and further:

> "It seems particularly inconsistent, therefore, for Sobell not to have introduced evidence, during the trial, of his kidnapping to contradict the Government's evidence of legal deportation" (p. 603, footnote 20).

THE PRESENT MOTION

The present motion and supporting papers charge (A. 11 et seq.):

1. The prosecution knowingly, wilfully, and intentionally introduced false and perjured evidence to establish that appellant was deported by the Government of Mexico. The prosecution knew that appellant was not deported or otherwise ousted by the Government of Mexico or its agencies. The prosecution knew that appellant was removed without the knowledge or consent of the Mexican Government. It was the prosecution itself which had planned, directed and participated in the illegal seizure and abduction of appellant, using the services of its agents in the United States and Mexico.

The prosecution and the witness Huggins long prior to the trial were informed by the Government of Mexico that it did not consent to or participate in appellant's removal. They had been advised by the Mexican authorities that appellant's seizure and abduction were unlawful and constituted a violation of Mexican sovereignty. Nevertheless, the prosecution used Government Exhibit 25A and Huggins' intentionally false and misleading testimony to prove that appellant's removal was effectuated by the Government of Mexico by means of a legal deportation.

2. The prosecutiom knowingly, wilfully and intentionally suppressed evidence which would have impeached this false testimony and would have disclosed its knowledge of the falsity of the evidence. It suppressed the fact that appellant was abducted by its agents without the knowledge or consent of the Mexican Government. Finally, it suppressed the fact that Huggins had been advised long prior to the trial that the notation "Deported from Mexico" on Government Exhibit 25A was false. The prosecution was impelled to suppress this evidence in order to enjoy the fruits of its illegal action, which otherwise would have been inadmissible.

3. Further, the prosecution, seeking to preclude a judicial inquiry into the facts, made false representations to the trial court. In opposition to the motion in arrest of judgment, the prosecution falsely represented that appellant was deported by the Mexican authorities. It attacked the truthfulness of appellant's affidavit in support of the motion in arrest of judgment which might have opened Pandora's box and led to the disclosure of the prosecution's illegal activities.

In its brief to this Court, the prosecution perpetuated the fraud of lawful deportation. It continued to suppress the fact and indeed denied that it was a party to appellant's illegal seizure.

THE FACTS

On June 22, 1950, appellant and his family left on a trip to Mexico (A. 21). Prior to departure they had obtained tourist cards from the Mexican Consul in New York City. They traveled by air, stopping at Dallas, Texas, where appellant registered certain personal effects with United States Customs officials to avoid paying duties upon his planned return (A.21, Exhibits 3, 4, 5). In going to Mexico appellant had not sought to avoid prosecution or apprehension by the criminal authorities nor was his trip in any way related to a purported involvement in any criminal activities. The authorities had not evidenced any desire to interview, let alone apprehend him, nor was he aware of any reason why they should. His departure from the United States was lawful and not surreptitious. His identity was not hidden (A. 16,21).

Appellant rented in his own name living quarters for himself and his family. On his person he carried numerous documents accurately reflecting his identity. Appellant planned to and would have voluntarily returned to the United States had he not been prevented from doing so by his unlawful abduction on August 16, 1950 (A. 21-22, Exhibits 7, 8, 9, 10, 11).*

* There was testimony that appellant, after being in Mexico a month, used aliases for a period of about ten days in traveling to Vera Cruz and Tampico. But by August 1, 1950, he had returned to Mexico City and openly resided with his family, using his correct name, until his abduction on August 16, 1950. At that time, appellant and his family

(cont'd on next page, footnote)

At the time of the trial appellant's knowledge of the circumstances of his seizure and removal from Mexico was essentially limited to the facts set forth above and in the affidavit in support of the motion in arrest of judgment.

After the introduction of Government Exhibit 25A and the testimony of Huggins, appellant proceeded on the belief that he was deported or otherwise ousted by the Government of Mexico at the request of the United States authorities. He concluded that the testimony of legal deportation by Mexico was unassailable, even though it may not have been done in accordance with normal procedure.

Subsequently, through the motion in arrest of judgment, appellant sought a hearing to obtain the facts with respect to the circumstances of his removal. Appellant in his brief to this Court on appeal from the original judgment of conviction indicated that he did not know the necessary facts relative to his seizure in Mexico.*

None of the allegations in the petition based upon facts dehors the record has been controverted by the appellee and hence must be accepted as true. United States v. Rosenberg, 200 F. 2d 666 (C.A.2).

These new facts obtained since the trial establish:

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cont'd:
were making plans to return to the United States and had obtained the requisite small pox vaccination.

Prior to appellant's abduction, the prosecution had no knowledge of his travels in Mexico or his use of aliases. This evidence was the fruit of the illegal seizure itself.

* The newly obtained evidence sustaining the present charge was obtained as a result of field investigations in Mexico which took more than a year to complete. Several journeys to Mexico were required. Mexican counsel was retained, witnesses were interviewed, and documents secured. In some instances it took months to find certain vital witnesses and trips had to be made to some of the most inaccessible parts of the country. It was only as a result of such work that the facts supporting the detailed allegations could be assembled.

1. The Government of Mexico did not deport appellant. This is attested to by the files and records of the Department of Migration in Mexico City as well as in Nuevo Laredo (A. 24-25, Exhibits 12, 13). Appellant was abducted by individuals who were employees of the Secret Service Police of the Federal District of Mexico, acting solely as agents of the prosecution, and not in their official capacity (A. 22). *

All deportations must be carried out by the Migration Department of the Secretariat of Gobernacion. In accordance with established procedures, deportations are carried out by officials of this agency during regular business hours between 8 A. M. and 6 P. M. Before putting an alien across the border, the immigration officials of Mexico give him certain documents, one copy of which is signed by the alien and retained by Mexico, advising him that he may not return under penalty of law. Deportations, summary or otherwise, must be instituted by written charges and all administrative actions are subject to judicial review.

Hence appellant's removal was clearly not effected by the Mexican Government, its agencies or authorities.

2. Appellant's removal was carried out without the participation, knowledge or consent of the Mexican Government. Upon learning, from United States news reports, of appellant's kidnapping, the Mexican Government instituted an investigation in Laredo and Nuevo Laredo and took certain steps to prevent a repetition of such an unlawful invasion of its national sovereignty. (A. 25).

3. The Mexican Government advised the prosecution and Government witness Huggins long before the trial that appellant was not deported or otherwise removed by that Government or with its sanction. Within a day of appellant's arrival in Laredo, Texas, Huggins and other employees of the United States immigration office at Laredo, Texas, were advised by Hector Rangel Obregon, Chancellor of the Mexican Consulate at Laredo, that appellant had not been deported. Obregon expressed

*In any event, the jurisdiction of this local police agency is limited to the Federal District of Mexico, whose geographical boundaries are essentially those of Mexico City. They have no power to act beyond these boundaries, nor are they authorized to act in any way in immigration matters. They are analogous to plainclothesmen of the New York City police department.

concern that the seizure and abduction had occurred without the knowledge or approval of the Mexican Government. (A.27).

This information was immediately transmitted to the prosecutors. At the very time Huggins was so informed by the Mexican Consulate, FBI agents John W. Lewis, Rex I. Shroder and Leo H. Frutkin were in Laredo, Texas, and in communication with Huggins. They had been sent from New York to Laredo at the direction of the prosecution in anticipation of appellant's abduction (A. 27-28).

FBI agent Lewis, who aided the prosecution throughout the pre-trial preparation, sat at the prosecutor's table throughout the trial (A. 28).

4. The prosecution itself, through its agents in the United States and Mexico, unlawfully planned, directed and participated in the unlawful seizure of appellant. Agents of the FBI in Mexico and employees of the United States Embassy in Mexico City participated in this illegal act. Hence the prosecution was fully apprised that appellant's removal was not effected by the Government of Mexico, and that he was not deported (A. 28-31).

The prosecution carried out the abduction in a secret and conspiratorial fashion so as to prevent knowledge and interference by the Government of Mexico until appellant was outside its borders (A. 34-35).

The FBI, at the behest of the prosecution, utilized its contacts in Mexico to devise a scheme to kidnap appellant without the consent of the Mexican Government and to deprive him of the opportunity of making his planned voluntary return to the United States. (See Paragraph Seventy-four of Petition, A. 36.) It recruited individuals in the employ of the secret police of the Federal District of Mexico to act in concert with American agents to seize appellant and bring him to the United States (A. 27, 28, 35).

On the afternoon of the abduction, Mexican and United States agents of the prosecution went to appellant's apartment house to discover his exact location (A. 28). Neighbors of appellant were told that he was wanted in the United States on a charge of kidnapping a child (A. 29).

Several hours after the kidnapping, appellant's domestic worker, Senora De Soto, was advised by one of the abductors that they were acting as agents and representatives of the United States* (A. 29).

Approximately two days after the kidnapping, some of appellant's abductors returned to the house in the company of an FBI agent and interviewed Senor Rios and his wife (A. 30). Within a period of ten days after the kidnapping, Rios was seen by the FBI on three occasions and taken to the United States Embassy for interrogation (A. 30). Within a month of the kidnapping, he was visited in Mexico at his place of business by prosecutors Roy Cohn and Irving Saypol in the company of an FBI agent (A.30). The FBI, in close cooperation with the prosecution, its local agents, and the United States Embassy in Mexico, continued its intensive investigation in Mexico (A. 38-39). Mr. Saypol acknowledged that he was fully advised of all of the circumstances of appellant's seizure (A. 28).

At the time of appellant's arrival in Laredo, Texas, at 3:45 A.M. on August 18, 1950, the Mexican agents of the prosecution handed over to the FBI the personal effects of appellant which included his tourist card and vaccination certificate ** (A. 32-33).

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* In searching the residence of appellant and his family and removing their personal effects, the agents took this woman's belongings also. She was advised that her possessions were being held by the United States Embassy and that she should go there to obtain them (A. 29-30).

** The personal documents seized from appellant bear the notation "R. I. S. 8/18/50", indicating their delivery to Rex I. Shroder, FBI agent from New York. None of the seized documents was returned to appellant prior to or during the trial. In 1954 and 1955 there was a partial return of appellant's personal effects (A. 33).

5. The circumstances surrounding appellant's delivery in Laredo, Texas, were such as to advise Huggins and the prosecution that appellant was not deported or otherwise removed by the Government of Mexico. Appellant's ouster occurred at three o'clock in the morning and was not effected by the immigration police of Mexico (A. 37). Appellant had not received or signed the necessary documents requisite for all deportees prior to leaving Mexico (A.38). The absence of formal notification by the Mexican Government to the United States Embassy and the immigration office at Laredo, Texas, as required by treaty between the two states, further indicated to Huggins and the prosecution that the Mexican Government did not deport appellant, and was not a party to his removal (A. 38). Further, Mexico sent a report of the abduction to its Embassy in Washington, D.C., which in turn made formal representations on the matter to the United States Government (A. 38).

6. The prosecution utilized its illegal seizure of appellant in Mexico to contrive the false evidence that appellant fled to Mexico and would not have voluntarily returned to the United States. The prosecution knew it had deprived appellant of the opportunity of making his planned return to the United States by illegally seizing him. It compounded its wrongful action by using it to prove that he did not intend to return voluntarily.

It is totality, the new evidence establishes the perjured and misleading nature of Huggins' testimony and the prosecution's guilty knowledge thereof.

THE PROSECUTION'S RESPONSE

The prosecution's answering affidavit by Paul W. Williams does not contest the sufficiency of the allegations. Appellee does not controvert any of the allegations of fact in the petition, nor does it submit any facts in opposition. Appellee relies upon the files and records of the case and maintains that they conclusively establish, without need for a hearing, that appellant is entitled to no relief.

Appellee in its affidavit opposing appellant's motion contends:

1. There was other evidence in the trial establishing appellant's guilt and flight from the authorities which is not challenged in the present motion.

2. While the challenged evidence of ouster by Mexico was relevant and material, it was not essential to the prosecution's case.

3. Huggins' testimony and Government Exhibit 25A merely established that appellant was forcibly removed from Mexico. Appellee claims that the evidence did not suggest or imply legal deportation by Mexico and hence was not false. Appellee's answer ignores the charge that the falsity also lay in the fact that appellant was abducted by the prosecution and that no Mexican authority had anything whatever to do with his removal.

4. Appellee asserts that the evidence alleged to have been suppressed was known or available at or prior to the trial. Appellee contends that all the facts upon which relief is presently sought were known and litigated in the motion in arrest of judgment. Hence it is claimed there are no new issues of fact and the record conclusively refutes appellant's contentions without need for a hearing.

5. Appellee contends that the prosecutor's representations to the court in the course of the argument on the motion in arrest of judgment that appellant "literally * * * was kicked out as a deportee" and that "the final act of deportation was effected at Laredo" were legally irrelevant in that they were made subsequent to the jury verdict and did not affect the decision of the trial court on the motion in arrest of judgment. Appellee further contends that the prosecutor's representations to the trial court by which he attacked the credibility of appellant's affidavit were not false.

P O I N T I

THE SUBSTANTIVE GROUNDS FOR RELIEF SET FORTH IN THE PRESENT PETITION ARE AUTHORIZED BY TITLE 28, UNITED STATES CODE, SECTION 2255.

A. The present petition rests basically upon three substantive grounds, any one of which would invalidate the judgment and sentence and require the court to grant the relief requested:

(1) That the prosecution knowingly, wilfully and intentionally used perjurious and false evidence.

(2) That the prosecution suppressed material evidence which was favorable to appellant and which would have impeached its case.

(3) That the prosecution knowingly made false representations to the court.

B. The use of testimony known by the prosecution to be false or perjured renders a conviction and sentence void for want of due process of law.

The first and basic ground for relief set forth in the motion is the charge that the knowing use by the prosecution of false and perjured testimony renders appellant's conviction and sentence void for want of due process of law. This charge, if sustained upon a hearing, subjects a conviction and sentence to collateral attack requiring the vacating of the original sentence and judgment.

> "That requirement [due process of law], in safeguarding the liberty of the citizen against deprivation through the action of the state, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. Hebert v. Louisiana, 272 U.S.312, 316, 317 * * *."

The importance of this principle to the preservation of an ordered system of law was incisively stated by Mr. Justice Frankfurter in Hysler v. Florida, supra, at 413:

"The guides for decision are clear. If a state, whether by the active conduct or the connivance of the prosecution, obtains a conviction through the use of perjured testimony, it violates civilized standards for the trial of guilt or innocence and thereby deprives an accused of liberty without due process of law."

C. The prosecution's suppression of evidence impeaching its case and favorable to a defendant renders a conviction and sentence void for want of due process of law.

The second ground for relief set forth in the petition is the charge that the prosecution suppressed material evidence impeaching its case, favorable to appellant, as well as evidence which would have established the prosecution's guilty knowledge of the falsity of evidence offered by it. This charge, if sustained at a hearing, likewise subjects a conviction and sentence to collateral attack.

The forthright repudiation of such conduct by prosecuting officials is required in the interests of law and decency. For, as was pointed out in United States ex. rel. Montgomery v. Ragen, 86 F. Supp. 382, 387 (D.C. Ill.):

"A prosecutor is supposed to be an impartial representative of public justice.* * * A prosecutor must, to be fair, not only use the evidence against the criminal, but must not willingly ignore that which is in an accused's favor. It is repugnant to the concept of due process that a prosecutor introduce everything in his favor and ignore anything which may excuse the accused for the crime with which he is charged."

D. False representations made to the court by the prosecution in a criminal proceeding render the conviction and sentence void for want of due process of law.

The third ground for relief upon which the motion rests is the charge that the prosecution made false representations to the court in the course of the original proceedings against appellant. The deliberate deception of either the court or the jury by the prosecution at any stage in a criminal

proceeding is so abhorrent to civilized norms of justice that it will render a conviction and sentence void for want of due process of law. Mooney v. Holohan and cases cited supra.

This principle established in Mooney obviously applies to representations made by the prosecution itself to the court at any stage of the proceedings. Misrepresentations to a court by a prosecuting official offend against the very heart of a system of impartial administration of justice. For, as the Supreme Court has pointed out in Berger v. United States, 295 U.S. 78 at 88,

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should to so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

The decision of the lower court justifying the actions of the prosecution in the instant proceeding disregards the serious questions of the administration of justice and the role of the prosecutor raised in the petition. In light of the standards enunciated by the federal courts, the lower court's decision cannot be permitted to stand.

P O I N T II

THE LOWER COURT FAILED TO APPLY THOSE PRINCIPLES OF LAW APPLICABLE TO A PROCEEDING PURSUANT TO TITLE 28, U. S. C., SECTION 2255.

The fundamental issue raised in this appeal is whether or not upon the files and records of the case and the present motion and supporting papers it was error for the court below to deny appellant a hearing. In refusing

to grant this relief, the district court's failure to apply those principles of law applicable to a proceeding pursuant to Title 28, U. S. C., Section 2255, warrants a reversal of the order appealed from herein.

A. The standards used in determining whether or not a hearing should be granted pursuant to Title 28, U. S. C., Section 2255.

Under Title 28, U. S. C., Section 2255, a district court is required to grant a prisoner a hearing unless, in the words of the statute, "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief."

Where a petition attacking a conviction and sentence as void raises factual issues outside the record, a hearing must be granted and the prisoner must be afforded an opportunity to prove these allegations in the course of a "judicial proceeding." Where legally sufficient allegations in the petition raise issues of fact, the decisions of the federal courts require that a hearing must be granted.

All allegations of the petition not controverted by the Government and not conclusively refuted by the record must be accepted as true in determining the legal and factual sufficiency of the petition. United States v. Rosenberg, 200 F. 2d 666 (C.A. 2).

In the present case the appellee does not challenge the legal grounds upon which the petition is based. Further the appellee does not controvert any of the allegations in the petition. But the appellee contends that the files and records of the case conclusively establish that appellant is entitled to no relief.

B. The lower court failed to apply the standards required by Section 2255 in ruling upon appellant's motion.

The statue requires that appellant be given a hearing "unless the motion and the files and records of the case conclusively show that the petitioner is entitled to no relief." The lower court significantly failed to state that findings adverse to appellant must be conclusively established by the files and records. In every

collateral attack charging knowing use of perjured testimony, the allegations based upon extrinsic evidence must be "inconsistent" with the files and records of the case. So, in the instant case, the new evidence establishing the knowing use of perjured evidence of "legal deportation" must be "inconsistent with the record." For this reason, the record cannot be relied on to resolve the issue. *

C. The lower court failed to accept as true and ignored the uncontroverted facts which establish appellant's right to a hearing.

Its opinion demonstrates that it refused to accept as true for the purposes of this motion the allegations based on evidence dehors the record and not controverted by appellee. Significantly, it refused to accept or consider for the purposes of this proceeding those new facts acquired since the trial of appellant, upon which appellant relies and which establish that the prosecution committed a fraud upon the court, appellant and the jury.

The lower court disregarded four basic and uncontroverted facts dehors the record:

1. The prosecution, through its agents in the United States and Mexico, kidnapped appellant and brought him to the United States, without the knowledge or consent of the Government of Mexico (A. 20-24, 28-32).

2. The Government of Mexico and its agents did not legally or illegally oust appellant from its territory, nor did it sanction his removal (A. 24-26).

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* The lower court commented:

> "Even if every one of the contentions as now raised by petitioner were to be sustained, it would not follow that he is innocent" (A.199).

Its comment is not germane. It is not the purpose of a motion under Section 2255 to litigate that question. Nevertheless, if appellant prevails herein, the conviction becomes a nullity, and he once again is cloaked with the presumption of innocence.

3. Prosecution witness Huggins and the prosecution itself were advised by representatives of the Government of Mexico that it had not had any part in removing appellant and that the prosecution's unlawful actions violated its sovereignty. (A. 26-28).

