

30 September 1947

UNITED STATES)

v.)

Case No. 12-1881)

Walter Heinrich Ernst
RIESEBERG, et al.)

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused were tried at Dachau, Germany, during the period 23-28 July 1947, before a General Military Government Court.

II. CHARGE AND PARTICULARS:

CHARGE: Violation of the Laws and Usages of War.

Particulars: In that Walter Heinrich Ernst RIESEBERG and Kurt Friedrich Wilhelm DILBA, German Nationals, did, at or near STAPELBERG, Germany, on or about 16 August 1944, wrongfully encourage, aid, abet and participate in the killing of two members of the United States Army, believed to be Harrel E. FULLER and Frank MISHAGA, who were then and there surrendered and unarmed prisoners of war in the custody of the then German Reich.

III. SUMMARY OF EVIDENCE: On about 16 August 1944 an American bomber was shot down. The crew members parachuted from the plane before it crashed. Two of the flyers landed in the vicinity of Stapelburg, Germany, and were captured by a group of civilians. Three SS men, the accused, Frank and Watzinger arrived and took the two flyers into custody and placed them in an automobile belonging to the accused. They then proceeded about one kilometer along a narrow dirt road through a forest. According to the accused, he stopped the car and ordered the two SS men and the flyers out of the car so that he could back up his automobile and turn around. After the accused had backed up approximately 100 meters, Frank came running up to the automobile and informed the accused that the flyers had jumped to the right and left of the road in an attempt to escape and that

he, Frank, had shot them. Each body was found to have a bullet wound almost in the center of the back of the head.

Unless otherwise indicated, an item referred to as a "Statement" is in the form of an extrajudicial sworn statement.

IV. EVIDENCE AND RECOMMENDATIONS:

1. Walter Heinrich Ernst RIESEBERG

Nationality:	German
Age:	48
Civilian Status:	Unknown
Party Status:	NSDAP since 1930
Military Status:	Allgemeine SS
Place:	NG
Findings:	G
Sentence:	Life imprisonment

Evidence for Prosecution: The accused testified that he joined the Nazi party in 1930, the SA in 1931, and the Allgemeine SS in 1932 (R 143); that he was in charge of a refugee camp for displaced foreign born Germans; and that he was stationed at Ilseburg from August 1942 until the end of the war (R 128, 129).

The accused testified further that in Ilseburg on 16 August 1944 an air alert occurred at about 1000 hours (R 130, 131); that the air wardens in the city hall reported to him that a German plane made a forced landing between Veckenstedt and Stapelburg; although he had no duty in this matter, he was requested to go to the scene of the crash inasmuch as he had a car (R 131, 132); that he started for the scene of the crash at about 1100 hours; that he took Frank and Watsinger with him (R 132); that it was about four kilometers from Ilseburg to where the German plane landed; and that when he arrived there he found that the German flyer was gone (R 132).

The accused testified further that he saw a group of about 20 civilians who had two flyers in custody (R 132, 133); that the civilians were beating the flyers; that he took the flyers away from the civilians; that the flyers were seated in the rear seat of his car; that Watzinger was seated on the turned down top of the car with his feet between the flyers; that Frank was seated on the front seat beside the accused; that after the crowd forced the flyers to dismount, they beat the flyers again; that the accused took the flyers away from the crowd, seating them and the SS men in the car as before; that he asked a man the way to the road from Stapelburg to Ilsenburg; that the man directed him to a road into the forest; and that the approximate place where he found the two flyers in the custody of the group of civilians is indicated on Prosecution Exhibit 3 with a letter "B" (R 132-135, 150).

The accused testified that he did not return to Ilsenburg with the flyers by the same route he used in coming from Ilsenburg, for the reason that part of this route was across a field which he was afraid to drive over with a loaded car; that he knew the highways of the area around Ilsenburg very well; but that he did not know this particular place inasmuch as it was off the highway (R 164, 165).

