DEPUTY THEATER JUDGE ADVOCATE'S OFFICE
7708 WAR CRIMES GROUP
UNITED STATES FORCES, EUROPEAN THEATER

23 December 1946

UNITED STATES)
)
v.) Case No. 12-1837
)
Richard WEGMANN, a German National.)

REVIEW AND RECOMMENDATIONS

1. TRIAL: The accused was tried on 10 and 11 June 1946 at DACHAU, Germany, by a General Military Government Court appointed by paragraph 11, Special Orders No. 1-, Headquarters, Third United States Army, APO 403, dated 7 June 1946.

2. FINDINGS: The offense involved was: Plea Finding

CHARGE: Violation of the Laws of War NG G

Particulars: In that Richard WEGMANN, a German national, did, at or near SL. Germany, on or about 28 May 1945, willfully, deliberately and wrongfully kill a member of the United States Army, believed to be Lt. Roy D. [illegible], who was then an unarmed, surrendered prisoner of war in the custody of the [illegible] Guard, by shooting him with a gun. NG G

3. SENTENCE:

The court by at least a two thirds of the members present at the time the vote was taken concurring, sentenced the accused to death by hanging until dead at such time and place as higher authority may direct (T 133).

4. DATA AS TO ACCUSED:

According to accused's own statements in his pre-trial affidavit dated 28 September 1946 he was then 35 years old, a resident of Gut Herrigshof, near SCHLOSSTEIN, Germany, and a farmer. The same document contains his allegation that he had become a member of the German Volkssturm in the fall of 1938, that he received a shot wound in the skull during the campaign in Poland and was on account of that injury discharged from the

Wehrmacht in the spring of 1941 (Pros. Exh. No. 1). He is a German national (R. 6).

No data on his family status or on his relation to the Nazi Party appear in the aforementioned affidavit, nor were they given by accused during the trial. He was not interrogated by the Court nor called as a witness by either Defense or Prosecution (R. 7, 117, 118). However, other persons heard as witnesses, made allegations substantially to the effect that accused was not a Party member. This as well as the accused's and other persons' statements concerning the effect of his head injury upon his mental competency will be covered in the summary of the evidence hereinbelow.

5. RECOMMENDATION:

a. Guilt: That the Court's finding the accused guilty of the Charge and Particulars be approved. No qualification of the words "believed to be Lt. Roy D. C. USE" appearing in the Particulars need be made in view of the fact that it was proved that the flyer was American, which is sufficient to support the finding. No positive charge was made that the flyer was Lt. Roy D. C USE.

b. Sentence: That the death sentence, noted out to the accused by the Court be commuted to imprisonment for a term of thirty (30) years commencing on 14 June 1946.

6. EVIDENCE:

a. Prosecution in its opening statement (R. 7, 8) offered to prove the following facts: On or about 28 May 1941 an American aviator parachuted safely from his disabled plane near ELF, Germany. He surrendered to the civilians who gathered around him. One Alois HOLZE took custody of the flyer and searched him for weapons. None were found on the person of the flyer. Very shortly thereafter, a soldier, a member of the

announced that he was in charge and led the flyer in the direction of the Burgomeister's office in [illegible], Germany. The crowd which had gathered around the flyer, by this time, followed along in the direction of [illegible]. As the group was proceeding there, the accused, Richard [illegible], appeared on the scene with a rifle. He ran up to the crowd, pushed his way through to the flyer and at a distance of five meters from the victim, fired his rifle at him. The victim fell to the ground and then attempted to stand up in further token of surrender when [illegible] fired a second shot at him. The flyer fell down again. His body was [illegible] covered with blood and he appeared in great pain. The accused called him an "Air Gangster" and called out that his own wife was [illegible] and that he was getting revenge for his brother who was killed in an air raid on Frankfurt. One of the by-standers, seeing that the flyer was still alive and in great pain suggested that since he was in such misery he might as well be finished off. At which, [illegible] fired a third shot into the head of the flyer, killing him. As [illegible] left the scene after he had killed the flyer he was heard to say, "Let's go get another one." The flyer was subsequently buried in a cemetery at [illegible], Germany.

b. The theory of the Defense was substantially that presented by Dr. Becker (R. 64), that the accused did kill the flyer in question by three shots, but that at the time of the act he was mentally incompetent and therefore not responsible for having committed a crime.