4. Appellant was unaware of these facts at the time of the trial (A. 20, 74).

These facts constitute the proof that the evidence of legal deportation was false and the prosecution knew it. These are the facts which were unknown to appellant at the time of trial and which the prosecution suppressed. These are the facts which establish appellant's right to a hearing and relief.

Yet it is these very facts which the lower court refuses to accept as true and totally disregards in its opinion. If these facts are accepted as true for the purposes of this motion, the decision below cannot stand and must be reversed.

The essence of the prosecution's fraud was that it intentionally, knowingly and wilfully used false evidence to establish that the Government of Mexico caused, sanctioned or participated in appellant's removal. The lower court argues that the tainted evidence did not import legal deportation by Mexico. Yet it is forced to recognize that the evidence imported governmental action by Mexico. But this, too, is false.

The lower court's opinion is based upon the erroneous premise that the Government of Mexico in some manner ousted appellant. It misstates appellant's contention to be that his deportation was improperly carried out by the Mexican Government and that hence the testimony of legal deportation was false. For example, the court states:

> "He asserts that when the government introduced evidence to show that he had been 'deported' from Mexico, this was subornation of perjury on the part of the prosecutors, as they then well knew that Sobell had not been deported in accordance with established Mexican procedures" (A. 201);

and further:

> "It is the petitioner's contention that Huggins perjured himself when he testified that Sobell had been deported as he then well knew that Sobell's seizure had been contrary to Mexican deportation procedure; and the prosecution was allegedly in possession of this information also." (A. 217-218).

In each instance the court misstated appellant's charge because it blandly ignored the facts set forth in the moving papers. Appellant does not suggest that the fraud related to irregularities in Mexican deportation proceedings--but that Mexico had nothing whatever to do with his ouster and that he was kidnapped by the prosecution.

The court inevitably made this error because it rejected ex parte the uncontroverted allegations of appellant. As is clearly demonstrated by the oral argument,* both the court and appellee assume that Mexico effected appellant's deportation.

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* "Mr. Williams: * * * The Mexican Government, I submit, has a perfect right to eject summarily a person there who is either disobeying its law or suspected of disobeying its law, and indeed it need not await the call of a friendly government against whom the accused is suspected of having committed treason for the normal, legal treaty-provided method of deportation. If it is the wish of the Mexican Government or the Mexican police to summarily eject an American citizen, it is their privilege to do it.

"The Court: Well the query is, does it alter the judgment or the prosecution if an agent of the Government is the demanding party or the party with whom the Mexican Government cooperates in the ejection of the defendant?" (A. 149-150).

And further:

"Mr. Williams: * * * Suppose there had been--I don't like to say a legal deportation because that assumes that the method used was not a legal deportation. I say both methods were legal at the option of the Mexican Authorities" (A. 157).

Appellant's motion alleges that the employees of the Secret Service Police for the Federal District of Mexico who kidnapped appellant were not acting in any official or governmental capacity (A. 22, 24-26). Rather, they were privately hired by the prosecution and acted solely as its agents in abducting appellant, and their actions were not sanctioned or authorized by any Mexican authority (A. 29). Yet upon oral argument, to prove the Government of Mexico deported appellant, appellee stated:

> "Mr. Williams: * * * and there is no denying that the Mexican Secret Police or Security Police are an arm of the authorities of the Mexican Government* * * " (A. 167).

If it is appellee's contention that the abduction was carried out on the authority of the Mexican Government, then it has posed an issue of fact which must be litigated in a hearing. In its answering affidavit appellee conspicuously failed either to affirm or deny that Mexican authorities effected appellant's removal. As a matter of fair play and in the interests of justice appellee should be required to respond to appellant's allegations.

The lower court disregarded all of the new and subsequently acquired evidence and sought to equate the issues and facts now posed to those presented in appellant's affidavit in support of the motion in arrest of judgment submitted five years ago. This device enabled the court to conclude that appellant had known of the evidence suppressed by the prosecution.

The section of the court's opinion purporting to summarize appellant's allegations (A. 201, 203) significantly omits all allegations save those in appellant's affidavit of April 4, 1951. The lower court could then declare:

> "The basic factual allegations set forth in Sobell's moving papers are not new to this court. Indeed, they were first raised five days after the verdict on a motion in arrest of judgment" (A. 200);

and further:

> "He argues, however, that although certain of these allegations have been made before, the legal consequences now urged as stemming from them have not been previously considered" (A. 200);

and finally:

> "It is clear that petitipner's present argument re jurisdiction is but a twice-told tale in new semantic guise. He seems to believe that by the mere device of changing attorneys and relabeling his claims he may return to court time after time with the same basic argument" (A. 208).

By assimilating the present petition to appellant's old motion in arrest of judgment, the lower court relieved itself of the burden of dealing with the new allegations. Consequently, the court also rejected ex parte appellant's assertion (A. 20, 74) that he did not have knowledge of the facts of the present petition at the time of trial and that, indeed, his ignorance was due to the prosecution's unlawful suppression.

In any event, appellant denies the prior knowledge imputed to him by the court and such denial is not conclusively refuted by the record. Hence, it was error to resolve this fact issue without granting a hearing.*

The lower court suggests that it could reject appellant's contentions as "hard to believe" and no more than "a figment of Sobell's imagination" (A. 220). But the court's personal disbelief and skepticism do not afford legal grounds for denying a hearing.

D. The lower court by disregarding the facts failed to appreciate the nature of the fraud and its impact upon the trial.

The lower court concluded that the facts supporting the present application could not have aided appellant in the trial:

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* Assuming, arguendo, that appellant knew the evidence was false, he is not precluded from now making a collateral attack upon learning that the prosecution knowingly used false and perjured evidence and suppressed impeaching evidence. Price v. Johnston, 334 U. S. 266; United States ex rel. Almeida v. Baldi, supra.

> "Dealing next with the contention that the prosecution should have brought out the facts regarding the alleged kidnapping during the trial--I cannot see in what way this would have been beneficial to Sobell, nor, quite obviously, could Sobell's trial attorneys, for they saw fit not to raise the issue before or during the trial. Even if this story might have created some sympathy for the defendant, it was incumbent upon the defense to raise the issue, if indeed the embellishments were not a figment of Sobell's imagination" (A. 220).

Having erroneously disregarded the significant averments of appellant in his motion for a hearing, the lower court obviously could not appreciate the nature of the prosecution's fraud and its impact upon appellant's trial.

The prosecution concluded that it was necessary to establish that appellant would not have voluntarily returned to the United States and was returned contrary to his will and over his objection. By this evidence it sought to show that appellant fled to Mexico to avoid apprehension. The purpose of the evidence was recognized by this Court. In view of the paucity of the other evidence against appellant, proof of guilty flight was essential to the prosecution's case.

Moreover, the prosecution realized that it could not introduce evidence of appellant's forced return unless it hid its illegal role and cloaked appellant's seizure in an aura of legality. If it had told the truth about the circumstances of appellant's return it would have revealed that his presence in the United States was unlawfully procured without the consent of the Government of Mexico and as a result of a kidnapping executed by agents of the prosecution. The legal consequences of this would have severely prejudiced, if not destroyed, the prosecution's case.

The prosecution's fears were well founded. Disclosure of the prosecution's abduction of appellant would have precluded introduction of all its flight testimony. This is so because the evidence of forced return was created and contrived by the prosecution and was the tainted fruit of its illegal acts. Under the doctrine of McNabb v. United States, 318 U. S. 332, such evidence could not be used to secure a conviction.

Appellant's seizure in Mexico and removal to the United States were obviously unlawful. See Rule 5 of the Federal Rules of Criminal Procedure and Title 18, U. S. C., Sections 1201, 3041, 3042, 3184. Use of the abduction as evidence to prove "involuntary return" would have come within the sanction of the McNabb doctrine. As Mr. Justice Frankfurter stated in that case (at 346):

> "But where in the course of a criminal trial in the federal courts it appears that evidence has been obtained in such violation of legal rights as this case discloses, it is the duty of the trial court to entertain a motion for the exclusion of such evidence and to hold a hearing, as was done here, to determine whether such motion should be granted or denied."

There can be little doubt that the policy underlying McNabb ("the history of liberty has largely been the history of observance of procedural safeguards") would have been applicable to this situation and would have raised substantial legal problems for the prosecution.

Moreover, the illegal search of appellant and his residence and the seizure of his personal effects, at the time of his abduction, may well have operated to exclude the remaining evidence of purported flight.* The evidence of a trip to Vera Cruz and Tampico and the use of aliases was obtained directly or from clues secured by the prosecution's agents in the course of their illegal search and seizure of appellant's residence and person at the time of the unlawful arrest.** Had appellant been advised of the circumstances of his seizure he could have moved for a hearing and upon such hearing had such evidence excluded.

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* Had the search and seizure been lawfully effected by agents of the Government of Mexico, the evidence might not have been excludable at the trial.

**Prior to appellant's arrest the prosecution was completely unaware of his trip to Vera Cruz and Tampico or the use of aliases.

Had the defense been aware that Mexico did not participate in or consent to appellant's seizure and abduction, it could have raised then, as it does now, a substantial question as to whether or not there was national jurisdiction to try appellant.

To make the flight testimony admissible, the prosecution had to prove that appellant's removal was lawful and authorized by the Government of Mexico. To import action by the Mexican authorities, it introduced the false evidence of legal deportation. This is the heart of the prosecution's fraud. Thus the seizure became "the natural capstone" of the flight evidence. As a concomitant, the prosecution was compelled to suppress evidence which would have exposed the fraud.

The flight testimony was used to corroborate the only witness who sought to implicate appellant in the conspiracy and as independent proof of appellant's membership in the Rosenberg-Greenglass conspiracy. Absend this testimony, there is a serious question whether the evidence was sufficient to go to the jury. It is certainly doubtful that the jury could have found the uncorroborated testimony of one witness sufficient to convict appellant.

The prosecution sought to accomplish its purposes in a manner least susceptible to refutation and exposure. Assistant Prosecutor Cohn first sought to prove the deportation by asking Government witness Rios the date the Mexican authorities deported appellant (R. 926). After being frustrated in this attempt, he sought to introduce Government Exhibit 25, bearing the notation "Deported from Mexico", without any testimonial support. When Huggins was finally produced, the prosecution assiduously avoided questioning him about the circumstances of appellant's removal.

Huggins' replies to the defense questioning reveal a studied attempt to reinforce the evidence of deportation by the Mexican authorities, without affording "a shred of evidence that the United States agent assisted the Mexicans". Neither the prosecution nor Huggins disclosed, in the face of persistent defense inquiries, that within a day of the seizure Huggins and the prosecution's agents had been contacted by the Mexican authorities and advised that Mexico had not deported or ousted appellant. Through every stage of the proceeding, the prosecution reinforced the fraud it had perpetrated on court and jury. When the possibility arose of a judicial inquiry into the circumstances of

appellant's removal, Prosecutor Saypol in unequivocal terms declared, "the final act of deportation was effected at Laredo" and that "literally he was kicked out as a deportee" (R. 1599).

Again before this Court the prosecution, recognizing the profound impact a disclosure of its wrongdoing would have upon the case, insisted that the testimony established lawful deportation by the Government of Mexico. The prosecution denied that it had illegally contrived or participated in appellant's removal from Mexico. Thus the prosecution practiced a deception on this Court (the Court of Appeals).

Obviously, had this Court been aware of the facts as now presented, it would have considered the many legal problems resulting therefrom. Unfortunately, the prosecution deprived this Court of such an opportunity.

The lower court's failure to consider the significant allegations of appellant's motion and to apply the proper statutory standards requires the reversal of its decision.

P O I N T III

THE ALLEGATIONS CHARGING KNOWING USE OF PERJURED EVIDENCE REQUIRE THAT A HEARING BE GRANTED PURSUANT TO TITLE 28, U. S. C., SECTION 2255.

The allegations of the petition establish that the prosecution knowingly, wilfully and intentionally used false and perjured evidence to secure appellant's conviction. Appellee does not challenge the legal and factual sufficiency of these allegations which far exceed the requirements established by the decisions of the federal courts.

The facts upon which the charge of knowing use of false and perjured evidence rests are not disputed by appellee in its answering affidavit, nor are they refuted by the record. The materiality and relevancy of the challenged evidence and its value to the prosecution in securing appellant's conviction is conceded. United States v. Rosenberg, supra, at 602.

The prosecution introduced oral and documentary evidence to establish that the Government of Mexico ejected appellant by legal deportation. This testimony was false. Appellant was not deported or otherwise ousted by Mexican authority. He was kidnapped by the agents of the prosecution in Mexico City and brought to Laredo, Texas.

The prosecution and its witness Huggins knew his testimony and Government Exhibit 25A were false and perjured. They had been advised by Mexican representatives long before the trial that Mexico had nothing whatever to do with appellant's removal. The prosecution nevertheless wilfully and intentionally used the perjured evidence to secure appellant's conviction.

The lower court's decision holds that the challenged evidence was not false in that it did not and was not intended to "create the impression of legal deportation" (A. 218).

The lower court misstates appellant's charge of perjury as relating to an irregularity in the procedure by which the Government of Mexico ousted appellant.* But the charge does not relate to the manner in which Mexico ejected appellant. Rather, the charge is that the evidence was false in attributing to the Mexican authorities any role at all in appellant's removal. The charge is that it was the prosecution which abducted appellant and then sought to hide its illegal action by imputing it to Mexico.

A. The files and records of the case conclusively establish that the challenged evidence served to prove legal deportation by Mexico.

This Court in its opinion affirming the original judgment of conviction held that Huggins' testimony and Government Exhibit 25A were "evidence of legal deportation", United States v. Rosenberg, supra, at 603.**

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*The lower court erroneously summarized appellant's allegations of perjury as follows: "Huggins perjured himself when he testified that Sobell had been deported as he then well knew that Sobell's seizure had been contrary to Mexican deportation procedure" (A. 217-218).

**This Court in its opinion enunciated the prosecution's purpose in introducing the evidence here at issue, stating: "When the government introduced evidence to show that Sobell had been legally deported * * *".

Significantly, the lower court's opinion avoids any reference to this Court's holding that the disputed evidence was proffered to establish that "Sobell had been legally deported from Mexico." Id.

Ignoring this Court's unequivocal finding, the lower court concludes that Huggins' testimony and Government Exhibit 25A were not false, contending that the evidence could not possibly suggest "legal deportation," but merely indicated that appellant was forcibly transported to the United States. The lower court's novel reconstruction of the trial and appeal would have us believe that when Huggins testified that appellant was "deported from Mexico," no one in the courtroom, including the jury could understand this to be "evidence of legal deportation" by Mexico. But such a reconstruction of the trial reckons without this Court's reading of the record.

The lower court categorically declares:

> "Patently, this does not show an attempt by the prosecution to create the impression of legal deportation as is now charged" (A. 218).

It is impossible to conceive how the record "patently" excludes the "impression of legal deportation" when three experienced jurists were left with precisely that impression. Thus it would appear that the lower court, in denying appellant's motion for a hearing, not only disregarded the evidence set forth for the first time in the moving papers. It also disregarded pertinent sections of the files and records of the case.

But even if the clear finding of this Court were to be disregarded, the holding below is erroneous and refuted by the record. Assistant Prosecutor Roy Cohn obviously referred to Mexican authorities in asking Rios when "Sobell was deported to the United States by the authorities" (R. 926). Mr. Cohn sought to introduce Government Exhibit 25 to establish "the circumstances of the departure of Sobell from Mexico to the United States" (R. 938). Defense counsel, recognizing that Mr. Cohn sought to prove action by the Mexican authorities, objected to its admissibility, in that the document was not competent to establish the act of another government (R. 938-940). Surely the prosecution was not trying to indicate by this document that appellant had been kidnapped by the prosecution's agents.

Seeking to support the prosecution's contention that appellant was deported by Mexico, Huggins testified that Mexican Secret Policemen acted in their official capacity in bringing appellant to Laredo.

In addition, Huggins testified that the exhibit was prepared because "regulations" required it in the case of "any person who is being deported from Mexico" (R. 1036). This testimony from an official of the Immigration and Naturalization Service could only impress upon the jury that the Government of Mexico had deported appellant. Similarly, the jury would give great weight to the conclusions of such an official, based on his personal "observation" (R. 1027, 1028). Obviously this was the "other proof * * * of deportation" (R. 926) promised by Mr. Cohn.

The lower court's suggestion that the sole purpose of Government Exhibit 25 was merely to establish that the Mexican Security Police had brought appellant to Laredo, Texas, is clearly refuted by the record.

Appellant's counsel objected only to one portion of Government Exhibit 25, the three words "Deported from Mexico" (R. 1029). Defense counsel declared they would not object to the admission of that side of the manifest which contained appellant's signature and the entry "Brought to immigration office by Mexican police." But the prosecution refused this offer and insisted that the entry "Deported from Mexico" on the other side of the document be admitted and made available to the jury.

The prosecution's insistence that the words "Deported from Mexico" not be excluded removes any question as to the purpose of submitting the challenged exhibit and Huggins' testimony. It clearly sought to do more than establish that appellant was forcibly returned to the United States by Mexican police.

Once again, in the argument on appellant's motion in arrest of judgment, the prosecution respresented unequivocally that "the final act of deportation was effected at Laredo" and that "literally he [appellant] was kicked out as a deportee" (R. 1599). Finally, the prosecution's statements in its brief to this Court manifest a clear "attempt * * * to create the impression of legal deportation".

All this was brought to the attention of the lower court in appellant's moving papers (A. 11-15, 69-71) and upon oral argument (A. 114-116, 124-125, 141, 142). Yet it chose to ignore these obviously pertinent portions of the record in rendering its opinion.

B. The prosecution knew that Huggins' testimony was perjured and intentionally misleading.

Huggins, in attempting to support the truth of the notation "Deported from Mexico" on Government Exhibits 25 and 25A, asserted under oath that the Mexican police, who brought appellant to Laredo, Texas, were acting in their "official capacity" (R. 1026).

Appellant's present motion demonstrates that this statement was false, as Huggins and the prosecution then and there well knew. The kidnappers of appellant were not acting as an "arm of the authorities of the Mexican Government" (A. 167), but solely as agents of the prosecution.

As has already been shown, Huggins' testimony and Government Exhibit 25A served to establish, in the context of the trial, that appellant had been legally deported by the Mexican authorities. This evidence indisputably impressed in the minds of all, including the jury, that appellant's ouster from Mexico was effected by Mexican, and not American, authorities.

The record of Huggins' examination is replete with references to "Mexican authorities" and "officials" on the strength of his testimony. Nowhere was an attempt made by the prosecution or the witness to correct this impression.*

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* Indeed, the trial court felt that any suggestion that authorities other than Mexican were involved in appellant's removal was too remote for consideration. When defense counsel sought to probe this possibility, the prosecution's objection was sustained.

"Q. Did you hear any of the FBI men say that they had gone into Mexico?

Mr. Kilsheimer: I object to that.

The Court: I will have to sustain that. We are getting very far afield" (R. 1036).

As the present motion proves, the prosecution consciously attributed appellant's removal to the Mexican Government in order to hide its own illegal role in the seizure and abduction.

In light of the averments of the motion, the lower court committed most grievous error in conclusively finding, without a hearing, that Huggins' testimony was not perjurious. At the core of the prosecution's fraud was the false imputation to the Government of Mexico of responsibility for appellant's seizure. Only thus could the prosecution obtain legal sanction for appellant's abduction and be able to introduce evidence of his "involuntary" return, as well as the other flight testimony which resulted from the illegal search and seizure. Huggins' perjured testimony was another step toward this fraudulent end.

The lower court, disregarding the totality of Huggins' testimony and other pertinent portions of the record, seeks to avoid the thrust of appellant's motion by relying on the witness' statement that the notation "deported from Mexico" was merely based upon his personal observation.

