

the offence for which he was tried (R 2, 3, 17). He was "second village leader" of the National Socialist Party in Neckarsulm (R 17, 41). His house had been destroyed and his wife killed in a bombing raid on the first of March, 1945, (R 31, 42).

5. RECOMMENDATION: That the action of the Military Court, as approved and modified by the Reviewing Authority, be confirmed.

6. EVIDENCE: On the afternoon of 21 March 1945, six American flyers, prisoners of war, arrived by bus in the town of Neckarsulm. They were under armed guard of three non-commissioned officers in the Wehrmacht, who were transporting them from Italy to Frankfurt am Main (R 7, 8; Pros. Ex. C). The party of guards and prisoners left the bus at the corner of Neckar and Urban Streets in Neckarsulm, at about 1645 hours (R 8, 15, 32, 34, 45; Pros. Exs. A, C). Two of the guards apparently left, for only one figure in the story of the actual witnesses to what follows (R 18). The Americans, who were unarmed, stood in "almost a straight line" along Neckar Street, together with one of the guards (R 8, 9, 15, 31, 34, 45, 46). Several minutes later accused and one Funder, the chief local party leader, came out of the Nazi Party House, which was on Salinen Street, across a small park from where the prisoners were standing (R 10, 11, 22, 27, 28, 46; Pros. Ex. A). Accused saw the prisoners, and called out or said, "These people should be shot. They destroyed my house on the first of March" (R 11, 18). He took a pistol out of his pocket when he was 3 or 4 meters away from the group (R 11, 18). The guard said to him, "don't touch these people" (R 11). Accused put his pistol in his pocket once more, and stepped back, but immediately drew it out again, advanced, said, "one must shoot them" and fired the weapon twice (R 11, 19).

The prisoners all raised their hands above their heads (R 12). Some tried to hide behind nearby trees (R 47). The one second from the right as accused faced them in the line in which they stood, grimaced in pain, fell to the ground, and rolled towards the street. One witness testified that it was a shot from Funder's weapon which

actually felled this prisoner (R 36), though witnesses Faust and Gebert are emphatic in their testimony that the man did not fall until accused had fired (R 19, 47). The prisoner on the right then started to jump or run away. Accused shot him from behind, and he fell to the ground (R 12). Funder also attempted to shoot at this prisoner, but the gun did not fire (R 35, 45). A third prisoner attempted to hide behind some trees. Accused pursued him, and the prisoner then ran and stood behind Faust, a civilian, who had been standing nearby and was one of the witnesses to the whole proceedings (R 12, 19, 20, 35, 36).

Accused called to Faust, "Come away so I will (can?) shoot," and aimed at Faust. Faust, in fear, bent over and stepped forward. Accused fired again. The third prisoner ran several steps forward, towards a tree, and collapsed (R 12, 13, 36). Funder walked towards this prisoner. Accused called to Funder, "give him the mercy shot", or, "give him the coup de grace". Funder shot this man, who was still alive, with a pistol which he was carrying (R 13, 16, 19, 21, 36).

A fourth prisoner had started to run from the scene, toward a railroad crossing about two blocks west on Neckar Street (R 13, 36; Pros. Exs. A, 10). Accused called to the guard, "Shoot, it's too far for me" (R 48). The guard raised his rifle and fired twice (R 13, 48). The running prisoner fell forwards and rolled to one side (R 13, 38, 48). Accused and the guard started to walk in his direction. Both the accused and the guard fired a shot into the body of the first prisoner, who had been shot by accused, and who was still alive (R 13, 49). Accused then attempted to shoot one of the remaining two prisoners, but was prevented from doing so by the guard (R 14, 15, 39, 49).

Accused and Funder then returned to the Party House on Salinen Street. To a secretary who had observed part of the action through a window, accused said, "Well, how did the village leaders do?" Later he made the remark, "Now I have finally avenged my

wife." Still later he took his weapon, reloaded it, and said, "So, this is for the next ones." (R 29, 30, 31).

Accused was in the guest room of the Hotel Post, in Neckarsulm, a few minutes thereafter. Also present were a Mr. Pickler and a Captain Gaslet, the latter the Commanding Officer of the Wehrmacht in the town of Neckarsulm. Upon being reproached by Gaslet for what he had done, accused said, "If you can't do it, we will ****. In Bavaria they slap them to death and then stick the to death." Later in the evening, accused telephoned the Kreisleiter and told him what he had done. Accused reported, "We have shot some escaped Americans" (R50-52).

The deaths and identity, as American soldiers, of the four victims of the shootings, were established by an exhumation and autopsy under the supervision of a pathologist, who was a captain in the United States Medical Corps (Pros. Exs. D, 60, 61, 62, 63).

(b) It was stated in open court that his rights as a witness had been explained to accused and that he chose to remain silent (R 63). The defense introduced one witness. He testified it was Punder who first pointed out the Americans, saying, "Here are the criminals, one should shoot them" (R 61, 62). Witness heard accused say, "They killed my wife" (R 62).

(c) Further detailed evidence will not be set forth here, but the recapitulation contained in the review of the Staff Judge Advocate, Third U. S. Army and Eastern Military District, dated 8 December 1945, and attached to the record, is adopted in its entirety.

7. JURISDICTION:

Accused's offense is the murder of four captured and unarmed American soldiers by a civilian. It was a violation of the laws of war and was properly triable by a General Military Court having custody of the accused. A general discussion of the jurisdiction in military courts, with appropriate citation of authorities,

is contained in prior reviews of confirmation cases written by this branch, and need not be repeated here. No additional jurisdictional question is involved in the instant case (See: United States v. Clemens Wiegand, review dated 10 November 1945).