It may be mentioned, in this connection, that upon special order of the President of the Court (R. 120) both the final arguments of Prosecution and of Defense have been transcribed and form part of the trial record (R. 119-131).

c. Prosecution's Evidence: Before starting with a

summary of Prosecution's evidence, attention must be called to the fact that there appears nothing in the evidence that would bear out the following passage of the Charge Sheet: "believed to be Lt. [illegible]y D. C.JST".

Turning now to a detailed review of the evidence of Prosecution, reference must be made to the testimony of its first witness: Wilhelm SCHMITT, a farmer's helper of [illegible], about two years younger than accused. On direct examination, he substantially testified as follows:

Witness remembers 28 May 19[illegible] on this day in [illegible] he observed a parachutist coming down from a German plane and hitting the ground at a distance of about 200 meters from where witness stood. It was in the afternoon. Witness walked toward the flyer, but before he reached him a group of Polish and German workers had already surrounded him. One of the Polish workers, accompanied by the witness, escorted the flyer in the direction of the police station. Meanwhile more people joined them, one of whom was a soldier and who on this ground claimed to be in charge of the flyer. At this time there were altogether some fifteen men surrounding the flyer and walking with him toward the police station (R. 8, 11). Shortly after, unknown therefore to witness, cries [illegible] "Together you have killed a brother of ours. [illegible] revenge." He furthermore shouted at the people standing around "Get out of my way or I'll shoot every one of you" (R. 10). At this time he fired the first shot. The witness shot a short while later, after the flyer had meanwhile attempted to [illegible] raise his hands. He also fired a third shot, whereupon the flyer was lying on the ground with the top of his skull lifted and his brain mass pouring out over the grass. Witness identified the accused as the man who fired all the three shots (R. 13-17).

Accused, on that day, introduced himself as Achard WEG[illegible] of the Zuchthaus (T 14). While he was shooting at the flyer, the crowd uttered their imitation (T 15). His weapon was a rifle (T 15). He shot at the flyer from a distance of four or five meters (T 16). After the perpetration of the deed and after walking away, he said, "We will look for another one" (T 17).

Prosecution's next witness, Christian [illegible], a technical railway inspector of SBB, 56 years old, upon direct examination substantially testified as follows:

He remembers 20 May 1944 as the Whitsunday of that year and as a very hot day. He did not himself see the plane or a man parachuting down from it, but when he was just taking a walk, he met on his way one Mr. HOLZE, the station superintendent, and a German soldier, with a flyer between them. According to HOLZE the flyer had just come down by parachute. Upon HOLZE's request he came along with the soldier to show the way to the police station, while HOLZE departed from the group to look for another parachutist who had come down. After they had proceeded about 200 meters, and while they were surrounded by a crowd of 20 to 50 people, including quite a few children, witness noticed that this crowd started to laugh. At this time he saw a man with a red face, his hair dyed in [illegible] like a red mat, a rifle which he had taken from his shoulder and which he was holding under his arm, pointing to the flyer. Witness shouted to him "For Heaven's sake don't be a fool. You can't [illegible] to us?" In the witness's words he looked like a mad man. "If you don't keep quiet I will shoot one or two of you". Then he shouted "My brother, my brother, our [illegible] (T 23), and shot at the flyer from a distance of about 3 meters. The flyer collapsed after this first shot, and witness immediately ran to the plane to report to the policeman on duty. After he had covered

about a hundred paces, he heard a second shot, and when he had run another 50 meters, a third one (R 19-20).

On cross-examination the witness added, among other things, that the people were laughing about the accused and the manner of his behavior which resembled that of a mad man (R 24). The accused had a puffed up, red face, which was almost blue. His hair was hanging into his face (R 25). As the accused ran toward the flyer, one Workmeister KLEE made the following remarks: "This fellow is crazy. He doesn't know what he is doing. There is something wrong with him." Witness himself had the same impression (R 26).

On redirect examination witness alleged that he had based his assumption of an abnormal mental condition of accused on the appearance of the latter, his saying "If you don't shut up I will shoot all of you," and his actual firing of the shot (R 28, 31).

