

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

23 June 1947

UNITED STATES )  
                  v. )                   Case No. 12-779  
Gottlieb WERNER, et al. )

REVIEW AND RECOMMENDATIONS

I. TRIAL DATE: The accused were tried at Dachau, Germany, during the period 21-25 April 1947, before a General Military Government Court.

II. CHARGE AND PARTICULARS:

CHARGE: Violation of the Laws of War.

Particulars: In that Gottlieb WERNER, Max MATTHES, Friedrich HEIM, Fritz KUNER, Heinrich BIERBRUER, Josef RISEKE, and Arthur FALLER, German nationals, did, at or near SCHOLLACH, Germany, on or about 21 July 1944, wilfully, deliberately and wrongfully encourage, aid, abet and participate in the killing of five members of the United States Army, believed to be 2nd Lt. Charles E. WOODS, S/Sgt. Frank L. MISIAR, S/Sgt. Meredith W. PHIS, Jr., 1st Lt. Leonard A. KORNBLAU, and 2nd Lt. Bernard E. RADONSKI, who were then unarmed, surrendered prisoners of war in the custody of the then German Reich.

III. SUMMARY OF EVIDENCE: On 21 July 1944, five American flyers parachuted from their disabled four motored plane and came to earth safely in the vicinity of Urach and Schollach, Germany. In Urach, three of the flyers were taken prisoners and incarcerated in a building occupied by Catholic Sisters in which the local Gendarmerie maintained a post. The other two were taken into custody and placed under guard in a building which served as both a city hall and school house in Schollach. The group of three flyers, while being marched from Urach to Schollach, were shot and killed by WERNER, MATTHES and Fritz Kuncer. The other two flyers were led from the city hall in Schollach to woods locally known as Winterwald and there shot and

killed by BIRNBERGER and EISELE with FALLER aiding and abetting therein.

IV. EVIDENCE AND RECOMMENDATIONS:

1. GOTTLIEB WERNER

Nationality:	German
Age:	60
Civilian Status:	Tax inspector
Party Status:	NSDAP, Organization leader
Military Status:	None
Race:	EG
Findings:	G
Sentence:	Death by hanging

Evidence for Prosecution: The accused, a civilian tax inspector from Neustadt, Germany, was instructed by the Kreisleiter Benedikt Kuner on 21 July 1944 to go to Schollach to kill certain American flyers who were known to have parachuted down in this area (R 103; P-Ex 19 pp 1, 2). Upon his arrival in Schollach, the accused, after some delay, together with two others went to a woods through which the three flyers were being brought from Urach (R 101; P-Ex 17 p 3). When the flyers approached, accused ordered the three rural guards off to the left and forthwith fired three shots from his pistol, each one striking a flyer (R 40, 41, 53, 75). It appears that MATTHES and Fritz Kuner may also have fired almost simultaneously (R 104; P-Ex 20A). Following the initial shooting and at the suggestion of the accused, one of the two other members of his party shot two of the flyers as they lay on the ground (R 41, 42). All the flyers died immediately (R 53, 76). The accused, by his extrajudicial sworn testimony, stated that he became very excited and fired without taking aim in the direction of the flyers (R 104; P-Ex 20a).

Evidence for Defense: The accused stated in his extrajudicial sworn testimony, "I had to obey the orders from the Landrat first and then from the Kreisleiter, otherwise, the Kreisleiter would have

shown by his prior extrajudicial sworn testimony, he merely asked the Kreisleiter whether higher authority had approved the decision to shoot the flyers, to which an affirmative answer was received (R 104; P-Ex 20A).

Sufficiency of Evidence: There is no showing that the accused attempted to or desired to avoid the shooting assignment. Thus, he failed to meet the burden of proof required by pertinent authorities discussed in Section V, post.

The findings of guilty are warranted by the evidence. The sentence is not excessive.

Petitions: A Petition for Review was filed by German defense counsel, Dr. Burger, 26 April 1947. Petitions for Clemency were filed by Wilhelm Roschach, 30 April 1947, and by accused's wife, Lina Werner, 17 May 1947.

Recommendation: That the findings and sentence be approved.

