

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

UNITED STATES)
))
 v)
Ernst Waldmann, a former)
member of the German Army.)

21 September 1945

Case No. 12-2175

REVIEW AND RECOMMENDATIONS OF THE
DEPUTY THEATER JUDGE ADVOCATE

1. TRIAL: Accused was tried at Munich, Germany, on 28th July 1945, by a Military Commission appointed by paragraph 42, Special Orders No. 195, Headquarters, Third U. S. Army, 16 July 1945, as amended by paragraph 7, Special Orders No. 200, Headquarters, Third U. S. Army, 21 July 1945, pursuant to authority delegated to the Commanding General, Third U. S. Army, by the Commanding General, 12th Army Group.

2. FINDINGS: The offenses involved were:

<u>Charges and Specifications</u>	<u>Pleas</u>	<u>Findings</u>
CHARGE: Violation of the Laws and Usages of War	NG	G
Specification: In that on or about 28 December 1944, ERNST WALDMANN, then a member of the German Army, did, at or near HADMEUCH, Germany, wrongfully and unlawfully kill Jon EGGLESTON, rank unknown, a member of the Armed Forces of the United States of America by shooting him with a rifle.	NG	G

3. SENTENCE: The accused was sentenced to be hanged by the neck until dead (R 50) . The Commanding General, Third U. S. Army, has approved the sentence, and the record of trial has been forwarded for confirmation to the Commanding General, U. S. Forces, European Theater, under the provisions of letter, Headquarters U. S. Forces, European Theater, AG 250.4, JAG, AGO, 1 August 1944.

4. DATA AS TO ACCUSED: Accused is a 43 year old man. He was a corporal in the German Army at the time of the commission of the offense. He is married and has children.

5. RECOMMENDATIONS: That the action of the court and of the reviewing authority be confirmed. *

6. EVIDENCE:

a. For the Prosecution:

1. On 28 December 1944, at about 1300 hours near Unter

Hainbuch, Germany, a flyer parachuted to earth, and landed in a field near the village (R 5, 6). Other parachutists had been seen in the air, and a group of people were waiting to take them into custody (R 7, 19, 20). Mrs. Maria TRINKL started toward the flyer who had landed, and about 300 meters from the flyer, met one GEORG FRUHSTORFER, a local farmer (R 5, 6, 11, 16, 21). FRUHSTORFER told her to stay behind, as the flyer might be armed, but she continued to follow FRUHSTORFER (R 5, 21). Upon landing, the flyer removed his parachute, and ran, or walked quickly, a distance of about 30 meters in the opposite direction from the witnesses (R 8, 22). The flyer then laid down in the furrows, and FRUHSTORFER, believing the flyer might hurt him, prepared his rifle (R 16). Thereupon, the flyer motioned, and FRUHSTORFER interpreted the motions as a desire to surrender (R 16). FRUHSTORFER approached to within four meters of the flyer, and the flyer was made to understand, by the use of the words "Allez Cop Mit" that he was to come with FRUHSTORFER (R 16). Because the flyer was very frightened FRUHSTORFER unloaded his gun, and showed the flyer the empty chamber and the cartridges (R 16). The flyer was wearing a military uniform with a leather jacket, brown pants, and a leather cap (R 11, 25, 26, 30). FRUHSTORFER did not search him (R 22). The flyer thereupon offered cigarettes to FRUHSTORFER, which FRUHSTORFER refused (R 16). The flyer picked up his parachute and shoes, and carried them under his right arm (R 9, 16). Then, the flyer, with Mrs. TRINKL at his left shoulder, and FRUHSTORFER at his right shoulder, started to walk away (R 6, 9, 10, 17). After walking about 100 meters they met the accused, Corporal Ernst WALDMANN of the German Army, who was very excited (R 5, 14). Accused said "Halt" and demanded papers from the flyer. FRUHSTORFER told accused the flyer could not understand (R 17). Accused said "Hands up" twice to the flyer. FRUHSTORFER again told the accused the flyer could not understand. Accused said "Brother, I shall help you". The flyer said "Brother, I

three times (R 17). FRUHSTORFER asked accused not to shoot, but accused told FRUHSTORFER to "shut up", and from a distance of four or five meters, shot the flyer (R 17).