But the lower court's argument misses the point and ignores the uncontroverted facts. Assuming, arguendo, that Huggins, at the time of appellant's arrival in Laredo, honestly believed that appellant was deported by the Mexican authorities, within a day thereafter he knew the notation to be false.* He was so advised by representatives of the Mexican Government. But Huggins and the prosecution concealed and covered up this highly material fact which would have completely destroyed the significance of the testimony and Government Exhibit 25A.**

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* The notation "Deported from Mexico" was not on the manifest at the time appellant signed it (A.13).

** Cf. Title 18, U. S. C., Section 1001:

> "Whoever * * * conceals or covers up by any trick, scheme, or device a material fact * * * shall be * * * imprisoned not more than five years * * * "

Huggins' testimony does not refute appellant's charge of perjury but rather establishes that there was a premediated and carefully conceived plan to cause the court and jury to believe that the Mexican Government had legally deported or otherwise ejected appellant.

Moreover, it is self-evident that Huggins, by personal observation, knew that appellant was not "Deported from Mexico." The circumstances of appellant's arrival in Laredo rebutted any such conclusion. Appellant was delivered by persons other than Mexican immigration officials, at 3:45 in the morning (A. 37). He did not have the documents regularly given by Mexico immigration officials to deportees, nor were any of the normal deportation procedures followed.†

To suggest that Huggins, fully acquainted with these facts, believed as a result of his personal observation that the Mexican authorities had deported appellant, is patently incredible.

C. The lower court disregarded the significance of the false evidence and failed to apply the principles underlying Mooney v. Holohan.

On the basis of the record, it was impossible for the lower court conclusively to determine that the jurors could not consider the tainted evidence to be proof of legal deportation by the Government of Mexico. The lower court conceded that such an inference would have been highly prejudicial to appellant.

> "* * * indeed, it would hurt you if they established that there was a legal deportation because then it would rise to the heights of having a legal adjudication" (A. 121).

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† By treaty between the United States and Mexico (Article VII, Convention between the United States and Mexico to Prevent Smuggling and for Other Purposes, signed at Washington, December 23, 1925. U. S. Treaty Series No. 732) the United States Embassy is advised of deportations by the immigration officials in Mexico. Concurrently the Mexican consulate and the United States immigration officials at the point of entry are notified. In the instant case, none of these standard procedures was followed.

Clearly, such a conclusion would have given the jury the impression that Mexico had oredered appellant's expulsion after making a determination of wrongdoing on his part. In the context of the prosecutions attempt to prove guilty flight, the challenged evidence had even more significance. It could only mean that the Government of Mexico had decided to expel appellant and deliver him to the federal authorities because he had either (a) entered Mexico illegally in the course of flight, (b) while in Mexico violated its laws, or (c) been adjudged by Mexican authorities to be a fugitive from justice. The false evidence was pregnant with such prejudicial inferences, all of which bolstered the prosecution's theory of guilty flight.

As set forth in Point II, supra, the prosecution, in order to hide its illegal seizure of appellant, tendered evidence of deportation to avoid an inquiry into the circumstances of his removal. Otherwise the prosecution could not have used the illegally manufactured evidence of "involuntary" return. Nor could it have used the evidence it secured as a result of its illegal search and seizure of appellant's residence and person.

Moreover, the purpose of the prosecution's fraud was to use the contrived testimony as the "natural capstone" of its flight evidence. This evidence did more than negative a possible mistaken inference of voluntary return. It established that appellant did not want to return and was taken into custody only because he had been seized by the Mexican authorities and brought to Laredo, Texas.

The trial court, in its charge to the jury, recognized that such was the purpose of Government Exhibit 25A and the testimony in support thereof, saying that appellant:

> "was apprehended only after being delivered to the United States by the Mexican authorities" (R. 1559).

In its brief to this Court the prosecution stated (p.66):

> "Thus, proof that his return was involuntary, in conjunction with proof of his activities in Mexico, tended strongly to show that his trip

to Mexico was prompted by a desire to escape prosecution. As such it was persuasive evidence of his consciousness of guilt."

But the circumstances of appellant's return could be "persuasive evidence of his consciousness of guilt" only if they imported that he would not have voluntarily returned. It is obvious that such was the prosecution's purpose, and such was the effect of the false evidence.

The prosecution knew that appellant's trip to Mexico was not surreptitious and could not connote guilty flight. By adducing evidence that appellant would not voluntarily return and therefore had to be deported, the prosecution distorted the innocent nature of his lawful departure from the United States. Cf. United States v. Rosenberg, supra, at 602. Absent the false evidence, the other "flight" testimony had little probative force and could not have established that appellant's trip to Mexico was ab initio for the purpose of flight.

Had the prosecution merely sought to negative any inference that appellant voluntarily returned to stand trial, it could have done so by telling the truth.

It would have been impossible then for the jury to conclude that there had been an adverse "legal adjudication" by Mexico. Had the truth been told, the jury would have known that appellant did not refuse to return voluntarily to stand trial. On the contrary, the truth would have disclosed that the prosecution had denied appellant the opportunity to return voluntarily.

The prejudicial nature of the false evidence underscores the fraudulent action of the prosecution. It makes even more necessary that the wrong be undone by granting appellant a hearing and the ultimate relief.

No court can conclusively resolve the impact of false evidence on a jury. For this reason, a court will not weigh the extent of prejudice when a prosecutor knowingly, wilfully and intentionally uses false evidence. As stated in Coggins v. O'Brien, 188 F. 2d 130, 139 (C.A. 1):

"* * * the burden is not on the petitioner to show a probability that in the jury's deliberations the perjured evidence tipped the scales in favor of conviction. If the prosecutor is not content to rely on the untainted evidence, and chooses to 'button up' the case by the known use of perjured testimony, an ensuing conviction cannot stand, and there is no occasion to speculate upon what the jury would have done without the perjured testimony before it."

Our nation has a vital interest in guaranteeing that no prosecuting official may corrupt the judicial process or taint the administration of justice by contriving a conviction through the knowing use of false and prejudiced evidence. The corrupting effect on our democratic structure of law is so great that the courts have resolved, regardless of the guilt or innocence of a defendant, that the interests of society require the nullification of such a tainted conviction.

The lower court suggests that appellant may have known that he was not legally deported.* It therefore concludes that he is estopped from collaterally attacking his conviction after learning subsequently that the prosecution knew this evidence to be false. The lower court utterly failed to recognize the purpose or meaning of Mooney v. Holohan, supra, or the concept of due process of law. It disregarded the clear obligation of a prosecutor in a criminal proceeding. See Berger v. United States, 295 U.S.78. How else can one explain the lower court's comment:

"What difference would it have made at that point, whether it was knowing or not. You could have litigated perjury" (A. 164).**

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* As set forth in appellant's moving papers (A. 20, 74), and discussed more fully in Point IV, infra, appellant did not know that he had not been removed by the Mexican authorities and that the prosecution was fully aware of the falsity of the evidence.

** See also (A. 137):
"Mr. Perlin: Your Honor, it doesn't make a bit of difference--talking about good faith, once the prosecution uses false testimony, knowing it to be false, the courts do not say 'This is a game of chance, that you can let them go unchallenged.'
"The Court: That is right. The defense must challenge it."
And further (A. 165): (cont'd next page, footnote)

One is constrained to conclude that the lower court did not give the necessary regard to the criteria of a fair trial and the decent and civilized norms of conduct encompassed within "due process of law." It failed to insist that the prosecution observe the principles enunciated in Berger v. United States, supra.

P O I N T IV

THE ALLEGATIONS CHARGING THE PROSECUTION SUPPRESSED EVIDENCE REQUIRE THAT A HEARING BE GRANTED PURSUANT TO TITLE 28, U. S . C., SECTION 2255.

The petition alleges that the prosecution suppressed evidence which would have impeached a vital portion of its case against appellant. The prosecution suppressed evidence which would have established (1) that its agents illegally seized and abducted appellant; (2) that the Mexican Government in no way participated in or authorized this act; and (3) that representatives of the Mexican Government on at least two occasions advised the prosecution that Mexico did not sanction its illegal actions (A. 26-39).

This suppressed evidence would have impeached the prosecution's testimony that appellant was legally deported or otherwise ousted by the Mexican authorities. It would have refuted the prosecution's contention that appellant intended to remain beyond the reach of the federal authorities. It would have shown that the prosecution knowingly deprived appellant of the opportunity to make his planned voluntary return to the United States.*

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cont'd: "The Court: * * * What I am saying is that you sit at counsel table and you know that perjury is being committed, whether the government is a conspirator with the perjurer or not, but you know that perjury is being committed, can you sit back and permit that perjury to go to the jury unchallenged, then come back and show perjury?"

* Thus the nature of the suppressed evidence supports appellant's charge that the prosecution intended to prove legal deportation. It suppressed precisely those facts which would have refuted any inference of ouster by the Mexican authorities. The suppression was an integral part of the prosecution's knowing use of perjured evidence.

Regardless of whether the prosecution knowingly used perjured evidence, its suppression of such highly significant facts constitutes independent legal grounds for vacating and setting aside the judgment of conviction. For apart from the falsity of its evidence, the prosecution by such suppression distorted the meaning of appellant's trip to Mexico and intentionally misled the jury to draw erroneous conclusions concerning his removal.

A. The present petition is based upon facts unknown to appellant at the time of the trial.

The lower court contends that appellant must have been fully aware of the suppressed evidence because he "knew that this alleged illegal seizure was highly irregular" (A. 219). The court further asserts that it is "hard to believe" that appellant did not know the "facts showing that the FBI had instigated this procedure as is charged now" in light of his assertion in his pre-sentence affidavit that "an FBI agent was waiting for him on the Mexican side" (A. 220).*

Patently, appellant's charge of suppression does not rest merely upon the irregularity of his seizure or FBI instigation. It is the suppression of the principal facts that the prosecution abducted appellant and that the Mexican authorities neither participated in, sanctioned or knew of his removal, which entitles appellant to relief. Appellant did not know, among other things, the total lack of Mexican association with the events described. Only by ignoring these operative facts could the court come to the erroneous conclusion that "the basic factual allegations set forth in Sobell's moving papers are not new * * * " (A. 200). Only thus could the court equate the present petition with appellant's affidavit in support of the motion in arrest of judgment.

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* The court's conclusion Here is contradicted by the prosecution in its original brief to this Court, which commented on this very point as follows:

> "From this it may be inferred that the Mexican authorities had alerted the FBI to expect Sobell's arrival, but it by no means follows that the Bureau was the instigator of Sobell's ouster."

But that affidavit merely described how he was physically seized and transported to the International Bridge at Laredo, Texas, where he was met by an agent of the FBI. All the other facts set forth in the petition relating to appellant's seizure and the subsequent events (A. 24-31) were totally unknown to appellant at the time of trial. Clearly, appellant's pre-sentence affidavit did not establish that it was the prosecution which had abducted him without the consent of the Government of Mexico.

Moreover, the record refutes any suggestion that appellant had knowledge of the suppressed evidence. In the argument on the motion in arrest of judgment, appellant's counsel proceeded on the assumption that the Government of Mexico was a party to the seizure. He had no evidence to the contrary. Hence he asked for a hearing to obtain information concerning the circumstances of appellant's removal, and the respective roles of the prosecution and of the Mexican authorities (R. 1598). In appellant's brief to this Court he reiterated his request for a hearing to determine what had transpired, stating that "the facts are equivocal" (at p. 65).

A reading of the argument on the motion in arrest of judgment and of appellant's brief to this Court suggstes no more than a conjecture on his part that the FBI Had acted illegally in conjunction with the Mexican Government to obtain his expulsion. On their face, defense counsel's hesitant and equivocal manner in raising this suspicion in the final moments of the trial and his plea for the aid of the court to secure the facts, manifest appellant's ignorance.*

And this is not surprising. Appellant could not conceive that the prosecution would knowingly use perjured evidence and suppress the facts. The testimony was vouchsafed by the United States Attorney. Government Exhibit 25A was authenticated as a record of the United States Government. And evidence was presented by an employee of the Department of Justice.

Nor could appellant be expected to have obtained the full story of his removal from Mexico to rebut Huggins'

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* In its brief to this Court, the prosecution made much of the fact that appellant could not produce "a scintilla of evidence" to show wrongdoing on its part.

testimony and Government Exhibit 25A. He was incarcerated continuously from the time of his arrival in Laredo and he had neither the facilities nor the funds to institute an investigation. Appellant could not foresee that the prosecution would use the circumstances of his removal as proof of flight or that it would contend that he had been legally deported by Mexico. The first inkling appellant had of this was during the examination of Rios and the very next day Huggins took the stand.

Appellant alleges in his petition that he did not have knowledge of the evidence suppressed by the prosecution. Appellee contests this fact. The files and records of the case support appellant's contention. They do not conclusively establish the contrary. Hence, it was error for the lower court to resolve this issue of fact without granting appellant a hearing. Where allegations that a conviction and sentence are void raise factual issues outside the record, a hearing must be granted. See Commonwealth of Pennsylvania ex rel. Herman v. Claudy, and cases cited in Point II, supra.

Even if it were to be assumed that appellant had some knowledge of the prosecution's role in the seizure, to sustain the lower court's decision one would be required conclusively to find that appellant obtained no new evidence since the time of the trial bearing on that matter or serving to establish the prosecution's misconduct at the trial. But there is no basis for such a finding and therefore appellant must be afforded the relief sought.

The newly acquired evidence, unlike the affidavit supporting the motion in arrest of judgment, clearly establishes the falsity of Huggins' testimony and Government Exhibit 25A, as well as the prosecution's misconduct at the trial.

The lower court's suggestion that appellant's present contentions are belated and that therefore he is estopped by passage of time from obtaining relief has no foundation in law. The doctrine of laches or waiver has no application to a proceeding in the nature of a writ of habeas corpus. As Judge Fahy stated in Farnsworth v. United States, 232 F. 2d 59 (App. D. C.), relying in large part upon the decision of this Court in United States v. Morgan, 222 F. 2d 673:

"If a defendant without good reason waits a long time before asserting his claimed right, with the consequence that many witnesses are dead, he might have difficulty maintaining his burden of proof, or a heavier burden of proof might be imposed upon him. See United States v.Morgan, 222 F. 2d at page 675. But where the fundamental constitutional right has been denied, an accused should not be precluded from relief because he cannot satisfy a court that he had good cause for any delay in seeking it. 'To permit a defense of laches to the writ would, in effect, denude it of one of its essential characteristics --the power to hurdle a time factor.' Haywood v. United States, D. C., S. D., N. Y., 127 F. Supp. 485, 488."

To suggest that appellant may not now obtain relief after securing the evidence of the prosecution's wrongful actions pays scant regard to the concept of due process. The lower court might have been less concerned with the diligence of appellant and directed its attention to the reprehensible acts of the prosecution.

B. Appellant is not barred from relief because he did not testify or adduce evidence relative to his removal from Mexico.

The lower court holds that since appellant did not testify or adduce evidence to controvert the prosecution's proof of legal deportation, he is now precluded from collaterally attacking the judgment of conviction.

The error of the opinion is obvious. Since appellant was unaware of the suppressed evidence, he was plainly unable to present it.

Where the prosecution consciously suppresses relevant evidence which would have impeached its case, the trial is invalid. The mere fact that a defendant could have cast some doubt on the prosecution's case, does not validate the trial.

In this case, appellant could only testify to the fact set forth in his affidavit supporting the motion in arrest of judgment. His testimony could not have refuted the challenged evidence of deportation by the Mexican authorities, even if he

had been convinced of its falsity. At most he could have suggested that the Mexican authorities in effecting his ouster did not comply with their internal laws and that the FBI knew of his ejection by the Government of Mexico. On the other hand, the suppressed evidence, known only to the prosecution, would have completely refuted the contention that appellant was legally deported.*

Had appellant characterized the testimony of Huggins, an official of the Department of Justice, as false, and Government Exhibit 25A, a certified document from the files of the Government, as inaccurate, without being able to present clear and convincing evidence in support thereof, the jury would not have believed him and disregarded the rest of his testimony. Undoubtedly his contention would have been characterized by the prosecution as "a figment of Sobell's imagination" (A. 220) and "fictional fantasies" (A. 222).

Appellant faced the choice of testifying without referring to this portion of the prosecution's case and therefore tacidly admitting its accuracy, or prejudicing his case by contending it was false. Hence the improper suppression of evidence substantially prejudiced appellant's defense.

The lower court has equated the great responsibility of a prosecutor to conduct a fair trial with the non-existent obligation of a defendant to take the stand and refute fraudulent evidence. Such a concept has no sanction in law and cannot be reconciled with the most rudimentary concepts of due process. It would convert the search for truth and justice into a game of chance.

P O I N T V

THE PROSECUTION PRACTICED A DECEIT UPON THE TRIAL AND APPELLATE COURTS.

A. The prosecution knowingly made false representations to the trial court.

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* Appellant's wife could say no more than appellant. Her testimony would have been attacked as biased and motivated by a desire to protect her husband.

In the last stages of the proceeding appellant submitted an affidavit in support of a motion in arrest of judgment, urging the court to hold a judicial inquiry to determine whether or not it had jurisdiction over his person (R. 1598).

The prosecution, taking advantage of appellant's limited knowledge of the circumstances, sought to prevent a hearing by asserting that the affidavit was false and hence should not be considered. Thus Mr. Saypol stated:

> "I submit to your Honor that the verity of what counsel has argued is as feigned as Sobell's defense, as counsel's seeming vehemence, as the nature of the defense, and the course that was pursued in an attack on the prosecutor. Two things I will concede: Mr. Phillips' statement that he is not familiar with the facts, and that is evident from my own experience in Mexico City * * * " (R. 1598).

Mr. Saypol vigorously rejected any suggestion that the FBI may have acted improperly and reaffirmed the false evidence of legal deportation by Mexico. He declared that appellant "literally * * * was kicked out as a deportee" and that "the final act of deportation was effected at Laredo" (R. 1599).

Seizing upon appellant's obviously innocent error of calling his tourist card a "visa",* Mr. Saypol attacked the credibility of his affidavit and sought to give the impression that appellant had entered Mexico illegally in the course of flight. Mr. Saypol stated:

> "This very affidavit contains a falsehood in the statement that there were exhibited amongst other things to the Mexican authorities visas" (R. 1598).

The prosecution knew just what appellant meant since his tourist card was in its possession, a fact it failed to mention to the court. Appellant's present motion demonstrates that his affidavit of April 4, 1951,

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*Appellant's counsel made the same unintentional error in the course of summation.

was true, and that the prosecutor's statements were false and misleading.

The lower court maintains that the prosecutor's statement that appellant "literally * * * was kicked out as a deportee" was taken out of context (A. 225). This is simply not so, as a reading of the whole statement will show. The lower court failed to relate this remark to Mr. Saypol's immediately preceeding statement that "the final act of deportation was effected at Laredo." Moreover, the lower court again did not consider the many attempts of the prosecution throughout the trial to establish that the Government of Mexico effected appellant's ouster.

The lower court's decision rests essentially upon the contention that the prosecutor's statements did not influence its decision in ruling on appellant's pre-sentence motion.* But such an argument reckons without the record of the case. Even at that late stage of the trial, full disclosure of the facts may well have provided grounds for setting aside the jury verdict. Hence, the prosecution was impelled to make these false statements, even though it may have been confident that appellant could not successfully contest personal jurisdiction.

The present case more than adequately demonstrates why prosecution misconduct at any stage of a proceeding cannot be left unchallenged. A defendant is entitled to due process at every stage of a proceeding, and even after a jury verdict is returned.

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* The lower court declares that "any possible harm done was negatived by the fact that petitioner has here been given an opportunity to relitigate in full the questions he raised on that first motion" (A. 225). But one of the principal grounds tendered for denying both this and the companion motion is that the matter had been litigated and resolved before.

