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War Crimes Case File 1945-53

Case # 12-1104

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HEADQUARTERS
EUROPEAN COMMAND
Office of the Judge Advocate

Case No. 13-1104-1
U.S. vs. Wilhelm Kenschat
Accused: Wilhelm KENSCHAT

2 July 1951

REVIEW OF THE WAR CRIMES BRANCH
JUDGE ADVOCATE
HEADQUARTERS, EUROPEAN COMMAND, APO 403, U. S. ARMY

TO: THE WAR CRIMES MODIFICATION BOARD, EUROPEAN COMMAND, APO 403, U.S. ARMY

1. THE RECORD OF TRIAL BY GENERAL MILITARY GOVERNMENT COURT, LEGALLY CONSTITUTED FOR TRIAL OF WAR CRIMES CASES, of the following named accused, together with all petitions and supporting documents, filed by and in behalf of said accused subsequent to the trial, having been examined and reviewed by me as to whether or not any modification of the sentence of said accused as heretofore approved should be made, I submit herewith my review summary, as specially authorized in War Crimes cases.

2. SYNOPSIS OF THE RECORD

a. Personal Data:

<u>KENSCHAT*</u> (Last Name)	<u>Wilhelm</u> (First Name)	<u>German</u> (Nationality)	<u>Male</u> (Sex)
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Tried at Dachau, Germany, on 25 August-1 September 1947. Date of original confinement under charges: 5 May 1947. Present age: 61. Married: Yes.

Children: One. Other dependents: Unknown. Employment record: Merchant.

Education: 6 years. Religion: Lutheran. Prior Convictions: None. Reputation in home community: Excellent. Military Record: Captain-Wehrmacht. Nazi Party Record: Member from 1933. Health: Fair.

b. Sentence:

- Sentence adjudged by court: On 1 Sept. 1947, sentenced to death by hanging.
- Recommendation of DLA/SG : On 29 October 1947, recommended approval.
- Recommendation of WCRB#3 : On 17 Feb. 1948, recommended sentence be commuted to life imprisonment.
- Recommendation of JA : On 26 Feb. 1948, recommended approval of death sentence.
- Action of Review Authority: On 8 March 1948, approved sentence. On 28 Dec. 1948, commuted sentence to life imprisonment.
- Recommendation of subsequent WCR Board Appraisals :
 1. On 26 Mar. 1948, #1 denied petition.
 2. On 70 Mar. 1948, #3 recommended a stay of execution.
 3. On 6 May 1948, #3 denied petition.
 4. On 11 May 1948, #1 denied petition.
 5. On 12 May 1948, #3 recommended stay of execution and commutation to life imprisonment.
 6. On 3 June 1948, #1 recommended stay of execution be vacated.

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By WGL NARS, Date 4/9/81

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7. On 8 October 1948, #1 recommended commutation to life imprisonment.
8. On 14 Sept. 1948, "Simpson Report" recommended commutation to life imprisonment.

Present Recommendation : Reduction to time served.

*NOTE: The name of the accused under consideration is capitalized wherever appearing in this review.

c. Charge and Particulars:

The accused was tried on the following Charge and Particulars during the period of 25-28 August 1947:

Charge: Violation of the Laws and Usages of War.

Particulars: In that Wilhelm KUNSCHEIT, German National, did, at or near Wolfenbuettel, Germany, on or about 28 September 1944, wrongfully encourage, aid, abet, and participate in the killing of a member of the U.S. Army, believed to be Sergeant Sheppard Kerman, who was then and there a surrendered and unarmed prisoner of war in the custody of the then German Reich.

Pleas: Not Guilty.

3. EVIDENCE

a. Summary of the Evidence:

On 28 September 1944, an American flyer parachuted from his disabled plane over Wolfenbuettel, Germany. His parachute caught on a roof of a house and he was pulled through a window into a room on the second floor. Otto Weinreich, Gerd Beck, and the accused KUNSCHEIT were present in the room together with several other people. The accused ordered all soldiers out of the room and then allegedly ordered Beck to shoot the flyer. Beck got a pistol from Weinreich and shot the flyer to death. Beck and Weinreich were tried for their participation in this killing in the case of the U.S. vs. Beck, et al., Case No. 12-1104. Beck was sentenced to death by hanging and Weinreich to life imprisonment. Both sentences were approved. The sentence of Beck to death by hanging was later commuted to imprisonment for life.

b. Evidence for the Prosecution:

(1) The prosecution called as its first witness Gerd Beck. (Reviewer's Note: Before this witness had been addressed by the Court, he asked the Court why he should take an oath and after considerable discussion and a ten minute recess, the prosecution announced that the witness would take an oath whereupon he was sworn.) The witness testified that he was a member of a Wehrmacht Elite Parachute regiment, but at the time of the incident concerned, was a patient at the military hospital at Wolfenbuettel, and knew the accused (R 10). On the morning of the 28th of September, an air raid alarm sounded and during the air raid he saw a flyer coming down in a parachute (R 11). The witness ran to the vicinity where the parachute was descending and saw it hanging on the roof above a large crowd in the street (R 12). He went upstairs and entered a room where the flyer was and saw a man in a political uniform with a pistol in his hand. He also saw the accused and several soldiers (R 13). The flyer was standing about two and one-half meters in front of the witness when he suddenly heard the order - all soldiers get out - given by the accused (R 14). Shortly thereafter, he heard an order, "Shoot that guy", which he presumed was given by the accused (R 15). To the best of the witness' memory, which was very vague, after he heard the order, he felt something in his hand. His next recollection was that he was walking through a crowd in the street

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outside the house, and when asked by bystanders about the blood on his hands, he (the witness) said, "I shot him" (R 18). The prosecution asked the witness whether or not during the preliminary investigation in July of 1947 he had not said "at about the same time, Captain K. NSCHLT said to me twice 'shoot that guy, shoot, shoot'". The witness admitted having so stated but reminded the prosecution and the Court that when he did so state, he was not under oath (R 18, 19).

On cross-examination, the witness was unable to tell anything certain about the interval between the time the order was given and the time he was running in the street to his house (R 20). He did not want to testify under oath because he was not certain what had happened and that he was not sure whether K. NSCHLT gave the order. Under oath he could not state that the accused gave the order to shoot the flyer (R 21).

(2) Ernst Meier, a German painter, formerly a sergeant in the German Army, testified he was a patient in the hospital in Wolfenbuettel in September 1944 and knew the accused (R 26). He testified that when the parachutist came down on the house he stood on the corner and, among others, saw the accused at the window (R 27). While he was standing on the street corner, he heard one shot (R 28).

On cross-examination, he testified that he was not in the room when the flyer was shot and did not have the slightest idea what happened (R 29).

On examination by the Court, he revealed that he had seen K. NSCHLT at the window only before the shot was fired (R 31).

(3) Otto Weinreich testified that he had been tried and convicted for his participation in this case and that he was in the room when the flyer was killed (R 32). There were many people in the room and among them an officer wearing a gray uniform; however, the witness was unable to determine the rank of the officer whom he learned to know only after he was taken prisoner (R 33). The witness identified the accused (R 35). Weinreich pulled out his pistol because he did not know whether the flyer was armed and while so doing, heard somebody say "all the soldiers leave the room" which in his opinion could only have come from an officer (R 36). After the officer told the soldiers to leave the room he heard shouts "shoot hi, shoot him" but the witness was not able to say who said it, but in his opinion it could only have been an officer. Immediately a soldier jumped at him, grabbed the pistol out of his hands and shot the flyer (R 37). The witness was standing in the room and saw Beck actually shoot the American (R 38). Weinreich testified that after he had been arrested, he had a talk with the accused at a camp in Lebnstadt in which conversation the accused asked whether or not the witness had heard him give the order to shoot to which the witness replied, "the order was given" and "if there was no other officer present at that time, it could only have been you who gave the order" (R 58). The witness was asked the following question:

Question: "How did you hear Captain K. NSCHLT say in that room 'kill that man'?"

Answer: "I didn't hear that."

The prosecution referred to the record of trial in the case of U.S. vs. Beck wherein this witness, not under oath, a co-accused, was asked the same question and the witness replied, "Yes" (R 60).

The prosecution referred to a statement taken during the investigation wherein the witness stated that he did not know whether or not the Captain left the room when he ordered all the soldiers to leave (R 63).

The prosecution introduced in evidence as Prosecution Exhibit 4 (R 63), a sworn statement of Weinreich taken on 1 June 1945 in an official

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investigation made in connection with the case. This statement substantially follows the testimony given from the witness stand but it is noted the witness at that time, stated that he believed the Captain left the room when he ordered all the soldiers out. The Exhibit also indicates that three or four policemen were in the room and that the police came after the witness had loaded his pistol. On page 5 Weinreich states that the Captain did not go out of the room.