Prosecution then introduced as its third witness in the person of one Konrad SCHWARZ of Berlin, driver of a locomotive, aged about 43 years old. On direct examination he substantially related that he was just observing the crowd which recognized the flyer, when a man with a gun arrived, asked how many flyers there were, and after being told that it was a single one, shot directly at him from a distance of about four to five meters. The flyer collapsed and screamed. His shirt and trousers were covered with blood (R 35). The man who did the shooting, shouted at the top of his voice: "You dirty murderer, you have murdered my brother"; he then shouted: "Fly [illegible] Germany". A short while later he fired a second shot. Thereupon one KLEE said: "What have you done? How are you able to hit this fellow like there." The perpetrator of the first two shots fired then a third one which went into the victim's back. The second and

third she to also came from a distance of about four to five meters. The flyer was an American (: 36, 37). Upon cross-examination, the witness substantially stated: There was warm weather on that day; accused was covered all over with sweat and his face was very red. Nobody was laughing. Witness did not hear anybody saying that the perpetrator was crazy. He himself did not hear but he was told that the perpetrator had said to the crowd: "If you do not go away I'll shoot every one of you" (R 38). Accused shouted this more after he had shot (R 39).

Prosecution's next witness, Johannes PUTZ, of GOLTZ, age 25 years old, a farmer's assistant, gave substantially this version of the incident:

On 20 May 1944 at around noon, witness was on vacation and indulging in a walk when he met some of together with whom he had in 1937 started to go to school and who remained his schoolmate for the next three years. They had a conversation about the war, especially new weapons, in the existence of which nobody believed. In this connection accused said: "... by the time they got their secret weapon out, the whole thing will be over ..." After finishing their conversation both of them returned to their respective homes (:1-14).

When in the afternoon of the said day at around two or three o'clock, a parachutist had come down, he saw accused again and went to see the flyer (:6). At a certain point accused ran on ahead of witness, who thereupon went to a man and therefore did not see accused while he approached the flyer. Witness heard three shots, but did not see who fired them (:49, 50). When he came to the scene of this shooting incident, he saw a crowd on one side, the flyer lying on the other side and accused about in the center with his rifle

pressed against his hip. Saliva was coming out of his mouth. Witness thought he was crazy. When witness arrived, he still found accused saying "gangster". The flyers' brains were hanging out. Witness asked accused why he had done it. His answer was "Because me, my brother also was killed" (R 50). When finally witness walked away with the accused the latter said something to the effect that he wanted to "rub out" every flyer he could find (R 51, 52).

In answering a question of the President of the Court, witness substantially stated that he had not noticed anything extraordinary in accused when he talked with him on that day before the incident took place (R 57, 58).

As further part of prosecution's evidence Exhibit No. 1, a sworn affidavit of accused dated 22 September 1945, was read to Court (R 61). While it is set forth in question and answer form, its substantial contents may fairly be summarized:

During the Garden campaign in 1944, accused's skull was fractured by a shell, whereupon he was discharged from the Army. This was in 1944. But even now his health is not completely reestablished. He has sometimes spells of unconsciousness, loses his memory for a few seconds and is very nervous and irritable. But upon the question of interrogator, "Do you know the difference between right and wrong?" accused answered "Yes." He knows that it is wrong to kill and also knew it in 1944.

On 28 May 1944 he was hunting deer and therefore carried a rifle. He then saw a plane in the air and some six flyers parachuting therefrom. He went to the scene, met in the way Lieutenant [redacted], and invited him to go with him to see what was the matter with the flyers. [redacted] joined him and was with him until they were about 100 to 110 meters from the flyers. During

[illegible] that time accused had no intention of killing a flyer, but "When I got close to the flyer, I carried [illegible] along, then I lost my thought and sense and I [illegible] shot the flyer". He fired three rounds. Accused claimed he had lost his mind when he [illegible] the killing of the flyer.

Finally Exhibit No. 2. being a medical report of investigation dated 4 May 1946 and signed by [illegible] M. [illegible], [illegible], MC and Donald W. [illegible] Jr., First Lieutenant, MC, was received and read in Court as part of the accused's evidence. In substantial part it reads:

1. "Michael [illegible], alleged war criminal, was wounded in action in 1915 with a metal fragment [illegible] in the left [illegible] region.

2. "With recovery at that time, symptoms of [illegible] and irritation - headache, [illegible] [illegible] were noted. X-rays showed a metal [illegible] [illegible] long and 1/8 inch wide in the [illegible].