B. The prosecution's assertion that appellant was lawfully deported by Mexican authorities constituted a deceit upon this Court (The Appeals Court).

This Court in reviewing appellant's conviction concluded that Huggins' testimony and Government Exhibit 25A constituted "evidence of legal deportation" and established that appellant was "legally deported from Mexico". United States v. Rosenberg, supra, at 603.

The prosecution, to perpetrate its fraud and safeguard the conviction from judicial attack, sought to impress upon this Court that such was the meaning of the challenged evidence. A reading of the prosecution's brief conclusively demonstrates that it sought to establish in the minds of this Court that appellant had been legally deported by the Mexican authorities and that the agents of the prosecution had in no way unlawfully participated in or instigated his seizure and removal to the United States.

The undisputed allegations of appellant's present motion clearly establish that the prosecution knew such arguments to be false and spurious.

We suggest that the prosecution's wrongful actions estop the prosecution from now maintaining that the tainted evidence did not serve to prove legal deportation.

We have already indicated the nature of the legal problems which the prosecution would have faced in the event that the true circumstances of appellant's removal had been disclosed. The prosecution misled this Court and sought to prevent consideration of those legal issues raised by appellant's conviction.

An examination of the decision of this Court affirming the conviction indicates the uniquely prejudicial effect of the prosecution's wrongdoing. In considering the admissibility of Government Exhibit 25A, the Court concluded that it was relevant to support the conclusion that appellant's trip to Mexico was ab initio for the purpose of flight (at 602).

The prosecution used this evidence and the trial court recognized it as independent and corroborative proof to establish appellant's membership in the Rosenberg-Greenglass conspiracy.

The trial court in charging the jury, stated:

> "To determine whether Morton Sobell was a member of the conspiracy you are only to consider the testimony of Max Elitcher, William Danziger and the testimony relating to the defendant Sobell's alleged attempt to flee the country" (R. 1560).

The lower court conspicuously failed to note that the writer of the opinion on appeal, Judge Frank, dissented from the majority view on the grounds that the trial court erred in failing correctly to charge on the question of whether or not appellant was a member of the Rosenberg-Greenglass conspiracy.

The majority of this Court contended that the jury could find on the basis of the evidence that appellant was a member of the "one giant conspiracy" and that hence the trial court correctly charged the jury. Judge Frank, however, maintained that, "The jury should have had the opportunity to choose between the inferences and to decide whether he actually joined the larger conspiracy" (at 601).

Evidence of flight to Mexico, in light of the trial court's charge, must have been considered by the reviewing court in determining the sufficiency of the evidence against appellant. It obviously related to the question of whether the jury should have been charged on the two-conspiracy theory.

But whether or not in the absence of the prosecution's false argument, another judge would have associated himself with Judge Frank's dissent or reversed the judgment of conviction on other grounds, is besides the point. When a prosecutor practices a fraud or deceit upon an appellate court, the argument that it may not have adversely affected the defendant will be given no weight. See Hazel-Atlas Glass Co. v. Hartford-Empire Co. supra.

In this case, Hartford-Empire had used contrived evidence in a patent infringement suit against Hazel-Atlas. The suit was dismissed, but the appellate court, referring inter alia to the challenged evidence, reversed the

judgment. Upon consequently learning the spurious nature of the evidence, Hazel-Atlas asked the Court of Appeals to vacate its judgment. The motion was denied on the grounds that this evidence was not basic to the decision. Mr. Justice Black, in reversing the decision of the Court of Appeals, stated (322 U. S. at 246-247):

> "Whether or not it was the primary basis for that ruling, the article did impress the Court, as shown by the Court's opinion. Doubtless it is wholly impossible accurately to appraise the influence that the article exerted on the judges."

Mr. Justice Black further held that the defrauding party was estopped from disputing the effectiveness of the evidence. One of the defenses was that the evidence may have been improperly contrived but nevertheless was true. The Supreme Court stated:

> "Truth needs no disguise. The article, even if true, should have stood or fallen under the only title it could honestly have been given--that of a brief in behalf of Hartford, prepared by Hartford's agents, attorneys and collaborators" (at 247).

The Supreme Court expressed the rationale underlying its decision in replying to the argument that the complaining party had failed to demonstrate sufficient diligence, stating (at 246):

> "But even if Hazel did not exercise the highest degree of diligence, Hartford's fraud cannot be condoned for that reason alone. This matter does not concern only private parties. There are issues of great moment to the public in a patent suit.* * * Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an inquiry to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."

A fortiori, the public interest in not permitting the corruption of the administration of the criminal law requires in the instant case a judicial correction of the prosecution's abuse of process and office.

In the words of Mr. Chief Justice Warren, the prosecution by its action

> "has poisened the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity. * * * If it [the Court] has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity."*

In accordance with the ideals of American justice and the demands of due process enunciated by Mr. Chief Justice Warren, the decision of the lower court should be reversed and a hearing granted or in the alternative this Court should vacate its order affirming appellant's conviction and direct that a judgment of acquittal be entered.

CONCLUSION

It is particularly true in this case that the ability of our courts to recognize and undo wrong, a characteristic of our democratic tradition, will do great service to our nation and further enhance the prestige of our courts. Mr. Justice Frankfurter has pointed out:

> "Perfection may not be demanded of law, but the capacity to counteract inevitable, though rare, frailties is the mark of a civilized legal mechanism."

Our heritage requires that questions concerning the corruption of justice be brought to the attention of the courts, where they will be accorded the most careful scrutiny with all of the protections of a judicial hearing. The fullest litigation of such questions is in the highest traditions of the bar and the courts.

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* Mesarosh v. United States, supra.

By denying appellant a hearing on the present charges, the lower court does not do justice to our courts or our country. If appellant fails to prove the charges, his contention will fall. If he prevails, justice requires that his conviction be vacated.

As the Supreme Court recently held:

> "The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts.* * * Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted."

Our nation cannot tolerate appellant's conviction based upon fraud. The strength and vitality of our country and its responsible role in the world require the repudiation of conduct inimical to the impartial administration of justice. In the words of Mr. Chief Justice Warren:

> "The dignity of the United States Government will not permit the conviction of any person on tainted testimony. * * *
>
> "The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them."

The decision of the lower court should be reversed and appellant should be granted a hearing, or in the alternative, the order of affirmance of the original judgment of conviction should be vacated and a judgment of acquittal entered.

Respectfully submitted,

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Abridged Copy of
Supplementary Brief Filed
With the U. S. Court of Appeals
In behalf of Morton Sobell

UNITED STATES COURT OF APPEALS

For the Second Circuit

October Term, 1956

No. 24300

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

against

MORTON SOBELL,
Defendant-Appellant.

On Appeal from an Order of the United States District Court for the Southern District of New York

BRIEF FOR MORTON SOBELL ON SUPPLEMENTARY MOTION

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STATEMENT OF THE CASE

On May 25, 1956, appellant, pursuant to Title 28, U. S. C., Section 2255, moved for a hearing and, upon the hearing, for an order vacating and setting aside the sentence and judgment of conviction on the grounds that the sentence was imposed in violation of the Constitution and laws of the United States and that the trial court was without jurisdiction to render the judgment of conviction and to impose the sentence. This motion is a companion to appellant's motion of May 8, 1956, the denial of which is concurrently being appealed (No. 24299).

The present motion raises, essentially, the total want of national jurisdiction in the United States and its domestic courts to try appellant and to impose sentence, as a result of gross violations of the Treaty of Extradition between the Governments of the United States and Mexico (31 Stat. 1818).

A. The petition.

The appellee failed to controvert any of the facts contained in the petition and exhibits. Accordingly, for the purpose of this appeal these facts will be deemed to be true.

We summarize here the basic operative facts upon which the petition rests.

1. Appellant is unlawfully imprisoned in the Alcatraz Penitentiary by virtue of a judgment entered by the United States District Court for the Southern District of New York, filed April 5, 1951, on an indictment returned on January 31, 1951, which charged in a single count that appellant had conspired with others to transmit certain materials to the Union of Soviet Socialist Republics in violation of Section 34 of Title 50 of the United States Code.

2. On appeal to this Court, the judgment of conviction was affirmed, Judge Frank dissenting, 195 F.2d 583. A petition to the Supreme Court of the United States for a writ of certiorari was denied, 344 U.S. 838.

3. Appellant has not made prior application to the district court for relief pursuant to Title 28,

U. S. C., Section 2255, on the grounds set forth in this petition.

4. Agents of the United States initiated, arranged, planned, directed and participated in the seizure of appellant in Mexico and his abduction and removal to the United States.

5. Local police of Mexico City, acting unlawfully as agents and representatives of the United States Government, and solely pursuant to the direction and control of the prosecution, were used by the United States in effecting appellant's seizure and removal.

6. Solely pursuant to these arrangements and subject to the direction and control of agents of the United States, appellant was forcibly taken to Nuevo Laredo, Mexico, where agents of the United States Government unlawfully seized him and brought him across the border to the United States.

7. The United States Embassy in Mexico City served as a place of interrogation and as a coordination center in connection with the planning and execution of the unlawful seizure and removal, and took custody of property and documents seized from appellant in Mexico City.

8. Appellant was not deported or expelled by the Government of Mexico, nor was his seizure in any way consented to by that Government. Representatives of the Government of Mexico objected to the proceedings and to the invasion of its sovereignty. Agents of the United States Government were advised of these facts.

9. The Treaty of Extradition between the United States and Mexico excludes removal and proceedings in the United States in the case of a person located in the territory of Mexico on the charge of espionage or conspiracy to commit espionage. This treaty also excludes such removal and proceedings for crimes of a political nature.

10. Apprehension, removal and prosecution under the treaty are based on diplomatic requests, the transmission of various authenticated and attested documents and charges, and judicial and executive review in Mexico.

P O I N T I

THE OPINION OF THE LOWER COURT RESTS UPON A MISCONCEPTION OF THE RELEVANT FACTS AND THE GOVERNING PRINCIPLES OF LAW.

A. Preliminary statement.

In the supplementary motion made pursuant to Title 28, U. S. C., Section 2255, appellant requested a hearing in open court based upon certain detailed factual allegations set forth in his petition. These factual allegations, which were required to be deemed as true in the conceded absence of denials from the prosecution or conclusive refutation from the files and records of the case, raised two ultimate propositions of fact. These may be summarized as follows:

1. The Government of the United States, through its agents and representatives, initiated, arranged, planned and participated in the unlawful seizure of appellant upon the sovereign territory of Mexico and his subsequent removal to, and prosecution in the United States; and

2. The Government of Mexico in no way consented to this removal, initiated, arranged, planned and participated in by agents of the Government of the United States. Appellant was neither deported nor expelled by the Government of Mexico, and agents of the United States were informed as to Mexico's objections to such occurrences and the invasion of its sovereignty.

These operative facts, only recently discovered by appellant, although known to the Government since the inception of the proceedings, reveal a total violation of the provisions of the Treaty of Extradition of 1899 (31 Stat. 1818) entered into between the United States

of America and Mexico.*

This flagrant violation of the treaty totally deprived the United States of national and consequently judicial power to try appellant or to impose a sentence. It is a fundamental principle of our jurisprudence that the United States lacks any national power to prosecute proceedings based upon extraterritorial action in violation of a binding treaty. Cook v. United States, 288 U. S. 102. Treaties are solemn contracts between sovereign nations, and by entering into the Treaty of 1899, the Government of the United States limited and circumscribed its national power to proceed judicially in circumstances involving alleged fugitives residing in the territory of the Government of Mexico. The jurisdiction of the domestic federal courts, deriving their fundamental power from the nation, is similarly circumscribed and limited by force of operation of the governing treaty. Accordingly, when representatives and agents of the Government of the United States violated the provisions of the governing treaty in their entirety, the domestic courts of the United States lacked national and thus judicial power to proceed against appellant.

This fundamental objection to national and, consequently, judicial power does not rest on the kidnapping or abduction of

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* The following facts are uncontested:

The United States failed, as required by treaty, to transmit to the Government of Mexico the request for removal as well as the authenticated documentation of the warrant, the charge, the offense and certain evidence of the commission of crime. Appellant was deprived of a hearing on probable guilt, and judicial and executive review in Mexico, as the treaty requires. Moreover, the United States proceeded against appellant upon a crime for which the treaty precludes removal and prosecution.

appellant as such, but rather upon the violation of the treaty. The jurisdictional disability originates in the limitations which the treaty imposes upon the power of the United States to institute any proceeding against alleged fugitives found in Mexican territory.

These limitations, expressed in high treaty contract and embodied in the statutory law of the United States, constitute conditions precedent to such proceedings. That is to say, whether or not the accused ultimately is brought within reach of the national court's process, and the offense charged is of the type which the court may adjudicate, the whole proceeding--all governmental action--cannot even commence if the treaty is violated and its preconditions are not met. A court may have jurisdiction over the person of a defendant, as well as power to deal with the particular offense or cause, yet the exercise of judicial power in the proceeding will lack validity if specific treaty prescriptions for its inception are ignored and violated.

When governmental action is based extraterritorially, and the controlling statutory preconditions to valid prosecution and adjudication are found in a treaty, the courts are required to enforce rigorously the legislative limitations upon the judicial power to proceed. A treaty, such as the one here, has municipal constitutional status as a law of the land.

Sufficient as this status is to command compliance, additional considerations come into play. The treaty statute is a bileteral compact with another nation, requiring the highest responsibility and good faith --uberrima fides--of sovereign to sovereign. The Supreme Court, accordingly, has always construed treaties in the highest good faith as international compacts to be faithfully observed by the United States and its courts.*

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*"In construing treaty provisions the [Supreme] Court has regarded treaties as international compacts to be faithfully observed by the United States. Any other view would have made it difficult for the United States to meet its international obligations. The tendency is for the Supreme Court to construe treaties in the highest good faith in so far as the other party is concerned, a principle of construction which the Court has consistently asserted."

Comment, Treaties and the Supreme Court, 1 University of Chicago L. R. 602, 617 (1934).

This appeal thus raises as a central issue the fundamental question as to whether one party to an international compact may unilaterally disregard and violate the treaty at will, and proceed to assert national jurisdiction based upon extraterritorial action in gross violation of the treaty. We suggest, in the words of the Supreme Court, that "No such views of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them." United States v. Rauscher, 119 U. S. 407, 422.

The court below grounded its denial of a hearing upon a three-pronged rationale. Thus the court argued that (1) this issue was previously raised and decided adversely to appellant on the motion in arrest of judgment in the trial court, and in this Court on the affirmance of the judgment of conviction; (2) that even if the point were now available, the facts alleged show no violation of treaty; and (3) that in any event, a violation of treaty creates only an issue of "personal" jurisdiction, which was waived by failure to raise the issue prior to trial. We suggest that each of these contentions rests upon a misconception of the relevant facts and the governing law.

The lower court states that the jurisdictional issue is foreclosed in that the "operative facts" upon which it rests were before this Court on the original appeal (A. 207). This is simply not so. The basic "operative facts" upon which the charge of treaty violation depends were never before the trial court or this Court on appeal. These are the facts revealing that (1) the United States Government initiated, arranged, planned and participated in the unlawful seizure of appellant on Mexican territory, and (2) that the Government of Mexico in no way consented to this seizure and removal of appellant. These are the facts which show in a striking fashion the violation by the United States of the binding Treaty of Extradition. These facts were not before the Court of Appeals at the time of the original appeal. They were only recently discovered by appellant, although the petition avers without contradiction that they were in fact known to the prosecution throughout the prior proceedings.*

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* More than this, these facts were not merely withheld from the defense and the courts; they were misrepresented to the trial court and more particularly to this Court on the appeal.

Thus the motion in arrest of judgment raised no issue of treaty violation, and consequently no issue of want of total jurisdiction. This issue is here raised for the first time and presents a proper basis for a motion under 28 U. S. C. 2255. Johnson v. Zerbst, 304 U. S. 458.

The lower court declined to rest solely upon the contention that appellant is foreclosed on the jurisdictional issue. Relying upon the general rule that illegal abduction will not affect the jurisdiction of a court except where there has been a violation of an existing treaty of extradition, the court below argued that despite the conceded failure to follow any of the provisions of the Treaty of Extradition, this did not constitute a violation of the Treaty. This position depends upon the assumption that an extradition treaty is a contract at will; that the United States Government could freely choose to disregard the treaty provisions and seize appellant in the territory of Mexico without the consent of the Mexican Government; that the sole obligation imposed by the high compact was to adhere to its provisions only after the demanding party chose itself to invoke its procedures.

But such an interpretation would make a mockery out of international obligations. An extradition treaty binds the signatory governments to obtain extra-territorial possession of alleged fugitives only through the procedures and under the circumstances delineated by the treaty, unless the consent of the government of asylum is obtained to alternative procedures. It is a compact between civilized nations to limit their own domestic sovereignty. It is exclusive in its terms and its concepts. It sanctions no marauding raids on the territory of a sovereign power. It places a positive injunction upon governments and their agents and officials to enforce the administration of justice extraterritorially according to the norms of civilized conduct as set forth in the treaty.

The power of the national sovereign ceases beyond its territorial limits, and especially within the territory of another nation. A treaty, such as extradition compact, creates extraterritorial power; without the treaty there is no judicial basis for power. While internally the national sovereign is endowed with fundamental governing power apart from specific statute, externally the power exists only as granted by treaty or other agreement. As a result, the treaty demands fulfillment not merely because it preempts or occupies the field, but, more elementally, because it is the sole instrument for creation of the

field. Looking to the present matter, the United States initially has no power to proceed against an alleged fugitive in Mexico; if it desires so to proceed, it must resort to some authority which is capable of generating the power, in this case the Extradition Treaty. Otherwise, treaty status and purpose, and the universal doctrine of the territorial limitation of national sovereignty, are ignored.

As the United States Department of State itself has said,

> "The treaty of extradition between the United States and Mexico prescribes the forms for carrying it into effect, and does not authorize either party, for any cause to deviate from these forms, or arbitrarily abduct in the territory of one party a person charged with crime for trial within the jurisdiction of the other." Quoted in 4 Moore, Digest of International Law, Section 603, p. 330.

The petition here charges that agents and representatives of the United States Government, a party to the treaty of extradition, did "arbitrarily abduct in the territory of one party a person charged with crime for trial within the jurisdiction of the other" without the consent of the Government of Mexico. If this is not a violation of the extradition treaty, then words lose their meaning and solemn international compacts are reduced to meaningless gestures.

Finally, the lower court argues that even if a violation of treaty were involved, this raises only a question of "personal" jurisdiction, which was waived by failure to raise the issue before trial. But such an appraisal seeks to solve a juridical problem by the convenient use of a label, rather than by an objective analysis of concepts. Mr. Justice Brandeis disposed of a similar contention with characteristic incisiveness in Cook v. United States, 288 U. S. at pages 120-122. Holding that the United States lacked any national power to prosecute proceedings based upon extraterritorial action in disregard or violation of a treaty obligation, Mr. Justice Brandeis rejected an attempt to evade the consequences of this conclusion by labelling the problem one of "personal jurisdiction." He carefully pointed out that "Here, the objection is more fundamental. It is to the jurisdiction of the United States. The objection is not * * * lost by the entry of an answer to the merits."

Similarly, the violation of the Treaty of Extradition here cannot be dismissed merely as an issue of personal jurisdiction. The treaty has limited the national power to institute proceedings based upon extraterritorial action. Proceedings resting on violations of such treaty limitations are totally without national power. This is not an issue of "personal jurisdiction". In the words of Mr.Justice Brandeis, "Here, the objection is more fundamental. It is to the jurisdiction of the United States." Cook v. United States, supra.

B. The violation of the extradition treaty deprived the United States of national power to proceed against appellant and deprived the trial court of total jurisdiction to maintain the trial or impose the sentence.

