MR. GLEESON: May I address the Court for just one moment, sir, before Your Honor proceeds.

Unintentionally a misunderstanding was created with respect to pending proceedings in the Southern District of New York by Mr. Saypol's letter of December 1 that I presented to Your Honor last Thursday. A second letter has been written correcting that misunderstanding and I have shown a copy of it to Mr. Hamilton.

I present a copy of it to Your Honor and I ask, sir, to be permitted to have Mr. Saypol's letter of December 7, the letter to which I am now referring, become part of the record.

THE COURT: Mr. Hamilton has it?

MR. GLEESON: Yes, sir.

MR. HAMILTON: And there is no objection, if Your Honor please.

MR. GLEESON: I have concluded, sir.

(The letter referred to is as follows:)

UNITED STATES DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY
Southern District of New York,
United States Court House
Foley Square
New York 7, N. Y. elf

December 7, 1950

Honorable Gerald A. Gleeson
United States Attorney
Eastern District of Pennsylvania
4th Floor, U. S. Courthouse
9th and Market Streets
Philadelphia, Pennsylvania

Re: United States v. Harry Gold
United States v. Julius Rosenberg, et al.

Dear Mr. Gleeson:

I wrote to you on December 1, stating in part in the second paragraph of my letter that Gold "* * * is a co-defendant on charges of conspiracy to commit espionage along with Julius Rosenberg, David Greenglass and others. He has not entered a plea to that indictment."

I regret an obvious error in describing Gold's status in the pending prosecution in this district. He is actually named as a co-conspirator. Two copies of the indictment are enclosed.

This indictment supersedes a previous one which named the Rosenbergs only, obtained on newly acquired evidence presented to another grand jury. At that time it was contemplated that Gold should be named as a

defendant. The final decision to name him as a co-conspirator was predicated on the fact that since maximum punishment could be imposed in the case in your jurisdiction, it would be of no advantage and might be tactically disadvantageous to the case pending in my district to name him as a defendant.

I hope that no embarrassment has been caused you. Judge McGranery, to whom I spoke after talking to you on the telephone today, expressed himself as completely understanding in the circumstances and said that he had no fault to find.

Very truly yours,

/s/ IRVING H. SAYPOL

Irving H. Saypol

United States Attorney

Enclosures

THE COURT: Mr. Gold, do you care to make a statement?

MR. GOLD: If Your Honor please --

THE COURT: You may move to the bar of the Court, if you will.

MR. GOLD: I shall be very brief.

There are just four points, and, with one exception, all of them have been very adequately set forth in this court on the 7th of December. I am making note of them now, because they represent matters which have been uppermost in my mind for the past few months.

First, nothing has served to bring me to a realization of the terrible mistake that I have made as this one fact, the appointment by this Court of Mr. Hamilton and Mr. Ballard as my counsel. These men have worked incredibly hard and faithfully in my behalf, and in the face of severe personal criticism and even invective, and they have done this, not for the reason that they condoned my crime, but because they believe that as a basic part of our law I was entitled to the best legal representation available.

Second, I am fully aware that I have received the most scrupulously fair trial and treatment that could be desired, and this has been not only in this Court, but has been the case with the F.B.I., with the other agencies of the Justice Department, and with the authorities at the various prisons where I have been lodged, both here and in New York. Most certainly this could never have happened in the Soviet Union or in any of the countries dominated by it.

Third, the most tormenting of all thoughts concerns the fact that those who meant so much to me have been the worst besmirched by my deeds. I refer here to this country, to my family and friends, to my former classmates at Xavier University, and to the Jesuits there, and to the people at the Heart Station of the Philadelphia General Hospital. There is a puny inadequacy about any words telling how deep and horrible is my remorse.

Fourth, and very last, I have tried to make the greatest possible amends by disclosing every phase of my espionage activities, by identifying all of the persons involved, and by revealing every last scrap, shred, and particle of evidence.

Your Honor, I have finished.

THE COURT: Mr. Gold, the Court has carefully considered the cogent and analytical statement presented by your able and distinguished counsel, Mr. Hamilton, whom this Court appointed to represent you. Mr. Hamilton's presentation of your life and character and of the circumstances surrounding the crimes charged in the indictment provided the Court with the fullest possible relevant information and expressed counsel's conscientious devotion to his duty as a member of the bar and as an officer of the court.

The Court has also considered with care the

recommendation made by the Attorney General that you be sentenced to prison for a term of twenty-five years. You have pleaded guilty to two counts in the indictment. Since the Congress had authorized the imposition of sentence of the extreme penalty of death for the crime charged in each count of the indictment, the Court had requested the Attorney General to submit a recommendation as to the sentence to be imposed.

It must now be said that, when a defendant has been charged with a certain crime or crimes and has entered a plea of guilty to the charge or charges, the Court, in arriving at the proper sentence, has a duty to deliberate upon certain factors, namely; the protection of society against wrongdoers; the discipline of the wrongdoer; the reformation and rehabilitation of the wrongdoer; and the deterrence of others from the commission of like offenses. The Court, in the exercise of its discretion, should give careful, humane and comprehensive consideration to the situation of each offender and to the circumstances contemporary to the offense. In studying the case, the Court should determine whether the crime involved danger to property, danger to human life, danger to the national security. The Court should further consider whether the crime was one of sudden passion or a studied and deliberate act or series of acts.

