

DEPUTY JUDGE ADVOCATE'S OFFICE
7708 WAR CRIMES GROUP
EUROPEAN COMMAND
APO 178

23 June 1947

UNITED STATES)
 v.)
August KLAEBE)

Case No. 12-2068

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused was tried at Dachau, Germany, on 23 April 1947, before a General Military Government Court.

II. CHARGE AND PARTICULARS:

CHARGE: Violation of the Laws of War.

PARTICULARS: In that August KLAEBE and Paul FOERSTER, German nationals, did, at or near SCHLEIDEN, Germany, in the vicinity of HERGARTEN, on or about 17 August 1943, willfully, deliberately and wrongfully encourage, aid, abet and participate in committing an assault upon 1st Lt. Eugene D. COOK, a member of the United States Army, who was then unarmed and in the act of surrendering as a prisoner of war to the then German Reich.

Note: The accused, Paul FOERSTER, named in the particulars above, escaped pending trial and the accused, August KLAEBE, was tried alone in this case (R 1).

III. SUMMARY OF EVIDENCE: On or about 17 August 1943, 1st Lieutenant Eugene D. Cook, U.S. AAF, landed from a disabled American bomber near Hergarten, Germany, and was shot and severely wounded by the accused, August KLAEBE, while he was not armed and in the act of surrendering as a prisoner of war, and while he had both hands raised above his head in a token of surrender. The accused, August KLAEBE, admits that he fired the shot which wounded Lieutenant Cook, but contends that such shooting was justified in that at the time Lieutenant Cook had repeatedly failed to respond to demands for surrender and was in the act of escaping and attempting to avoid capture.

IV. EVIDENCE AND RECOMMENDATIONS:

1. AUGUST KLAEBE

Age:	44
Civilian Status	Police Master
Party Status:	None shown
Military Status:	None
Plea:	NG
Findings:	G
Sentence:	Eight years' imprisonment commencing 21 May 1946.

Evidence for Prosecution: The accused, in his written interrogatory, says that at about 1400 or 1500 hours, some time in August 1943, near Hergarten, Germany, two American bomber squadrons were attacked by German fighters. One plane exploded, and accused saw four to six parachutes in the air. A German soldier in uniform named Witsch, who was on furlough, was taken by accused on his motorcycle to search for parachuted flyers and assist at the burning plane wreck. Accused was in the uniform of a T/Sgt. of the State Police. As accused with the soldier entered the woods they saw no one, but coming back to the road they saw a man in khaki uniform cross the road into the woods. Accused shouted in German, "Come out, I won't harm you"; then shouted in English, which he remembered from the last war, "Come on, come on." He received no answer, and he then separated from the German soldier, each going separately into the woods to search. Accused could hear someone moving about in the woods, but could see no one. He continued to shout, "Come on," but received no answer. He decided there must be two men in the woods from the sounds he heard. A motorcycle stopped on the road and accused recognized the voice of his superior, Paul Foerster, calling him to come out. Accused went near and said to Foerster, "There are two men in the woods." Foerster said, "No, there he is (pointing). Fire." Accused saw a man in khaki standing across the road about 80 to 120 meters away, and looking to the right and to the left. Accused fired immediately with his service pistol, .08 caliber, and the man fell. Foerster urged accused to hurry with

him to the scene of the crash where the plane was burning, but instead accused went to the wounded man. A civilian named Schmitz, whom accused had not seen before, was standing near the wounded man. Soldier Witsch then came up and accused ordered him to remain with and to protect the wounded man, and to stop the first passing car and take the man to a doctor. This Witsch did. Then accused went with Foerster to the scene of the plane crash. Accused took charge at the crash. He had the bodies of the four flyers killed in the crash put into coffins and buried in the village cemetery. He had members of his family attend the funeral services. He prosecuted a farmer for having removed a ring from the hand of one of the dead flyers, for which the farmer received a jail sentence. Upon the approach of Allied Forces in 1945, accused left his home and went to southern Bavaria, but upon being informed through his wife that he was wanted in connection with shooting an American flyer, he returned to his home in April 1946, and immediately reported voluntarily to the British authorities - his home being in the British Zone. Accused shot the flyer because he thought that he (the flyer) was continuing his attempt to get into the woods and escape capture (P-Ex 2).