Although the lower court relegates the argument to a last-line-of-defense position, perhaps the crux of its analysis of the substantive problems presented by this appeal, lies in its contention that a treaty violation raises, after all, only an issue of personal jurisdiction. Thus, the court argues that even if appellant is correct in his contention that he is not foreclosed because of a prior determination, he is foreclosed since a violation of the treaty would not have, in any event, deprived the trial court of total jurisdiction to proceed.

In order to arrive at this conclusion, the lower court was not only required to evade the impact of the principle of law enunciated by the Supreme Court in Cook v. United States, supra. It was forced to avoid any fundamental analysis of the juridical consequences flowing from a violation of a high international compact between sovereign nations. The solution of problems of this nature is not to be found in the resort to a convenient label. It is to be found only in an objective analysis of the juridical relationships generated by the consummation of such compacts and the subsequent breach of their obligations.

Every jurisdictional problem in the law requires this close analysis. A juridical controversy raises several jurisdictional considerations, each of which must be analyzed separately and distinctly to avoid utter confusion. Most frequently in our juris - prudence we deal with two heads of judicial jurisdiction, labelled "personal"--the physical reach of

judicial process, and "subject matter"--judicial competency over the type or class of offense or cause. Defects in personal jurisdiction are only irregularities which may be waived, while lack of subject-matter jurisdiction goes to fundamental adjudicative power, is never waived, and may be raised at any stage to void the proceedings.

Less commonly confronted, but even more fundamental, is a third head of jurisdiction, which may be described as the genetic sovereign power to initiate and entertain the proceedings: to exercise the authority afforded by the presence of personal and subject-matter jurisdiction: to allow the jurisdictional incidents of personal and subject-matter competency to operate. This goes to power in the proceeding itself, and, accordingly, if defective, will render the proceeding void ab initio.

Since the national sovereign power essentially is territorial, attempts to exercise that power extraterritorially, in violation of treaty statutes, directly raise this fundamental jurisdictional issue.

In such cases, the Supreme Court has held that the failure to follow statutory treaty prerequisites serves to nullify a proceeding in its entirety, since the treaty is the very basis of power.

1. THE APPLICABLE DECISIONS OF THE UNITED STATES SUPREME COURT GOVERNING THIS APPEAL.

(a) The Principle of Cook v. United States

The leading modern decision governing this appeal is Cook v. United States, 288 U. S. 102. The essential facts of Cook are as follows:

A ship of British registry, the Mazel Tov, cruising some eleven and a half miles off our coast with a cargo of unmanifested liquor, was seized by the United States agents and brought into port. A penalty was assessed against the master, and ship and cargo libelled, upon the charge of hovering for smuggling purposes in violation of the Custom Law (Section 581 of the Tariff Act of 1830). This was a federal offense admittedly cognizable by the federal district court, and the cargo, the vessel and its master actually were brought within reach of that court's process.

After answering to the merits, the respondent objected that the siezure which initiated the proceedings was not in conformity with the treaty of 1924 between the United States and Great Britain (43 Stat. 1761). That treaty granted to the United States authority to board and search ships of British registry at certain distances beyond the territorial waters of the United States, but did not grant such authority in the case of vessels found at a greater distance from the United States coast than they could travel in one hour. The maximum speed of the vessel in the Cook case was ten miles per hour. However, it was seized eleven and a half miles off the coast. Accordingly, the respondent argued that the court lacked total jurisdiction to proceed as a result of the extraterritorial action in violation of the binding treaty.

In response to this contention, the government argued that (1) the illegal seizure was immaterial since the court had "subject-matter jurisdiction", and "personal jurisdiction" over the master, ship and cargo, (2) the judicial proceedings initiated by the United States served to validate and ratify the prior acts of its agents, if wrongful, and (3) in any event, the answer to the merits waived any objections to jurisdiction. Mr. Justice Brandeis, writing for the Court, characterized these arguments as "misconceptions."

Appellant's personal subjection to the process of the District Court for the Southern District of New York on the charge contained in the indictment and his answer to the charge, could not more waive the nullifying effect of his seizure in violation of the requirements of the controlling extradition treaty, than could the existence of "personal" and subject-matter" jurisdiction in the Cook case overcome the fundamental jurisdictional consequences of disregard of that treaty. The operative effect of the treaty limitations here is identical with that in the Cook case.*

In Cook, the treaty with Great Britain limited the jurisdiction of the United States to search and seize vessels of British registry to specified extraterritorial distances and for particular purposes. Here, the Treaty of

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*If there is any difference, it is one which emphasizes rather than minimizes the conclusion of total want of jurisdiction. In Cook, the nullifying treaty trespass took place in open international waters, whereas in the present case it occurred not merely outside the territorial limits of the United States, but within the territory of an independent sovereign.

Extradition with Mexico limits the jurisdiction of the United States to obtain, remove and proceed criminally against alleged fugitives, to instances of specified crimes, pursuant to arrangements officially instituted and consummated between the two governments.

In Cook, United States agents seized the master, vessel and cargo outside the limits of authority granted by treaty. Here, United States agents arranged and participated in the extraterritorial seizure and removal of appellant for an alleged crime excluded by treaty. In addition, they completely violated all of the other treaty requirements relating to such removal and proceedings.

In Cook, the British Government did not consent to the treaty violation. Here, there was no such consent by the Government of Mexico. In fact, the proper governmental authorities of Mexico later expressed objection to the unlawful measures taken by the United States.

Accordingly, the conclusion must be, as it was in Cook, that "the objection is * * * fundamental. It is to the jurisdiction of the United States. * * * The ordinary incidents of possession * * * yield to the international agreement."

2. THE EXECUTIVE BRANCH OF THE GOVERNMENT HAS CONSISTENTLY INTERPRETED THE TREATY AS PROHIBITING UNILATERAL DEVIATION FROM ITS REQUIREMENTS.

National policy and executive administrative practice under treaties of extradition support the foregoing analysis of the cases and authorities. It has been the substantial pattern of our policy and practice that removal of alleged fugitives from one treaty nation to another may be accomplished only through treaty. Professor Moore states, "To this position the Government of the United States has adhered." 1 Moore on Extradition, Section 135, p. 167. Professor Moore also quotes the following declaration of Secretary of State Blaine as to our policy and practice under the treaty of extradition with Mexico involved here (4 Digest of International Law, Section 603, p. 330):

"The treaty of extradition between the United States and Mexico prescribes the forms for carrying it into

effect, and does not authorize either party, for any cause, to deviate from those forms, or arbitrarily abduct in the territory of one party a person charged with crime for trial within the jurisdiction of the other."

And again Secretary of State Frelinghuysen has declared:

"The treaty between the United States and Mexico creates an obligation on the part of the respective governments * * * and where the obligation ceases the power falls. * * * It would be a great evil that those guilty of high crime, whether American citizens or not, should go unpunished; but even that result could not justify an usurpation of power." (1 Moore on Extradition, Section 135, pp. 166-168).

Throughout its history, the United States has held that such extraterritorial removal without treaty warrant or the proper consent of the asylum sovereign, cannot form the basis for valid national prosecution. Referring to a removal from the United States outside of treaty, Secretary of State Fish stated (as quoted in 1 Moore on Extradition, Section 192, p. 286):

"* * * a violation of the sovereignty of the United States has been committed, and the recapture and removal of the prisoner from the jurisdiction of the United States to British soil was an illegal, violent, and forcible act, which cannot justify the subsequent proceedings whereby he has been, is, or may be restrained of his liberty."

The inadequacy of the lower court's analysis of the extradition treaty must be contrasted to these forthright statements on the part of the United States Department of State. The executive arm of the government has consistently repudiated any concept that a treaty of extradition permits a unilateral disregard of its provisions. In the words of the Department of State, neither party may for any cause "deviate from those forms or arbitrarily abduct in the territory of one party a person charged with crime for trial within the jurisdiction of the other." In the opinion of the Department of State, charged with the administration of international treaties, an arbitrary abduction by one party to an extradition treaty, in the territory of another, without the consent of that party, would be a gross violation of the governing treaty.

And yet this is precisely what the present petition charges. The facts brought before the court on the motion under Section 2255 reveal without denial that agents and representatives of the United States Government, a party to the treaty of extradition, arbitrarily abducted appellant in the territory of the Government of Mexico, the other party to the treaty, for trial within the jurisdiction of the United States, without the consent, and indeed, in the face of the opposition of the Government of Mexico. Under the persuasive interpretation of the executive branch of our Government, the petition clearly charges a violation of the binding extradition treaty.

3. THE LOWER COURT'S RELIANCE ON KER V. ILLINOIS IS INAPPOSITE.

The lower court relies heavily upon Ker v. Illinois, 119 U. S. 436, in support of its contention that utter disregard of an existing extradition treaty by the United States is not a violation of that treaty. Ker does not support this proposition.

The removal of Ker from Lima, Peru, to the United States, and his trial and conviction for larceny in the Illinois state court, involved neither the violation of a treaty, nor the transgression of Peru's sovereignty.

The defendant Ker only argued that his forcible abduction violated due process and interfered with an asserted personal right of asylum in Peru. He did not urge that the Illinois criminal proceedings lacked basic jurisdictional sanction as the result of a failure to comply with any applicable treaty conditions precedent to the exercise of judicial power.

P O I N T II

THE CONTENTION OF LACK OF TOTAL JURISDICTION OF THE COURT RAISED BY THIS PETITION IS NOT FORECLOSED BY PRIOR LITIGATION.

The lower court seeks to avoid the entire impact of appellant's petition by arguing that the jurisdictional issue is foreclosed. Thus the court finds that the issue here raised was previously litigated adversely to appellant in the motion in arrest of

judgment in the trial court, and in this court on the affirmance of the judgment of conviction.

After the verdict, on April 5, 1951, the day of sentencing, appellant made a motion in arrest of judgment challenging the jurisdiction of the court over his person. The lower court rests its conclusion that this prior litigation forecloses appellant from pressing his present contention upon the assumption that the essential "operative facts" were thus before this Court on the original appeal.

The lower court charges that appellant is playing with labels. It suggests that appellant is merely replacing the label of "personal jurisdiction" with the label of "national jurisdiction". And the court suggests that since the "operative facts" remain the same, it is presumptuous of appellant to imply that the extremely able and experienced judges of this Court rested their prior decision solely upon the jurisdictional label rather than the operative facts (A. 207).

But we suggest that the lower court's analysis exposes its own infirmity. Its rationale rests upon the assumption that the essential "operative facts" which are determinative in this petition were presented to the trial court and to this Court in the original proceeding. This rationale collapses, however, upon an examination of the petition. The simple fact of the matter is that the essential facts upon which the charge of treaty violation depends were never before the trial court nor before this Court on appeal.

We have adverted to these operative facts several times during the course of this argument. However, the singular failure of the lower court to even mention these facts in its opinion, despite its obligation under the law to accept the facts as true in the absence of denial, requires their restatement here.

The essential operative facts which expose a violation of the binding treaty of extradition presented in this petition for the first time are: (1) The facts revealing that the United States Government initiated, arranged, planned and participated in the unlawful seizure of appellant on Mexican territory; and (2) the facts revealing that the Government of Mexico neither deported nor expelled appellant nor consented in any way to his seizure and removal.

When this Court heard the case, these facts were not before it. They were not contained in the motion in arrest of judgment. They were not in the trial record and they were not raised before this Court. They were not before this Court for the simple reason that they were not known to the defense. But more than this, the petition charges in great detail that these facts were known to the prosecution and withheld from the defense, the trial court and this Court during the pendency of the entire proceedings.

This situation must be deemed to be true for the purpose of this appeal, and the conclusion which flows from it is striking. The operative facts upon which the present challenge to jurisdiction is based were not merely absent from the litigation below. They were consciously suppressed and kept from the court by a party to the litigation which had these facts in its possession. The prosecution was not content with merely suppressing these facts from the court. On the oral argument it totally foreclosed consideration of the issue by misrepresenting the facts to the court.*

The opinion of the court below is thus an example of bootstrap reasoning. Having once assumed that the operative facts contained in the present petition were all litigated before the Court of Appeals on the original appeal, the lower court then proceeds to erect an edifice of reasoning which has a surface plausibility. But this is the central fallacy of the lower court's opinion. The original assumption is too easily made. The essential "operative facts" are here presented for the first time.

A careful reading of the opinion of this Court on the original appeal fully confirms this analysis. The motion in arrest of judgment and the affidavit submitted in its support could in their very nature only raise questions relating to the court's juris-

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*Thus in respect to the key operative facts, the existence of which would have exposed a violation of the governing treaty to the court, the prosecution stated (1) that the appellant had been legally deported by the Mexican authorities, although the prosecution then knew that this was not the fact, (2) the prosecution represented to the Court of Appeals that the Mexican Government had consented to the appellant's "expulsion", although the prosecution then knew that this was not the fact, and (3) the prosecution broadly inferred that there was no participation by United States agents in the seizure of appellant, although the prosecution then knew that this was not the fact.

diction over the person of the defendant. The basic facts were not presented which could lead the court to an examination of the want of total national jurisdiction caused by a breach of the governing treaty of extradition. The facts averred in the motion in arrest of judgment revolved solely around an alleged violent seizure of the defendant while residing in the territory of Mexico. No facts were brought forward to show either (1) the initiation, planning, and participation in the abduction by agents of the United States Government, or (2) any lack of consent by the Mexican Government.* In the absence of such facts, no treaty violation could be shown. It is, of course, elementary law that however irregular the expulsion, the consent of the high contracting parties nullifies any claim of treaty violation. The only legal issue posed by the facts submitted to the trial court and to this Court on appeal was the question whether the personal rights of the defendant to be immune from arbitrary seizure were violated in such a manner as to negate the court's jurisdiction over his person.

The forced kidnapping of appellant raised in the first place questions involving the jurisdiction of the court over the person of the defendant. These questions were analogous to problems raised by an arrest without a warrant. See, for example, United States v. Coplon, 185 F. 2d 629 (C. A. 2). They called for a consideration as to whether personal rights of the defendant to be immune from arbitrary seizure were violated. Such questions do not raise the competency of the court to hear the controversy. They are questions which, revolving around personal rights of the individual, may be waived by the individual. They are questions which consequently must be timely raised. See, for example, Rule 12(b)(2) of the Federal Rules of Criminal Procedure. This was the type of question raised by appellant in the motion in arrest of judgment. As Judge Frank pointed out in this Court's opinion, appellant's contention at that stage rested upon his assertion of "his right to be free from unlawful molestation or assault by his own Government; and his right not to be convicted by an admission wrested from him by a violent act" (at 603, footnote 20). Thus the affidavit in support of the motion in arrest of judgment complained that appellant's kidnapping violated his personal rights in such a manner as to defeat personal jurisdiction. Appellant so presented his argument to the Court of Appeals.

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*As a matter of fact it would appear from the motion in arrest of judgment and the argument in the Court of Appeals that appellant and his counsel were under the impression that the Mexican Government participated in and consented to the seizure.

The careful opinion of Judge Frank makes it crystal clear that as far as this Court was concerned the only question raised by the facts then before the Court related to the impact of a violation of personal rights upon jurisdiction over the person. No issue of treaty violation was before the Court, nor could it be, since the Court assumed from the record and the representations of the government that the Mexican Government had consented to the "expulsion".

If the fact of United States initiation of and participation in the abduction, as well as the lack of Mexican governmental consent, had been presented, then a totally different situation, legally and factually, would have been before the Court. Only, at this point, the issue of lack of national jurisdiction generated by a treaty violation would have been ripe for adjudication. But these crucial facts, while known to the prosecution during the appeal, were unknown to appellant and to this Court. To urge now that appellant is foreclosed from litigating this issue is not merely to disregard logic and governing rules of law. It would sanction and condone conduct on the part of the prosecutors inconsistent with their obligations as officers of the Court and impartial administrators of justice.

Thus, the fundamental question of want of total national jurisdiction raised in this petition is not foreclosed by the prior litigation. In the original appeal, this Court held that issues of personal jurisdiction were waived by the failure to raise them prior to trial. We do not seek to relitigate this issue.

The petition now before the Court raises issues of a fundamentally different character. Based upon operative facts only recently discovered by appellant, although known to the prosecution throughout the entire prior proceeding, the petition raises for the first time the total judicial competency of the trial court--a want of national jurisdiction flowing from a flagrant and complete violation of a binding international treaty of extradition.

CONCLUSION

The opinion and order of the lower court must be reversed. Under the principles of law which govern Title 28, U. S. C., Section 2255, the court was required to grant a hearing on the facts set forth in appellant's petition.

101-2483-4

February 6, 1957

Mr. Arnold Forster
Anti-Defamation League
of B'nai B'rith
515 Madison Avenue
New York 22, New York

Dear Arnold:

Many thanks for your note of January 28, 1957, in which you mentioned receiving a load of material relating to the Morton Sobell crowd. We have received copies of briefs, petitions and related data; however, on the chance that you have something we do not, I am taking the liberty of having one of our New York representatives drop by to see you.

With best wishes,

Sincerely,

MAILED 2
FEB 6 1957
COMM-FBI

L. B. Nichols

2 cc's - New York, with two copies of incoming

ATTENTION SAC: At the earliest convenient moment, you should have a representative of your office, experienced in the Sobell investigation, call upon Mr. Forster and review the material he has made available. Copies of new material should be obtained and forwarded to the Bureau. Sulet results of contact with Mr. Forster under caption "Mr. Arnold Forster, Anti-Defamation League of B'nai B'rith, Research (Crime Records)," no later than 2/20/57.

cc - Mr. J. P. Lee, 1734, with copy of incoming

Follow -up made for 2/22/57.

GEM:cag
(8)

Tolson
Nichols
Boardman
Belmont
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Mohr
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FEB 14 1957

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ORIGINAL COPY FILED IN 101-530-242

Federal Bureau of Investigation
Records Branch

2-4, 19

- [ ] Name Check Unit - Room 6523
- [ ] Service Unit - Room 6524
- [ ] Forward to File Review
- [ ] Attention
- [x] Return to Lee 1734

Supervisor Room Ext.