3. "Operation was performed [illegible] [illegible] Karlsruhe, Germany, on 7 March [illegible]. The fragment was found, [illegible] [illegible] [illegible] bone flap in the lower [illegible]. An uneventful recovery with [illegible] of the symptoms except for occasional headaches was [illegible].

4. "At present, this [illegible] condition is excellent. The neurological examination was essentially negative. The patient is found to be of rather limited intelligence, but is well oriented.

5. "The [illegible] [illegible] [illegible] his [illegible] to [illegible] [illegible] [illegible] [illegible] normal means of transportation."

3. Defense's [illegible]. [illegible] in attempting to [illegible] its plea that accused, at the time he [illegible] the [illegible] American flyer by three shots, "was not [illegible] [illegible] what he [illegible] [illegible] competent" (R 64) first introduced as witness [illegible], [illegible], 57 years old, a helper in the [illegible] [illegible] [illegible] since the time when he was [illegible] years old. She was then [illegible] nurse (R 65, 66). The substance of her statements on [illegible] examination may thus be summarized:

The Wegmanns were not Nazi minded. It is customary in that neighbourhood to give a human name to each piece of cattle and to make it visible on a board over the stall. Accused's father called one of his oxen "Hitler" and was therefore punished with imprisonment for eight days (R 66). The accused was a diligent, gifted student, never repeated a class, and had good school certificates up to his final examination (Matura) which he passed (R 66).

In the fall of 1938 accused entered the army and in September 1939 he was wounded in Poland (R 66, 67). Thereupon he was hospitalized, first in Breslau and then in Sandwechtel, the place next to his home. From the last it he was sent home on leave (R 67).

While in the hospital and while on leave at home he made upon witness the impression that he was distorted and tired, and a different person from the man who had joined the army in 1938 (R 67). He always complained about headaches and also had attacks, during one of which he said: "My head is splitting, my head hurts, scream, I go crazy." At such times he would also rush and shove his mother, for which he would later ask his parents to forgive him. "Sometimes he would sleep days and nights and then he would get up and everything would be all right." Doctor Teller was often called to take care of him (R 68).

On the day when accused shot the Jew, witness had no opportunity to observe him, but she was told that when he came home after his deed, he said in a regretful way to his father: "I have done something terrible." She says that the incident occurred on a very warm day and accused must have suffered a great deal from the heat (R 69).

On cross-examination, witness additionally added: Four years after receiving his wound, that is, until 1941, accused was

first hospitalize [illegible] then [illegible] regular intervals treated in a hospital (T 68-72). Then he began to get better, in that he did not always have attacks (T 72). After being discharged from the army, accused first helped his father in the latter's farm work and then attended an agricultural university at Giessen in 1949. He was there during two terms, but was not capable of continuing and finishing this study (T 73, 74). He thereupon did farm work, mostly on his father's farm (T 75).

Since he was wounded, accused in the witness' opinion, did not know the difference between right or wrong. But witness did not recollect his having committed any offense before his killing of the flyer (T 76, 77).

On redirect examination witness substantially testified: At Giessen, accused could not study any longer because of his headaches and he failed an examination there. But until the time of his last examination, he had only good marks, except for one bad one which he received because he had written a letter against the Hitler Youth (T 77). At home he often said that he was no longer able to carry out a simple mental process like counting. While accused, in the period described, went with his parents, that did not occur before he received his injury (T 78). The departures were a natural and well-known fact (T 79, 80). Accused would at times get excited for which he took, "Sack [illegible] you're crazy." He would get those attacks when there was a great heat or sultry weather and on excitement in the street (T 80). Whenever accused had a disagreement with certain people [illegible] on his father's farm, they would say, "Let him go, he does not know what he is doing." (T 81, 82).

Defense's next witness, Dr. Irene [illegible], a doctor of philosophy, 77 years old, who was allowed to practice under the occupation regime, since he had never been a party member (T 83),

substantially testified:

He had been the family doctor of the Wagmanns for over 20 years (T 83). Between the years 1940 and 1946, he was often called because of the troubles accused had after (according to that his father told the witness) he had received a shot in the head, with a fragment entering the brain (T 84). Witness had known the accused since the latter's childhood. He was, before his head injury, peaceful, quiet, and intelligent (T 85, 86). That, in 1940, accused's mother called witness over the phone to come and see accused immediately, he found the latter very tense, scarcely giving an answer and befuddled. Witness told accused's father that the first symptoms of the brain injury, namely the fact that he could not read, write, or speak, would sometimes return (T 86). In such cases as that of the accused, weaknesses remain or may remain as a result of the disturbance of the brain mass. The accused in particular lost all knowledge of what he had learned in school and he lost his intelligence (T 87). Between the years 1940 to 1946 accused had such attacks in which he was no longer competent and responsible for what he did. During such attacks his mental status was close to idiocy. Such attacks can be caused by the slightest stimulants, as for instance the heat of the day. The breach is temporarily not capable of work (T 88). "The International Medical Society is unanimous in agreeing that people suffering from this weakness are not capable of judging the culpability of their acts and that they should be treated with this in view." (T 89). Also the witness was told about the accused's external appearance and conduct at the time of incident, whereas would evidence that accused had such an attack and did not know what he did (T 90) Neither accused's father nor accused, himself, was Nazi-minded. Accused's brother lost his life during an air raid attack on

Frankfurt (91). Before accused committed this deed, he had been examined by specialists and put in the Ward's wounded class number three, on the basis of an official report stating that he had a severe brain sickness (92). Witness's diagnosis of accused's condition on the basis of observation between the years 1940 and 1944 is thus summarized by the witness himself: "Surgical witnesses as far as the brain's capacity to work is concerned, with effective aberrations, extreme irritation, excitability, and typical sensibility to weather." (93). Witness arrived at his diagnosis by considering the following facts: "The ability of the brain of the accused to work collapsed because of an unrest in the brain area. Proof: He forgot what he had learned in school. Earlier he had been intelligent and had passed all his examinations. After his head injury, however, he flunked the next examination. He was examined by specialists in the brain injury hospital in Frankfurt, as well as by military doctors, and was placed in the class for wounded persons, No. 3. That occurred only when a person has severe disturbances"(N 95, [illegible]

Upon cross-examination witness [illegible] other things admitted that he determined that accused had a head injury and a splintered brain without ever X-raying his head (10), and that he treated him under the assumption of a splintered brain without ever attempting to find out in what part of accused's [illegible] piece of metal was imbedded (103). He based [illegible] on such a [illegible] of a brain injury as the facts that accused, after his injury, could not write, see, speak, or read [illegible] presents visiting him in the hospital (105). Witness admitted that the accused's inability to read, write, and to speak [illegible] occurred in 1939 and that he subsequently regained the ability to [illegible] and [illegible] (110).

On redirect, witness substantially [illegible] that his test in

treating the accused was not to remove the brain splinter, but to reduce his troubles, and that it was therefore not necessary for witness to have accused X-rayed (R. 113).

c. Special Observation on the Failure to Put Accused on the Stand: Defense counsel did not put accused, himself, on the stand but declared that he was ready and willing to testify should the court like to interrogate him (R. 118). The court did not make use of this possibility offered to it (R. 117, 118). It is submitted that this must be regretted.

Of course, it is elementary that the accused must not be compelled to testify. But if, as in the present case, an express declaration is made on his behalf that he is ready and willing to testify should the court desire to interrogate him, use should be made of this opportunity to obtain further basis for forming an opinion of his mental status at the time of his deed. Certain clues thereto might indeed be found in his utterances and in his own narration at the trial. But it is not believed that this examination prejudiced any substantial rights of accused or defense or impaired the possibility of rendering a proper finding in the case.

V. JURISDICTION:

The general basis of jurisdiction over every civilian concerning war crimes and the continuation of this jurisdiction after the cessation of hostilities, the war crimes jurisdiction of American Military Government Courts and the jurisdiction of these courts irrespective of the nationality of the crime committed in the American Zone - at least if it was committed against a national - all this has been amply discussed by this office in previous reviews. It would therefore be futile to refer in this regard to those previous discussions in the light of which it cannot be doubted that the court had jurisdiction of the person and of the subject matter.

first one is correct, but that the second and third ones are conclusions which do not necessarily follow from the evidence on record.

