

according to Wolter and the accused, of searching for a pistol and other articles that the flyer claimed to have hidden when he landed. Wolter further claimed that, when the party stopped to make the search, the flyer ran into the woods, and when he failed to halt upon command, was shot at by both Gestapo agents and also by someone guardsmen who had joined the pursuit. These shots resulted in the death of the flyer. The accused was the Gestapo superior of Wolter, Zellmann and Bremen. During the course of the day of the plane crash the accused, who was identified by the sound of his voice, was overheard to say to some unknown person or persons present in his office, that American flyers should be shot according to orders from higher authority. A rumor was circulated afterward to the effect that the accused had ordered that an American flyer be taken out and shot.

Unless otherwise indicated, items hereinafter referred to as "Statements" are in the form of extrajudicial sworn testimony.

IV. EVIDENCE AND RECOMMENDATIONS:

Leo KOWITZKE

Nationality:	German
Age:	53
Civilian Status:	Police instructor
Party Status:	Chief of Gestapo Branch Office
Military Status:	None
Pleas:	NG Charge I; NG Charge II
Findings:	G Charge I; G Charge II
Sentence:	Death by hanging

Evidence for Prosecution: There are two killing incidents involved in this case, but the incomplete nature of the testimony makes it impractical to attempt to apply the evidence definitely to one or the other of the incidents, and the evidence below is set out as applying to both incidents generally.

In her Statement, Straube said that she was working in the Gestapo office at Bad Harzburg on 7 July 1944, when an American

flyer was in the office of the accused. Zellmann came to her and told her to call the airport and arrange for someone to come and pick up American prisoners. He then went into the office of the accused. Soon thereafter she was told not to call. Some time later she heard a discussion in the office "to the effect that KOWITZKE had ordered the American flyer be taken away and shot" (R 8, 10; P-Ex 6 and P-Ex 17, thereof).

Mrs. Dinkel in her Statement stated that she worked at the Gestapo headquarters in Bad Harzburg in a room adjoining the office of the accused; that she had worked for the accused for two years; that on 7 July 1944 she overheard a conversation in the accused's office about a crashed American plane and about American prisoners; that she recognized the voice of the accused; and that the accused told the other men in his office that the Americans must be killed according to orders from higher headquarters. She then went to the office of Deutschbein, a photographer in the Gestapo headquarters, told him that American flyers were going to be killed, following which she cried. This was corroborated by Deutschbein in his Statement (R 8, 10; P-Ex 6 and P-Exs 22 and 23, thereof, P-Ex 7).

The accused admitted in his testimony that he was Chief of the Gestapo Branch Office at Bad Harzburg, Saxony, Germany; that soon after the shootings in the vicinity thereof on 7 July 1944 he heard that two American flyers had been killed; that Wolter, Zellmann and Bremen were Gestapo agents working under him in his office; and that a flyer with dark hair was in his office about noon 7 July 1944 (R 15, 17, 19-21, 25, 27).

United States Army Air Forces records show Technical Sergeant L. A. Hambel and Second Lieutenant Anthony J. Santomieri to be missing in action as members of the same crew (R 8, 9; P-Ex 6 and P-Exs 3, 4, 5, thereof). Sergeant Hambel was reported as one of the only two flyers killed and buried in the vicinity of

Bad Harzburg, Germany. The bodies were later disinterred by Americans (R 8, 9, 10; P-Ex 6 and Pxs 6 and 10 thereof).

In his Statement, Heisecke said that, in the summer of 1944 after a plane had crashed, he and a companion were searching in the woods for flyers, when they met two Gestapo agents who told them that they were too late and that the flyer had already been shot while escaping (R 8, 9; P-Ex 6 and P-Ex 7, thereof).

In his Statement, Wellner stated that on 7 July 1944, near Bad Harzburg, he was escorting a captured American flyer along a road when two Gestapo agents, one named Zellmann, took the flyer away from him; that a few minutes later he heard about five shots fired; and that in going in that direction he saw the two Gestapo agents standing in the woods with the same flyer lying dead near them (R 8, 9; P-Ex 6 and P-Ex 9A, thereof).