CLASSIFIED BY: 3042/PUT/cls
DECLASSIFY ON: OADR 6.1.87

Type of References Requested:
- [ ] Regular Request (Analytical Search)
- [x] All References (Subversive & Nonsubversive)
- [ ] Subversive References Only
- [ ] Nonsubversive References Only
- [ ] Main ______ References Only

Type of Search Requested:
- [ ] Restricted to Locality of
- [ ] Exact Name Only (On the Nose)
- [ ] Buildup
- [ ] Variations
- [ ] Check for Alphabetical Loyalty Form

Subject Luis Sanchez Ponton
Birthdate & Place
Address
Localities

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE

R# ______ Date 2-4 Searcher Initials mal

	FILE NUMBER	SERIAL
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I	~~105-16690-~~ ~~56p3;~~	
I	~~105-55019-1~~	
I	~~101-2443-1351,1330,1317~~	
I	~~105-40993-X3,5p2,13,14~~	
I	~~100-387835-1519p11;~~	
I	~~64-2701-7801~~	
I	~~65-62562-143p3;~~	
I	~~100-171127-24~~	
	64-200-221-~~1922~~p6;	
O.L	~~1923~~,1439	
I	~~105-39352-~~	
	64-200-221-~~1333~~p10;	
	22p4; 1424p3;	
	14p20; ~~1205~~	
	726p12,22; 924	
	~~705, 706,~~ 707,609	
	708, 490p24;	
	269, 16, 35; 241	
	Walters	

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(1)

NUMEROUS REFERENCE 4-22a

SEARCH SLIP

Subj: Luis Sanchez Portes

Supervisor Lee Room 1734

R# Date 2-4 Searcher Initial mel

	FILE NUMBER	SERIAL
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I	~~64-2700-bE-3~~	
I	~~64-2704-mbA-209~~	
I	~~100-2661-496~~	
I	~~100-18314-136 pgs~~	
I	~~100-35-6615-45 <20,37~~	
	62-62736-1125	
I	~~64-3410-14~~	
I	~~100-370051-12~~	
I	64-200-221-8-44	b1
I	[redacted]	
I	~~64-2706-D-4,34,25~~	
I	~~64-2701-425, 430, 442~~	
I	~~100-347225-3~~	
I	~~64-3130-16 pgs~~	
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	64-2706-A-150	
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	61-7559-5259X	
I	~~64-2701-317X~~	

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SEARCH SLIP

Subj: ~~Luis Sanchez~~ Ponton

Supervisor Lee Room 1734

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		Vol 1 p 332
I	~~64-32143-22~~	
I	~~100-9061-250~~	
I	~~64-3301-37~~	
I	~~65-43302-2606~~	
	64-20180-3	
I	~~64-30440-7~~	
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	~~Luis Sanchez~~ Ponton	
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	Luis Ponton	
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	[redacted]	b1
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Subj: Luis Sanchez Porton

Supervisor Lee Room 1734

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64-31301-16 p 5;	
~~64-30410-7~~ dupe to p 3	
~~64-30410-3~~ dupe to p 3	
NR ~~105-2519-1~~	
~~64-200-221~~ ~~[illegible], 1139~~	
~~100-2061-416~~ dupe to p 2	
NR ~~64-1000-544~~	
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~~64-211-221-905~~ dupe to p 1	
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Supervisor Lee Room 1734

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~~64-200-221-1325~~ dupe to p3	
~~101-2483-136~~ dupe to p1	b1
[redacted]	
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~~64-200-221-1922~~ dupe p	
~~64-200-223-178~~ dupe to p4	
62-75147-45-47 p5	
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~~64-24-221-100~~ dupe to p4	
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100-18314-136 p20; dupe to p2	

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NUMEROUS REFERENCE 4-22a

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Subj: Luis Sanchez Porton

Supervisor Lee Room 1734

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	~~64-20160-3~~ dupe to 3	
	~~64-20671-252~~ dupe to p 3	
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I	~~64-211-221-~~	
	62-62736-1127 copy 124 Vol 2 p 33	Dupe to p 3
	~~64-211-221-~~ dupe to p 4	
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	~~66~~ dupe to p 1	
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	~~64-23143-~~ dupe to p 3	
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VR	~~62-62736-1125~~ copy 124	
	Vol 2 p 545	
	~~64-211-221-~~ dupe to p 4	
	~~64-31341-~~ dupe to p 2	
	~~64-200-221-~~ p 1	
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NR	~~43-9914-3~~	
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Subj: Luisa Sanchez Porton

Supervisor Lee Room 1734

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	~~64-200-22~~	dupe to p4 ~~1939~~
	~~101-2483-1317~~	~~1330~~ dupe p1
	~~105-10890-5~~	dupe to p1
	~~100-342305~~	~~3~~ dupe to p2
NR	~~64-3160-498~~	
NR	~~64-1208-E-47~~	
NI	~~64-3104-236~~	p1
T	~~105-40777~~	dupe to p3
	~~105-43300~~	~~2606~~ dupe to p3
	~~64-200-221~~	dupe to p1
		dupe to p4 ~~1214 p30~~
	~~100-32005~~	~~12~~ dupe to p6
	~~105-40977~~	dupe to p1 ~~13, 14, 16~~
	~~65-62562~~	~~142~~ dupe to p1
	64-30410-18	
	~~105-~~	dupe to p1
	~~64-200-221~~	dupe p2 ~~-41~~
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NR	[redacted]	b2
	94-1-2569-6	b2
NR	~~62-63736-2~~	~~11976~~
NI	~~64-5003-3194~~	

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SEARCH SLIP

Subj: ~~Luisa Sanchez~~

Supervisor ~~Lee~~ Room ~~4734~~

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		~~NR 4159~~
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NR	~~64-3301~~	~~973~~
NR	~~64-3404-D~~	~~5~~
NR	~~64-3104-A~~	~~400~~
NR	~~64-2401~~	~~165~~
NR	~~64-2900-D~~	~~7~~
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	~~99-82~~	~~80, 84~~
NR	~~64-3211-A~~	~~5~~
NR	~~64-2709~~	~~26~~
NR	~~64-3206-A~~	~~127~~

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SEARCH SLIP

Subj: Luis Sanchez

Supervisor Lee Room 1934

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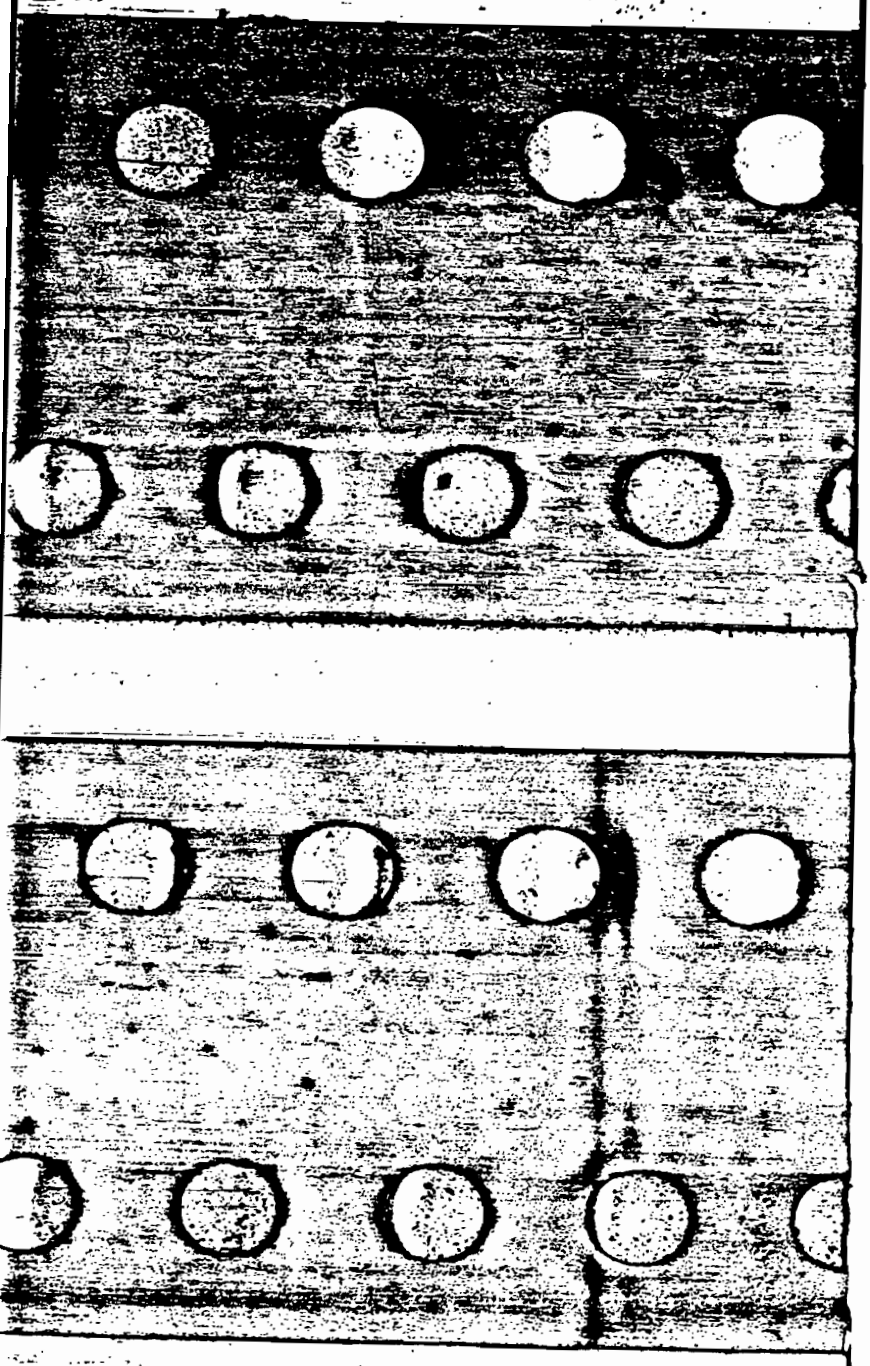
NR [redacted]	b7C
NR [redacted]	
NR [redacted]	
NR 65-53944	112
NR 64-1200-G	4
64-1204-E	42X1
NR 65-16273	~~238~~
	21
NR 62-75149-16-41	Encl. p.47
NR 62-75149-45-48	Encl. p.4
NR [redacted]	
NI 64-186-26	8 b2
NR 100-134956	82 b7C
64-2704-E	163 (#1 only)
NR 65-16273	5829
NR 64-2704-E	133
NR 65-16273	4243
NR 65-16273	UR 4184
	3827
written	NR 4157 b2 b7C
@	2494



NUMEROUS REFEREN[illegible] 4-22a

SEARCH SLIP

Subj: Luis Sanchez

Supervisor Lee Room 1934

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NR 64 5203	339 b7C
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NR ~~64-3201~~	~~359~~
NR ~~65-46382~~	~~524~~
NR ~~64-3204~~	~~81~~
NR ~~39-0~~	~~33058~~
NR 62 7721	3245 Encl. pursuant
NR [redacted]	b2 b7C
NR ~~100-395349~~	~~142 pt 2~~

Written (D)

c - Lee
Belmont

~~SECRET~~

Assistant Attorney General
William F. Tompkins (orig. & 1)

February 6, 1957

Director, FBI

5-7-87

MORTON SOBELL, with aliases
ESPIONAGE - R

CLASSIFIED BY: 3042/pkt/cls
DECLASSIFY ON: OADR

In accordance with the telephonic request of Mr. J. Walter Yeagley of your Division made of Mr. J. A. Sizoo of this Bureau on February 4, 1957, there is set forth information concerning Luis Sanchez Ponton (U)

Information has been received that Mexico City newspapers carried articles on February 4, 1957, to the effect that Mrs. Morton Sobell, wife of the subject, claimed that Luis Sanchez Ponton, Mexican attorney, had been refused permission to travel to the United States by the American Embassy in Mexico City. Mrs. Sobell claimed this refusal was based upon the fact that Ponton was scheduled to testify on behalf of her husband. She was apparently referring to the oral argument before the Circuit Court of Appeals, Second Circuit, of Sobell's appeal from the denials of his motions for a new trial by the District Court, Southern District of New York. It has been learned that Ponton visited the American Embassy, Mexico City, at 3 p.m. on February 1, 1957, and requested a visa for the purpose of visiting the United States to see an eye specialist and consult with a "colleague." He made no mention of the instant case. Due to derogatory information concerning him, Ponton was informed by the visa officer that an investigation would have to be conducted before the visa was issued. Ponton remarked it was not too important as he expected that the specialist would be coming to Mexico in the near future (U)

Following is background information concerning Luis Sanchez Ponton. The information set forth has been furnished by informants who have furnished reliable information in the past unless otherwise specified (U)

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE

COMM - FBI
FEB 7 1957
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101-2483

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FEB 15 1957

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Classified by 2355 101-0
Exempt from GDS, Category 1 AND 3
Date of Declassification Indefinite

Ponton was born in Puebla, Puebla, Mexico, on August 5, 1899. In 1922 he was a professor at the National School of Jurisprudence, National University. In 1926 he was named as a member of the Reform Commission and sent to the United States. He also served a term as Consulting Attorney in the Treasury Department (Mexican) and was the Mexican delegate to the 7th Pan American Conference in Montevideo. He also has been a deputy to the 37th Legislature; Provisional Governor of Puebla; Secretary of Education 1940-1941, and Mexican Minister to Switzerland in 1945. He also was Mexican Ambassador to the Soviet Union in 1946. (U) (64-211-221-269)

[redacted] b1

(S) (64-2706-45)

[redacted] b1

(64-2706-[illegible])

The newspaper "Ultimas Noticias" for December 8, 1939, carried an article indicating that Diego Rivera, prominent artist, testified before the Dies Committee and named persons he believed were Stalinists in the Mexican Government. He furnished the name of Ponton as one such person in the Department of Treasury and Public Credit. (U) (61-7559-5759X)

[redacted] b1

(64-30410-7)

SECRET

CONFIDENTIAL

Assistant Attorney General
William F. Tompkins

[redacted] b1

[redacted] -1053) b1

[redacted]) (64-3301-37) b1

[redacted] (64-20180-3)

[redacted]

[redacted] (64-211-221-689)

[redacted]

[redacted] 221-689)

Referred CIA

1342

SECRET

Assistant Attorney General
William F. Tompkins

The newspaper "El Popular" carried an advertisement on May 30, 1951, concerning the Month of Friendship between the people of Mexico and the people of USSR. This advertisement stated that a lecture would be given by Ponton on June 5, 1951. (V)

(64-211-221-661)

[redacted] b1

(105-40977-X2)

[redacted] b1

(105-40977-X3)

[redacted] b1

(64-200-221-1214)

[redacted] b1

Refer CIA

(64-200-221-1972)

[redacted] b1

SECRET (64-200-221-1373)

- 4 -

[redacted]

Assistant Attorney General
William F. Tompkins

SECRET

[redacted] b1

[redacted] (64-200-221-8-41)

[redacted] b1

[redacted] 40977-5)

[redacted] b1

[redacted] (105-53019-1)

There is attached for your information a Photostat of an article which appeared in the "Daily Worker," east coast communist newspaper, for February 4, 1957, which contains information concerning the statements made by Mrs. Sobell.(U)

The above is furnished to you for your information.(U)

Enclosure

SECRET

[redacted]

1352

STANDARD FORM NO. 64

Office Memorandum • UNITED STATES GOVERNMENT

TO : MR. BELMONT

DATE: February 7, 1957

FROM : W. A. BRANIGAN

SUBJECT: MORTON SOBELL, WAS.,
ESPIONAGE - R

Tolson
Nichols
Boardman
Belmont
Mason
Mohr
Parsons
Rosen
Tamm
Nease
Winterrowd
Tele. Room
Holloman
Gandy

Mr. Tom Hall of the Internal Security Division of the Department called SA Sterling B. Donahoe at 5:45 p.m., 2/6/57. He referred to the claims that had been made publicly that Luis Sanchez Ponton, Mexican Attorney, had been refused admission to U.S. for appearance in connection with this case. Oral arguments are presently taking place before Circuit Court of Appeals, Second Circuit, on Sobell's appeal from the denials of his motions for a new trial by the District Court, Southern District of New York.

Mr. Hall advised that this question of Ponton's appearance came up during oral argument 2/6/57. The Assistant U. S. Attorney told the court Ponton had applied for a visa in Mexico on 2/1/57 but there was no indication whatsoever that his proposed trip was in connection with the appeal. The court was advised that actually there had been no denial or refusal of his visa. Further arguments were postponed until 10:30 a.m. 2/8/57.

Mr. Hall advised the Department is taking steps through State Department to see if Ponton can be admitted solely for purpose of this appeal. We have given the Department all data available to us on Ponton (by letter 2/6/57). The question of whether he should be admitted solely for purpose of arguments on the appeal in the case is entirely one between the Department and the State Department.

ACTION:

For information.

SBD:hmm
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TO: DIRECTOR, FBI (101-2483)

FROM: SAC, NEW YORK (100-37158)

MORTON SOBELL, was.
ESPIONAGE - R

MORTON SOBELL

On 1/30/57, AUSA MAURICE NESSEN, SDNY, furnished a copy of the government's brief in answer to subject's appeal filed in the U.S. Circuit Court of Appeals in December, 1956. A copy of the government's brief is enclosed herewith for the Bureau.

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Mr. Belmont

cc: MR. BELMONT
AND SUPERVISOR
DOM. INTEL. DIVISION

memo Belmont to Boardman 2-4-57 JPL:jdb

101-2483 — 1364

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Special Agent in Charge

To be argued by
PAUL W. WILLIAMS

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 0 134-245

UNITED STATES OF AMERICA,
Appellee,

—v.—

MORTON SOBELL,
Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL W. WILLIAMS
United States Attorney for the
Southern District of New York
Attorney for United States of America

ROBERT KIRTLAND
MAURICE N. NESSEN
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Of Counsel

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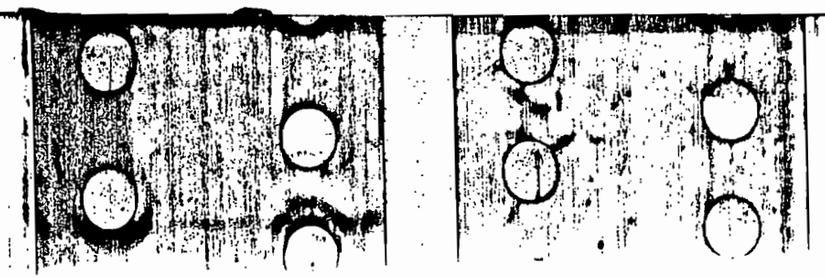

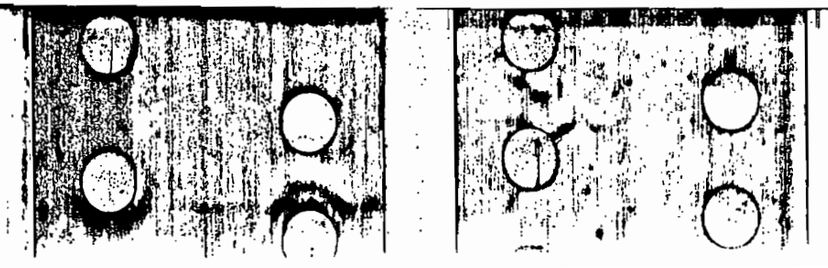

To be argued by
PAUL W. WILLIAMS

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. C 134-245

UNITED STATES OF AMERICA,
Appellee,

– v –

MORTON SOBELL,
Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Statement

Morton Sobell appeals from a decision of the District Court denying two motions of his under 28 U. S. C. § 2255 for hearings and for orders setting aside his conviction for espionage conspiracy.

Sobell and others were charged with conspiracy to commit espionage on behalf of the Union of Soviet Socialist Republics in violation of 50 U. S. C. §§ 32 and 34. After a trial of three weeks, the jury found Sobell and his co-defendants Julius and Ethel Rosenberg guilty on March 29, 1951. On April 5, 1951 the District Court sentenced Sobell to thirty years imprisonment.

Sobell moved to arrest judgment on the ground that the United States had no jurisdiction of his person "since he was forcibly seized in another country by or at the instance of the FBI." (S. App. p. 98.)[1] The District Court denied that motion.

This Court affirmed Sobell's conviction. *United States* v. *Rosenberg*, 195 F. 2d 583 (1952). The Supreme Court denied his petition for a writ of certiorari and denied a rehearing on the petition. 344 U. S. 838, 889 (1952). There have been a variety of other attacks on Sobell's conviction, including two previous § 2255 motions. *United States* v. *Rosenberg*, 108 F. Supp. 798, *affirmed*, 200 F. 2d 666 and 204 F. 2d 688 (2d Cir. 1952), *cert denied*, 345 U. S. 965, *rehearing denied*, 345 U. S. 1003 (1953). All have been rejected. A partial list of the judicial proceedings upholding the convictions of Sobell and his co-defendants is set forth at page 95 of the Appendix.

What constitute Sobell's third and fourth § 2255 motions were argued on June 4, 1956, before the Honorable Irving R. Kaufman, the trial judge, and denied on June 20, 1956. The District Court's opinion is printed at pages 197 through 228 of the Appendix and at 142 F. Supp. 515.