The flyer had raised his left hand immediately when WALDMANN ordered him to raise his hands (R 6, 7, 19). His right hand held the parachute and shoes, part of the fingers being visible (R 6, 19). Mrs. TRINKL or WALDMANN did not see any weapons on the flyer (R 7, 19).

Mrs. TRINKL had called out to WALDMANN, "You will not shoot, don't shoot him, please don't shoot him" (R 6, 12). The flyer was shot in the neck, and died about 10 minutes thereafter (R 18).

On orders of WALDMANN, FRUHSTORFER stayed with the body while WALDMANN went towards another flyer, some 20 or 30 meters away (R 14, 17, 23, 24). Sometime later one Johann GIERSTORFER arrived with a wagon, and FRUHSTORFER helped him load the body thereon (R 17). Two days later, FRUHSTORFER and TRINKL helped bury the body in the Haimbuch cemetery (R 18).

FRUHSTORFER did not know the nationality of the flyer (R 18). The flyer could not understand German (R 19). FRUHSTORFER had never seen the type of uniform worn by the flyer on an American soldier. (R 25).

On 28 December 1944, the Burgermeister of Haimbuch saw the body of a flyer Johann GIERSTORFER had brought to the fire house (R 27). The body was buried in the Haimbuch cemetery, and the Burgermeister made out the death certificate (R 27, Pros Ex. a and b). Only one American flyer was buried in the cemetery at Haimbuch and the grave was pointed out by the Burgermeister to an American officer (R 28). Some Luftwaffe officers gave the name of the dead flyer "an American flyer" to the Chief of the Gendarmerie, who in turn gave this information to the Burgermeister, who entered it on the death certificate (Pros. Ex. A and B).

On 16 July 1945, Capt. Fred W. HOFSTETTER of the U. S. Army disinterred a body in the Haimbuch cemetery in a mass grave.

by the Burgermeister (R 31) In answer to a question as to an identification tag and as to whether or not it was a U. S. "dogtag", Capt. HOPSTETTER replied "I would say yes" (R 31). He did not notice the name on the "dogtag" (R 31). Lt. ELLIS was instructed by Capt. HOPSTETTER to meet the body in Nuremberg.

First Lt. John M. ELLIS made a report on the cause of death of one Jon E. EGGLESTON on 16 July 1945 at U. S. Military Cemetery No. 1 at Nuremberg, Germany (R 32, Pros Ex. C). Death was caused by a perforating object of great force in the chest and neck (Pros Ex. C). The body was clothed in the uniform of a U. S. soldier (Pros Ex. C).

b. For the Defense:

1. Johann SCHEIBINGER, a resident of Haimbuch, was ordered to look for the parachutists who had landed nearby (R 36). On the way to one parachutist, he heard the noise of a shot (R 36). LUCAS, a Frenchman, brought over a parachutist who had been caught. Accused WALDMANN was with SCHEIBINGER at the time (R 37, 38). WALDMANN searched this parachutist (R 38). WALDMANN was rather excited at the time (R 40).

2. The accused elected to testify under oath. He testified that he was married and had children. He was a farmer and shoemaker until he entered the army in 1941. He has never participated in fighting, because of his "heart and neck" (R 42, 43). On 28th December 1944 he noticed many parachutists over Haimbuch. He went out into the fields, with his rifle slung over his shoulder (R 44). He saw a parachutist who had landed "turn loose" his parachute and leave, and then lie down (R 44). FRUHSTORFER came running and the parachutist got up and walked with him. The parachutist walked between FRUHSTORFER and accused back to the parachute, and the parachutist took up his parachute (R 44, 45). Accused testified: "Then he took his parachute. Then he just took his parachute, he just took it like that, and at that time I came closer. And then FRUHSTORFER and the flyer came towards me a few

steps, and FRUHSTORFER did like that, and I called out 'Hands up'. Then I called out again, 'Hands up'. He did not hold his hands up. I didn't see his hands at all. I didn't see his hands, he did not hold them up. He held his parachute like that across his stomach with the parachute over the hands. The parachute was so large it was hanging down. And then because he did not hold his hands up I shot".