The Polish laborer Wladyslaw stated in his Statement that at about 1100 hours on 7 July 1944 he was near the scene of the American plane crash near Bad Harzburg and saw an American flyer in the custody of Gestapo agents, Bremen and "Kubitzke", and two unknown Germans being led toward the wreckage of the plane. The flyer was taken into the woods and the witness heard about four shots. Later he went to the place and saw the dead body of a flyer with dark blond hair (R 8, 10; P-Ex 6 and P-Ex 184, thereof).

In her Statement, Mennecke stated that after an American bomber crashed near Bad Harzburg a flyer landed near the hospital; that a policeman, "Knockelmann", arrived and prevented two surgeons from giving aid; and that two Gestapo agents, one named "Kobitzke, head of the Gestapo here", appeared and mistreated the flyer, "roughed him up", and "Kobitzke" stated, "And now you cannot interfere, he belongs to us". Mennecke further said that the two Gestapo men took the flyer toward town (R 8, 10; P-Ex 6 and P-Ex 11A, thereof).

Wolter, who was convicted and sentenced to life imprisonment in United States v. Ludwig WOLTER, Case No. 12-1960, in connection

with the killing alleged under Charge I herein, said in one of his Statements that, in June or July 1944, he, Zellmann and a driver took an American flyer pursuant to an order from the accused to search for some articles, which the flyer said that he had hidden when he landed. When the car was stopped at the flyer's signal, the two Gestapo agents and the flyer dismounted. As the agents started to light a cigarette, the flyer dashed into some small trees beside the road. The agents pursued calling, "Halt", and when the flyer, still running, passed through the trees into an open space both agents fired at the flyer. Some home guardsmen, who had come upon the scene, simultaneously fired at the flyer. The flyer was shot to death. Wolter said he fired at the flyer and did not mention warning shots (R 8, 9; P-Ex 6 and P-Ex 81, thereof). Wolter repeated similar but not like versions in a later Statement and in his testimony at his own trial (R 8; P-Ex 6, pp 26-29, and P-Ex 21, thereof).

Kazimierz, a Polish laborer, said in his Statement that he removed an identification tag from the body of a flyer lying in the woods near Bad Harzburg on 7 July 1944, and that the name thereon was L. A. Harbel (R 8, 10; P-Ex 6 and P-Ex 104, thereof).

Policeman Knockelmann stated in his Statement that an American four motored bomber crashed near Bad Harzburg, 7 July 1944. Six flyers bailed out and four were taken to the municipal building. Upon hearing that a flyer was at Gestapo headquarters, he telephoned to the accused who refused to turn the flyer over to the civil authorities. Knockelmann called the accused again in 30 minutes and was told that the flyer had been taken to look for his pistol. Knockelmann stated further that he went to the scene of the crash "to bring the aviator back". On the way home on the road he met Zellmann and Wolter at a considerable distance from the wrecked plane. He asked where the flyer was, resulting in the following conversation:

I : "Where is the Man?" -- No reply.
I : "I must report and you don't have to."
Zellmann: "He tried to escape and had been shot."
I : "Take me to the body, I must get the identifica-
tion."
Zellmann: "We have no time left. The body is lying in
the woods just around the corner."

Further along on the way home Knockelmann picked up Gerken and found a dead flyer with dark hair who had been shot (R 8, 10; P-Ex 6 and P-Ex 12A, thereof).

Gerken in his Statement stated that he went to the scene of the plane crash; that later he proceeded south and, when about 300 meters north of some woods, he heard a single shot followed by "6 - 8 others"; that he then saw a car parked on a parallel road; that he saw Wolter and Zellmann, each with a pistol in their hands; that they were walking toward the body of a dark haired flyer and he followed; that six SA men also appeared; that later Knockelmann arrived and had a "lively" argument with the Gestapo agents; and that one of them stated, "We have no time to spare; it is your business to remove the body" (R 8, 10; P-Ex 6 and P-Ex 14A, thereof).