In discharging the duty of pronouncing sentence upon you, this Court has endeavored logically and thoughtfully to apply to the facts presented those principles and standards which have in our law withstood the test of time. The Court, if it is to be a Court of Justice, must never be arbitrary, capricious, or subject to whims of popular passion.

You have pleaded guilty to charges of crimes affecting the national security of the United States and to the advantage of the Union of Soviet Socialist Republics. The gravity of these offenses is indicated by the Congressional authorization to impose sentence of the death penalty for each crime charged.

While these offenses are properly viewed in the setting of the period of their commission, at which time the Union of Soviet Socialist Republics was an ally of the United States, nevertheless, you transmitted and delivered documents and information vital to our national defense and affecting the national security of the United States to agents of a foreign government, and you entered into unlawful conspiracy with agents of the foreign government with full, complete and calculated knowledge of the secret character of this information relating to atomic energy and nuclear

fission and of its importance to the national defense of the United States and with knowledge that in so acting you were in violation of the laws of the United States.

The Court has properly considered that with advice of counsel you have entered pleas of guilty to the crimes charged in the two counts of the indictment; and the Court has further considered, as it has a like duty to consider, the fact that you, in addition to confessing your guilt, have attempted to atone for your crimes against the United States by actively cooperating with the Government to cause the apprehension of and the conviction of co-conspirators who participated with you in your wrongdoing.

The Court, nevertheless, must reflect upon the need to deter others in the future from the commission of similar offenses to the injury of the United States and to the advantage of a foreign Government. The Court stresses that the deterrence of others from such offenses is an obligation whose weight cannot be minimized in this case. Since the responsibility of a judge in imposing sentence remains the conscientious exercise of his discretion, the Court has concluded that it will not follow the recommendation of the Attorney General, but, after long and deliberate application of the principles to the facts, the Court has

determined the sentence and judgment in this case as follows:

On Count No. 1 in the bill of indictment 42458, United States District Court for the Eastern District of New York, and to which you have properly agreed that you be tried in this court, it is the sentence and judgment of the Court, upon the plea of guilty to Count 1 of the indictment, that you, Harry Gold, be confined in a federal penitentiary for a term of thirty years, which is the maximum prison term under the law.

That on Count No. 2, it is the sentence and judgment of the Court, upon the plea of Guilty to Count 2 of the indictment, that you, Harry Gold, shall be confined in a federal penitentiary for a term of thirty years. The service of this sentence shall run concurrently with the sentence imposed on Count 1.

This Court can not close the pages of this case without expressing its deepest and most profound thanks to Mr. Hamilton and to his associate, Mr. Augustus Ballard. As I have said, the conscientious effort devoted to the task that this Court imposed upon both you gentlemen make this very onerous responsibility of the court lighter in its weight by your devotion to that task. I am sure both you gentlemen will find satisfaction in the memory of a heavy responsibility

discharged with the greatest of fidelity, and my mere thanks is no reward.

MR. HAMILTON: May I ask Your Honor's indulgence to the extent of a five or ten minute recess before making any comment for the record, as I should like to talk to my client and to my associate.

THE COURT: Surely.

This Court will be in recess for five minutes.

MR. GLEESON: May it please the Court, may Mr. Hamilton and I see you for a moment at side bar?

THE COURT: Yes.

(The following transpired at side bar:

MR. GLEESON: I respectfully suggest to the Court that the indictment on which sentence is being pronounced is in reality a one-count indictment, and I move that Your Honor pass sentence on the indictment as a whole.

THE COURT: The Court has already stated in language that the Court knows no other way of clearing up that it was the sentence and judgment of this Court upon the plea of guilty entered by the defendant to the indictment, set forth in Count No. 1, that the defendant, Harry Gold, be confined in a federal penitentiary for a

term of thirty years, the maximum prison term under the law.

I will not change that.

MR. HAMILTON: If Your Honor please, I had hoped that this would be the end of this whole matter this morning, but, in addition to what Mr. Gleeson says, I, as a matter of record only, at this time at least, want to call Your Honor's attention to the fact that at the time of the arraignment the clerk, in reading the indictment, asked for a plea upon the first count, which was given, and upon the second count, which was given, and before I could object Mr. Gleeson made the statement to the Court that this was a single crime and asked for a plea to the indictment as a whole, which was given. There are any number of authorities on that.

THE COURT: Excuse me.

Would you want the Court to clarify this by saying that as to the thirty-year prison term imposed, which is the maximum under the law, it is the judgment of the Court that he serve thirty years in prison under the indictment as a whole?

MR. HAMILTON: Yes, Your Honor.

THE COURT: I will do that.

MR. GLEESON: Yes, that will clear it up.)

THE COURT: Mr. Gold, will you come forward to the bar of the Court.

(Mr. Gold stands at the bar of the Court.)