The written interrogatory of Paul Foerster does not differ, but is substantially the same as to material points, as that of the accused (P-Ex 3). The statement of Hans Witsch corroborates the statement of the accused in material points (P-Ex 4). Statement of Dr. med. Hermann Bremer describes the wound of 1st Lieutenant Eugene Cook, American flyer, and his medical treatment for six to eight weeks at a hospital in Munstereifel, Germany. It was a bullet wound in lower part of abdomen on right side, entered from the front and there was a penetration near junction of thin and thick intestines. At operation, bullet was removed of about .08 caliber. Lieutenant Cook was given three blood transfusions (P-Ex 5). Written interrogatory of Dr. Anton Schmitz, practicing physician at Gemuend, Germany, describes first aid

17 August 1943. He identified a photograph of Lt. Cook taken in his living room on that day, with a memorandum in doctor's handwriting on back (P-Ex 6).

The written interrogatory of 1st Lieutenant Eugene D. Cook says of the incident:

"My plane was shot down on 17 August 1943 . . . I landed and disposed of my parachute. About five minutes afterward two German soldiers, each on a motorcycle, approached me from opposite directions. There were also quite a few German civilians around, so I had no chance to get away. One of the German soldiers was in the road and called out several words in German that I didn't understand. I just walked out from a small wooded area onto the highway. . . The German soldier who had spoken drew his pistol and wanted to know whether I was an American. I said I was and he pulled the trigger and shot me in the right hip. I was watching him closely and could see his finger tighten on the trigger. When I saw his finger tighten on the trigger, I swund around sidewise thinking by doing so I could cause the shot to miss me and just as I got swung around about half way he shot me."

Lieutenant Cook says that he was "about thirty-five feet" from the soldier who shot him. "I had my hands raised above my head at the time. I raised my hands when the German soldier spoke to me and asked whether I was an American." "...the other German soldier came up and searched me." He tells of being taken to a village and then to a hospital. In answer to the question for description of the soldier who shot him, Lieutenant Cook said,

"He was in the Wehrmacht and had on his shoulder insignia a little metal tag bearing the number "6" which I think represents German 6th Guard Division. It is an infantry outfit. I am not positive as to his rank, but I think it was the same as private first class in the U.S. Army."

(P-Ex 7).

Evidence for Defense: Hans Witsch, whose written interrogatory had already been introduced by the prosecution (P-Ex 4) was introduced as a witness for the defense. There are no material differences in the written and oral testimony of this witness, the oral testimony being in more detail. He together with Policeman KLEBE, the accused, went on accused's motorcycle in the direction where a plane had crashed and parachutes were seen descending (R 14). They saw a flyer run across

the road running to the left of them into woods with underbrush. They

searched in the woods. After eight or ten minutes, witness came back to the edge of the woods and saw the flyer run over to the right side of the road. Witness and accused then searched on the right of the road - they separated to search. Witness could not see accused and did not see the flyer in the woods. He heard a motorcycle stop, and heard words being called, but because of the noise of the motorcycle motor which continued running, he could not distinguish what was said. He then heard the report of a shot. Witness came to the edge of the woods in a few seconds and saw accused talking with Police Captain Foerster, who was excited and was yelling out, "Quick, quick". Witness ran about seventy meters to the wounded flyer. A civilian was standing near him. Accused and Foerster came up, Foerster still on the motorcycle (R 15). Accused ordered witness to stay with the wounded flyer and see that no civilians approached him, and to stop the next car or vehicle and get the wounded man to Gemuend (R 16). Witness wore a Luftwaffe uniform, and accused was in uniform (R 16). Neither had a numeral 60 on his uniform (R 17). Witness heard accused calling out constantly during the search for the flyer, and heard him shout the words, "Come on". He remembers these words because he was surprised at accused speaking in English. It was a good 20 minutes from the time the search started before the flyer was shot. Accused was about 20 meters from witness when shot was fired. Witness then ran about seventy meters to the wounded flyer. The accused was as far from the flyer (R 17). The flyer was on the right side of the road when witness reached him, about two meters off the road. Accused was on the left side of the road inside a wire fence in the edge of the woods (R 20). The flyer was in a clear spot (R 21). Witness conditionally identified the photograph of Lieutenant Cook, introduced with prosecution exhibit 7, as the flyer, "might have looked like this" (R 22).