The accused testified that after he drove into the forest, he followed a narrow road for four to five kilometers; that he decided that the road did not lead to the main highway from Stapelburg to Ilsenburg (R 135); but that he never found out where this road led to (R 166). He testified that he ordered Frank, Watzinger and the two flyers out of the car so he could back up about 100 meters to a wide place in the road (R 135, 136); that when he backed up and turned around, Frank ran up and said that he shot the two flyers after they jumped to the left and right of the road into the forest; that the accused asked him, "Are they dead?"; that Frank said, "I don't know";

and that the accused said, "Well you sure fumbled things up then" (R 137, 154).

The accused asserted that he backed the car for about 100 meters without stepping or looking to the front of the car; and that he was able to do this inasmuch as he had owned about 20 cars after 1907 (R 154). The accused testified that he returned to the spot where the flyers were shot; that he saw one of them about 15 meters from the road on the right and the other about 12 meters from the road on the left; that he saw two holes in the coveralls of the one on the right; that he saw no wounds on the one on the left (R 137); that he did not hear any shots fired (R 156); that he did not examine the heads of the flyers; that Frank did not tell him how many shots were fired (R 156, 159). The accused testified that as near as he could remember the spot that he marked with a letter "C" on Prosecution Exhibit 3 corresponded to the place where the flyers were killed. However, he said positively that it occurred in that section of forest (R 150).

The accused testified that before he left the scene of the shooting an Air Corps man arrived on the scene; and that the accused told the Air Corps man to stay with the bodies until someone came to investigate (R 138). (At this point the accused did not say anything about another person arriving on the scene). However, on cross-examination concerning this point he said, "Then an official came from Ilsenburg to survey the scene of the action and to take the bodies away" (R 157).

The accused testified that inasmuch as Frank was not armed with a rifle, he must have been armed with a pistol, but that he did not see the pistol (R 155). He testified that he never searched the flyers to see if they were armed (R 156).

He testified that he drove out of the forest, across a field and to the main road to Ilsenburg (R 138); that he drove

to the city hall in Ilsenburg where he told Frank and Watzinger to report the incident to a police lieutenant Dahn (R 138); and that he did not report the incident to his SS superiors inasmuch as he had no duty to do so (R 139, 140).

Concerning the report of the incident, the defense read into the record D-Ex 2, as follows:

"Honorable Mr. Riessberg: The record was not able to be located. How is anything like that possible? The police repeatedly told me that nothing has been discovered. We certainly gave ourselves trouble trying to locate it. The former secretary of Mr. Dahn didn't know anything about the record. Do you think it is possible that it might be lying around somewhere in the castle? There is nothing any longer there, no matter how much we think about it, nor how much we are trying to find it we still can't locate it. If you ask me I'll be glad to help you in any way I can, in any kind of testimony I might be able to give. I remember the date exactly. This car came back to Ilsenburg and immediately the word went around that Frank had shot to death two men escaping. At any time I am at your disposal, at any time you need me. At any rate I hope the matter is cleaned up quickly so that you and Mr. Dilbe can return to your relatives. Please tell me how the thing turns out. I wish you everything good and I send my best greeting to you.

S/S Mr. Manger" (R 142).

The accused asserted that he never heard of Himmler's non-intervention order, Goebbels' decree or Martin Bormann's order (R 147, 148). He further asserted that the only provisions concerning prisoners of war that he knew were the declarations of the Geneva Convention (R 162).

Although the Statement of the accused agrees in many respects with his testimony, those portions that disagree significantly are set out hereinafter.

The accused stated in his statement that he found out that the two flyers were Americans; that when he rescued the two flyers from the angry group of civilians, he drove in the direction of the main street to Ilsenburg; that he drove a little more than one kilometer when he lost his way going through a forest; that he could not go to the main street without going through the forest; that he stopped the car about 800 meters-

from the edge of the forest; that he dismounted his passengers, backed up and turned around; that when he was turning the car, Frank came up saying that the flyers had suddenly dashed to the right and left in the forest and that he and Watzinger had shot them (R 9; P-Ex 4A, pp. 1-3).

He further stated that according to Frank and Watzinger, they both shot the flyers; that they were both subordinates of the accused; and that the accused was in charge of the office in Ilsenburg (R 9; P-Ex 4A, pp. 4, 5).

