

DEPUTY JUDGE ADVOCATE'S OFFICE
7708 WAR CRIMES GROUP
EUROPEAN COMMAND
APO 207-1

4 August 1947

UNITED STATES)

v.)

Eugen Hermann NOKY)

Case No. 000-Mauthausen-20

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused was tried at Dachau, Germany, on 24 April 1947, before a General Military Government Court.

II. CHARGES AND PARTICULARS:

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

PARTICULARS: In that Eugen Hermann NOKY, a German national, did, at or in the vicinity of Peggau, Austria, in or about April 1945, wrongfully encourage, aid, abet and participate in the killing of four non-German nationals, inmates of Peggau Concentration Camp, who were then in the custody of the then German Reich, the names of such persons being unknown.

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

PARTICULARS: In that Eugen Hermann NOKY, a German national, did, at or in the vicinity of Peggau, Austria, in or about April 1945, wrongfully encourage, aid, abet and participate in the killing of a non-German national, an inmate of Peggau Concentration Camp, who was then in the custody of the then German Reich, the name of such person being unknown.

III. SUMMARY OF EVIDENCE: With the advance of the Russian armies in Austria in the spring of 1945, an evacuation of prisoners from Camp Peggau, Austria, an outcamp of Mauthausen Concentration Camp, was undertaken during 2-3 April 1945. As an incident of this operation, orders were issued that all sick inmates who were unfit for transport were to be shot. Accused NOKY killed four non-German nationals in order to fulfill the commands given to him and another without any instruction from his superior, with the possible exception that a very broad and general instruction may have been considered applicable. The fifth killing was not in the presence of his superior.

IV. EVIDENCE AND RECOMMENDATIONS:

EUGEN HERMANN NOKY

Nationality:	German
Age:	43
Civilian Status:	Motor car painter
Party Status:	NSDAP, Allgemeine SS
Military Status:	Waffen SS, Technical Sergeant
Plea:	NG
Findings:	G
Sentence:	Death by hanging

Evidence for Prosecution: Using his Austrian service pistol (R 10, 46), NOKY, an Oberscharführer in Camp Pezzau, Austria. (P-Ex 2, 2A; R 6, 16) shot four non-German, presumably Russian, inmates (P-Ex 2, 2A; R 6, 9, 45, 49) in the neck (P-Ex 2, 2A; R 6, 46) from a distance of only a few centimeters (P-Ex 2, 2A; R 6); killing them (R 9, 10) in a branch tunnel during the night or early morning of 2-3 April 1945 (R 27, 45) in response to orders from his immediate superior, Obersturmführer Miroff (P-Ex 2, 2A; R 6, 11, 45, 46, 48). Miroff was not his disciplinary superior nor was his disciplinary superior present at the camp at the time of the incidents covered by the charges (R 12, 48). These inmates were several among others selected from the infirmary patients either by the accused (R 9, 21, 25, 26) or by Miroff (R 44) or by the Polish medic and infirmary capo (R 46) as being incapable of walking or unfit for transport (P-Ex 2, 2A; R 6, 25 44). No objection was made by NOKY to the performance of this task (R 13, 14, 28).

Subsequent to these killings, NOKY entered the infirmary in response to the pleas of the capos and camp eldest (P-Ex 2, 2A; R 6, 47) to get rid of the chief idiot of the camp; there he shot and killed the petty-thieving, "completely insane" Polish inmate, "Millionendieb" (thief of millions) (P-Ex 2, 2A; R 6, 9, 15, 16, 35, 47). The accused was not specifically directed to kill this victim nor was

Miroff, his only superior in the camp, present. The accused testified that at first he did not respond to their "begging" but told them they could do as they pleased as to killing this fifth victim. However, he finally complied with their requests by performing the killing himself (R 46-48).

Early next morning holes were dug (R 22, 27) and the bodies were buried (R 25, 27). These inmates whose cards had been marked for death (R 26) and who were taken from the infirmary by the accused were never seen again (R 28).

Evidence for Defense: NOKY made a sworn pre-trial statement in which he admits killing four non-German nationals, prisoners he thought to be Russians, with neck shots and the notorious "Millionendieb" with one shot (P-Ex 2, 2A; R 6). He denied selecting and marking these inmates for death (R 44, 45, 46, 47). But he sharply insisted that he acted in this fashion at the direction of his immediate superior, Miroff (P-Ex 2, 2A; R 6, 44, 45, 48), who admitted ordering the accused to shoot four Russian prisoners in the tunnel (R 11) and his own inability to punish the accused for a failure to obey his orders, a fact known to the non-commissioned officers in Miroff's command (R 13).

Sufficiency of Evidence: Concerning the evidence offered by the accused in support of superior orders, no effort was made to show, as to the fifth killing, that the accused had received a specific direction to kill this victim. His own testimony indicates he did not consider any general orders as requiring the killing. Moreover, the superior was not present. Thus, it appears that no order had been received and in any event he was not shown to have acted under immediate compulsion to any degree. 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, dated 1 May 1947, was filed by Chief Defense Counsel, Lieutenant John H. Pohlman. Five Petitions for Clemency were filed, viz.: by Willi Klein, accused's brother-in-law, 11 May 1947; Lina Noky, accused's wife, 11 May 1947; August Noky, accused's brother, 5 May 1947; Otto Pfisterer, undated; and Kaspar Adler, et al., 5 May 1947.

Recommendation: That the findings and sentence be approved.

V. QUESTIONS OF LAW:

Superior Orders: Accused NOKY, as shown in Section IV, paragraph 2, supra, sought to justify his action by offering evidence to show that he was 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 812; Vol. II, Sixth Edition, Oppenheim, "International Law," paragraph 253, page 453; Llandovery 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, Charge No. 1, 15 November 1944; Oppenheim, "International Law," supra, and Llandovery 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 Dury 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 sentence be approved.
2. Legal Forms Nos. 13 and 16 to accomplish this result are attached hereto, should it meet with approval.

/s/ Richard C. Hagan
/t/ RICHARD C. HAGAN
Major, JAGD
Attorney
Post Trial Branch

Having examined the record of trial, I concur.

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