THE COURT: So that there will be no misunderstanding as to the judgement of the Court in its pronouncement of its sentence upon you, the maximum prison term under the law for the crime that you have committed is thirty years, it is the sentence and judgment of this Court that you serve thirty years, and that that maximum prison term be imposed, and that is as to both counts set forth in the indictment, to which you have pleaded guilty, and to the full and complete indictment. In other words, there is one sentence imposed, that of thirty years.

Is that clear, gentlemen?

MR. HAMILTON: It is to me, Your Honor.

MR. GLEESON: Your Honor, that is satisfactory.

THE COURT: Will there be any other question now before the Court, for the record?

MR. HAMILTON: I have none, Your Honor.

THE COURT: Are there any other statements.

MR. GLEESON: I have none, sir.

FD-36 (Rev. 5-22-64)

FBI

Date: 7/7/66

Transmit the following in _____ (Type in plaintext or code)

Via AIRTEL (Priority)

TO: DIRECTOR, FBI (101-2483)

FROM: SAC, NEW YORK (100-37158)(P)

SUBJECT: MORTON SOBELL
ESP - R
(OO: NY)

ReNYairtels, 4/4/66 and 4/21/66, re USDC, SDNY, order making available to Sobell attorneys and "experts" the previously sealed trial exhibits.

AUSA ROBERT L. KING, SDNY, advised 7/7/66, that USA's office, SDNY, had received a letter dated 7/6/66, from ELINOR JACKSON PIEL of DONNER, [redacted] and PIEL, associate counsel of SOBELL, that in accordance with the order they were going to show the trial exhibits to Dr. PHILIP MORRISON, "a scientist," who would be bound by the restriction against public disclosure.

The Dr. PHILIP MORRISON is undoubtedly identical with the person of the same name who is the subject of Bufiles 100-345840 and 65-67551. MORRISON is professor of physics and nuclear studies at Cornell University. He is an admitted member of the Young Communist League and has a long and extensive record of association with numerous CP front organizations. He worked at Los Alamos from 1944 to 1946.

For info.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 4/30/87 BY 3040 PAT/IMW

4 - BUREAU (RM)
(1 - 62-106323)(WALTER D. SCHNEIR)
(Att: Crime Records)
2 - PHILADELPHIA (65-4372)(RM)
1 - NY 100-109849 (HELEN SOBELL)
1 - NY 100-135206 (WALTER D. SCHNEIR)
1 - NY 100-107111 (CSJMS)(41)
1 - NY 100-91669 (DR. PHILIP MORRISON)
1 - NY 100-37158

EFM:mfd (#331)
(13)

62-106323-C9

101-2483-1623

REC-65

10 JUL 8 1966

SOVIET SECTION

Approved: _____ Sent _____ M Per _____
Special Agent in Charge

33 JUL 19 1966

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA GEN. REG. NO. 27
5010-106

UNITED STATES GOVERNMENT

Memorandum

1 - Mr. DeLoach
1 - Mr. Sullivan
1 - Mr. Wick

TO : Mr. W. C. Sullivan

DATE: 7/14/66

1 - Mr. Branigan
1 - Mr. Lee

FROM : Mr. W. A. Branigan

SUBJECT: MORTON SOBELL
ESPIONAGE - RUSSIA

Tolson
DeLoach
Mohr
Wick
Casper
Callahan
Conrad
Felt
Gale
Rosen
Sullivan
Tavel
Trotter
Tele. Room
Holmes
Gandy

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 4/30/87 BY 3040PWT/lmw

This is an informative memorandum.

BACKGROUND:

Morton Sobell is currently serving a 30-year sentence as a result of his conviction in 1951 of espionage conspiracy along with Julius and Ethel Rosenberg. Since his conviction numerous efforts have been made to obtain his release without success. On 5/13/66 Sobell made his sixth motion under Title 28, United States Code 2255, in the District Court, Southern District of New York, to set aside his conviction claiming the Government knowingly used forged documents, perjured testimony and suppressed evidence which would have proved his innocence. He requested a hearing to produce evidence of the above allegations.

The United States Attorney, Southern District of New York, filed an affidavit and memorandum in opposition to Sobell's motion on July 11, 1966, and the New York Office has furnished a copy of these papers. In the papers the Government contends that the ends of justice dictate a termination of attacks on the credibility of Government witness and the good faith of the prosecution. The Government states this motion is based on grounds previously heard and determined on their merits and that this motion is an abuse of Section 2255.

Further, the Government contends that Sobell's petition does not raise any issue of fact which warrants a hearing. The Government memorandum points out that if the unsupported allegations of the defense were substantiated they would not show perjury or the knowing use of perjury. The Government claims that in this motion Sobell is trying to relitigate the credibility of David and Ruth Greenglass, Government witnesses, and to reverse the strategy of trial counsel in 1951 and cross examine Harry Gold, another Government witness.

101-2483

101-2483-1624

JUL 19 1966

JPL:mab (6)

CONTINUED-OVER

The third point in the Government memorandum is that Sobell's claim that his counsel did not provide effective representation at the trial is frivolous. The memorandum points out that Sobell claims the trial was conducted in such an atmosphere of terror that defense counsel was prevented from presenting an effective defense. It is pointed out that in a motion under Section 2255 made in 1952 the claim was made that newspaper publicity had prevented the selection of an impartial jury. When the question was raised at that time about seeking a change of venue the defense stated that counsel was unaware of such publicity.