Q Why did you shoot the flyer?

A I wanted to search him for weapons. I thought he had a weapon in his hand."

Accused was about 10 meters from the flyer when he shot him. He would not have shot him if he had put his hands up (R 46).

Accused was afraid that the flyer had a pistol under the parachute (R 47). Neither Mrs. TRINKL or FRUHSTORFER told him not to shoot the flyer (R 46). Thereafter, accused went to the second flyer who had parachuted down, and who was about 400 or 500 meters away (R 46). This second flyer held up his hands when ordered to do so (R 46).

7. JURISDICTION:

(a) The Military³ Commission which heard this case was properly appointed under the provisions of Paragraph 42, Special Orders 195, Headquarters, Third U. S. Army, 16 July 1945. The court was properly constituted, and had jurisdiction over the subject matter, and of the accused. A military commission has jurisdiction over the inhabitants of an occupied enemy country held by the right of conquest. (Winthrop's Military Law and Precedents, 1920 Reprint, p. 838) Nor are military commissions restricted in their jurisdiction by territorial limits. Thus an offense committed in a country prior to its occupation may properly be tried by a military commission of the victorious army upon occupation. See cases cited on pp. 207-216 in Universality of Jurisdiction over War Crimes by Williard B. Cowles, 33 Cali-

b. The charge in this case alleges a violation of the laws and usages of war. The specification alleges the murder of an American soldier. The offense alleged is in violation of the laws of war (Arts. 4, 23, Chapter II of the Annex to the Hague Convention No. IV of 18 October 1907; Arts. 2, 3 of the Geneva (Prisoner of War) Convention, 29 July 1929). Both United States and Germany were signatory powers to said Convention. The offense alleged in the instant case closely approximated common law murder. It is intrinsically so barbarous and inhumane, that it can be properly said to violate those implied concepts and standards of decency to which every belligerent is bound by unwritten law.

8. DISCUSSION:

(a) The commission of the offense by the accused is established by the direct and competent testimony of two eye-witnesses. Both Mrs. Maria TRINKL and Georg FRUHSTORFER, apparently German nationals, observed the unlawful killing from a distance of a few feet. There is nothing whatsoever in the record to indicate that either of the eye-witnesses was prejudiced in any manner toward the accused. The fact that accused shot and killed the flyer is not in dispute, since the shooting was admitted by the accused. There is some testimony in the record to indicate that shortly after the accused killed the flyer, he assisted in the apprehension of a second flyer, whom he did not kill. Counsel for the accused intimated that since the accused did not kill this second flyer, accused must have had some reason to have killed the first flyer. There appear to be no logical deductions to excuse the accused that can be drawn from this argument. Any one of a number of different motives may be drawn from the failure to kill the second flyer, all of which are purely conjectural, and not necessarily favorable to the accused.

(b) The accused contended that he shot the flyer

and that the flyer did not raise his hands, and that accused could not see the hands of the flyer, since the flyer was holding a parachute across his stomach that covered his hands (R 45). FRUHSTORFER testified that the flyer did raise his hands when ordered to do so (R 17). Mrs. TRINKL testified the flyer put up his hands "immediately" when ordered to do so by accused (R 7). However, in a later, more complete description, the witness testified that, while the flyer raised his left hand, his right hand was holding his parachute and shoes at the midriff, with the fingers showing (R 6). Even though the flyer did not raise his right hand, it is clear that he had surrendered, and was expressing his assent to the surrender by raising his left hand. The malicious intent of the accused is established by the conversation that took place between accused and the two witnesses. FRUHSTORFER said to accused "You certainly won't shoot" (R 17). Mrs. TRINKL said "You will not shoot, don't shoot him, please don't shoot" (R 6, 12). Accused said to the flyer "Brother, I shall help you" and told FRUHSTORFER to shut up (R 17). Thereupon, the fatal shot was fired.