On cross-examination, Weinreich admitted that in his own trial he was asked the question, "You have mentioned about an order being given by Captain KANSCHET, just what was that order?" to which he had replied, "the order was to shoot the man or shoot the guy but I found that out only from the accused Beck" (R 66). Beck told the witness that after the incident (R 67).

Question: "Did Beck tell you what the order was and who gave it?"

Answer : "Beck said that the Captain had given that order" (R 69).

The witness presented that the order could only have been given by an officer (R 70). He did not see the accused give an order nor did he see the accused move his lips but this may have been because everything in the room was mixed up and everyone was excited (R 72). The entire affair was strictly a military matter (R 73).

On examination by the Court, Weinreich testified he first knew KANSCHET was an officer when Beck told him about it after being taken into custody. The witness admitted having talked to Beck on a few occasions and having talked to him last while they were being brought to Dachau (R 77).

(4) Lieslotte Lunkewitz testified that she remembered the incident in September when the American flyer parachuted down. She observed the incident from across the street but was unable to state what happened in the room. She saw, however, some soldiers and policemen in the room (R 42). Shortly afterwards, she saw the body of the flyer being carried out (R 43).

On cross-examination, she testified she did not know the difference between the various uniforms which were seen that day (R 46). She could not state with certainty that an army officer was present (R 47).

(5) Hubert Bolm testified that he arrived at the house and cut the flyer loose from his parachute and pulled him into the room. A lot of other people entered the room (R 50). An army captain was present in the room whom he was later told was Captain KANSCHET. The witness was unable to identify the accused in the courtroom (R 51). He learned that it was Captain KANSCHET only after being taken into custody in connection with the case. KANSCHET ordered all members of the Wehrmacht to leave the room and the witness left. When leaving he noticed the political leader Weinreich had a pistol in his hands checking the mechanism (R 52). The witness knew nothing more of what happened in the room.

On cross-examination, he admitted that he had seen the Captain only for a few seconds while in the room and that, as a matter of fact, KANSCHET might have left the room when he ordered all soldiers out (R 56).

c. Evidence for the Defense:

(1) Ursula Renmert testified that she was standing in the Kornmarkt shortly after the flyer landed and Beck passed with blood on his hands and uniform and when asked what had happened, said that he had just shot an American but did not mention anything about having done so on the order of a superior; however, later that evening she heard that he had done so under orders (R 109). He said that he had shot him because of all the bombs that were being dropped by flyers (R 111).

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On cross-examination, witness testified Beck said he did it "because the Americans are dropping bombs and killing women and children".

On examination by the Court, the witness testified that it was rumored Captain KANSCHLT gave the order (R 112).

(2) The defense introduced in evidence as Exhibit 2 a sworn statement of Mrs. Minna Brecht (R 113) in which she stated that a German Air Force soldier said to her and some other people "I have killed this man" and on the occasion did not say anything about having acted on the order of a superior officer.

(3) Theresia Kartenstein testified that she heard of the incident from KANSCHLT who told her that a flyer had come down and that he was rescued and was alive. This was during the air raid which was in effect. It was later rumored the flyer had been shot (R 115) and when KANSCHLT came back later, he said the flyer was supposed to be dead and wanted to know how it had happened. KANSCHLT told the witness he had been to the Kreisleiter's office and asked there and was told the flyer had died from a spine injury (R 116).

On cross-examination, witness testified she had known KANSCHLT since 1943 or 1944 (R 117). The witness did not know KANSCHLT's duties (R 120). She testified that KANSCHLT had said the flyer had come down and had gotten into a window and then he, KANSCHLT, had gone away (R 122).

On examination by the Court, the witness testified that she knew nothing about the flyer landing until KANSCHLT came to the house and told them about it and that the flyer was alive (R 127).

(4) Defense introduced in evidence a sworn statement of Ursula Kartenstein (D-Ex 3; R 129), which testifies to the good character and reputation of the accused and also states that KANSCHLT came to them on the day and told them that he had saved the flyer and that he was alive. He stopped at the house only a minute as he had to return to the hospital. Sometime later KANSCHLT came again and said that he heard the airman was dead and that he would go to the police and the Kreisleiter and inquire about the matter. He returned that evening and said that investigation of the death was not finished but his mind appeared at ease because, according to information he had, the airman had not suffered from a violent death.