8. DISCUSSION:

(a) The case requires very little discussion. The evidence is overwhelming that accused shot and killed two of the prisoners, the second and the third in line. There is strong evidence that he shot the first one, who, as witness Faust stated, certainly did not fall until after accused had shot at him. Accused directed the guard to shoot at the fourth prisoner. His acts in encouraging and directing the wanton slaughter make him a principal in all four murders whether any of his own shots took effect or not. The acts of the prisoners in attempting to dodge behind trees did not constitute any attempt to escape, for they had a right to seek safety from accused's illegal attempts on their lives. His intent to kill is established even by the evidence of his witness. The very wantonness of his acts is sufficient to establish the malice aforethought, and it was actually stated by accused that his motive was to avenge the death of his wife. Every element of the crime of murder, by statute or by common law, was proved by the prosecution. No evidence introduced by the defense rebutted one iota of the damning evidence against accused. His full guilt is patent on the face of the record.

(b) The Staff Judge Advocate, Third U. S. Army and Eastern Military District, calls attention in his review to the admission in evidence of a telephone conversation in which the accused engaged some two hours after committing the acts for which he was here tried. The Judge Advocate states in his review that this evidence should not have been admitted. When this evidence is viewed from the standpoint of its character as an admission of his participation in and reasons for committing the murders, it constitutes a series of admissions, except possibly the last one,

"So, this is for the next ones". The use of the word "next" reasonably may be said to relate to previous use of the pistol - that is, on the men that he had lately killed. All his statements so referred to were voluntarily made by him. If they are not res gestae, as the Staff Judge Advocate implies, they may on the other hand be considered admissions, and so be justified as proper evidence, for evidence admissible on one ground is admissible on all grounds. It is clear that the rest of the evidence against accused is so overwhelming that no prejudicial error could have resulted even if the evidence of statements made two hours later to his associates had been erroneously admitted. All of the evidence had probative value to the mind of a reasonable man, and was therefore properly admissible under the rules governing military courts.

The evidence of accused's attempts to kill the other two prisoners, is, as the Staff Judge Advocate says, so closely connected with the actual killings as to constitute part of the whole plan or design. It shows accused's state of mind and his intentions (Underhill, Criminal Evidence, 4th Ed., 1935, p 354; Wharton, Criminal Evidence, 11th Ed., Vol. I, Sec. 495 and numerous cases cited).

The defense apparently sought, by showing that accused's wife had been killed and his house destroyed by bombing raids three weeks previously, to show further that accused was embittered and inflamed in his mind against Americans. Assuming this to be true, it provides at most a reason or motive for his acts. It cannot constitute a defense, or even any exculpation. His acts were planned, deliberate, and vengeful. He maliciously took the lives of four unarmed men, who, as a representative of the ruling party of a belligerent nation, he was particularly bound by the laws of war to protect.

(c) From an examination of the entire record it appears that no error or omission of the Court, technical or otherwise, resulted in the prejudice of any substantial right of the accused.

The proceedings satisfied all the requirements of a fair trial. The right of confrontation was adhered to; challenges for cause were allowed; military counsel was provided and civilian counsel was permitted, although the accused elected to be defended by the military counsel provided him; competent interpreters were used to keep accused and counsel informed of what was said and done; objections to testimony were permitted; and a two-thirds vote of the members of the Court, present was required for conviction and sentence. There was substantial compliance with the requirements of the Handbook, "Military Government Germany, Technical Manual for Legal and Prison Officers, 2nd Edition", and with the general principles of international law recognized as applicable to the trial of such cases.

9. CLEMENCY:

(a) There is attached to the record a Petition for Review, filed in accused's behalf by his military defense counsel. It first calls attention to the admission by the Court of evidence of accused's efforts to kill the other two prisoners, and of his statements that afternoon and evening. Claiming that this evidence was erroneously admitted, counsel argues that it was highly prejudicial and that the extreme sentence imposed upon accused was a result of that prejudice. We have previously held that it was not erroneously admitted and that no prejudice resulted. The killing of one victim was enough to justify the sentence imposed. Responsibility for and participation in the killing of four make the sentence that much more a reasonable one. Counsel also urges that the death of accused's wife and the destruction of his house in a bombing raid "a few days prior to the occurrence of the incident" constituted mitigating factors in accused's behalf. Actually these events had taken place three weeks earlier. The prisoners whom chance placed in Neckarsulm on the afternoon of 21 March were being transported from Italy. They had not been responsible for accused's misfortunes, and it is doubtful that he actually believed they were. He was motivated by desire for vengeance, as he himself said. It did not

particularly matter to him who was the object of it. This was no killing in self-defense or in the heat of anger. It was calculated murder and deserves no clemency. The Staff Judge Advocate points out in his review that two days after this crime, accused participated in the killing of another surrendered American Prisoner of War. One life is not too much to demand for the five taken by accused. No clemency is recommended.

10. CONCLUSION:

It is accordingly believed that the sentence of the Court, as modified by the Reviewing Authority, should be confirmed. A form of action prepared to accomplish this result is attached hereto.

/s/ Samuel Sonenfield
/t/ SAMUEL SONENFIELD,
Captain, JAGD

Having examined the record of trial, I concur.

/s/ C. B. Mickelwait
Col. JAGD
Deputy Theater Judge Advocate
23 Jan. '46