DEPUTY JUDGE ADVOCATE'S OFFICE
7708 WAR CRIMES GROUP
EUROPEAN COMMAND
APO 407

1 December 1947

UNITED STATES)
)
v.) Case No. 000-Flossenburg-2
)
Wenzel WODAK)

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused was tried at Dachau, Germany, during the period 2-13 June 1947, before a General Military Government Court.

II. CHARGES AND PARTICULARS:

CHARGE I: Violation of the Laws and Usages of War.

Particulars: In that Wenzel WODAK, a German national, did, at or in the vicinity of Flossenbürg, Germany, in or about March 1942, wrongfully encourage, aid, abet and participate in the killing of approximately 40 non-German nationals, inmates of Flossenbürg Concentration Camp, who were then in the custody of the then German Reich, the exact names and numbers of said victims being unknown.

CHARGE II: Violation of the Laws and Usages of War.

Particulars: In that Wenzel WODAK, a German national, did, at or in the vicinity of Flossenbürg, Germany, in or about February 1942, wrongfully encourage, aid, abet and participate in the killing of one SINGER Stanliaus, a non-German national, inmate of Flossenbürg Concentration Camp, who was then in the custody of the then German Reich.

CHARGE III: Violation of the Laws and Usages of War.

Particulars: In that Wenzel WODAK, a German national, did, at or in the vicinity of Flossenbürg, Germany, in or about December 1942, wrongfully encourage, aid, abet and participate in the killing of an unknown non-German national, inmate of Flossenbürg Concentration Camp, who was then in the custody of the then German Reich.

CHARGE IV: Violation of the Laws and Usages of War.

Particulars: In that Wensel WODAK, a German national, did, at or in the vicinity of Flossenbuerg, Germany, in or <u>about April 1943</u>, wrongfully encourage, aid, abet and participate in the killing of 4 non-German nationals, inmates of Flossenbuerg Concentration Camp, who were in the custody of the then German Reich, the names of said victims being unknown.

CHARGE V: Violation of the Laws and Usages of War.

Particulars: In that Wenzel WODAK, a German national, did, at or in the vicinity of Flossenbuerg, Germany, in or <u>about May 1943</u>, wrongfully encourage, aid, abet and participate in the killing of an unknown non-German national, inmate of Flossenbuerg Concentration Camp, who was then in the custody of the then German Reich.

III. <u>SUMMARY OF EVIDENCE</u>:

1. <u>General</u>: From 1941 to 1944 the accused served progressively as SS guard, detail leader, labor service leader and block leader at Flossenburg Concentration Camp, rising in rank from private to sergeant. The accused had the reputation of a "murderer", who boasted of his killings.

Trial was started against the accused in the case of United States v. Friederich Becker, et al., 000-50-46, opinion DJAWC, May 1947, commonly known as the Flossenburg Concentration Camp case, hereinafter referred to as the "Parent Case", but a nolle prosequi as to him was entered before findings or sentence.

2. <u>Incidents</u>: The incidents covered by charges I through V will hereinafter be referred to as "Incident No. 1", "Incident No. 2", etc. There follows a description of these incidents:

a. Incident No. 1: In the spring of 1942, approximately 40 Polish inmates were led to the shooting gallery in the camp by the accused and others where they were executed.

b. Incident No. 2: In or about February 1942, an inmate was brought to the roll call square after a severe beating He said the accused beat him. He died 3 days later.

c. Incident No. 3: In or about December 1942, a Russian inmate was beaten to death by the accused with a handle of a shovel at stone quarry #2.

d. Incident No. 4: In or about April 1943, four inmates died as a result of strangling and beating by the accused in blocks 21 and 23 where he was block leader.

e. Incident No. 5: In or about May 1943, at block 9 where he was a block leader, the accused strangled and beat a Czechoslovakian inmate who died shortly thereafter.

3. Little credence was given the testimony in this case of witness Adolf Kuefner for the reason that examination of the various cases in which he has testified reveals substantial inconsistence.