One of the points raised by Sobell relates to a registration card of the Hotel Hilton, Albuquerque, for Harry Gold for June 3, 1945. Defense claims the FBI forged this card since the handwritten date on the face is 6/3 and the time stamp is 6/4. The memorandum points out that even those who accuse the FBI of dishonesty "... do not accuse it of being incompetent which it would have to be if it made the idiotic mistake of placing inconsistent dates on a card it allegedly manufactured."

ACTION:

For information. This matter is being followed closely.

42-64)

FBI

Date: 7/12/66

Transmit the following in _____ (Type in plaintext or code)

Via AIRTEL (Priority)

TO: DIRECTOR, FBI (101-2483)

FROM: SAC, NEW YORK (100-37158)(P)

SUBJECT: MORTON SOBELL
ESP - R
(OO: NY)

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 4/30/80 BY 3042 PWT/lmw

ReNYairtel, 6/27/66.

Enclosed for the Bureau are one copy of affidavit of AUSA ROBERT L. KING, SDNY, opposing SOBELL's motion and one copy of USA, SDNY, memorandum in opposition to the motion. These are in reply to SOBELL's motion under Section 2255 and were served on WILLIAM KUNSTLER, SOBELL's attorney, on 7/11/66.

Information contained in PH airtel of 7/8/66, was discussed with AUSA KING.

Bureau will be advised of developments.

ENCLOSURE "ENCL. BEHIND FILE"

4 - BUREAU (Encl. 2)(RM)
(1 - 62-106323)(WALTER D. SCHNEIR)
(ATT: CRIME RECORDS)
1 -NY 100-109849 (HELEN SOBELL)
1 - NY 100-135206 (WALTER D. SCHNEIR)
1 - NY 100-107111 (CSJMS)(41)
1 - NY 100-37158

EFM:mfd ($331)
(10)

REC-43 101-2483-1625

EX-104

18 JUL 25 1966

SOVIET SECTION

62-106323-

RECORDED COPY FILED IN

Approved: _____ Sent _____ M Per _____
Special Agent in Charge

56 JUL 22 1966

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-- -- -- -- -- -- -- -- -- -- -- x

MORTON SOBELL, :

Petitioner, :

- v - :

UNITED STATES OF AMERICA, :

Respondent. :

-- -- -- -- -- -- -- -- -- -- -- x

66 Civ. 1328

MEMORANDUM OF THE UNITED STATES OF AMERICA IN OPPOSITION TO SECTION 2255 PETITION OF MORTON SOBELL.

ROBERT M. MORGENTHAU,
United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.

ROBERT L. KING,
STEPHEN F. WILLIAMS,
Assistant United States Attorneys,

Of Counsel.

RLK:km
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MORTON SOBELL,	:	
Petitioner,	:	66 Civ. 1328
- v -	:	
UNITED STATES OF AMERICA,	:	
Respondent.	:	

MEMORANDUM OF THE UNITED STATES OF AMERICA IN OPPOSITION TO SECTION 2255 PETITION OF MORTON SOBELL

Preliminary Statement

By order to show cause, returnable May 13, 1966, petitioner Morton Sobell brought his sixth motion, pursuant to 28 U.S.C. §2255, to vacate and set aside his 30-year prison sentence and his judgment of conviction entered on April 5, 1951. Said motion also seeks the following interim relief: (1) a hearing to determine the issues; (2) the release of petitioner on bail or in the alternative, a direction that he be present at the hearing; (3) authority to take the

deposition of Harry Gold,* a Government witness at the trial; (4) the furnishing to petitioner of the confession of Klaus Fuchs, not a witness at the trial; and (5) the furnishing to petitioner of any and all pre-trial statements of David and Ruth Greenglass and Harry Gold, each of whom testified for the Government at the trial.

The return date of the motion was adjourned either by consent or by order of this Court to July 25, 1966.

The Government submits this memorandum in opposition to petitioner's said motion and to each and every request for relief sought therein. The grounds of the Government's opposition are that (1) the motion constitutes an abuse of 28 U.S.C. §2255, and (2) the motion and the files and records of this case conclusively show that petitioner is entitled to no relief.

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* Mr. Gold's release from prison on May 18, 1966 was the reason the instant motion was initiated by order to show cause. Upon assurance given by the Government to Judge Marvin E. Frankel on May 13, 1966, that Mr. Gold will be available should this Court order a hearing on the motion, the question whether Gold should be produced was deferred pending a determination on whether a hearing is necessitated by the motion.

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Statement of Facts

Indictment C. 134-245, filed on January 31, 1951, charged Julius and Ethel Rosenberg, Morton Sobell, David Greenglass and Anatoli A. Yakovlev with conspiring between 1944 and 1950 to violate 50 U.S.C. §32* by combining to communicate to the Union of Soviet Socialist Republics documents, writings, sketches, notes and information relating to the national defense of the United States, with intent and reason to believe that they would be used to the advantage of the Soviet Union. Named as conspirators but not as defendants were Harry Gold and Ruth Greenglass; and a severance for trial purposes was granted to David Greenglass, who pleaded guilty, and as to Anatoli Yakovlev, who had left the United States.