Evidence for Defense: In his Statement, Wolter, who admitted participation in the shooting of one of the flyers killed near Bad Harzburg on 7 July 1944, stated positively that the accused, who was his superior, did not give any order to shoot nor to kill the flyer (R 8, 10; P-Ex 6 and P-Ex 21, p 4, thereof). Testifying at his own trial, Wolter said that the accused instructed him and Zellmann to go along with the flyer as guards to search for a pistol and papers that the flyer said he had hidden when he landed (R 8; P-Ex 6, p 26). When the car had stopped and they had gotten out to start a search for the objects and while Zellmann was giving him a light for his cigarette, the flyer ran into some woods and he and Zellmann pursued him. Some home guards also joined in the pursuit. Zellmann and some of the home guardsmen fired at the fleeing flyer, and the flyer was killed (R 8; P-Ex 6, pp 28, 35). Wolter further testified that there was no

conversation by the accused or anyone else relative to killing the flyer (R 8; P-Ex 6, pp. 29, 32).

* The accused testified that there was an air raid alarm on 7 July 1944; that he was in an air raid bunker; that someone outside yelled "murderers"; and that he went out and observed flyers parachuting down; and that later there was a large crowd in the street shouting that the flyers must be shot on the spot. He gave Wolter an order to search for the parachuted flyers and warned him to be careful not to let the flyers come in contact with the excited crowds (R 10, 17). About 45 minutes later, Wolter came to his office with a captured flyer, and, while the accused could not remember, he thought there was a third person with Wolter. The flyer stated that upon landing he threw his pistol away (R 18) and some other things, and the accused sent Wolter and a "second officer", Bremen to the best of his recollection, along with the flyer to find these articles. The accused further testified that he especially warned Wolter to be careful of the crowds and gave them a car to go in on that account (R 19). He denied that he refused to turn the flyer over to the police, stating he could not have done so because the flyer had already gone on the search (R20). When Wolter returned he was wounded. His hand was bleeding. Later the accused testified that it was Wolter's arm. Wolter told the accused that "The pilot tried to escape, he ran away into the forest and while he ran away he (Wolter) injured his arm so they shot him." To his best memory Wolter wrote out and forwarded a report (R 20). The accused denied that he gave Zellmann an order to shoot a flyer, stating that Zellmann had "that day gone away without my knowledge" (R 21). He denied that he ever received an order from any source as to what action he should take against captured Allied flyers and never heard of any such orders issued by Himmler or Goering or any higher authorities prior to it being talked about in his detention camp after the war. Later he qualified

his remark by stating he had read an article in the "Voelkischer Beobachter" written by Goebbels, but he had little recollection as to the content and his attitude in any event was not changed (R 22). He denied that he ever made a statement such as that attributed to him by Mrs. Dinkel in one of her Statements to the effect that the American flyers must be killed. He denied that he gave an order on 7 July 1944 to anyone to take a flyer out and mistreat or kill him (R 23). He denied going into the office of Mrs. Straube and telling her not to call the airport and ask them to come and get the flyer (R 26). Upon interrogation by the Court the accused stated he sent Wolter and another man out to search for the flyer's pistol and other articles because the flyer seemed interested in finding them and because he, the accused, believed it his duty. Later he testified in response to a question by the Court that, "Mainly I wanted to make sure that the weapon would not come into wrong hands" (R 28, 29).

Sufficiency of Evidence: It was clearly established that two American flyers were killed by Gestapo agents, possibly assisted by other persons, on the outskirts of the accused's town on the day in question; also that the accused was Chief of the Gestapo branch office and the superior of the agents involved. It was clear that one of the flyers was killed very soon after landing in the vicinity of the crashed plane and that the other was killed sometime later, after he had been taken to the office of the accused for interrogation. It was tentatively shown that the flyers were Second Lieutenant Anthony J. Santomiery and Technical Sergeant L. A. Hambel.

The evidence fails to connect the accused with illegally killing the first flyer, which killing was effected by Gestapo agents Zellmann and Bremen. The witness, who gave the name of one of the participants as a name similar to that of the accused, was not definite in identifying the accused and no other witness named the accused as being present. There is some evidence

indicating that the accused was in his own office at the time.

In regard to the second killing in which the flyer who had been interrogated in the accused's office was killed, the evidence raised some inference of guilt on the part of the accused. However, legal proof of his guilt is not present.