b. In his Petition for Review, defense counsel substantially says: Whenever a defendant or his defense counsel pleads that the accused was criminally incompetent at the time of the alleged crime, it is up to the prosecution to prove the contrary, in other words to prove that he was then in a condition which did not exclude his criminal responsibility. It is believed that this is a sound proposition of law, even though there are certain jurisdictions which place the burden of proof for the criminal incompetency of accused on the defense. Reference is in this connection sometimes made to a so-called presumption of the accused's criminal capacity at the time of his deed, which presumption is said to exist until it is refuted by evidence proving the contrary. However, the word "presumption" used in that connection would seem to be a misnomer. What is really meant is that the burden (the burden of "going forward" with the evidence of accused's mental incompetency is generally believed to rest upon the defense, in other words, that it is up to accused or his counsel to challenge accused's criminal responsibility. The latter is the rule for [illegible] in the case of an adult person. However, this burden "of going forward" can be discharged by a mere allegation. It does not amount to a burden of proof proper. The latter must rest with the prosecution, since criminal responsibility is one of the substantial elements of the commission of a punishable crime. All substantial elements of a crime must be proven by prosecution. That is a corollary of the fundamental principle of criminal justice in all civilized nations, which is called "the presumption of innocence". It is [illegible] will be

8. DISCUSSION OF THE MERITS:

a. The final argument of defence counsel, which forms part of the record, substantially states, and it also appears from the evidence, that apart from the limited issue of the accused's mental competency at the time of the alleged crime, he certainly committed the deed of which he is accused in the charge sheet, with the qualification that there appears to be nothing on record to justify the following words in the particulars: "believed to be Lt. Col. D. Gruss." It can therefore not be doubted that, apart from the issue of accused's criminal responsibility at the time in question, he should have been found guilty of the war crime of murdering an unarmed, surrendered prisoner of war in the custody of the then German Reich. Hence, the only problem to be discussed is as to whether or not the court was justified in the assumption naturally inherent in its finding, that accused was mentally competent insofar as his capacity to commit the crime was concerned. German defence counsel in his final and written arguments (p. 129-131), as well as in an elaborate Petition for Review (dated 1 July 1946) forcefully submits that the question of accused's criminal responsibility in view of his state of mind at the time of his deed should be answered in the negative. In his observations he treats this result on three main grounds, which may thus be summarized, that prosecution has the burden of proof with regard to the mental competency of accused at the time of his deed, or of his criminal responsibility in general; that prosecution in the present case failed to discharge this burden of proof; and that accused on the contrary proved the mental incompetency of accused at the time when he perpetrated the killing of which he is charged. All these three propositions will be discussed in the following paragraphs. It will be attempted to show that only the

shown that prosecution in the present case discharged its respective burden of proof. Before further discussion of this, some preliminary points must be briefly taken up.

c. To begin with: What is the test for deciding the question as to whether or not accused at the time of his deed was criminally competent? It is believed that the applicable criterion is whether or not he was mentally able to distinguish between right and wrong and to know the wrongful nature of the deed he was about to commit - in other words, the so-called "right-and-wrong test". It follows from the foregoing that it is up to the court and not for the medical expert to decide this question even though the medical expert will by his testimony or opinion, as the case may be, help the court in reaching its finding. It is for the medical expert to state whether the accused at the time in question was or was not mentally sick and in the first case to disclose the symptoms of the respective insanity with particular reference to the impact upon the mental condition of the person affected thereby. Expressly stated such mental sickness in the individual case has at the given time prevented the affected person from distinguishing right and wrong remains still a judicial problem to be solved by the court in application of its discretionary power to weigh the probative value of the evidence presented on trial. It is believed and will a further chapter hereof bear out that in the present case the court did not make an unreasonable use of its discretion in weighing the evidence and that the latter justified the belief that accused at the time in question was able to distinguish between right and wrong and to know that he was committing a wrongful act.

d. The evidence of record does not support, but rather supports the conclusion that accused at the time of the killing of the American flyer [illegible] was able to distinguish between right and wrong

