

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

30 April 1947

UNITED STATES

vs

Case No. 12-1733

Eduard Karl Ludwig CURDTS,  
Fritz WARNEKE, German nationals

REVIEW AND RECOMMENDATIONS

1. TRIAL DATA:

ACCUSED

Tried at Dachau, Germany  
Date: 22-23 January 1947  
General Military Government  
Court  
Sentence: Death by Hanging

Married, two children  
24 and 27 years  
Age 56  
Police Master Sergeant

Facts

Findings

CHARGE: Violation of the laws  
of War

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MEMORANDUM: In that Eduard Karl  
Ludwig CURDTS and Fritz WARNEKE,  
also known as Friedrich WARNEKE,  
German nationals, did, at or near  
SEESSEN, Germany, in or about June  
or July 1944, wilfully, deliber-  
ately and wrongfully encourage,  
aid, abet and participate in the  
killing of an unknown member of  
the United States Army who was  
then an unarmed, surrendered  
prisoner of war in the custody  
of the then German Reich.

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2. RECOMMENDATIONS: That the findings and sentence be approved.
3. EVIDENCE: The charges against Fritz WARNEKE were withdrawn and he was not tried.

For the Prosecution. It was shown that during the month of June or July 1944, a plane crashed and an unidentified American flyer was captured near SEESSEN, Germany (R 10, 13, 14). The accused CURDTS, a police master sergeant, with his immediate superior, 1st sergeant CLEVE and one WARNEKE, a lieutenant of the rural police took charge of the flyer (R 14, 4B). Witness MACKENSEN testified WARNEKE and accused CURDTS drove the airman to the wrecked plane and WARNEKE asked the accused, "Do you want, or should I", meaning shoot the flyer

(R 14, 15, 18). WARNEKE and accused took the victim into woods about 200 meters distant and accused shot the flyer in the head, killing him instantly (R 17, 22, 34, 35, 51). The victim was unarmed and made no attempt to escape (R 54). Witness SACKMAN and others buried the body that same day (R 31). The accused in an extrajudicial statement admitted the murder of the pilot (I-Ex 14, R 7). The flyer was an American (R 10). The accused is a German national (R 47).

For the Defense. Accused testified in his own defense; he admitted the killing (R 51) but claimed he acted under superior orders from WARNEKE (R 51). He failed to refute testimony of witness LACKENSEN (R 15, 16), that he was given choice of shooting or not shooting the flyer.

4. JURISDICTION: The Court was legally constituted and had jurisdiction of the person of the accused and of the offense.

5. COMMENTS: Examination of the entire record fails to disclose any error or omission which resulted in injustice to the accused. Defense counsel objected to the jurisdiction of the Court (R 3, 4, 5), on the grounds that Articles II and III, Military Government Ordinance No. 2, "Technical Manual for Legal and Prison Officers", Second Edition, published by Supreme Headquarters, Allied Expeditionary Force, which was superseded at the time of this trial by Title 5, "Legal and Penal Administration", of "Military Government Regulations", published by Headquarters, United States Forces, European Theater, 30 November 1945, failed to define the penalty for the commission of such crime. The defense claimed that, if no statutory penalties were provided for the courts to impose, the court itself was without jurisdiction to hear this case. That point is disposed of by reference to Criminal Law from American Jurisprudence, Volume 26, Paragraph 580, Page 567, which reads as follows:

"The punishment which may be inflicted upon conviction of any of the grades or degrees of homicide is usually provided by statute. If, however, no penalty is prescribed by statute in respect of any grade of culpable homicide, the punishment to be inflicted must be that prescribed by the common law, as, at



common law, under the statutes of most states, murder or first degree murder is punishable by death ~~and~~."

In other words even if no statutory penalties were set out, the common law would still govern and the courts would be entitled to impose the death sentence in a first degree murder case. All war crimes are subject to the death penalty, although a lesser may be imposed (FM 27-10, War Department, U.S. Army, "Rules of Land Warfare", Paragraph 357).

6. CLEMENCY: There was a Petition for Review filed 19 March 1947 by Frank L. Walters, Chief Defense Counsel, on behalf of accused CURTIS, alleging (1) the defense of superior orders as a complete defense and (2) that the Court erred in not considering the superior orders as a mitigating circumstance. Defense counsel contended that on the date of the killing, the defense of superior orders was a complete and valid defense in both the American and German armies (FM 27-10, Paragraph 347, Page E7). Said provisions merely constituted a temporary self imposed policy of the United States concerning the imposition of punishment for violations of the laws and usages of war under the conditions therein contemplated and in no way altered the existing law of nations. More, over, by this expression of policy which permitted of a very lenient administration and enforcement of the laws of war, the United States could not be said to have attempted to abrogate valid and existing provisions of international law then obtaining. The expressed policy of the United States has since been changed as indicated by FM 27-10, War Department, U.S. Army, "Rules of Land Warfare", Paragraph 345.1, Change No. 1.

As to the second allegation in the Petition for Review, namely, the consideration of superior orders as a mitigating circumstance in imposing sentence, the testimony of prosecution witnesses and the defendant himself show this killing to be a cold blooded murder without any extenuating circumstances. Furthermore it was shown by the prosecution and not rebutted by the defense that 1st Sergeant VARNEKE asked the accused whether he, CURTIS, would do the killing or should VARNEKE do it himself. Accused had the election of killing or not.

killing the flyer. Under these circumstances, the court was fully justified in the sentence it imposed.

7. CONCLUSION:

- a. It is recommended that the sentence be approved.
- b. Legal Forms Nos. 13 and 16 are attached hereto, should it meet with your approval.

/s/ Robert J. Travis  
/t/ ROBERT J. TRAVIS  
Attorney  
Post Trial Section

Having examined the record of trial, I concur.

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