Trial of the Rosenbergs and Sobell commenced before Hon. Irving R. Kaufman and a jury on March 6, 1951, and concluded on March 29, 1951 with a verdict of guilty as to each

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* Repealed June 25, 1948, C.645, §21, 62 Stat. 862, effective September 1, 1948; now covered by Title 18, United States Code, Sections 792 and 2388.

defendant. The evidence at the trial was summarized by the Court of Appeals on the Rosenbergs and Sobell's direct appeal from the conviction as follows:

"At the trial, witnesses for the government testified to the following: In November 1944, Ruth Greenglass planned a visit to her husband, David, stationed as a soldier in the Los Alamos atomic experimental station. Before her visit, Ethel and Julius Rosenberg, sister and brother-in-law of David Greenglass, urged Ruth to obtain from David specific information concerning the location, personnel, physical description, security measures, camouflage and experiments at Los Alamos. Ruth was to commit this information to memory and tell it to Julius upon her return to New York, for ultimate transmittal to the Soviet Union. David, reluctant at first, agreed to give Ruth the information Julius had requested. He told her the location and security measures of the station, and the names of leading scientists working there. When David returned to New York in 1945 on furlough, he wrote out a fuller report on the project for Julius, and sketched a lens mold used in the atomic experiment. A few nights later, at the Rosenberg home, the Greenglasses were

introduced to Mrs. Sidorovich whom Julius explained might be sent as an emissary to collect information from David in New Mexico. It was agreed that whoever was sent would bear a torn half of the top of a Jello box which would match the half retained in Ruth's possession. Ethel Rosenberg, at this time, admitted her active part in the espionage work Julius was carrying on, and her regular typing of information for him. Julius introduced David to a Russian, who questioned David about the atomic-bomb operation and formula. In June 1945, Harry Gold arrived in Albuquerque with the torn half of the Jello box and the salutation, "I come from Julius." He had been assigned to the mission by Yakolev, his Soviet superior, and had, the day before his trip, met pursuant to Yakolev's command, with Emil Fuchs, British scientist and Russian spy working at Los Alamos. David delivered to Gold information about personnel in the project who might be recruited for espionage, and another sketch of the lens mold, showing the basic principles of implosion used in the bomb construction. Gold relayed the information to Yakolev. On a revisit of the Greenglasses to New York, David turned over a sketch of the

cross-section and a ten-page exposition of the bomb to Rosenberg. Ethel typed up the report, and, during this meeting, Julius admitted he had stolen a proximity fuse from a factory, and had given it to Russia. After the war, David went into business -- a small machine-shop -- with Julius, and Julius several times offered to send David to college on Russian money. Julius confided to David that he was helping the Russians subsidize American students, that he had contacts in New York and Ohio, and supplied information for siphoning to Russia, that he transmitted information to Russia on microfilm equipment, and that he received rewards for his services from the Russians in money and gifts. In 1950, Julius came to David and told him to leave the country immediately, since Dr. Fuchs, one of Gold's collaborators, had been arrested; he, Julius, would supply the money and the plan to get to Russia. A month later, after Gold's arrest, Julius repeated the warning to flee, adding that he and his family intended to do likewise, and giving David $1,000.

Julius said his own flight was necessitated by the fact that Jacob Golos, already exposed as a Soviet agent, and Elizabeth Bentley, probably knew him. Julius said he had made several phone calls to her and that she had acted as a go-between for him and Golos. Julius gave David an additional $4,000 for the trip. Julius had passport photos taken telling the photographer that he and his family planned to leave for France. After David's arrest for espionage, Ethel asked Ruth to make David keep quiet about Julius and take the blame alone, since Julius had been released after admitting nothing to the F.B.I. In 1944, Julius several times solicited Max Elitcher, a Navy Department engineer, to obtain anti-aircraft and fire-control secrets for Russia, and in 1948 asked him not to leave his Navy Department job because he could be of use there in espionage. A month or so later Elitcher accompanied Sobell to deliver "valuable information" in a 35-millimeter can to Julius.

"According to the government's witnesses, Sobell a college classmate of Rosenberg's suggested to Rosenberg that Elitcher would be a good source of espionage information, and he, Sobell, later joined Julius, in urging Elitcher not leave the Navy Department. According to Julius, Sobell regularly

delivered information for transmittal to Russia. Sobell (as noted above) delivered "valuable information" to Julius on an emergency midnight ride after learning that Elitcher was being followed by the F.B.I. He asked Elitcher for a fire-ordinance pamphlet and for the names of young engineers who might supply military information to the Russians. In 1950, Sobell fled to Mexico, used various aliases there, and made inquiries about leaving Mexico for other countries. He was, however, deported from Mexico to the United States.