and also knew that the deed he was doing was wrong. This appears even from the testimony of the main witness of the defense, Mrs. Lina [illegible], and more specifically from her statement that upon coming home after his deed, he said to his father, "I have done something terrible." True, she only knew it from hearsay, but hearsay testimony is on principle not excluded before American Military Government Courts in Germany and there was no reason to disregard this particular hearsay-statement which fits very well into the general picture of accused and his deed. Accused's action, though atrocious, was not senseless, but rather in a logical way determined by his motive to take revenge for the death of his brother, who had been one of the victims of an allied air-raid over Frankfurt. Nor was it senseless or a symptom of an unawareness of the character of his act that he threatened the crowd to shoot at them if they would not let him have his way. This attitude was not crazy but rather symptomatic of the fanatic energy with which he carried out his obvious purpose to seek retaliation. Similarly, the physical appearance of accused at the time he shot at the victim can well be explained without taking recourse to the theory that it was the symptom of the recurrence of one of those pathological attacks of a temporary nature to which accused had allegedly been subject on previous occasions. And also the fact that he disclosed his name after the victim was lying on the ground [?] [illegible] necessarily the [illegible] of [illegible] introducing himself to the dead body of the one he had killed. It is more [illegible] to explain it as self-identification of accused, indicating that he was well aware of the nature of his deed and ready to take the consequences thereof. The utterance which he made after the flier was killed, that he was looking for another one, is likewise logically connected with his motive of revenge. The court could therefore well reach a contrary result than the statements

of part of prosecution's witnesses who on the basis of accused's behaviour on the scene of the shooting had gained the impression that he acted like a crazy man and who also referred to similar impressions which allegedly other eye witnesses had then and there received from him. The testimony of both defense witnesses, Mrs. Lina [illegible] and Dr. Fritz T[illegible], though possibly made in good faith, was undoubtedly influenced by a desire to aid the accused and accordingly cannot be considered as being completely objective. Only those parts of their respective statements which represent opinions rather than observations would be conclusive in favor of the theory of the defense if they were taken at their face value. However, the court was free to use its discretion in weighing the probative value of evidence with regard to the testimony of those two witnesses and to reach a conclusion of fact different from the opinion expressed by the witnesses. If, of course, if the [illegible] presentation be true, prosecution [illegible] and defense [illegible] disprove the existence of mental competency of accused at the time of the alleged crime.

c. One of the two defense counsel in part of his final argument (T.129) referred to the [illegible] Procedure for Trial [illegible] Criminals by General [illegible] Intermediate Military Government Courts" by quoting from its par. 13 the following passage:

> 3. Action in Case of Evidence of Accused.
>
> "c. Whenever the Court is satisfied that substantial issue has been raised on the question whether the accused, either at the time of the commission of the offense charged, or at the time of trial is insane, the Court should suspend further proceedings in the case and report the matter to the appointing authority for further instruction."

It must be conceded that there was in this case "a substantial issue" on the accused's sanity at the time of the commission of the alleged crime. However, [illegible] of fact

the Court's action was proper and that it correctly exercised its discretionary power to weigh the evidence with regard to its bearing on the question of accused's criminal responsibility and to reach itself the corresponding conclusion rather than to refer it to another authority for action outside the [illegible]. The [illegible]-quoted provision is ineptly worded and is not in harmony with the general practice concerning the judicial function with regard to an issue of the accused's contemporaneous insanity raised in a criminal trial and it is not clear that it was intended that it be at variance with the following provisions contained in [illegible] 5-335:

> "Whenever a Court is satisfied that the accused is unable by reason of insanity to understand the nature of the charges against him or the proceedings of the Court, or that the accused committed the offense for which he is being tried but was insane when he committed it, the Court shall record a finding of either such fact and may make an order providing for temporary custody pending direction by the reviewing authority for permanent custody or other disposition."

Identical provisions appear in Section [illegible] of "Manual for Trial of War Crimes and Related Cases," [illegible] as amended, and now in use.

f. The same defense counsel, in his final argument ([illegible] 1289), also referred to page 117, paragraph 11 of the Technical Manual for Legal and Prison Officers (2nd Edition) which under the heading "Defenses in Criminal Prosecution" provides:

> "No criminal deed is committed if the actor is incompetent at the time of [illegible] on account of unconsciousness, or on account of mental impairment or feeble-mindedness which deprives him of the ability of understanding the wrongfulness of the deed or of acting in accordance with this understanding."

Even though this quoted one [illegible] found [illegible] "Outline of German Criminal Law and Procedure", Section 7, Technical Manual for Legal and Prison Officers, 2nd Edition, for the purpose of argument it would be assumed that it is declaratory of general principles [illegible] applied in [illegible] procedure,

too. However, it supports rather than [illegible] the conclusion reached by the reviewer. The evidence, in the light of its reasonable interpretation, would seem to leave no doubt about the fact that at the time when he shot against his victim the accused was capable of understanding the wrongfulness of his deed and of acting in accordance with this understanding, that is abstaining from his assault of the flyer. That his capacity was materially lessened will be submitted hereinbelow and is the reason for the reviewer's recommendation to commute the death sentence pronounced by the Court.