### 2. MAX MATTHES

Nationality:	German
Age:	53
Civilian Status:	Tax Secretary
Party Status:	NSDAP, SA, Master Sgt.
Military Status:	None
Plea:	NG
Findings:	G
Sentence:	Life in prisonment

Evidence for Prosecution: The accused accompanied WERNER from Neustadt to Schollach (R 102; P-Ex 18 p 2). He was with WERNER and Fritz Kuner when WERNER and Kuner shot the three American flyers (R 102; P-Ex 18 p 3). accused WERNER stated in his first extrajudicial sworn testimony that accused also fired at the flyers (R 104; P-Ex 20A). After the shooting the three American flyers were left lying dead in the woods (R 102; P-Ex 18 p 3). The accused admitted that he knew the purpose of the mission, i.e., that the

flyers were to be shot and that he went to the scene armed with a pistol specially issued for that purpose (R 102; P-Ex 18 p 3). That he was armed and accompanied the shooting party knowing the objective is corroborated by accused WERNER and BIRNBREITER (R 103, 116; P-Exs 19 p 2, 24 p 6).

Evidence for Defense: The accused stated in his extrajudicial sworn testimony that he did not fire any shots (R 102; P-Ex 18 p3). He admitted being fully armed and being present during the shooting, stating that WERNER and Kuner did all the shooting (R 102; P-Ex 18 pp 3, 4). Accused WERNER stated in his second extrajudicial sworn testimony that he did not know whether this accused fired any shots (R 103; P-Ex 19 p 3). In his extrajudicial sworn testimony the accused stated, "It was told to me if we did not want to obey orders, we would have to carry the responsibility ourselves" (R 102; P-Ex 18 p3).

Sufficiency of Evidence: It appears that the accused's desire to cooperate with other Party officials was more important than other considerations, and that he willingly participated. Consequently, it is apparent that he did not act under immediate compulsion. Therefore, concerning superior orders, the accused failed to meet the burden of proof required by pertinent authorities discussed in Section V, post. It appears by the sentence imposed that the Court may have fully considered the absence of adequate proof that the accused fired any of the fatal shots.

The findings of guilty are warranted by the evidence. The sentence is not excessive.

Petitions: A Petition for Review was filed by German defense counsel, Dr. Buerger, 26 April 1947. No Petitions for Clemency were filed.

Recommendation: That the findings and sentence be approved.

3. FRIEDRICH HEIM

This accused was acquitted (R 233).

4. FRITZ KUTHE

This accused was not tried inasmuch as attempts to apprehend

him were unsuccessful (R 4).

5. HEINRICH BIRNBEITER

Nationality:	German
Age:	33
Civilian Status:	Kreispersonalamtsleiter
Party Status:	NSDAP, file leader
Military Status:	None
Place:	NG
Findings:	G
Sentence:	Death by hanging

Evidence for Prosecution: The accused was one of the men selected by the Kreisleiter for the detail to go to Schollach to kill the American flyers (R 116; P-Ex 24 p 4). According to prior arranged plans, this accused and accused EISELE stationed themselves in the woods near Schollach where two captured American flyers were brought by accused FALLER (R 116; P-Ex 24 pp 12, 13). In his extrajudicial sworn testimony the accused stated, "I asked him (the American flyer) if he was in Munich. I asked him if he had any weapons on him. I ordered him to hold up his hands. I searched him and found a knife on him. I gave the sign to the man to lower his hands and after that I shot him from a distance of about two or three meters" (R 116; P-Ex 24 p 12). The accused also stated therein that accused EISELE gave the flyer a mercy shot and further that he and EISELE then waited for FALLER to fetch the second flyer, at his direction, who was shot upon his arrival by the accused and EISELE (R 116; P-Ex 24 pp 13-15).

Evidence for Defense: In his extrajudicial sworn testimony the accused stated that he had been ordered to kill the flyers by the Kreisleiter and had tried to refuse the orders but was told he would be responsible "with his head" (R 116; P-Ex 24 pp 4, 8).

Sufficiency of Evidence: The killings were accomplished at a distant point with no superior present. The Court might well have concluded that the accused's desire to cooperate with and please his

superior and Party officials was greater than other considerations; that he did not unwillingly participate in the killings; that he did not act under immediate compulsion; and that, concerning superior orders, the accused failed to meet the burden of proof required by pertinent authorities discussed in Section V, post.

The findings of guilty are warranted by the evidence. The sentence is not excessive.

Petitions: A Petition for Review was filed by German defense counsel, Dr. Buerger, 26 April 1947. No Petitions for Clemency were filed.

Recommendation: That the findings and sentence be approved.