(5) Wilhelm Lueders testified that on his way to the hospital during the air raid, he saw the flyer dangling from the roof. Standing on the street, he saw the flyer pulled inside the window and shortly thereafter the door to the house opened and Private Boln came out. Together they went to the next corner and talked where Boln expressed the opinion that "something dirty was going to happen in there". The witness ambled back toward the house and after standing there

saw the door open and the dead flyer being carried down. He went into the back yard and looked at the body while standing in the corner of the yard. While standing there, he saw Captain KANSCHLT arrive. The witness stayed in the courtyard until the body was carried out and then left (R 132). After the collapse of Germany, witness was taken into custody in connection with the incident and Captain KANSCHLT had stated "Beck is supposed to have shot him and I have given the order and did not do it".

(6) Rudi Obermann testified that he observed the flyer hanging from the roof of the house in front of the window. He also saw the flyer inside the room and when the witness left the room, the pilot was still alive (R 148). He was not in the room when the shot was fired and knew nothing of what happened there (R 149). He talked to Captain KANSCHLT the same afternoon and KANSCHLT asked if he knew who had shot the pilot (R 150). KANSCHLT arrived in the room shortly after the witness (R 152). All soldiers were ordered out of the room and at the time the witness left the room he did not see KANSCHLT inside (R 153).

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On cross-examination, the witness admitted that it was possible that KANSCHAT was in the room after the witness had left (R 155).

On examination by the Court, the witness testified there were about fifteen people in the room. The witness recalled that at that time the Party had as much to say about those matters as the Wehrmacht (R 158). While Captain KANSCHAT was the highest Wehrmacht officer in the room, the witness was unable to state how much more the political leader had to say about the matter (R 161).

(7) Wilhelm KANSCHAT, the accused, took the stand under oath and testified that he was 57 years old, a merchant by occupation and had been a soldier in the first World War (R 163). He had also served in the German Army as a reserve captain since February 1940. He was discharged in August 1945 by the British Discharge Center and had lived in Barten and Freden and had been registered with the police in both places (R 164). (Defense introduced as Exhibit D-5 (R 165) a statement from the Village Administration of Freden certifying as to his residence in that community from August 1946 until May 1947.) He was first taken into custody on the 19th of April 1945 and interrogated by an American captain about the shooting of the flyer in 1945. After the investigation, he was released to the British at Hanover where he was discharged (R 166). The accused became acquainted with Beck at the military hospital (R 167). The accused knew the Hartenstein family in Wolfenbusttel. At a meeting at Wehrmacht headquarters in Hanover, an order was received addressed to all police stations and party organizations to protect all bailed-out pilots (R 173). He further testified that as a captain of the Wehrmacht he could not give orders to police and that after the attack on Hitler on July 20, 1944, the Party influence was much greater than the army (R 174) and he could give orders only to his soldiers.

(Defense introduced Exhibit 6 (R 176) which was a statement from the accused's former commanding officer to the effect that all enemy pilots had to be taken according to orders issued by the police and that the reputation of the accused was excellent and that as an old soldier, KANSCHAT was far too clever to issue any order to kill the pilot as alleged because he knew it was illegal.)

KANSCHAT was on the roof of the hospital at an observation post when the air raid alarm was sounded and went into the village to round up the patients and order them back to the hospital air raid shelter. He was absent from the hospital about fifteen minutes (R 178). He was at the house where the pilot landed twice. After he had found the pilot alive and the other soldiers in the room, he handed him over to the police and political leader and left. On leaving, he stopped briefly and talked to Frau Hartenstein and told her about the affair and that the pilot was alive (R 179). While he was in the room, the police arrived and the political leader. No one had weapons except the political leader and the policemen (R 180). He left the room because it was necessary for him and the soldiers to return to the air raid shelter at the hospital. After he had returned to the hospital, he heard that something had happened to the pilot and he ran back again to see (R 181). He entered the house a second time and discovered a lot of people out in the backyard. There he saw the pilot lying on his back and a few policemen. It was about ten minutes between the time he had left the first time when he arrived and saw the pilot in the backyard. That afternoon he again went to the Hartenstein's on his way to the Kreisleiter and told them that the pilot he had taken alive was dead (R 182). The Kreisleiter told him that afternoon that the investigation was not yet finished but that he should come around again the following day. The next day he was told the pilot died as a result of injuries he received while landing (R 180). The accused did not consider the pilot his prisoner or a prisoner of the Wehrmacht as, according to orders, it was the duty of the police to take charge (R 185). After he had given the order "all Wehrmacht out" only the policemen and the political leader remained behind (R 186). After giving the order, the accused left. He did not give any order to shoot the flyer who was alive when he left the room (R 187).