IV. EVIDENCE AND RECOMMENDATIONS:

Wenzel WODAK

Nationality:	German
Age:	38
Civilian Status.	Unknown
Party Status:	Nazi party since 1938
Military Status.	Allgemeine SS, 1938-1945 Waffen SS, 1941-1945
Pleas:	NG Charges I, II, III, IV and V
Findings:	G Charges I, II, III, IV and V
Sentence:	Death by hanging

Evidence for Prosecution: The accused was a member of the SS assigned to Flossenburg Concentration Camp from February 194[illegible] to March 1944, as a guard, block leader, labor service leader and detail leader (R 163; P-Ex 15). One witness testified that he had the reputation of a "murderer" (R 111). In an unsworn pretrial statement, a second witness declared that the accused boasted of killing 1000 inmates at Flossenburg (R 151; P-Ex 12). Two witnesses testified to a remark of the accused that he would be a rich man if he were paid for every inmate he had killed (R 41, 48). The accused admitted in court that he beat inmates and had administered a "mercy shot" to one inmate (R 175

A fifth witness testified in the Parent Case that in the spring of 1942, the accused led 40 Polish inmates to the shooting gallery to be executed (R 32; P-Ex 3). A sixth witness confirmed the presence of the accused on this execution detail in an unsworn pretrial statement (R 34, P-Ex 4, Annex B). The accused in an extrajudicial sworn statement admitted that he participated to a limited extent in Incident No. 1 (R 32; P-Ex 2); and testified in court that he knew "slightly" that the prisoners he was leading were to be executed (R 73).

A seventh witness testified in the Parent Case as to Incident No. 2, that in February 1942 the accused beat an inmate, Stanliaus Singer, who died three days later (R 50; P-Ex 5).

An eighth witness testified in the Parent Case as to Incident No. 3 that in December 1942 while accused was detail leader in the camp quarry, he beat a Russian inmate to death with a shovel handle (R 51, P-Ex 7).

The accused testified as to Incident No. 4 that he was block leader of blocks 20 through 23 from April to September 1943 A ninth witness testified that in April 1943 in the area of blocks 20 through 23 the accused strangled and beat four inmates whose bodies were immediately taken to the crematory (R 89-95, 103-105; P-Ex 9).

The same witness testified as to Incident No. 5 that in May 1943 the accused strangled a Czech inmate in block 5 in the same manner as the victims in Incident No. 4. The victim was pronounced dead by a dispensary doctor in the presence of this witness (R 105-110, 109; P-Ex 10).

Adolf Kuefner testified in the Parent Case that accused beat numerous inmates (R 112; P-Ex 11).

Evidence for Defense: The accused testified that Incident No. 1 involved 36 inmates, five of whom he conducted to a point some distance from the execution place, where he turned t

over to Sergeant Nies (R 87). He further testified that he participated in one execution where one man was shot by order of the Reichsfuehrer. He further testified "in case this is murder, its the only one" (R 81).

One witness, a former SS man, testified that the execution of 40 inmates occurred in the fall of 1941; that he saw the execution orders, which were a prepared form with the inmate's name and the reason for his execution typed in; and that the name "Himmler" was typed in at the end (R 62, 63). He further testified that he knew the members of the firing squad of this particular execution and that the accused was not one of them (R 65).

The same witness testified as to Incident No. 2 that new inmates usually arrived on Monday, and were not assigned to work on the quarry detail until eight days later (R 66). The accused stated in an extrajudicial sworn statement that Singer, the victim in Incident No. 2, could not have been working on the quarry detail four days after his arrival in camp, inasmuch as all incoming inmates spent eight to 14 days in a reception block after their arrival (R 52; P-Ex 6).

A second defense witness testified in the Parent Case as to Incident No. 3 to the effect that he was a civilian master in quarry No. 2 from 1941 to 1945; that he knew of no death at the quarry in December 1942; and that if there had been such an incident he would have known of it (R 57, D-Ex 4). The accused denied in court that he ever beat a Russian to death (R 82, 83).

A third witness testified as to Incident No. 4 that he saw the accused every day in blocks 20 through 23 from the 1st of April 1943 until middle of May 1943 (R 167); that he never saw the accused kill anybody (R 171); and that the accused on one occasion saved the witness's life (R 171).

Sufficiency of Evidence: The Court was warranted from the evidence in its findings of guilty. The sentence is not excessive.

Petitions: No Petitions for Review were filed. A Petition for Clemency was filed by the accused 10 October 1947.

Recommendation: That the findings and sentence be approved.

V. QUESTIONS OF LAW:

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

2. Double Jeopardy: The accused pleaded in bar to his trial that he was being placed in double jeopardy, inasmuch as he had been arraigned previously as one of the original accused in the Parent Case which commenced at Dachau, Germany, on 12 June 1946. On the 17th day of December 1946, a nolle prosequi was entered by the prosecution as to the accused.

While it is doubted that accused war criminals can claim the benefits of the Constitution of the United States, it is not necessary to consider that question herein.