Accepting the prosecution evidence as true, the most that is established to involve the accused is that he, at sometime on the day in question, said, to some unknown person or persons present in his office, that American flyers must be killed according to orders from higher headquarters. It was not shown whether this statement was in the form of a direction or a mere remark in the course of a conversation or discussion. It was not shown that any person connected with either killing was present or heard such order or discussion. Furthermore, it was not shown whether this statement was made before, during or after the time that the flyer was present in the office, or whether before or after the flyer was killed.

Wolter, who admitted participation in the second killing, stated in two extrajudicial sworn statements and testified at his own trial that the accused did not order the flyer killed and that no discussion was ever had about killing the flyer.

The findings of guilty are not warranted by the evidence.

Petitions: No Petitions for Review were filed. Petitions for Clemency were filed by Dr. Benton, 1 November 1947, and by the accused, 30 November 1947.

Recommendation: That the findings of guilty be disapproved.

V. QUESTIONS OF LAW:

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

Right to Confer with Counsel: At the time of his arraignment the accused stated he was ready for trial. In response to an inquiry by the Court as to whether a copy of the Charge Sheet

had been served upon him prior to trial, the accused replied in the affirmative, but stated that he had not had a chance to confer with his defense counsel until "today". The case commenced at 1330 hours. The defense counsel agreed that the statement of the accused as to conferences was true, following which the accused stated in response to inquiry by the Court as to whether he was satisfied to proceed with the trial, "I think I am on the facts that I am acquainted with" (R 1,6). One of the rights specially granted to an accused is "to confer with counsel before trial" (Section 501, page 404, "Manual for Trial of War Crimes and Related Cases", 15 July 1946, as amended).

Upon initial examination, it appears that the defense counsel failed to perform his duty prior to the opening of the trial and even at that time should have asked for a continuance. However, an examination of the evidence adduced reveals that three months before the instant trial the defense counsel defended the accused in *United States v. Wolter*, supra; that the issue involved herein as to whether the accused ordered the flyers to be shot was contested in the earlier case; that Zellmann, the only other person in a position to give direct evidence, had eluded the defense counsel and apprehension agencies; and that the defense counsel was already in possession of weapons with which to defend the accused. Neither the accused, a man of mature years, and with a comparatively broad experience (R 32-34), nor the defense counsel asked for a continuance. The accused in giving evidence in mitigation made no mention of lack of time to defend, as he might well have done, if he knew of witnesses who could have aided in his defense. It appears that the accused was quite well defended and it does not appear that any injustice resulted to the accused in this connection.

Disqualification of Court Members: Three members of the Court, including the president and the legally trained member (R 3) had previously, sat as members of the Court which heard the companion

case of United States v. Wolter, supra, (R 8; P-Ex 6, p. 2) in which much of the same evidence was presented by the prosecution and in which it was contended that this accused ordered Wolter to shoot one of the flyers involved in this case. However, the issuance of an order to Wolter, by this accused or any one else, was not a condition precedent to a finding of guilty in that case. Under these circumstances, from the standpoint of propriety, the three members in question might well have disqualified themselves.

Admissibility of Evidence: It is noted that the Court in the Wolter case did not admit the prosecution's P-Exs 4 and 5, forming a part of prosecution's P-Ex 6 in this case. The defense making no objection in this case, these two exhibits, unsigned, were admitted (R 8, 9; P-Ex 6 and P-Exs 4 and 5, thereof). However, while they are a very low form of evidence, if the Court considered them to be of any probative value, they were compatible with the position taken by the defense, i.e., that the flyers were shot while attempting to escape. The defense and the accused did not deny or attempt to discredit other prosecution evidence that the two flyers were shot and killed. No injustice resulted to the accused from the admission of the documents.

An examination of the entire record fails to disclose any error or omission in the conduct of the trial which resulted in injustice to the accused.

VI. CONCLUSIONS:

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

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

V. H. McClintock

V. H. McCLINTOCK
Attorney
Post Trial Branch

Having examined the record of trial, I concur, this 12th day
of March 1948.

C. W. Phifer

C. W. PHIFER
Lieutenant Colonel, USAF
Acting Deputy Judge Advocate
for War Crimes