On cross-examination, KANSCHAT testified the air raid began about thirty minutes or an hour before the enemy pilot landed (R 188). KANSCHAT's duties during an air raid were to remain with the soldiers but because a considerable number were in the town, he also had to get them back to the hospital to the

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shelter (R 189). The political leader in the room was wearing a simple uniform without rank (R 191). KANSCHAU admitted he was a member of the Nazi Party, having joined in May 1933 (R 193). When he ordered the soldiers out of the room and he left himself, he intended to get all the soldiers back to the air raid shelters in accordance with the orders he had received (R 196). His first conversation with the Hartensteins was very brief because he had no time and said he would come back later (R 196). The first time he knew the pilot had been shot to death was in April of 1945. He had heard rumors to that effect previously (R 198). In order to clear up the rumors he had asked Obermann if he knew anything about the death and that was also the reason why he went to the Kreisleiter. He was interested only insofar as the Wehrmacht was being pulled into the affair and in defending the interests of the army (R 198). The accused was interested as an officer and a Christian in what had happened to the flyer after he had left him alive and when he asked the policemen in the backyard what was the matter, the police answered, "We don't know, the Kreisleiter has started an investigation" (R 204).

On examination by the Court, he testified that the order concerning the capture of flyers was passed down by General Wolfe of the Air Force in Hamburg at a meeting (R 205). KANSCHAU had heard Goebels on the radio say that on account of the increase of air raids, the safety of pilots could no longer be guaranteed because of a shortage of policemen (R 206).

d. Post-Trial Petitions and Reviews:

Attached to the original of this review as "Exhibit A" are 13 petitions for clemency submitted by or on behalf of KANSCHAU together with the appraisals made at the time by the reviewer, where the same is available.

(1) A sworn statement by Gunter Rode forwarded through the SACR Headquarters states the affiant saw the incident but was not called as a witness. He saw no Wehrmacht officers on the scene until about ten minutes after the shot was fired, when two such officers arrived on the scene. One of these, he believes, was the accused. This tends to bear out the accused that he left the scene before the shot was fired and returned about ten minutes later (R 181). This statement was volunteered after the affiant read in the paper that KANSCHAU had been convicted, and corroborates testimony of at least two defense witnesses.

(2) A petition for Review, dated 17 September 1947, submitted by German defense counsel was considered by the Board of Review which also reviewed the record of trial on 17 February 1948. The Board concluded the petition presented no new evidence. The petition is a rehash and discussion of the evidence presented at the trial and is argumentative.

(3) On 12 March 1948, the wife of the accused submitted a petition for clemency based solely on compassionate reasons. Petitioner gives a picture of a loving, dutiful husband but does not present evidence pertinent to the issue.

(4) A petition for a stay of execution submitted on 8 February 1948, by German Defense counsel, on the basis of newly discovered witnesses who could add new evidence was considered and a stay was recommended.

(5) On 5 April 1948, a petition was submitted by Franz Umstaetter which maintains KANSCHAU has been the victim of the witness Beck. Beck having bragged that he alone committed the deed. The petition contains no evidence and is opinion and argument. Review Board No. 3 considered same and recommended no action.

(6) A petition for review and clemency, dated 27 April 1948, submitted by German defense counsel indicates that in the opinion of petitioner prosecution witness Beck is insane, untrustworthy and unreliable; and further that Beck admitted full responsibility for the killing and only fell back on the defense of superior orders when he realized it would be to his advantage. War Crimes Boards of Review No. 1 and No. 3 considered the same petition and made separate reports. Board No. 1 recommended the petition not be entertained and filed. Board

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No. 3 concluded the petition had merit and should be entertained by the reviewing authority and recommended (a) a stay of execution (b) the death sentence be commuted to life imprisonment or (c) if the latter was not favorably considered, that Beck be examined by a neuro-psychiatrist. On 15 May 1948, the then Judge Advocate approved the report of Board No. 1. However, on 30 June 1948, the then Judge Advocate expressed his dissatisfaction with the various reviews which had been written and directed a psychiatric examination and after the report was received, directed another review board make comprehensive study and report.

(7) A petition, dated 31 July 1948, from German defense counsel, enclosed a sworn statement from Ludwig Losacher who had a conversation with Beck at Dachau while the latter was waiting to testify against KANSCHKE. Affiant relates Beck's account of the incident wherein Beck did not mention KANSCHKE nor any part he played in the killing. The affiant is a jurist and not related to accused either by blood or marriage, and the statement appears both reliable and plausible. A War Crimes reviewer at the time evaluated the statement on the basis that affiant was not an expert as to mental status of Beck, and concluded it had no probative value, nor presented any new matter for consideration. This reviewer cannot entirely agree with the latter conclusions. While no new evidence is submitted, the conversation with Beck set out in the statement does have some probative value and tends to corroborate and confirm the accused's contention he did not participate in the killing.