The Rosenbergs took the stand and testified as follows: They had never solicited the Greenglasses for atomic information or participated in any kind of espionage work for Russia. Julius denied stealing a proximity fuse. He did not, he said, ever know Harry Gold or call Elizabeth Bentley. He admitted that he and David went into business together after the war, but said they did not enjoy good business relations. In 1950, David, according to Julius, excited, asked Julius to get a smallpox vaccination certificate from his doctor and to find out what kind of injections were necessary for entrance into Mexico. Ruth had told Julius that David stole things while in the Army, and Julius

thought David was in trouble on this account. David asked for a few thousand in cash and, when Julius refused, told Julius he would be sorry. Julius denied that he gave David any money to flee, or had any passport pictures of his own family taken preparatory to flight. He never discussed anything pertaining to espionage with either Sobell or Elitcher although he saw both socially. In short, the Rosenbergs denied any and every part of the evidence which the government introduced in so far as it connected them with Soviet espionage. Sobell did not take the stand but he pleaded not guilty."

Testimony of Harry Gold

Harry Gold testified on March 15, 1951, as part of the Government's direct case as follows: He was engaged in espionage work for the Soviet Union from the spring of 1935 until the time of his arrest on May 23, 1950 (R. 1161).* From March 1944 until late December 1946, he engaged in espionage work with Anatoli Yakovlev as his Soviet superior, a man he knew only as "John" (R. 1155, 1158-59, 1171).** Gold had meetings with Klaus Fuchs in June and July, 1944, and January, 1945 in New York and Massachusetts and secured information which he reported to Yakovlev (R. 1172-76, 1183-85).

In May, 1945, Yakovlev told Gold he was to meet Fuchs on the first Saturday in June, 1945 (June 2, 1945) in Sante Fe, New Mexico and then to proceed to an additional

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* References with the prefic "R." are to the transcript of the proceedings at the trial.

** Government's Exhibit 15 showed Yakovlev to be a Soviet national and an official of the Soviet government (R. 1225-28).

mission in Albuquerque, New Mexico (R. 1185-86). Concerning this additional mission, Yakovlev said a woman who was supposed to make the trip was unable to go and that it was vital that Gold do it (R. 1187). Yakovlev gave Gold a piece of paper with the name "Greenglass", an address on High Street, Albuquerque, New Mexico, and the notation "Recognition signal. I come from Julius", together with a piece of cardboard cut in an odd shape from a packaged food container and an envelope containing $500 for Greenglass (R. 1187-88).

Gold met with Fuchs in Santa Fe, New Mexico for a half hour on June 2, 1945 (R. 1190). That evening he went to Albuquerque and to the designated address on High Street, but ascertained that the Greenglasses were out for the evening and would return the next morning (R. 1191). He stayed the night at a rooming house and on Sunday morning, June 3, 1945, registered at the Hilton Hotel in Albuquerque (R. 1191-92).

At about 8:30 a.m. on June 3 he went again to the High Street address and there encountered David Greenglass. When Gold said "I came from Julius" and showed David the piece of cardboard Yakovlev had given him, David produced a matching piece of cardboard. Gold then introduced himself as "Dave from Pittsburgh" and David Greenglass introduced Gold to his wife Ruth (R. 1192-93).

David told Gold the information on the atom bomb was not ready and said he would have it ready at 3:00 or 4:00 p.m. that afternoon (R. 1194). When Gold returned at that time, David Greenglass gave him an envelope, saying it contained the information on the atom bomb for which Gold had come. He also told Gold that he expected to get a furlough at Christmas and would return to New York, at which time he could be contacted through his brother-in-law Julius. He gave Gold the telephone number of Julius in New York City. (R. 1195-96.)

Gold returned to New York on June 5, 1945 and on the same evening met with Yakovlev and turned over to him information which he had received from Fuchs and Greenglass (R. 1198-1200). Two weeks later, he again met with Yakovlev, at which time Yakovlev told Gold the information had been sent to the Soviet Union and that the information received from Greenglass "was extremely excellent and very valuable" (R. 1201).

Gold also testified to several additional meetings with Yakovlev and a further meeting with Fuchs in September, 1945 (R. 1202-23).

It should be noted that Gold did not testify that he ever met the Rosenbergs or Morton Sobell. Indeed, Judge Kaufman recognized that Gold's testimony in no way implicated Sobell as a member of the conspiracy charged when he instructed the jury as follows:

> "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.

"If you do not believe the testimony of Max Elitcher as it pertains to Sobell, then you must acquit the defendant Sobell." (R. 2355.)*

Though given overnight to make their decision, counsel for both Rosenbergs and for Sobell chose not to cross-examine Gold (R. 1230). In his summation, the Rosenbergs' counsel made perfectly clear what his trial strategy was in this respect. He conceded the June 3, 1945 meetings between Gold and Greenglass but emphasized that Gold had never claimed to have met Rosenberg (R. 2205-06, 2215). Counsel accepted the Jello-box evidence, except for the Greenglasses testimony that their half was obtained from the Rosenbergs. He stated: "Is it too unreasonable to infer that maybe David got his one-half of the Jello box from the very man who gave the other half to Gold?" (R. 2216.)** He added that Gold:

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* When he sentenced Sobell, Judge Kaufman remarked that "the evidence in the case did not point to any activity on your part in connection with the atom bomb project." (R. 2461.)

** The references to "Julius" were explained away by Mr. Bloch as code names rather than true names (R. 2218-19)

> "got his 30-year bit [his sentence upon his conviction on a similar charge in Philadelphia] and he told the truth. That is why I didn't cross-examine him. I didn't ask him one question because there is no doubt in my mind that he impressed you as well as impressed everybody that he was telling the absolute truth, the absolute truth." (R. 2215; emphasis added.)