Accused DILBA testified that this accused was in the SS; that defense witness Altens was the immediate superior of the accused (R 79); and that it is possible that he heard a rumor that the two flyers were shot while they were trying to escape (R 91).

A witness, Altens, testified that he knew the accused following 1940; that the accused was a subordinate of this witness; that this witness may have told the accused that he should have reported the incident to his superior in the SS (R 124, 125); that Frank and Watzinger were subordinates of the accused (R 103, 105); that this witness considered the accused a fanatical Nazi; that Frank told him that he shot both the flyers; and that he did not know what kind of a marksman Frank was (R 113, 125, 127).

A witness stated in his Statements that during the month of August 1944 he was working in a field near his house; that he saw an air fight between a German plane and an American plane; that the American plane was shot down; that two flyers parachuted from this plane; that he started to the scene, but found the distance too great; that when he was in the yard of his home he saw a car traveling at great speed in the direction of Stapelburg; that at the same car passed him again on its way back toward Ilsenburg, he recognized the occupants as the accused, Frank and accused DILBA. This witness further stated that a few days later he talked to Frank; that Frank told him that he shot the two flyers while they were attempting to escape; that later this witness

heard that they were shot while sitting at the edge of a ditch; that the people of Ilsenburg were very much upset about the incident, saying that it was "cold blooded murder" (this witness did not state anything about a German plane being forced down) (R 15; P-Exs 6A, 7A).

A witness stated in his Statement that during the month of August at about 1100 hours he saw an air fight between a German plane and an American plane; that a bomber was shot down; that two flyers parachuted from the plane; that these two flyers were captured by people working in the fields; that three SS men came by in a car; that they put the two flyers into the car; that about 15 minutes after they drove into the woods toward Ilsenburg, he heard two shots (this witness did not state anything about a German plane being forced down) (R 20; P-Ex 8A).

A witness stated in his Statement; that in July 1944 a plane fell near Stapelburg; that he rode on a bicycle to where the plane fell; that he then went to a place about two and one half kilometers southeast of Stapelburg, where the flyers landed; that he was told that the flyers were shot by SS men; that he learned that the bodies were in the woods; that he went to the woods, finding them about one and one half kilometers southeast of Stapelburg; that each flyer was shot once almost in the center of the back of the head; and that he was told that the flyers were captured by the police, turned over to the SS men, taken on foot about 200 meters into the woods and shot (this witness did not state anything about a German plane being forced down) (R 22; P-Ex 9A).

A witness stated in a Statement that he was Gendarmerie-meister of Ilsenburg; that in August 1944 he received a telephone call from Vochenstedt saying that the bodies of two enemy flyers were lying in the woods of Stapelburg; that he went to the place, found the bodies and took them to the morgue in Vochenstedt; that he examined the bodies and found ".... one

bullet hole about in the center of the back of the head and one bullet hole in the face of each flyer. It seemed as if each flyer was killed by one shot" (R 23; P-Ex 10A).

A witness stated in a Statement that he was a helper in the town office of Vechenstedt on 16 August 1944 when two American flyers were brought in for burial by Brenstedt who was Gendarm-eriemeister of Ilsenburg. He stated that he did not see the bodies but that he got their names from their dog tags and that the names were "Harrel W. Fuller - 18183278 - T42-43A" and "Frank Michaga - Y - 123187 - T43-44" (R 24; P-Ex 11A).

Evidence for Defense: The accused testified that on 16 August 1944, during the air alert, he received a telephone call from the air guards in Ilsenburg to the effect that a German flyer had been shot down between Vechenstedt and Stapelburg and it was believed that he was wounded. The accused was requested to proceed to the vicinity and pick up the wounded German flyer (R 131, 132). The accused picked up Frank and Watzinger and proceeded in the direction of the crashed German plane. Traveling approximately four kilometers they arrived at the crashed German plane and were told that the German flyer had already been removed (R 132). Not far from the spot a crowd of people were gathered around two captured American flyers and were beating them. The accused, Frank and Watzinger, took the flyers from the hostile crowd and put them in the accused's car. The accused and Frank sat in front; Watzinger sat on the turned down top with his feet between the two flyers who were sitting in the back (R 132, 133). Before they could drive off the crowd became very hostile so they all dismounted from the automobile. A railway employee threatened to shoot the flyers. They again took the flyers away from the crowd and placed them in the automobile. The accused inquired the way to the road leading from Stapelburg to Ilsenburg. An individual pointed out the