(8) A statement, dated 18 August 1948, submitted by the accused, contains complaints about his treatment while awaiting trial and during trial. It presents no evidence.

(9) On 20 October 1948, German defense counsel petitioned for a psychiatric examination of prosecution witness Beck alleging that head wounds have affected his mind and consequently this testimony is unreliable.

(10) On 14 October 1948, German defense counsel submitted a petition for clemency supported by 24 affidavits and 250 signatures testifying to the good reputation in his home community, church, etc. of the accused. The imposing array of testimonials while vouching for the good character of the accused presents no new evidence.

(11) German counsel submitted a petition, dated 11 November 1948, enclosing a plea for mercy from a Father Flossdorf who asks clemency in return for services rendered the U.S. No new evidence is offered.

(12) On 6 May 1950, the wife and niece of the accused petition for clemency and an early review of the case. Petition reiterates the good character of the accused and adds that due to his age (61) his health has suffered greatly while in prison.

(13) A review of the case by the "Simpson Board" in September 1948 recommended commuting the sentence to life imprisonment for the following reasons: "The prejudice on the part of these two principal witnesses (Beck and Weinreich) for the prosecution and their reluctance on the witness stand to positively identify the accused as the person who actually gave the order to shoot the flyer, was considered by WCBR No. 3 in its report dated 17 February 1948. This Board recommended commuting the sentence to life imprisonment. We concur."

4. CLEMENCY

a. Civilian Background:

The accused is now 61 years old and is married. He was a merchant before the war. As a reserve officer he served in both World Wars. His reputation in his home community is excellent and he was active in civic undertakings. He joined the Nazi Party in 1933. His health apparently is about what would be expected for a man his age in his circumstances.

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3. The Sentence:

As has been pointed out in at least three previous reviews of the case, there is definitely prejudice on the part of the prosecution's two principal witnesses, Beck and Weinreich. One Review Board, with which the then European Command Judge Advocate agreed, concluded the prejudice was in favor of the accused, and was motivated by a desire to help save a fellow German from the gallows. To say the least, it seems unwarranted and a peculiar twist of reasoning. To reason that two men sentenced to life imprisonment wanted to save the neck of a third, who by their own statements had gotten them into their unfortunate predicament and who allegedly was responsible for the act for which they are being punished, borders on the ridiculous. Such an assumption would seem to be based neither on logic nor common sense nor an understanding of human nature. Admittedly, there was prejudice, this has been recognized ever since the record was reviewed by the first Board of Review after trial, and confirmed by the "Simpson Board". The Commander-in-Chief recognized this on 20 December 1948 by noting on an action IRS that "In view of the prejudice (in their own interests) of principal prosecution witnesses and confirmation of Review Board by Simpson Board commutation to life imprisonment appears warranted. L. W. C."

After an exhaustive study of this case and the case of the U.S. vs. Beck, et al. (Case No. 12-1104) together with the pre-trial investigation, it is obvious to this reviewer that the prejudice which unquestionably existed was not in favor of the accused but, on the contrary, was in the interest of the prosecution witnesses Beck and Weinreich. Consideration of the following will make the latter conclusion more apparent. Beck and Weinreich were tried fourteen months before KANSCHAT and had had their sentences to life imprisonment approved. In their trial both maintained KANSCHAT ordered the killing, KANSCHAT was not there to deny it. Both testified in their own defense that KANSCHAT was present and ordered the flyer shot, but neither testified under oath. Testifying under oath against KANSCHAT both would not say KANSCHAT ordered the flyer shot, because they were not sure. When their own neckswere in jeopardy both were clever enough not to testify under oath, and could thereby shift blame to another whose whereabouts were unknown. When called to testify against KANSCHAT it is worthy of note that Beck again, apparently, had the same general plan in mind and objected to taking the oath. However, after a recess during which the prosecutor talked to him and after undoubted persuasion by the prosecutor, the oath was taken, whereupon Beck would not testify KANSCHAT ordered him to shoot the flyer. In the opinion of this reviewer, Beck would have testified otherwise if he had not been under oath, as would Weinreich. Both Beck and Weinreich were in a position to gain favorable clemency action if they could conclusively show KANSCHAT was guilty and had issued the order. To have the Court find that this was a fact, would bear out and confirm their own defense at their trial and tend to make them minor actors in the deed. It seems obvious that both prosecution principal witnesses should and would have no compunction about testifying to the truth against this accused.