Counsel for Sobell, in his summation, adopted the strategy of attacking the testimony of Elitcher and the flight evidence, emphasizing that this was the only evidence against his client (R. 2243, 2258). Harry Gold was not mentioned once in the entire summation (R. 2239-65).

The Hotel Hilton Registration Card

To corroborate Gold's testimony concerning his June 3, 1945 activities in Albuquerque, New Mexico, the Government on March 16, 1951, introduced in evidence a photostat of a Hotel Hilton registration card showing Gold's registration at the Albuquerque Hotel on June 3, 1945. The circumstances of the introduction of the photostat are as follows:

> "MR. SAYPOL [the prosecutor]: I now have some testimony which it is possible there may be a stipulation on: The fact of the registration of Harry Gold at the Hotel Hilton on June 3. I have a photostat of the registration card. I also have the original on the way, together with a witness if required. . . ." (R. 1258)
>
> "MR. SAYPOL: I want to offer in evidence and have received a copy of the registration card as a record regularly kept in the course of business and show it to the jury.
>
> "MR. E.H. BLOCH [Rosenberg's counsel]: I certainly have no objection to that introduction.
>
> "MR. KUNTZ [Sobell's counsel]: We have no objection." (R. 1259.)

Since the foregoing proceedings took place outside the presence of the jury, they were repeated when the jury returned (R. 1261-62). The photostat of the registration card was then received as Government Exhibit 16 and the record reflects:

> "MR. SAYPOL: Yes. I will ask leave to read it to the jury and exhibit it to the jury, both the face and the reverse side of the photostat received.

May I proceed to read it to the jury?

THE COURT: Yes.

(Government's Exhibit 16 exhibited and read to the jury.)" (R. 1262; emphasis added.)

Sobell's Post-Conviction Proceedings

Upon the conviction of the Rosenbergs and Sobell on March 29, 1951, sentencing was scheduled for April 5, 1951. On that day, counsel for Sobell made a motion in arrest of judgment, claiming that Sobell's conviction was obtained upon false testimony about which the F.B.I. must have known (R. 2402-19).* Judge Kaufman denied the motion and sentenced Sobell to 30 years imprisonment (R. 2425, 2462).

* The alleged false testimony was that of James S. Huggins, an Immigration official from Laredo, Texas, who wrote on an Immigration record that Sobell was "Deported from Mexico" (R. 1516-35). In support of the motion, Sobell submitted an affidavit alleging in substance that he was forceably kidnapped from Mexico (R. 2406-14).

The Rosenberg and Sobell convictions were affirmed on appeal, 195 F.2d 583 (2d Cir. 1952). One of the attacks on appeal concerned "the reliability of the damaging testimony given against . . . [the defendants] by the government's chief witnesses who are all self-confessed spies, and particularly the credibility of the testimony of the Greenglasses. . . ." 195 F.2d at 592. Pointing out that Judge Kaufman had instructed the jury that they must consider the accomplice testimony of the Greenglasses and Gold "carefully and act upon it with caution" (R. 2364), the Court of Appeals declined to enter the province of the jury and consider the matter of credibility. 195 F.2d at 592. Rehearing of the appeal was denied at 195 F.2d 609 (2d Cir. 1952).

Petition for certiorari was denied, 344 U.S. 838 (1952) and rehearing denied, 344 U.S. 889 (1952). In 1954 Sobell moved for leave to file a second petition for rehearing, which was denied at 347 U.S. 1021. Again, in 1957 Sobell moved to vacate the orders denying certiorari and rehearing, which motion was denied at 355 U.S. 860.

Sobell and the Rosenbergs joined in a motion under 28 U.S.C. §2255 in late 1952. Among the grounds of the Rosenberg motion, in which Sobell joined, was the contention that "the prosecuting authorities knowingly used false testimony to bring about petitioners' conviction." Rosenberg petition, November 24, 1952, p. 5; 108 F. Supp. 800 N.1.*

The claim of knowing use of perjured testimony in this motion was threefold. First, it was contended that David Greenglass lied when he testified that he had cooperated with the authorities from the time of his arrest on June 15, 1950, as was evidenced by a statement of Mr. Saypol, the prosecutor, at the time of David Greenglass' sentencing. Rosenberg petition, supra at 60-64. Second, David Greenglass allegedly perjured

* Another ground urged was that pre-trial and trial publicity "created a trial atmosphere of prejudice and hostility toward" the petitioners. Rosenberg petition, supra at p.4, 108 F. Supp. 800 N.1.

himself when he testified that Government Exhibits 2, 6, 7 and 8 (reproductions of sketches of atomic bomb information turned over to Rosenberg and Gold) were prepared from his memory alone without outside aid. To demonstrate the falsity of this testimony, petitioners adduced affidavits of scientists saying it was "impossible" or "improbable" that Greenglass could have prepared these sketches solely from memory; and petitioners alleged that Gold had assisted Greenglass while both were lodged under the same roof at the "Tombs" (the New York City prison). Rosenberg petition, supra at 64-68. Finally, petitioners asserted that rebuttal witness Ben Schneider perjured himself to the knowledge of the prosecution when he testified on March 28, 1951 that the last time he saw Julius Rosenberg before that day was in May or June 1950, when Rosenberg came into his shop for passport photos. Petitioners relied upon reports that Schneider had been brought into court the day before, March 27, 1951, to ascertain whether he could identify Rosenberg. Rosenberg petition, supra at 68-70.