dirt road leading through the woods as the road that they wanted (R 134, 135). After proceeding along the forest road for four or five kilometers it was decided that the road did not lead to the desired road so the accused stopped the automobile and ordered the four persons to get out of the vehicle so the accused could back up to a place where he could turn around. He also ordered Frank and Watzinger to follow him. After backing approximately 100 meters the accused discovered a place where he could turn around. When he turned the automobile around Frank ran up and stated that he had shot the flyers because they attempted to escape (R 135-137, 154). The accused got out of the automobile and returned to where the bodies of the flyers were lying. One was on the left side of the road and the other was on the right. He saw two holes in the back of the coveralls of the flyer on the right, but did not see any wounds on the flyer on the left (R 137). At that time a soldier from the air corps arrived. The accused instructed him to stay there with the bodies until the police arrived to make their investigation (R 138). The accused, after considerable trouble, located the road to Ilseburg. He took Frank and Watzinger to the police station ordering them to report the shooting to the police (R 138). The accused heard later that the flyers were buried in the cemetery in Vochensstedt (R 140). It was known to many persons in the town of Ilseburg, either by rumor or by statements made by Frank, that he, Frank, had shot the two American flyers while attempting to escape (R 8, 12, 15, 58, 76, 107, 137, 142; P-Exs 4, p. 3; D-Ex 2).

In August 1944 the accused prevented a Jewess from being placed in a concentration camp by his humane actions (R 163, D-Ex 3).

Sufficiency of Evidence: The guilt of the accused is not satisfactorily established. The findings of guilty are not warranted by the evidence.

Petitions: A Petition for Review was filed by Frank L. Walters, Chief Defense Counsel, 18 August 1947. No Petitions for Clemency were filed.

Recommendation: That the findings and sentence be disapproved.

2. Kurt Friedrich Wilhelm DILBA

This accused was acquitted (R 191).

V. QUESTIONS OF LAW:

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

Objection to Admission of Extrajudicial Statements: The defense objected to the admission into evidence of some of the statements offered by the prosecution (R 13, 17, 19, 21, 22) on the grounds that the witnesses could be produced if the prosecution made a reasonable effort to do so and that there was no proof that these statements were taken by an officer officially appointed to investigate war crimes as provided by a letter from Colonel Mickelwait, dated 6 October 1945. The defense made a further objection apparently on the grounds that the admission of statements nullified the right of an accused to be confronted with and cross-examine witnesses, allegedly laid down by General Eisenhower in SHAEF Ordinance No. 2.

It is not necessary to discuss the historical accuracy of the statements made by counsel for the defense inasmuch as Section 5-329, Title 2, "Legal and Penal Administration" of "Military Government Regulations," published by Office of Military Government for Germany (US), 27 March 1947, provides: "A Military Government Court shall in general admit oral, written and physical evidence having a bearing on the issues before it, and may exclude any evidence which in its opinion is of no value as proof."

Obviously the Court considered that these Statements had some probative value. The Court overruled the objections of

the defense.

Motion to Dismiss: The action of the Court in overruling the defense's motion to dismiss at the close of the prosecution's case was proper. It is not error for a war crimes tribunal to overrule a motion for findings of not guilty made at the close of the case for the prosecution, if it believes that there is sufficient evidence to support the charge and that the accused should be required to answer it (Section 5-327.2, Title 5, supra; and Section 501, page 409, "Manual for Trial of War Crimes and Related Cases," 15 July 1946). A similar practice is followed in Courts-Martial (paragraph 71, d, "Manual for Courts-Martial, United States Army", 1926). The Court in this instance did not abuse its discretion in denying the motion.

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

VI. CONCLUSIONS:

1. It is recommended that the findings and sentence be disapproved.

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

ELMER MOODY
1st Lt., Inf
Attorney
Post Trial Branch

Having examined the record of trial, I concur, this _____ day
of _____ 1948.

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