KANSCHAT stated he was not in the room when the flyer was shot and did not order anyone to shoot him. After ordering all Wehrmacht to leave, he left also and the flyer was alive and unharmed. After an absence of from ten to fifteen minutes he returned after hearing a rumor the flyer was dead. During this absence he told the Hartensteins about the affair and that he left the pilot alive. Hartensteins corroborate this testimony. Another witness saw KANSCHAT come into the yard after the killing when the body was there. The prosecution did not point out that in Prosecution Exhibit No. 3 which was in evidence, Card Beck under oath in his statement of 1 June 1945 stated only he (Beck) the flyer and Weinreich were in the room when he fired the shot and "KANSCHAT was not in the room...and nobody was at the door looking in". Also asked if Bolm was in the room when he fired the shot Beck replied, "I saw only the political leader Weinreich". Weinreich, in a sworn statement, dated 1 June 1945, which was introduced in as Prosecution Exhibit No. 4, stated therein in reply to a question that KANSCHAT was not in the room, further on he didn't know. The weight of the evidence in the case leads to the conclusion that KANSCHAT was not in the room.

Whether the accused ordered Beck to shoot the flyer before he left the room is another question. Only Beck and Weinreich and the accused are in a

position to know the answer. KANSCHAT can be disposed of by his denial. Weinreich testifying in his own defense in U.S. vs. Beck (ibid), (R 71), in reply to a question by the Court about the order, testified, "the order was 'shoot that man' or 'shoot that guy', but I found that out only from the accused Beck." This together with the fact that he could not testify in this case that the order was given by the accused compels the conclusion that he did not hear it and knows nothing about it from his own knowledge. It also seems reasonable that if it had been given he would have heard it and would have so testified.

Only Beck, in his own defense, while not under oath, testified he heard KANSCHAT give the order. Under oath he could not and would not so testify against KANSCHAT. If he had heard it, and knew he had heard it, there is no reason to assume he would not have testified so under oath against KANSCHAT. As pointed out above, it was to his (Beck's) advantage to do so, as it would bolster his own previous testimony. The reason he so testified in his own case and would not in this case seems apparent and leads this reviewer to conclude that KANSCHAT did not order the flyer killed and further, that Beck, after committing the deed of his own volition, in the presence of Weinreich, manufactured the defense of superior orders and thereby incriminated KANSCHAT.

There is reason to believe that Beck and Weinreich alone are responsible and while they were in custody together manufactured a set of circumstances to provide a defense and implicate KANSCHAT who they thought had disappeared. Considering the U.S. vs. Beck, (ibid) and U.S. vs. KANSCHAT together, the evidence in the former is strong whereas in the latter the best that can be said is that it is weak and unconvincing.

I am of the opinion Wilhelm KANSCHAT was not present when the flyer was killed and did not issue an order to any other person to kill the flyer; and further that the sole responsibility for the killing is on the hands of Beck and Weinreich as this reviewer indicated in his review of their cases. After a thorough study over a three week period of the cases of all principals in this killing, I am firmly and unalterably convinced the sentence is not even supported by a preponderance of the evidence to say nothing about showing his participation beyond a reasonable doubt.

The record of trial shows this accused was placed in pre-trial confinement on 6 May 1947.

5. RECOMMENDATION

It is recommended that the sentence be reduced to the time served.

R. C. Miller
R. C. MILLER
Lt. Col. MSG

CONCURRING:

William J. Coleman
WILLIAM J. COLEMAN
Lt. Col. CMC

DISSENTING:

It must be admitted that, besides the accused, the only persons who actually know what happened in the room where the flyer was killed are the witnesses Beck and Weinreich, and their testimony, when considered together with their unsworn testimony given at their own trial and in their pre-trial statements, is so contradictory and conflicting that it is difficult to give credit to any testimony given by either of them except so much thereof as may be corroborated and clarified by other testimony and by known and proven facts and circumstances.

The one question necessary to answer is whether or not accused KANSCHAT

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gave the order to Beck which resulted in the flyer being killed or otherwise wrongfully encouraged, aided, abetted and participated in the killing.