Statutes Involved

28 U. S. C. § 2255:

§ 2255. **Federal custody: remedies on motion attacking sentence.**

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was

[1] The Appendix is abbreviated "S. App."

imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

In this motion he and his counsel said that Immigration official Huggins' statement "deported from Mexico" was "a downright falsehood." Counsel said that the Government knew that it was a falsehood—"must have known it." (2404.) Counsel said that the United States Government could not be excused "in the brutal assault on a man and kidnapping a man and abducting an American citizen." (2407.) In detail, counsel told of Sobell's arrest by Mexican officials; he read an affidavit of Sobell which told the story with much flavor of how he was "bodily" uprooted by the Mexican police. (2411.) Sobell in that affidavit spoke at greater length than at present of his ride to police headquarters and to the Mexican border where he was met and arrested by "United States agents." (2413-4.)

Counsel specifically accused the United States Government of "abduction" and "kidnapping" with the "cooperation of Mexican authorities." (2418.) He told of "constant telephone calls" between the Mexican police and United States authorities. (2418.) At another point he characterized the action of the United States in obtaining Sobell as "criminal, illegal." (2420.) Sobell and his counsel charged the prosecution with using "spurious evidence." (2421.)

On original appeal to this Court from his conviction, Sobell suggested that the United States was *solely* responsible for his "abduction" and that treaties and international law were violated; he cited the same cases he now relies on; he made the same charges of abduction. It was all in his brief on appeal in Point V, which was titled:

> "THE UNITED STATES, AND HENCE THE COURT BELOW, HAD NO JURISDICTION OF THE PERSON OF SOBELL, SINCE HE WAS FORCIBLY SEIZED IN ANOTHER COUNTRY BY OR AT THE INSTANCE OF THE F. B. I., AND THE COURT BELOW SHOULD HAVE DIRECTED A HEARING ON THIS ISSUE."
>
> (S. App. p. 98.)

There he also said:

> "A court *is* concerned with how a defendant is brought from a foreign place, when he is brought in violation of treaty or international law, *United States* v. *Rauscher*, 119 U. S. 407; *Cook* v. *United States*, 288 U. S. 102. If the kidnapping and involuntary transportation of Sobell from Mexico City to the border was attributable to agents of the F. B. I., it was a violation of international law, and in contravention of our own law as well."
>
> (S. App. p. 99; emphasis was Sobell's.)

The accusations were made to the United States Supreme Court in Sobell's petition for certiorari. Here was Sobell in his brief to the Supreme Court:

> "The powers of arrest of agents of the F. B. I., are confined to our territory by a rule of construction, required by international law. If a hearing were to disclose either that they invaded Mexico as the literal meaning of the prosecutor's statement (R. 1534) would imply or that Mexican individuals (or officials) acted on their behalf in beating and kidnaping petitioner, there was a violation of Mexican territorial sovereignty by their conduct."
>
> (S. App. p. 105.)

In sum, there is no doubt: The "facts" from which Sobell can swear to of his own knowledge in this new petition were all before the Courts once before. All the accusations now before the court were here before in but slightly different and more hesitant language.

The only differences between the present petitions and the old are that Sobell now has—with hearsay unattributed—filled in some fringe details of what took place just prior and after his arrest; that he now speaks—without telling of the source—of what one named Mexican official

did and supposedly said and of what vague "officials" of the Mexican Immigration Department did; and that he makes his flat conclusions broader and his accusations more stinging.

The truth is also that the "facts" of the "abduction" story with all its possible implications were known by Sobell's counsel before and during trial. He admitted this to the trial judge in arguing the motion to arrest judgment. (2407.) Yet deliberately, after a discussion among competent and articulate lawyers, that issue was held off until after trial. (2407-16.)

The motion in arrest was denied by the District Court. In upholding that decision, this Court held that the allegations of Sobell raised no question on jurisdiction over the offense but concerned merely jurisdiction over "the person". Sobell's motion was considered untimely and part of an ill-conceived game played with justice:

> "He preferred to take his chances on the verdict, withholding his trump card until the trial was over. The Federal Rules of Criminal Procedure allow no such tactic."
>
> 195 F. 2d at p. 603.

INTRODUCTION TO ARGUMENT

The "Ground Rules" of Motions Under Section 2255

Section 2255 of the Judicial Code serves the functions of the old writ of habeas corpus in criminal cases. A petitioner, to succeed under it, must raise "jurisdictional defects" or deprivation of rights so fundamental that it can be said that he was denied "due process" or a "fair trial". *United States* v. *Hayman,* 342 U. S. 205 (1952).

But a petitioner cannot under Section 2255 obtain a re-trial in order to use procedures or evidence which he voluntarily discarded at or before trial. He cannot substitute the Section 2255 proceeding for proper examination and cross-examination at trial. *United States* v. *Rosenberg,* 200 F. 2d at pp. 666-7; *United States* v. *Weatherbee,* 175 F. 2d 834, 835 (2d Cir.), *cert. denied,* 338 U. S. 906 (1949); *Smith* v. *United States,* 187 F. 2d 192, 199 (D. C. Cir. 1950), *cert. denied,* 341 U. S. 927 (1951); *United States* v. *Spadafora,* 200 F. 2d 140 (7th Cir. 1952).

Accordingly, no matter what fundamental rights a petitioner may claim were violated, he cannot succeed if he knew of information at trial or before trial and remained silent to await the jury verdict. The underlying fairness of the rule is beyond questioning: if it were otherwise, a defendant could hold back, hope for a jury verdict, but no matter what, reserve a winning maneuver. Not under Section 2255, habeas corpus, or any other remedy for relief is a defendant allowed to play a game of "heads I win, tails the prosecution loses." See, e. g., *United States* v. *Rosenberg,* 195 F. 2d at pp. 601-3; *United States* v. *Lawrence,* 216 F. 2d 570, 572 (7th Cir. 1954); *Smith* v. *United States, supra* at pp. 198-9; *Carruthers* v. *Reed,* 102 F. 2d 933, 938 (8th Cir.), *cert. denied,* 307 U. S. 643 (1939); *Howell* v. *United States,* 172 F. 2d 213, 215 (4th Cir.), *cert. denied,* 337 U. S. 906 (1949).

It does not help the petitioner that he only knew of some of the facts and did not know all the embellishments, if the facts he knew placed him on notice to make inquiry. Otherwise there would be no end to litigitation and again defendants could play games with judicial proceedings. All a defendant would then have to do is hold back on the facts which he knows, then seek out the details

after trial if he loses. See *United States* v. *Walker*, 197 F. 2d 287, 288 (2d Cir.), *cert. denied*, 344 U. S. 877 (1952); *Bowen* v. *United States*, 192 F. 2d 515, 517 (5th Cir. 1951), *cert. denied*, 343 U. S. 943, *rehearing denied*, 343 U. S. 988 (1952).

Furthermore, a petitioner is entitled to a hearing only on true factual issues raised by his petition on fundamental rights which he is not barred from presenting. *United States* v. *Hayman, supra; Jordan* v. *United States District Court*, 233 F. 2d 362, 368 (D. C. Cir. 1956). If the record conclusively shows that he presents no factual issue or that he is barred from presenting factual issues, a petitioner is not entitled to a hearing. *United States* v. *Rosenberg*, 200 F. 2d at p. 666; *Klein* v. *United States*, 204 F. 2d 513 (7th Cir. 1953).

In determining this question the District Court is not bound by petitioner's characterizations, and is not required to accept as "fact" conclusory allegations or accusations. Nor need the District Court accept the word of a man without possible first-hand knowledge of what he speaks; certainly, not when he declines to give the source of his hearsay. On appeal, only facts free of coloring, set out by a person who knows the facts, are to be accepted for the purpose of determining whether a hearing in the district court was required. *United States* v. *Rosenberg*, 200 F. 2d at p. 668; *United States* v. *Pisciotta*, 199 F. 2d 603, 606, 607 (2d Cir. 1952); *United States* v. *Spadafora, supra* at p. 143; *Powell* v. *United States*, 174 F. 2d, 470, 471 (5th Cir. 1949); *United States* v. *Sturm*, 180 F. 2d 413, 414 (7th Cir.), *cert. denied*, 339 U. S. 986 (1950); *United States* v. *Page*, 229 F. 2d 91, 92 (2d Cir. 1956); *Taylor* v. *United States*, 229 F. 2d 826 (8th Cir.), *cert. denied*, 351 U. S. 986 (1956).

ARGUMENT

POINT 1

Sobell does not raise any issue of fact which warrants a hearing on his allegations of "perjury" because his petition supports the trial testimony, and he deliberately withheld cross-examination.

Sobell charges in his third Section 2255 petition that the prosecution knowingly put into evidence perjured testimony.

Petitioner Sobell's charge of perjury and false evidence concerns itself with the testimony that he was "deported from Mexico." James S. Huggins, a Government employee attached to the Immigration and Naturalization Service of the Department of Justice, is said to be the perjurer. An Immigration and Naturalization document which Huggins filled out with a notation "deported from Mexico," is said to constitute the major part of the "false" evidence. (Trial Exh. 25, Exh. 1 to S. Petition No. 1.)

There are two elements to Sobell's claim: there was placed before the jury evidence which was perjurious; the prosecution knew this. Sobell's petition must support both elements if he is to have a hearing. *United States* v. *Rosenberg*, 200 F. 2d at pp. 670-1; *Ryles* v. *United States*, 198 F. 2d 199 (10th Cir. 1952); *United States* v. *Wetherbee, supra; Cobb* v. *Hunter*, 167 F. 2d 888 (10th Cir.), *cert. denied*, 335 U. S. 836 (1948); *United States* v. *Spadafora, supra;* see *Mooney* v. *Holohan*, 294 U. S. 103 (1935).

Sobell fails at the outset because the claim of perjury of Huggins just cannot be—by the "facts" set out in Sobell's own petition.

Huggins testified at trial that he filled out the card, which had the notation "Deported from Mexico". On preliminary questioning and cross-examination by petitioner's counsel Huggins said that the information on the card was not given to him by Mexican authorities. (1521, 1534.) He stated that he was not in Mexico and that his contact with Sobell was in Texas. Huggins stated that the basis for his writing down the words "Deported from Mexico" was his own observation—not anything said by Mexican authorities. (1521-2; 1534.)

Huggins testified to seeing the Mexican police forcibly eject Sobell from their country. (1525-35.) From what Huggins said, it is beyond dispute that what he meant by the words "deported from Mexico" was *ejected from Mexico.*

Funk and Wagnalls New Standard Dictionary of the English Language bears out Huggins' use of the word "deported". The New Standard Dictionary defines the verb "deport" as

> "to carry off or away; transport; especially, to take or send away forcibly, as to a penal colony; banish; as, the prisoners were *deported* by boat."[4]

Sobell's petition papers do not conflict with this definition and Huggins' use of the words "deported from

[4] This is the definition used by Sobell himself in his brief to this Court on his appeal of his conviction when he argued that evidence of his "deportation" was irrelevant and should have been excluded. (S. App. p. 51.)

Mexico". On the contrary, Sobell tells vividly the story of how he was "forcibly sent away from Mexico."

Now, Sobell and his counsel would say that Huggins perjured himself because their understanding of "deported from Mexico" does not accord with Huggins' use of the words "deported from Mexico".

Their claim of perjury is based on the view that "deported from Mexico" must necessarily mean that Sobell was given a hearing by Mexican officials and certain procedures were followed.

But Huggins did not say that Sobell was given a hearing. Huggins made no mention of any proceedings followed by the Mexican authorities. He admitted that he did not know what went on in Mexico and that he did not inquire about what went on in Mexico. Huggins used the word "deported" as it is generally understood. No amount of listing Mexican procedures in immigration matters can establish perjury.

At trial, Sobell's counsel refrained from asking Huggins what he meant by "deported." Counsel knew right well what Huggins meant: he told the jury in summation that Huggins' testimony did not prove that Sobell was given a hearing and was "deported" by orderly proceedings. (2260-1, S. App. p. 60.) In any event, he stopped his cross-examination without asking what the witness meant—the question he would now have to ask at a hearing to establish even the semblance of a claim of "perjury." Sobell cannot use a hearing under Section 2255 to right the "inadequacies" of trial cross-examination. *United States* v. *Rosenberg,* 200 F. 2d at pp. 670-1; *Smith* v. *United States, supra* at p. 199; and all cases cited p. 21, *supra.*

POINT 2

The prosecutor's statements to the Court in arguing against a motion in arrest of judgment were absolutely true and in no event had any effect on a fair trial; accordingly, his statements cannot form the basis for Section 2255 relief.

Sobell complains that the Government prosecutor misrepresented facts to the trial judge.

Government's counsel is said to have "misrepresented" the facts by stating to the trial judge in arguing against a motion to arrest judgment that Sobell did not go to Mexico with "a visa", that Sobell was arrested in Laredo, the situs of the final act of "deportation", and that Sobell was "literally * * * kicked out [of Mexico] as a deportee." (2423-5).

First and foremost, the prosecutor did not tell a "falsehood". Sobell never had a "visa". All he ever had was a "tourist card". Government counsel's remarks were in fact aimed at rebutting Sobell's claim that he produced a "visa" for Mexican authorities the night on which he was deported; Sobell's claim was not true.

Sobell's trick of accusing Government counsel of lying in a case involving the death penalty is to refer to his tourist card in his motion papers as "tourist card (visa)." (S. App. 21.) The two just are not the same. Sobell's brief now concedes the difference; but, undaunted, it continues the point. (S. brief No. 1, p. 69.)

It is also plain that Government's counsel did not misrepresent the facts when he said that the final act of

"deportation" came in Laredo. He made it sparkling clear to the trial judge exactly what he meant by "deportation" when he said that Sobell was "literally kicked out," The prosecutor was using the term "deportation" in the most common sense—forcible ejection. Again, Sobell suffers from the continued belief that "deportation" must include what he and his present counsel now associate with the word.

Second, these statements were not made to the jury; nor were they made during trial. They were made *after* the trial to the trial judge during the argument on Sobell's motion in arrest of judgment. They could not have altered the fairness of Sobell's trial. They could not "vitiate" the trial. The statements even if they had been utterly false just had nothing to do with a "fundamental right," the jurisdiction of the Court, or anything which could qualify for relief under Section 2255. Compare *United States* v. *Lowe,* 173 F. 2d 346 (2d Cir.), *cert. denied,* 337 U. S. 944 (1949).

Finally, the statements of Government's counsel did not even have any force on the motion to arrest judgment; for they were not in the slightest degree relevant to the *ratio decidendi* for denying that motion. Neither the circumstances of how Sobell went into Mexico nor of how he came out of Mexico played any part in the decision not to arrest judgment. Whether petitioner had a "visa", a "tourist card", or a "tourist card (visa)", or was not "deported" within the meaning of everybody's definition, was of no concern at all to the motion in arrest of judgment. Petitioner's motion for arrest of judgment was denied because on the more fundamental ground that he had waived any challenge to the jurisdiction of the Court

over his person by not making a proper pre-trial motion under the Federal Rules of Criminal Procedure. 195 F. 2d at pp. 601-2.

POINT 3

Sobell's petition fails to establish any "suppression" of evidence or any right to relief under Section 2255 since it shows he knew of the operative "facts" before and during trial, but did nothing to bring out "the facts."

Sobell's final complaint in the third Section 2255 petition was that the prosecution "suppressed" evidence. Sobell's original charge was that the Government "suppressed" his "tourist card (visa)" and an international vaccination certificate. In a reply affidavit on the motion, Sobell expanded his "suppression" to include a charge that the prosecution hid evidence which would have established that Sobell was improperly "deported". (S. A. p. 33.)

The charges of "suppression" of Sobell's "tourist card (visa)" and his international vaccination certificate have not been argued in Sobell's brief on appeal. The Government assumes that Sobell has abandoned the claim and accepts the District Court's view that his contention about them was "farcical on its face." (S. App. p. 223.) It is only his later and broader charge of "suppression" which now survives in Sobell's brief: that is, the claim of "knowing use of perjury" reframed.

Sobell fails here both because he does not show any "suppression" of evidence and because he violates the ground-rules of Section 2255.

The meaning of "suppression"

The "suppression" of evidence occurs only if a prosecutor possesses and hides "relevant" information truly helpful to a criminal defendant, who does not know of its existence or its possible existence. See *United States* v. *Rutkin*, 212 F. 2d 641, 645 (3d Cir. 1954); *United States* v. *Baldi*, 195 F. 2d 815 (3d Cir. 1952).

The Government does not "suppress" evidence when a defendant knows of the existence of evidence or has reason to believe exists, and does nothing himself to obtain the information. There is no "suppression" by the prosecutor if the information he has was such that it could not truly be helpful; accordingly the Government is not obliged to come forward with irrelevant or immaterial evidence. *Ibidem.*

Sobell's accusation of "suppression" is faulty at every turn. First, the record shows conclusively that he knew of—before trial and during trial—every operative "fact" which he now claims to have discovered or at least more than enough facts to alert him to make inquiry and to call available witnesses and to present available documents. Second, the Government was under no obligation to come up with Sobell's "facts of abduction" since it would not have helped Sobell's case. It made no difference at trial whether Sobell was "abducted" or thrown out in some other way. The only issue was whether he came back willingly or no.

No "suppression": Sobell's knowledge of operative facts

Sobell's own petitions establish that he was aware of the facts which would, at least, prompt an inquiry before trial and during trial on cross-examination and on de-

fense. Sobell knew that he was not given a deportation hearing; he says he complained about that in Laredo, Texas. (S. App. p. 37.) According to Sobell, he complained to Huggins and F. B. I. Agents of "unlawful abduction by Mexican Secret Police." (S. App. p. 24.) Sobell says he complained to the F. B. I. and Immigration officials of "kidnapping" and being "assaulted." (S. App. p. 37.) He says that he knew F. B. I. Agents and Huggins had been waiting for him. There is, thus, no doubt that he knew the F. B. I. was contacted. (S. App. p. 23.) And if Sobell is to be believed he knew of F. B. I. "participation": he says that at Laredo he heard an agent say, "I hated to do it this way." (S. App. p. 32.)

What Sobell's petitions leave unsaid about his knowledge of events, Sobell's motion in arrest of judgment after the jury verdict said it. (See pp. 17-9, *supra*.)

The motion was made on April 5, 1951; it challenged the "jurisdiction" of the Court. The claims of wrongdoing—including perjury—were just about identical to the claims now being made. (2402-25.)

On Sobell's affidavit, counsel said then that the notation "Deported from Mexico" was a falsehood and that the prosecution must have known it to be false. (2403-04.) The "facts" and even the unsupported conclusions were almost identical. Sobell alleged that he was accosted in Mexico by armed men, blackjacked, detained during a part of the night, and then summarily driven to the United States border where he was turned over to the waiting authorities of the United States. (2410-4.)

Sobell and his counsel also asserted that the United States Government was responsible for Sobell's apprehension;

counsel announced that "what we overlooked to do will not excuse our Government in the brutal assault, and kidnapping, and abducting an American citizen, born in this country." (2407.) Counsel stated further: "the United States of America by these methods secured the body of Sobell, jurisdiction over him by a criminal, illegal act, and so the United States of America must send Sobell back to the place where they took him from * * *." (2420.)

Under questioning of the trial judge, counsel admitted that he knew of all this information before and during trial but that he held back. He conceded that Mrs. Sobell also knew what had happened, but he had not called her—as a matter of deliberate choice. (2406-9.)

So Sobell and his counsel let the trial go on for three weeks; they did not confront Huggins with a thing. There could be no more blatant case of a criminal defendant attempting to treat court proceedings as a useless game.

The motion in arrest of judgment was denied by the trial judge and the trial judge affirmed by this Court because of Sobell's attempt to trick justice. 195 F. 2d at p. 603.

Sobell seeks to avoid all this in his brief by his progressively wandering conclusions. In the latest position, his briefs claim broadly that "the Mexican Government and its agencies" did not know of his deportation and did not participate in the removal "legally or illegally" and that Sobell did not know of this total lack of Mexican Government participation. (S. brief No. 1, pp. 31-2.)