6. JOSEF WISSELE

Nationality:	German
Age:	46
Civilian Status:	Supervisor of factory
Party Status:	NSDAP, SA
Military Status:	None
Flea:	NO
Findings:	G
Sentence:	Life imprisonment

Evidence for Prosecution: The accused admitted in his extrajudicial sworn testimony that he was present with the accused FIRNBERGER in the woods near Schollach and administered mercy shots to the two American flyers (R 117; P-Ex 25 p 8). This admission was substantiated by accused FIRNBERGER, and accused FALLER was certain that this accused shot at least one of the flyers (R 115, 116; P-Ex 23 pp 7, 8, P-Ex 24 pp 13, 15). The accused admitted firing his pistol into the heads of the two flyers (R 117; P-Ex 25 p 8).

Evidence for Defense: In his extrajudicial sworn testimony the accused stated that he only complied with orders given to him by the Kreisleiter in this language, "I had to order you here to my office of duty. There were two flyers parachuted in the vicinity of Schollach

of people are dead and I give you the order from the Landrat to go out and capture these flyers and kill them. For this work others are being called" (R 117; P. Ex 25 p 3).

Sufficiency of Evidence: The killings were accomplished at a distant point from the Kreisleiter who apparently gave the order to shoot the flyers. The accused administered the mercy shots to the two victims without being told to do so by his co-accused who shot the flyers first. The Court might well have concluded that the accused's desire to cooperate with and please his superior and other Party officials who were not present was greater than other considerations; that he did not unwillingly participate in the killings; that he did not act under immediate compulsion; and that, concerning superior orders, the accused failed to meet the burden of proof required by pertinent authorities discussed in Section V, post.

The findings of guilty are warranted by the evidence. The sentence is not excessive.

Petitions A Petition for Review was filed by German defense counsel, Dr. Buecker, 26 April 1947. No Petitions for Clemency were filed.

Recommendation: That the findings and sentence be approved.

7. ARTHUR FALLER

Nationality:	German
Age:	53
Civilian Status:	Reserve Condemne
Party Status:	None
Military Status:	None
Plea:	no
Findings:	G
Sentence:	30 years imprisonment from 5 July 1946

Evidence for Prosecution: The accused escorted the two American flyers held in Schollach to a tryst with the accused BIKNEBREITER and

EISELE in the woods near Schollach where the two flyers were shot and killed (R 115-117; P-Ex 23 pp 6-8, P-Ex 24 pp 13, 14, P-Ex 25 pp 7-9). The accused escorted the flyers, one at a time, about forty-five minutes apart, to the woods (R 111, 117; P-Ex 25 p 8). He was present throughout the killing of the first airman and heard and saw everything (R 115; P-Ex 23 pp 7, 8). Thereafter, and knowing what had happened to the first American flyer, the accused fetched the second flyer to his death (R 115; P-Ex 23 p 8).

Evidence for Defense: In his extrajudicial sworn testimony the accused stated that he had been ordered by the Kreisleiter to escort the flyers separately along the road to where he would be met by BIRNBREIER and EISELE who would then transport the flyers further on (R 115; P-Ex 23 p 5). He had been startled when the first American had been slain by BIRNBREIER and EISELE (R 115; P-Ex 23 p 7).

Sufficiency of Evidence: As to the killing of the second flyer, there can be no doubt but what the accused was aware of the fact that the flyer was to be killed. According to the extrajudicial sworn testimony of the accused he was never ordered to actually participate in the killing but was merely to transport the flyers to a point in the woods where he was to deliver them to other accused. However, after the first flyer was killed in front of him he willingly fetched the second flyer with knowledge that he too would be killed in the same manner. The killings were accomplished at a distant point with no superior present. The Court might well have concluded that the accused's desire to cooperate with and please superiors was greater than other considerations; that he did not unwillingly participate in the killings; that he did not act under immediate compulsion; and that, concerning superior orders, the accused failed to meet the burden of proof required by pertinent authorities discussed in Section V, post.

The findings of guilty are warranted by the evidence. The sentence is not excessive.



Petitions: A Petition for Review was filed by German defense counsel, Dr. Buerger, 26 April 1947. The following Petitions for Clemency were filed: By the mayor and municipal council of Lenzkirch, Mayor Schneider, Councilmen Albrecht Hermann, Otto Keller, Lambert Waldvogel, Johannes Luetzner and Karl Gunter, 29 April 1947; by Pastor Keller, 28 April 1947; by a friend, Dr. Med. A. Hummel, 1 May 1947; by a friend, Josef Palka, 30 April 1947; by seventy-five townsmen of Lenzkirch, 29 April 1947. Certificates of character were also filed by Pastor Keller and indorsed by Archbishop Conrad dated 24 July 1946 and a certificate of character by Dr. Mayer dated 12 August 1946.