[illegible] Dr. [illegible], who was the German Defense Counsel of the accused during the trial, filed a supplementary Petition for Review dated 26 July 1948 and another supplementary Petition for Review dated 9 August 1948 was filed by Dr. [illegible], a member of the Bar of Wiesbaden. To both these petitions there was attached an opinion by Dr. [illegible] SCHM[illegible], a specialist for nerve diseases, [illegible], 10 July 1948. The supplementary Petition for Review of Dr. [illegible] submitted in addition an expert opinion by the [illegible] of [illegible] and philosophy, Dr. Franz [illegible], Director of the State College (Gymnasium) in FULDA, dated 12 July 1948. While Dr. [illegible]'s petition merely refers to the two above mentioned expert opinions attached to it, Dr. [illegible]'s petition also contains an argument of his own, destined to prove that the accused was not mentally competent at the time of his deed.

Dr. SCHM[illegible]'s expert opinion in all its assumptions of facts based on the information received by him from [illegible] [illegible]", apparently identical with the witness [illegible] [illegible] after at length stating the [illegible] [illegible] other facts which he thus takes for granted Dr. SCHM[illegible] [illegible] the conclusion: it must be believed [illegible] [illegible] degree

of probability which in medical matters amounts to certainty: that the accused at the time of his action was subject to such mental defect which made him unconscious of what he did.

Dr. [illegible]'s opinion does not reach such a definite and concrete conclusion, but suggests rather in a similar direction by way of certain observations which he as a Catholic priest made with regard to the accused, and as a school-teacher made with regard to Nazi Youth in general.

It is believed that this supplementary material does not deprive the discussion contained in his foregoing subsections a to f of so much force as may be inherent in it, especially in view of what has been set forth hereinabove at c, concerning the Court's prerogative in passing the final judgment as to the mental capacity of an accused.

Dr. [illegible] substantially argues that the court should not have reached the final decision in this case before ordering an investigation into the mental capacity of the accused by a commission of medical experts. It is not believed that it was necessary for the court to do this, if on the basis of the evidence it felt fully satisfied of the existence of such a mental condition of the accused at the time of the crime which made him responsible for what he then and there did.

h. Examination of the charge sheet discloses that while the charge and particulars and the indorsement referring the case to trial, were properly signed, the blank spaces in the printed indorsement were not filled in to name the court specifically to which was to try the case. It is already been decided by this office that such an omission is technical in its nature, and does not prejudice any substantial right of accused. (United States v. Ernst [illegible], Bull. JAG, July 45).

9. CLEMENCY:

A [illegible] Petition for Review, dated 1 July [illegible], was submitted by Dr. Richard WAGNER, a German civilian, [illegible] of the Bar in STUTTGART, who served as special defense counsel for accused. Dr. WAGNER filed [illegible] supplementary [illegible] Review and Dr. [illegible] an additional Petition for Review which both are covered hereinabove at subparagraph [illegible].

It is not believed that the criminal [illegible] was of such a nature as to be devoid of [illegible] circumstances. There is enough in the case to justify the [illegible] commutation of the death sentence to imprisonment [illegible] of the [illegible] the accused for a term of 30 years commencing [illegible] June [illegible]. In this connection, reference must [illegible] the first place be made to the fact that accused, at the time of his crime [illegible] fragment [illegible] in the left [illegible] region which was removed by operation on 7 March 1946 (Pros. Ex. [illegible]) and that [illegible] is therefore [illegible] that the [illegible] of [illegible] pathological condition of his mental condition, as given by the two defense witnesses, though probably [illegible], contained substantial elements of truth. [illegible] not believed that the corrective evidence could [illegible] prevent the court from concluding that accused [illegible] he did, it cannot be excluded that his [illegible] by the impact of that pathological condition.

10. CONCLUSION:

In view of all these [illegible] and others which similarly be [illegible] to [illegible] of [illegible] in [illegible] is [illegible] of [illegible] in his [illegible] with the [illegible] of such [illegible]. It is [illegible] for a term of 30 years would [illegible]

vue of the special nature of the case.

A form of motion to accomplish the reviewer's recommendation is attached in case it meets with the approval of the governing authority.

Having examined the record of trial, and

Deputy