But, even here, Sobell is gainsaid by his own earlier extravagant claims in the motion to arrest judgment, even if this Court accepted his conclusory accusations. He did suggest to the District Court and this Court that the Mexican Government officially had nothing to do with his removal; he argued that this was a fair inference. (2407, 2420, S. App. p. 98; see pp. 17-9, *supra.)*

And in this Court he shot out as wildly. (See pp. 18-9, *supra.*) For example, Morton Sobell, at page 9 of his original appeal brief, stated:

> "[W]e neither concede nor contend that the outrage perpetrated on Sobell was an official act of the Mexican Police. The whole point of our argument on this subject * * * is that assault by individual Mexicans, even if they were police, may not be dignified as an 'act of Mexico'."

And, of course, this Court need not in this motion accept Sobell's conclusions and his many unattributed statements; it can go to the "facts". Once the "facts" are sought in the petition, Sobell's claim of total lack of "Mexican participation" reduces to nothing. The ignorance of the entire "Mexican Government" reduces to the ignorance of Sr. Obregon, Chancellor of the Mexican Consulate in Laredo, Texas, some vague "immigration authorities", and "the Chief of Immigration at Nuevo Laredo. (¶¶ 38th-42nd of Sobell Petition No. 1, S. App. pp. 24-5.) Compare *United States* v. *Rosenberg,* 200 F. 2d at p. 668. And even their ignorance is not attested to by them, but by Sobell. A comparison of "facts" now put out and then set out in the motion to arrest judgment show only that the "newly discovered" evidence give more details of what went on—such as a taxi trip by some "woman". There are just more frills on the old cloth now: they are

hardly within the scope of what Sobell calls "operative facts".[5] (See pp. 13-6, 17-20, *supra.*) Even the frills are given without telling the source for them.

Be all that as it may, beyond all possible dispute, *Sobell had more than enough facts to alert him to make inquiry before trial and to take issue during trial.* Sobell concedes as much in his brief on this point when he talks of his trial counsel's request, made in his motion to arrest judgment, for a hearing to determine "the respective roles of the prosecution and of Mexican authorities" and when he notes that his brief on the original appeal stated that on the roles of the two governments "the facts are equivocal." (S. brief No. 1, p. 60.)

Sobell's claim that he did not have opportunity to make inquiry before or during trial is just not so. He made pre-trial motions before trial for discovery; he applied for a writ of habeas corpus in which he charged that his detention was unlawful. (S. App. p. 57.) He admits he knew who the F.B.I. agents were; as he points out, one of them sat through his trial in the court-room. (§§ 50th S. Petition No. 1, S. App. pp. 27-8.) But no subpoenas were issued; nobody was requested to tell his story. That is, not until after the verdict was in.

Furthermore, Sobell did subpoena Mexican Government records and then let them pass by without showing them to anyone—until now. Here is the trial record on this:

> "Mr. Collenburg: I am here on behalf of the Mexican Government. Last week a subpoena duces tecum which I have here was served upon the Consulate here to produce certain records in the Court. The

[5] Sobell himself does not include the frills within his description of "basic facts." (See S. brief No. 1, pp. 31-2.)

Government asked me to appear specially to protest this service and to ask that the subpoena be vacated.

At the same time the Ambassador says that if a proper request is made for these documents through official channels he will be very happy to comply with such request.

The Court: What is your name?

Mr. Collenburg: Mr. Collenburg of Hardin, Hess & Eder.

Mr. Kuntz: It becomes academic, your Honor. I am not going to even introduce it.

The Court: You have no objection to my dismissing it?

Mr. Kuntz: No.

The Court: The subpoena is being withdrawn * * *."

(1770-1, S. App. pp. 57-8.)

No "suppression": lack of relevancy

There was no duty on the prosecutor's part to come forward with the details of Sobell's claimed "abduction," for there was no point to it.

The whole object of the evidence that Sobell was deported from Mexico was to prove that Sobell did not come back voluntarily. It was the final aspect of guilty flight. This Court has made this point:

> "Sobell's forced return to the United States was certainly relevant to the government's theory that he had fled to Mexico to escape prosecution, for otherwise the jury might have inferred that he had returned voluntarily to stand trial." 195 F. 2d at p. 602.

Sobell's present contentions against this evidence are utterly irrelevant. There is no disputing the fact that

Sobell's return was forced. Whether he was unceremoniously thrown out by the police with or without the help and direction of the F. B. I. or punctiliously ejected under the regular procedures of the Mexican immigration authorities makes no difference: in either event, he did not return voluntarily to stand trial. That is what the evidence tended to prove, and that remains the undisputed fact. *Cf. United States* v. *Wetherbee, supra* at p. 835; *United States* v. *Davis,* 233 F. 2d 646, 648 (7th Cir. 1956).

The contention of Sobell, in arguing relevancy, that the Government claimed that Sobell was deported in the sense that he was given a hearing by the Mexican authorities is just not so. The record is to the very contrary. (1588-9.)

The ground-rules of Section 2255 violated: Sobell's game

Sobell's knowledge of events more than sufficient to put him on inquiry before and during trial and his deliberate choice not to use the evidence or seek it out offend the basic ground rules of Section 2255. Section 2255 does not help a petitioner who knows of the existence or possible existence of evidence and does nothing to bring it out. *United States* v. *Walker, supra,* at p. 288; *Howell* v. *United States, supra* at p. 215; *Bowen* v. *United States, supra; cf. Goss* v. *United States,* 179 F. 2d 706 (6th Cir. 1949); *Wallace* v. *United States,* 174 F. 2d 112, 118 (8th Cir.), *cert. denied,* 337 U. S. 947, *rehearing denied,* 338 U. S. 842 (1949). A defendant is certainly not denied due process if he holds back to see what the jury does and then spring if the verdict displeases him or if he deliberately discards opportunities during and before trial. *United States* v. *Rosenberg,* 200 F. 2d at pp. 668, 669; *Carruthers* v. *Reed, supra.*

In sum

Sobell fails to lay a foundation for a hearing on "suppression": first, the record shows that he knew of the "suppressed facts" before and during trial or at least more than enough to look for and bring out the "facts"; second, there is no "suppression" because there was no duty on the part of the Government to come forward with the details of the claimed "abduction." Moreover, the withholding of the facts and inquiry is part of a game not permitted in any event by Section 2255.

POINT 4

Sobell waived any right which he might have had to escape justice because of an alleged "abduction" by withholding known information and any claim until he was found to be a Soviet spy.

On "the facts" of his "abduction", Sobell now claims the United States of America lost "jurisdiction" over his trial "ab initio" and "in total". The characterization of this contention in his fourth Section 2255 motion was "a lack of jurisdiction over the subject matter". (¶10, S. Petition No. 2, S. App. p. 82.) Sobell now prefers not to use that expression.[6]

[6] Re-labeling of the "jurisdictional" attack based on Sobell's "abduction" is a habit with Sobell's attorneys. On the motion in arrest of judgment and on appeal to this Court from Sobell's conviction it was called an attack on "the jurisdiction over his person". After Judge Frank pointed out that "personal jurisdiction" was waived, Sobell's counsel in the petition to the Supreme Court for certiorari changed the label of the attack to "the absence of power, *ab initio*" and just plain "jurisdiction". S. App. pp. 105-6.

The answer, in brief, is that no matter what he calls his attack, Sobell cannot escape the fact that he is merely claiming that he was improperly placed before the court and that he waived the claim by failing to raise it before and during trial—when he knew more than enough to make a challenge.

The only kind of "jurisdictional" claim which is never waived by withholding is the claim that the court lacks jurisdiction over the offense charged in the indictment—what the case calls "jurisdiction over the subject matter." *Ford* v. *United States,* 273 U. S. 593, 606 (1927); *Pon* v. *United States,* 168 F. 2d 373 (1st Cir. 1948). Sobell's attack is not of this genre.

Sobell's attack was waivable and was waived

The indictment in this case charged Sobell with conspiring to deliver documents, writings, sketches, notes, and information relating to the military defenses of the United States of America to the Soviet Union with the intent to help the Soviet Union and with the belief that it would be to the advantage of the Soviet Union. The indictment charged that this conspiracy took place in the Southern District of New York and "elsewhere" in violation of 50 U. S. C. §§ 32 and 34. There is no question that the indictment charged the offense prescribed by 50 U. S. C. §§ 32 and 34. There can be no dispute that the District Court in the Southern District of New York had jurisdiction to hear such offenses under 18 U. S. C. § 3231. *United States* v. *Rosenberg,* 195 F. 2d at p. 583. And no question that the Court's power to hear espionage cases under statute is sanctioned by Article III, Section 2 of the Constitution which provides:

"The judicial Power shall extend to all Cases, in Law

and Equity, arising under this Constitution, [and] the Laws of the United States."

Nowhere in the 82-page brief of Sobell in support of this fourth motion under Section 2255 does he gainsay either the fact that the United States made espionage a crime or that the District Court in the Southern District of New York could hear the offense of espionage charged against Sobell.

Sobell is again merely claiming that he should not have been "abducted" or thrown out of Mexico. Factually, that has nothing to do with the District Court's power to try offenses against the United States nor with the power of the United States to make espionage or conspiracy to commit espionage a crime punishable with a jail term. The fact that Sobell was ejected from Mexico is not a crime; it is not the crime with which he was charged. All this talk about extradition treaties and the like can aim at one thing: was the defendant Sobell properly here in the Southern District standing trial? By definition, that is strictly a problem of jurisdiction over the person. This point and this characterization are made in *Ford* v. *United States, supra* p. 606. They were made by Judge Frank on the original appeal in this case in the Second Circuit. 195 F. 2d at p. 603.

Since this is an attack on the "jurisdiction over the person" and not an attack on the Court's jurisdiction over the offense charged, Sobell waived the right to attack by deliberately permitting this case to go to the jury and withholding his information or fire until that jury found him to be a spy for the Soviet Union. See, *United States* v. *Rosenberg,* 195 F. 2d at p. 603; *Pon* v. *United States, supra; Ford* v. *United States, supra.*

Indeed, Sobell's counsel in arguing the present petitions to the district court admitted that a challenge to the jurisdiction over Sobell's person was waived by holding back for the jury verdict. (S. App. p. 132.)

Sobell's citations prove him wrong

Not one single case relied on by Sobell— not *Cook* v. *United States,* 288 U. S. 102 (1933), not *United States* v. *Rauscher,* 119 U. S. 407 (1886), not *Johnson* v. *Browne,* 205 U. S. 309 (1907), not *United States* v. *Mulligan,* 74 F. 2d 220 (2d Cir. 1934), not *United States* v. *Ferris,* 19 F. 2d 925 (D. N. D. Cal. 1927)—changes the fact that Sobell waived all claims of being improperly placed before the court. Nor do they at all change the proper characterization of Sobell's challenge as one against "personal jurisdiction."

Every case which deals with the problem of an alleged irregular seizure of a criminal fugitive in violation of a treaty or otherwise makes it clear that it is dealing with "personal jurisdiction". *Johnson* v. *Browne* recognizes at page 320 that it is talking about "jurisdiction over the individual"; *Ferris* states thrice that it is dealing with "jurisdiction over the person" (926-7); *Rauscher* talks of "jurisdiction of the person" (433). Accord: *In re Johnson,* 167 U. S. 120 (1897); *McMahan* v. *Hunter,* 150 F. 2d 498 (10th Cir. 1945), *cert. denied,* 326 U. S. 783 (1946); *Pon* v. *United States, supra;* see also Orfield, *Arrest of Judgment in Federal Criminal Procedure,* 42 Iowa L. Rev. 8, 17-20 (1956). In every case where relief was granted the claim was made timely by a writ or by a plea to the jurisdiction; where the claim was not, relief was denied. Compare *United States* v. *Rauscher, supra,* with, *Ford* v. *United States, supra.*

Sobell's great reliance on *Cook* v. *United States* and *United States* v. *Rauscher* and even on *Ford* v. *United States* to create some sort of unwaivable jurisdiction could not be more misplaced.

Cook v. *United States, supra,* was a proceeding *in rem* against the British vessel *Mazel Tov* and her cargo of liquor.

The United States by a "hovering" statute provided for the boarding and search of suspected rum-runners and the seizure and forfeiture of vessels within 12 miles of the shore, if a violation of the prohibition laws had occurred.

After what were spirited negotiations, indeed, the United States and Great Britain concluded a treaty in which Britain agreed that she would raise no objection to the boarding of British rum-runners outside American territorial waters provided that the seizure did not take place at a distance from the coast greater than the vessel could sail in one hour.

The maximum speed of *Mazel Tov* was 10 miles an hour. She was seized by the Coast Guard 11.5 miles off the coast, and there was no proof at trial that *Mazel Tov* ever had been any closer than over an hour's distance from shore.

The issue for the Supreme Court was whether the United States through treaty had modified the "hovering" statute to change it for British ships so that the seizure of *Mazel Tov* was unauthorized. The Court held that it had and that the seizure violated the treaty with Great Britain and was outside the scope of the statute. Justice Brandeis said the court lacked "power * * * to subject the vessel to our laws" because of our agreement with Great Britain. 288 U. S. at p. 121.

First, whether there could have been a waiver of the "jurisdictional" point had Captain Cook held back, nobody will over really know for certain, since the proper objection to "jurisdiction" was made by exception to the merits before trial. The case thus, right from the start, gives Sobell no comfort.

Second, even if *Cook* stood for unwaivable jurisdiction, it offers no help to Sobell because it was dealing with the court's civil "jurisdiction *in rem*" over a ship illegally seized. The essence of jurisdiction *in rem* is seizure; without seizure there cannot be anything filed against the ship. The seizure by the Government is the be-all and the end-all: it was the end-all in *Cook* because the Government had put "a territorial limitation on its own authority." 288 U. S. at pp. 120-1. This is not a civil case *in rem* or otherwise. The Grand Jury was not powerless to file its indictment although Sobell had fled to Mexico and was bound for even more distant lands. See *United States* v. *Rauscher, supra* at p. 433.

Third, Justice Brandeis in *Cook* said that there could be no "adjudication" because if the courts took civil action against the vessel they would go far to vitiate the treaty and offend Great Britain. 288 U. S. at pp. 121-2. This is a public policy rationale, and the Supreme Court has said that there is an over-riding public policy involved when the apprehension of a criminal is involved:

> "The law will not permit a person to be kidnapped or decoyed within the jurisdiction for the purpose of being compelled to answer to a mere private claim, but in criminal cases the interests of the public override that which is, after all, a mere privilege from arrest." *In re Johnson, supra,* at p. 126.

On the public policy consideration of giving offense to another nation, it becomes important also that *Mazel Tov* flew the Union Jack and Sobell is an American. Compare *The Richmond,* 13 U. S. (9 Cranch) 102 (1815) and *The Merino,* 22 U. S. (9 Wheat.) 391 (1824) (upholding forfeitures of vessels of American registry seized by the Navy within the territory of another sovereign in violation of international law).

Last, but not the least significant, is the fact that Justice Brandeis in *Cook* took particular notice and said that *Mazel Tov* never came within the territorial waters of the United States, nor even within the limits of United States authority as extended by treaty, and *Mazel Tov* never committed an offense within the territorial "jurisdiction" of the United States. 288 U. S. at pp. 107-8. Sobell's activities in spying for the Soviet Union, on the other hand, were accomplished right here in the Southern District of New York on American soil. His offense was committed within the territorial "jurisdiction" of the United States.

That each of these differences provides a point of departure between Sobell and *Mazel Tov* is established beyond doubt by *Ford* v. *United States.* Like the *Cook* case, *Ford* involved a seizure of a British rum-runner and the contention that the seizure occurred beyond the treaty limits. Unlike *Cook, Ford* was a criminal prosecution. The charge, conspiracy to import liquor, allegedly took place in San Francisco Bay. The defendants moved before trial to suppress the evidence on the ground that it was illegally seized at more than one hour's sailing distance from land. The lower court held a preliminary hearing and found that the point of seizure was within treaty limits, since the vessel was seized 5.7 miles from land and one of its boats could go 6.6 miles an hour.

At the trial itself the defendants sought to introduce evidence and submit to the jury the issue on the place of seizure. The Supreme Court held that it was not error to refuse to submit that issue to the jury because it went only to the question of "jurisdiction of the person", which was waived by the failure to enter a plea to the jurisdiction. Chief Justice Taft wrote:

> "But there is a reason why this assignment of error can not prevail. The issue whether the ship was seized within the prescribed limit did not affect the question of the defendant's guilt or innocence. It only affected the right of the court to hold their persons for trial. It was necessarily preliminary to that trial. The proper way of raising the issue of fact of the place of seizure was by a plea to the jurisdiction. A plea to the jurisdiction must precede the plea of not guilty. Such a plea was not filed. The effect of the failure to file it was to waive the question of the jurisdiction of the persons of defendants [citing cases.]."

273 U. S. at p. 606.

As for Sobell's reliance on *Rauscher* v. *United States*: in words which could not be clearer, *Rauscher* says and holds that a contention by a criminal that he has been brought before the court in violation of treaty raises only a question of "jurisdiction of the person."

Rauscher was tried on a charge different from the one on which he was extradited from England and claimed a violation of the extradition treaty with England. Rauscher raised the question before trial and entered a plea to the jurisdiction of the court. 119 U. S. at p. 409. Upon trial Rauscher, unlike Sobell, offered evidence in

support of his contentions. The timeliness of Rauscher's motion was not disputed. The question of whether Rauscher's objection to "jurisdiction" went to "jurisdiction of the offense" or to "jurisdiction of the person", however, had to be answered in order to answer of one of the questions certified to the Court. The Supreme Court expressly found that the extradition treaty violation raised a question only of "jurisdiction of the person" and that there was no question that the Court had power to try the offense:

> "Under the view we have taken of the case the jurisdiction of the court to try such an offense, if the party himself was properly within its jurisdiction, is not denied, but the facts relied upon go to show that while the court did have jurisdiction to find the indictment, as well as of the questions involved in such indictment, it did not have jurisdiction of the person at that time, so as to subject him to trial."
>
> 119 U. S. at p. 433.

Finally, Sobell's contention that Judge Frank's characterization of Sobell's claim of illegal seizure as one of "jurisdiction over the person" in the first appeal does not control because of the "fact" of a possible treaty violation was not pointed out to the court is refuted by Sobell's brief on appeal. One passage of his original brief on appeal seems worthy here of requoting:

> "A court *is* concerned with how a defendant is brought from a foreign place, when he is brought in violation of treaty or international law, *United States* v. *Rauscher*, 119 U. S. 407; *Cook* v. *United States*, 288 U. S. 102. If the kidnapping and involuntary transportation of Sobell from Mexico City to the border was attributable to agents of the F.B.I., it was a violation of international law, and in contravention of our own law as well."
>
> S. App. p. 99; emphasis was Sobell's. See pp. 18-20, *supra*.

Thus, Sobell does not avoid by cloaking his arguments in different words the ruling that he waived his claim of illegal seizure.

POINT 5

In no event, would Sobell's forced return from Mexico defeat his conviction as a spy in a criminal case; for Sobell comes within no exception to the rule that it matters not how a criminal defendant comes before the court.

Even if Sobell had raised his "jurisdictional" point in time and even if he were entitled to rely on all his wild unbottomed accusations, Sobell would not have been entitled to avoid trial.

The general rule

The federal authorities are virtually unanimous on the general rule that jurisdiction of a defendant in a criminal case is not impaired by the manner in which he was brought before the court. See Note, 165 A. L. R. 947 (1946). Thus, it is no bar to prosecution that the defendant was illegally arrested [*In re Johnson, supra;* see *Malone* v. *United States*, 67 F. 2d 339, 341 (9th Cir. 1933)], removed from another district in violation of the federal removal statute [*Ex parte Lamar,*