Recommendation: That the findings and sentence be approved.

#### V. QUESTIONS OF LAW.

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

Superior Orders: As shown in Section IV, supra, all the convicted accused sought to justify their actions by offering evidence to show that they were acting in compliance with "superior orders". Compliance with superior orders does not constitute a defense to the charge of having committed a war crime (Trial of Henry Wirz, 40th Congress, 2nd Sess., House of Representatives, Ex. Doc. No. 23, page 813; Vol. II Sixth Edition, Oppenheim, "International Law", paragraph 253, page 453; Llandoverly Castle Case, 16 American Journal of International Law, page 708; United States v. Dominikus Thomas, December 1945, and United States v. Alfons Klein, et al. (Hadamar Murder Factory Case), February 1946). This rule is followed in Anglo-American jurisprudence (Mitchell v. Harmony, 13 How. 115, and "Manual for Courts Martial, U.S. Army", 1928; paragraph 148).

Compliance with superior orders may, under certain circumstances, be considered in mitigation of punishment. However, an accused who seeks relief on such grounds assumes the burden of establishing

(a) that he received an order from a superior directing that he commit the wrongful act, (b) that he did not know or, as a reasonably prudent person, would not have known that the act which he was directed to perform was illegal or contrary to universally accepted standards of human conduct, and (c) that he acted, at least to some extent, under immediate compulsion. Having satisfactorily established these elements, the amount to which his sentence should be mitigated depends upon the character and extent of the immediate compulsion under which he acted. (See London Agreement of 8 August 1945, Concerning Prosecution and Punishment of Major War Criminals of the European Axis; FM 27-10, War Department, U.S. Army, "Rules of Land Warfare", paragraph 345.1, Change No. 1, 15 November 1944; Opencheim, "International Law", supra, and the Elandevory Castle Case cited therein; "Manual for Courts-Martial", supra, "Report to the President of United States", 7 June 1945, by Mr. Justice Jackson, U.S. Chief Counsel for the Prosecution of Axis Criminality; Extract from Goebbels' "The Air Terror Of Our Enemies", found in footnote, page 53, "Military Occupation and the Rule of the Law", by Ernst Fraenkel; and opinions of the Deputy Theater Judge Advocate for War Crimes in U.S. v. Albert Bury and Wilhelm Hofner, September 1945, U.S. v. Dominikus Thomas, December 1945, and U.S. v. Gerd Beck and Otto Weinreich, December 1946).

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

VI. CONCLUSIONS:

1. It is recommended that the findings and the sentences be approved.
2. Legal Forms Nos. 13 and 16 to accomplish this result are attached hereto, should it meet with approval.

/s/ Abraham S. Bernstein  
ABRAHAM S. BERNSTEIN  
attorney  
Post Trial Branch

LEGAL FORM NO. 16  
HEADQUARTERS  
EUROPEAN COMMAND

AG 383 JAG

APC 757  
21 Nov 1947

SUBJECT: Execution of Sentence in the Case of the United States vs.  
Gottlieb WERNER, et al. (Case No. 13-779)

TO : Commanding General  
First Military District  
APC 1, U.S. Army

Reference is made to letter, Ho. USFMT, file AG 383 JAG-

AGO, subject: "Designation of Prisons for War Criminals," 26  
February 1947 and to the inclosed copies of the Order on Review in  
the above entitled case as to accused Arthur TALKER.

Upon compliance with the Order on Review the certificate  
below will be completed and returned to the Deputy Judge Advocate  
for War Crimes, 7708 War Crimes Group, APC 407, U.S. Army.

BY COMMAND OF GENERAL CLAY:

/s/ Gen. T. Bergin  
W. E. BERGIN  
Brigadier General, USA  
Adjutant General

1 Incl:  
1 Form No. 13 (in dup)

Frankfurt 7175

---

CERTIFICATE OF COMPLIANCE

The sentence covered by the above described Order on Review  
was carried into execution at War Criminal Prison No. 1, Landsberg,  
Germany, on 4 December 1947, at 1300.

/s/ Lloyd A. Wilson  
(Signature and Rank)  
LLOYD A. WILSON, Captain, GMP  
Prison Officer

(Organization)

/s/ David A. Oakley  
(Countersignature and Rank of  
Witnessing Officer)  
DAVID A. OAKLEY, 1st Lt. CMIC  
Asst. Prison Officer

Having examined the record of trial, I concur,  
on this 9th day of October 1947.

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