Considering the question stated, it should be noted that KANSCHAT's own words and actions and attempts to cover himself immediately following the killing do not reflect the conduct of an innocent man. He explains his having gone to the room where the flyer was held and his having ordered all Wehrmacht soldiers to leave by saying that he was out rounding up these soldiers to make them get back into the air raid shelter; but, according to all testimony, he did not order the soldiers to return to the air raid shelter or to go to any other particular place-- he only ordered them to leave the room. Did he expect to get out and round them up a second time and then complete his order for them to go to the shelter? He has not explained this detail, nor did he take any further action to get the soldiers back to the shelter. It is not clear whether the air raid was over at the time, but it is clear that many civilians as well as the soldiers had left their shelters.

KANSCHAT told defense witness Theresa Hartenstein that he had left the flyer alive, but later had heard that the flyer had died from a spinal injury, presumably received in landing. He told about the same story to defense witness Ursula Hartenstein later in the evening, and appeared to receive satisfaction from the knowledge that the flyer had not died a violent death. Now, for what reason was KANSCHAT making such talk? By that time practically everybody in the town must have known that Beck had passed along the street with blood on his hands and had announced that he had shot the flyer -- see testimony of defense witness Ursula Rennert and others. By the undisputed evidence, KANSCHAT did see the flyer in the room standing upright and uninjured, and according to his own testimony, he returned some ten minutes later and saw the flyer dead out in the yard. He knew that the flyer had not died from a spinal injury, and he knew that no investigation was being made by the mayor into the death. Beck, according to the defense, had publicly announced how the flyer had died. Also, earlier in the afternoon and before he had talked to the Hartenstein women, KANSCHAT himself had asked defense witness Obermann if he, Obermann, knew who had shot the flyer. Clearly KANSCHAT was attempting to build for himself a defense against the day he foresaw when, "murder will out".

It is a well know fact that under German law and regulations in force at the time of this incident, prisoners of war were under the jurisdiction of the Army and Air Force, whichever first acquired custody. By military regulations Captain KANSCHAT, as the senior officer present, was responsible for the captured flyer as a prisoner of war. Defense efforts to show that the police were responsible just are not in accordance with known facts. Also, International Law and the Geneva Convention made KANSCHAT responsible for the prisoner of war.

It is also known that it was the policy of the Party, of which witness Weinreich was the local head (ortgruppenleiter), to get any captured flyers killed before they could be taken under protection by the military forces. Weinreich had evidently appeared on the scene to see that this policy was carried out, if possible. KANSCHAT, who was also a Party man, must have known of the Party policy and admitted having heard the Goebels propaganda on the radio. If it should be admitted, for argument's sake, that KANSCHAT left the room after having ordered the soldiers out, the only reasonable explanation for such action under the conditions there and then existing would be that he cleared the room of soldiers and left himself in order to give Weinreich a free hand to kill the flyer and knowing that such action was intended by Weinreich.

And, as has been pointed out, KANSCHAT was responsible for the prisoner of war, but he has not been charged with failure to protect the prisoner of war, as could well have been done, so we cannot hold his failure to act to protect the flyer against him. But, according to admitted facts, he did more than merely fail to act. His clearing the room and leaving himself under such circumstances was a direct and positive action which contributed to "wrongfully encourage, aid, abet, and participate in the killing....".

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Under consideration is the matter of clemency, and it is believed that any known fact and circumstance, from whatever source, may be considered in order to do justice. If this theory is correct, it is believed that taking into consideration, in addition to the record in this case, the record in the Beck and Weinreich trial, and the known fact that KANSCHAT was the man responsible by law and regulations for the flyer prisoner of war, coupled with his immediate efforts following the killing to build himself a defense, any doubt that KANSCHAT did give the order that resulted in the flyer being killed is removed, and must lead to the inevitable conclusion that Beck and Weinreich told the truth at their own trial, even though not under oath, when they testified that the order to kill the flyer was given by KANSCHAT. It is immaterial whether KANSCHAT remained immediately present in the room after he gave the order and until the fatal shot was fired.

As a matter of fact, it is immaterial whether KANSCHAT did directly give the order. He did take direct and positive action to clear the room of all persons who might be expected to interfere in behalf of the flyer and under circumstances where he must have known the flyer was to be killed, and such action on his part was a contribution to the killing. Under either theory taken KANSCHAT is just as much a part of the act and the result as if he had himself fired the fatal shot. The further fact that it was his moral and legal duty to have protected the prisoner of war takes away any reasonable basis for mitigation of punishment, and no grounds for clemency have been shown.

RECOMMENDATION: It is recommended that no modification be made of the approved sentence of Wilhelm KANSCHAT to imprisonment for life.

V. H. McClintock

V. H. McCLINTOCK
DA Civilian Attorney

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