There is considerable authority in Military Law and in American municipal criminal law in support of the view that an accused is not put in jeopardy until the case has proceeded to final judgment, either a conviction or an acquittal.

In the Digest of Opinions of the Judge Advocates General, 1912, page 167, it is stated:

> "The Constitution (art. V of the Amendments) declares that 'no person shall be subjected, for the same offense, to be twice put in jeopardy of life or limb.' The United States courts, in treating the term 'put in jeopardy' as meaning practically tried, hold that the 'jeopardy' indicated 'can be interpreted to mean nothing short of the acquittal or conviction of the prisoner and the judgment of the court thereon.' (United States v. Haskell, 4 Wash. C. C., 402, 409. And see United States v. Shoemaker, 2 McLean, 114; United States v. Gilbert, 2 Sumner, 19; United States v. Perez, 9 Wheaton, 579; 1 Op. Atty. Gen., 294.)"

In Winthrop's Military Law and Precedents, second edition, 1920 reprint, pp. 262, 263, it is stated:

> "DISCONTINUANCE BEFORE FINDING NOT EQUIVALENT TO ACQUITTAL OR AMOUNTING TO JEOPARDY. It remains to notice the principle, applicable equally to civil and military cases, that where, instead of a complete trial on the merits, the proceedings are discontinued by some interlocutory action, the accused, though not in fault, is not to be regarded as having been acquitted or put in jeopardy. Thus where an indictment has been duly abated by the entry of a nolle prosequi, or on a motion to quash, demurrer, or other proceedings; or where the trial has been broken off by reason of the death or disability of a juror or the judge, or of the defendant himself; or where by reason of an irreconcilable difference of opinion among the jurors the jury has been discharged -- the defendant has not been legally 'tried' and cannot plead autrefois acquit upon a separate trial for the same offence. So, at military law, neither a mere arraignment, nor an arrest followed by a discharge without trial, nor a service of charges withdrawn or dropped without prosecution, nor a withdrawal of the charges after arraignment or pending the trial, nor a discontinuance of the proceedings, by the order of the convening authority, for any cause before a finding, nor a permanent interruption of the same by reason of war or other exigency, nor a failure of the court to agree upon a finding, followed by a dissolution -- will amount to an acquittal or a 'trial' of the accused."

In the Manual for Courts-Martial, U. S. Army, par 72, page 57, it is stated:

> "A nolle prosequi is not in itself equivalent to an acquittal or to a grant of pardon and is not a ground of objection or of defense in a subsequent trial. It may be entered either before or after arraignment and plea."

However, a holding to the contrary is indicated in "Constitutional Law of the United States", Willoughby, Second Student Edition, p. 472, wherein it is stated:

> "It is not necessary, in order that prior jeopardy may be pleaded in bar, that there should have been a former trial and verdict by a jury. This is not the rule uniformly stated, but, as declared by the Supreme Court in Kepner v. United States, 'the weight of authority, as well as decisions of this court, have sanctioned the rule that a person has been in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him; certainly so after acquittal.'"

Thus it appears that the plea of the accused (R 5) was properly overruled (R 28). If the Court had sustained the plea, it would have applied technical and legalistic methods in ruling on a question which is apparently not well settled in American municipal criminal law. Military Government Courts are required to avoid technical and legalisti view points during their proceedings (Section 5-351, Title 5, "Legal and Penal Administration" of "Military Government Regulations", published by Office of Military Government for Germany (U.S.), 27 March 1947.) There is no allegation nor does it appear from the record that the defense of this case was rendered more difficult by the nolle prosequi of the charges against the accused in the Parent Case and recharging him in a separate case. Neither the defense counsel in his argument on the question in court nor the accused in his Petition for Clemency urged that any practical injustice was done to the accused.

In any event the international law of war and not American municipal criminal law is applicable in trial of war crimes cases (In re Yamashita, 66 Supreme Court Reporter 340). The defense has not cited any provisions of international law or any provision in the regulations governing Military Government Courts in the trial of war crimes cases in support of its position. The denial of the plea of double jeopardy worked no hardship on the accused, nor was it inconsistent with a complete and fair hearing under the rules of Military Government Courts.

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

VII. CONCLUSION:

1. It is recommended that the findings and sentence be approved.

2. Legal Forms Nos. 13 and 16 to accomplish this result are attached hereto, should it meet with approval.

GEORGE A. Mc DONOUGH
Attorney
Post Trial Branch

Having examined the record of trial, I concur, this _____ day of _____ 1948.

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