matters, coupled with the basic fact that the flier being pursued had not actually been apprehended or placed in custody, are factors that militate in favor of consideration being shown the accused. However, from the point of view of the reviewer, the weightiest consideration involved in the petitions for clemency for the accused is the fact that the decision of the Court was apparently not unanimous. Dissent from the prevailing view of the Court in capital cases is frequently effective in procuring commutation (supra p. 11). In a case where, as here, life imprisonment is involved, the fact that a minority or dissenting vote is recorded by any one or more of the members of the Court having heard all the evidence and participated in the trial would naturally be a most potent argument to urge upon the Reviewing Authority as a basis for the exercise of clemency in favor of the accused. This fact, in conjunction with the extenuating circumstances set forth above, the petition for review of the Defense Counsel, the petition of Colonel BOROWSKI, the dissenting member of the Court, and that of the communications from friends, relatives and other acquaintances attesting the good character and humanity of the accused, present a powerful and compelling impulsion in inducing the exercise of clemency in this case and has resulted in influencing the modification of the sentence in a large and measurable degree in favor of the accused.

8. CONCLUSIONS:

(a) In view of all of the foregoing and upon careful consideration

of the entire record, it is recommended that the findings of the court be approved, and that the sentence be reduced from life imprisonment to imprisonment for a period of 20 years to commence 1 June 1945.

(b) Forms of action designed to carry out the foregoing recommendations, should they meet with approval, are submitted herewith.

/s/ Jacob Silberman
JACOB SILBERMAN
Attorney
Post Trial Section

Having examined the record of trial, I concur.

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