c. The identity of the flyer as an American soldier was established by a chain of circumstances that admitted only one deduction - that the murdered flyer was one Jon E. EGGLESTON, S.W. 38514757, U. S. Army. Very unfortunately, Capt. Fred W. HOFSTETTER, who disinterred the body, neglected to look at the dogtags he testified were American type. However, this neglect on his part was overcome by the fact the burial certificate, though admittedly based on hearsay evidence, described the flyer as "American flier - JAN EGGLESTON. The body received in Nuremberg by Lt. ELLIS for postmortem examination was that of Jon E EGGLESTON. Although the body disinterred in the cemetery was not traced to Nuremberg by direct testimony of witnesses, it is obvious that the body of the JAN Eggleston buried in the cemetery was the body of the

d. The flyer was a prisoner of war at the time he was killed. All of the witnesses present recognized his uniform as that of a soldier. A prisoner of war may be killed, if such action is necessary to prevent his escape (JAGS Text 7, Law of Land Warfare, P. 104). In the instant case, even the accused did not contend the flyer was attempting to escape. Even if the testimony of the accused to the effect that the flyer failed to raise his hands is accepted, the killing was nevertheless not justifiable. Accused had his rifle pointed at the flyer, and could not have reasonably believed that the flyer, even if he had been armed, which he was not, could have used a gun on the accused. The accused's testimony was, of course, refuted by the other witnesses, who testified that the flyer was wantonly shot.

e. The accused was given a fair trial. He was represented by competent counsel. The essential elements of the offense were established by the direct testimony of eye-witnesses. There is no question whatsoever as to the guilt of the accused.

f. It is my opinion that the record of trial is legally sufficient to support the findings and sentence of the court and the action of the reviewing authority, and is free of any error injuriously affecting the substantial rights of the accused.

9. CLEMENCY:

a. The record contains some evidence, corroborated by both the witnesses for the defense and prosecution, that accused was nervous and excitable at the time of the commission of the offense. A witness for the defense testified accused was rather excited. A witness for the prosecution testified accused was excited, and that he was very white. Accused himself contended he had heart trouble. Some credence is given to the evidence that accused was excited by his own testimony to the effect that he did not see Mrs. TRINKL or FRUHSTORFER, although apparently these two individuals were standing beside the victim. However, there

to commit the offense or that he was mentally deranged. As a matter of fact, accused was examined by an American Army Neuropsychiatrist and was found to have been sane, both at the time of the commission of the act, and at the time of the examination, 15 August 1945. There is a statement in the record to indicate that the accused was beaten while in confinement, on the 13th and 23rd of July 1945. However, when interrogated by the President of the court, the accused stated he did not fear physical violence at the time of the trial, and it is perfectly obvious, from the record, that he was not testifying under compulsion.

Accused was found guilty of the commission of a war crime. All war crimes are subject to the death penalty, although a lesser penalty may be imposed (psr, 357, WD, FM 27-10). The offense in this case was particularly heinous because it involved the cold-blooded murder of an absolutely defenseless soldier. No mercy whatsoever was exhibited by the accused.

The offense closely approximated common law murder. Murder is the unlawful killing of a human being with malice aforethought. The usual penalty among civilized peoples for murder is life imprisonment or death. There are no extenuating circumstances in the instant case to warrant changing the penalty of death imposed by the court.

10. CONCLUSION:

It is accordingly recommended that the sentence of the court be confirmed. A form of action prepared to accomplish this result, is attached hereto.

22 Sept. 1945

/s/ Ford R. Sargent
/t/ FORD R. SARGENT
Major, JAGD

I concur:

/s/ C. B. Mickelweit
Col. JAGD
Deputy Theater Judge Advocate