The accused testified in his own behalf under oath (R 24). He

was a police master or first sergeant. Testimony of accused has no material variations from that of his written interrogatory introduced by the prosecution as prosecution exhibit 2. Accused introduced a sketch showing the place of the incident, not to scale, but showing the approximate location of persons and approximated distances, etc., concerning the incident (D-Ex 1). Accused first saw a man in khaki uniform on right of road as he was facing. Accused called, "Halt, police, police". The man did not stop, but went across the road into the woods on left side of road (R 28). Accused went to the place where the man had entered the woods and called out in German, then called out in English, "Come on, come on". Nobody came, and accused entered the woods where he searched and shouted all the time. A motorcycle stopped and accused was called by name, "August!" Accused answered, "Paul!" and then accused said, "Come on here, there are two men in here." The man on the motorcycle shouted, "You come on here." Testimony as to shooting is same as set out above from written interrogatory of accused (P-Ex 2). Witness indicated on sketch (D-EX 1) cross in blue and solid cross in red as spots where he and the flyer respectively were at the time shot was fired. The two locations are connected on the sketch by a broken blue line (R 30, D-Ex 1). The distance between the two points is approximately 80 to 100 meters (R 30, D-Ex 1). When accused was searching in the woods he could hear the flyer moving about but could not see him. The flyer never called out. Accused estimates the whole time from the time he first saw the flyer until the shot was fired as, "15, 20, 25 minutes". He held no conversation with the flyer at any time - "absolutely impossible". At the time Foerster called attention of accused to the flyer,

"The flyer was still going, still walking, and he went onto his knees looking to the left and to the right. He was walking like this (indicating long steps), and then he went onto his knees and looked to the left and to the right and then I thought he was going to jump into the woods."

Accused did not see the flyer's hands up at any time as, "Then I

the flyer intended to give himself up (R 31, 32). Foerster was urging accused to come on to the place of the plane crash. Accused said to the soldier who had come up,

"Witsch, we have no time. Look after the flyer. Take care and when a car passes by stop it in order that he can get to a doctor or to a hospital, and take care that this man won't be beaten or that he will be robbed." (R 32, 33).

Accused declared that he did not shoot because of Foerster's order, but voluntarily because he thought the flyer was escaping. He explained that if he said to the witness, Witsch, that he shot because of an order, that what he meant was the Police Regulations which required a policeman to shoot to prevent an escape (R 35). Accused learned later that the wounded flyer was taken to Dr. Schmitz in Gemuend (R 36). It was agreed by the defense and prosecution that the case files corroborated accused's statement that he voluntarily surrendered himself to the British authorities when he learned that he was wanted in connection with shooting a flyer (R 37). Accused denies that he could have been within 26 feet of the flyer when the shot was fired. Accused says that he had just stepped out of the woods and saw flyer, but that the flyer could have seen him at time shot was fired (R 37). Accused denies that he ever wore a number "6" on his uniform, or any number (R 43). In answer to a question by the Court, accused said that he did not call halt immediately before he fired the shot, because he had been constantly shouting "halt" before. In accused's opinion the flyer could not see him at time shot was fired (R 44, 45).

Sufficiency of Evidence. In this case the prosecution's evidence was introduced entirely in the form of written statements and written interrogatories, prosecution's exhibits Nos. 2 to 6, inclusive, are all by German nationals. These exhibits prove conclusively that the victim, 1st Lieutenant Eugene D. Cook, U.S. AAF, was shot and seriously wounded by the accused, August KLAEBBE, "at or near Schleiden, Germany,

these five exhibits, which were introduced by the prosecution, if taken in their entirety, would strongly tend to establish that the shooting was justified, showing that the victim was shot while making a determined effort to escape, and after he had ignored repeated calls to come out and surrender.

Prosecution's exhibit No. 7 is a written interrogatory by the victim, Lieutenant Cook, and is sufficient to establish the other necessary elements of the offense alleged, i.e. that the assault was, "wilful, deliberate and wrongful", and committed while the victim "was then unarmed and in the act of surrendering as a prisoner of war".

Testimony introduced by the defense was to further establish that the shooting was justified in that the victim at the time was attempting to escape capture. Also evidence introduced concerning the actions of accused immediately after the shooting, and which is uncontroverted, shows that the accused did all that could, under the circumstances, have been reasonably expected of him, toward the care of the wounded man, and to get medical attention for him. Also the conduct of the accused in the burial of four members of the crew killed in the plane crash, was entirely proper. All this tended to establish that accused had acted entirely without malice.

In justice to the accused, although no mention of such conditions was made in the trial court, it should be noted that this incident occurred in August 1945, and several months before the issuance of the notorious "Flyer Orders" which resulted in the killing of many Allied flyers a year later. Also that this incident occurred not far from the Belgian border, and it is a generally known fact that, at that time, all American flyers had been briefed on escapes and on how to make contact with Belgian and French "Underground" representatives if shut down in areas where such representatives could be reached.

However, it was the prerogative of, and within the discretion of the trial court to believe the version of the shooting as given by

testimony, and this version of the shooting, taken together with the admission of accused that he fired the shot, and other evidence identifying the accused and the victim as alleged in the particulars, there is sufficient evidence to sustain the finding of guilty, at least to the extent that accused acted in a too hasty manner and used more force than was, under the circumstances, justified.

But the evidence introduced at the trial very strongly indicated at least the possibility, viewing the circumstances from the viewpoint of the accused and as they must have appeared to him at the time, that the accused when he fired the shot may have actually believed that the flyer was attempting to escape into the woods and to avoid capture. Also, it must be borne in mind that the flyer, from the viewpoint of the accused, was a hostile enemy, and probably armed.

Also there are some rather certain errors in the statement made by Lieutenant Cook. He gives as a reason for his ducking away ("turn around sidewise") that he saw the finger of accused tightening upon the trigger of the pistol. This might have been possible, but is very highly improbable under the circumstances, even at a distance of 35 feet that Lieutenant Cook fixes. It is more probable that the Lieutenant got such an impression due to his excitement at the time, rather than as an actual fact, and it is entirely possible that this ("turn around sidewise") was mistaken by accused as an attempt to "jump into the woods" and was the immediate cause of the shot being fired.

The finding of guilty should be approved.

It is believed that, taking into consideration all of the facts and circumstances as established by the evidence, the sentence imposed is excessive.

Petitions: Petition for Review, dated 5 May 1947, in behalf of the accused, August KLAEBE, by Donald J. Ross, defense attorney, raises the issue that punishment assessed by the trial court is excessive.

Recommendation: It is recommended that the findings of guilty by the trial court be approved, but that the sentence of imprisonment for eight years be reduced to imprisonment for three years.

V. QUESTIONS OF LAW:

Jurisdiction: The Court was legally constituted and had jurisdiction of the person of the accused and of the offense. The examination of the entire record fails to disclose any error or omission which resulted in injustice to the accused.

Sufficiency of Evidence: Concerning the sufficiency of the evidence to sustain the finding of guilty, it may be stated as a general principal of law in criminal cases, that:

Where there is a conflict in the testimony as to the facts of the case, it is the prerogative of the trial court, and within its discretion, to accept as true that portion of the testimony deemed by it to be most worthy of belief, and to disregard all of the conflicting testimony.

Also:

In the trial of War Crimes cases, the Prosecution may introduce in evidence the written statements and/or interrogatories of enemy nationals, for the purpose of establishing necessary elements of the offense as alleged in the Particulars, and to identify the accused, the victims, etc., where such evidence is contained in such statements and/or interrogatories, without being bound by other portions of such written instruments which contain testimony that may be directly opposed to the Prosecution's theory of the case. This is especially true because of the rule of procedure in such cases is generally that any written instrument offered in evidence by either side must be introduced in its entirety.

Excessive Penalty: It may further be stated as a general principal of law:

That in assessing a penalty the Court should take into consideration all of the facts and circumstances concerning the corpus delicti and that may reasonably be considered to have had a bearing upon the mind of the accused at the time he committed the overt act. This should include, in addition to the evidence, any generally known fact existing at the time and of which the Court is authorized to take judicial notice. Acts committed under circumstances reasonably showing an absence of malice should merit a milder punishment.

than if malice and deliberate intent to injure
had been conclusively shown.

VI. CONCLUSIONS:

1. It is recommended that the findings of guilty by the trial court be approved.
2. It is recommended that the sentence of imprisonment for eight years be reduced to imprisonment for three years.
3. Legal Forms Nos. 13 and 16 to accomplish this result are attached hereto, should it meet with approval.

/s/ V. H. McClintock
/v/ V. H. McCLINTOCK
Attorney
Post Trial Branch

Having examined the record of trial, I concur.

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