These motions of the Rosenbergs and Sobell were denied by Hon. Sylvester J. Ryan on December 10, 1952 at 108 F. Supp. 798 (S.D.N.Y. 1952), and the denial was affirmed on December 31, 1952, 200 F.2d 666 (2d Cir.). Certiorari was denied on May 25, 1953, 345 U.S. 965 and rehearing denied on June 15, 1953, 345 U.S. 1003.*

By notice of motion, dated June 5, 1953, the Rosenbergs moved for a new trial under Rule 33, F.R. Crim. P., and for an order pursuant to Section 2255 vacating and setting aside their judgments of conviction. By order to show cause, dated the same day, Sobell made a similar motion based on the evidence set forth in the Rosenberg petition. The grounds of the motion were (1) newly discovered evidence, and (2) the use by the prosecuting authorities of knowingly perjured testimony. Rosenberg petition, June 5, 1953, p. 4.

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* A further motion of the Rosenbergs under Section 2255 and Rule 35, F.R. Crim. P., was denied by Judge Kaufman on June 1, 1953, affirmed June 5, 1953, 204 F.2d 688 (2d Cir.). A motion by Sobell under Rule 35 to reduce sentence was denied by Judge Kaufman on January 9, 1953, 109 F. Supp. 381.

The newly-discovered evidence consisted of a console table said to belong to the Rosenbergs, about which David and Ruth Greenglass had testified at the trial, and certain pre-trial statements of Ruth and David Greenglass to their attorneys and inter-office memoranda of those attorneys, which had been stolen from the office of those attorneys. Upon the basis of these items, the following contentions were made: (1) Ruth and David Greenglass perjured themselves in their testimony concerning the console table, and the Government knowingly sponsored this testimony and suppressed the console table, knowing that it could expose Ruth Greenglass' perjury with respect thereto, Rosenberg petition, supra at 13-15; (2) Greenglass was a "hysteric" and a habitual liar, id. at 15-17; (3) the Government suppressed the fact that David Greenglass was questioned in February 1950 concerning the theft of uranium from Los Alamos, id. at 17; (4) David Greenglass' pre-trial statements to his attorneys omitted mention of portions of his trial testimony which tended to connect Julius Rosenberg to the conspiracy, e.g., he stated he identified

Gold by a "torn or cut piece of card" rather than by a Jello box and he stated "I did not know who sent Gold to me", id. at 19-23.

These motions were heard by Judge Kaufman on June 8, 1953 and he orally rendered his opinion denying the motions the same day. Transcript of Hearing, June 8, 1953, pp. 122-37. Concerning the relief sought under Section 2255, Judge Kaufman, while noting "that this Court does not in its discretion believe that this motion should be entertained",* proceeded to decide the application "on its merits or lack of merit" (id. at 123). He treated "as true all the basic facts stated in the moving papers", noting that "this does not mean, of course, that I am obliged to accept conclusionary allegations asserted by petitioners" (id. at 123-24). In substance, Judge Kaufman expressed doubts whether

* In this connection, Judge Kaufman adverted to the claim of knowing use of perjurious testimony in the earlier Section 2255 motion decided by Judge Ryan (id. at 122-23).

the evidence adduced even indicated perjury, but in any event held it was no proof whatsoever of knowing use of perjury. It consisted rather of "a series of conjectures", "hypothetical charges" and "incredible" conclusions. (Id. at 126-32.) Judge Kaufman concluded:

> "Bold allegations and charges, which have been unfortunately characteristic of the defense, have been made, but in the realm of facts nothing of significance has been uncovered. I have said many times that I cannot remember a case in our courts which has received the meticulous attention of so many judges on so many occasions. The fervor and persistence of counsel cannot supply substance and merit where such is lacking, and the present attack is devoid of substance and at best cumulative." (Id. at 136.)

The denial as to the Rosenbergs was affirmed on June 11, 1953, 204 F.2d 688 (2d Cir.) and as to Sobell was affirmed on October 8, 1953, with rehearing denied on October 31, 1953 (unreported, Docket No. 22885). A petition by Sobell for certiorari was denied on February 1, 1954, 347 U.S. 904.

By notice of motion, dated May 8, 1956 and May 25, 1956, Sobell brought his third and fourth Section 2255 motions. The grounds for relief in the May 8 motion were that:

> "the prosecuting authorities knowingly, wilfully and intentionally used false and perjurious testimony and evidence, made false representations to the Court, and suppressed evidence which would have impeached and refuted testimony given against petitioner, all to cause and sustain his conviction. . . ." Sobell petition, May 1956, p. 2.

Renewing the claim that he had been kidnapped from Mexico at the time of his arrest, see page 17 supra, Sobell again claimed the prosecution had suborned perjury when it introduced evidence to show he had been "deported" from Mexico. He further asserted that the Government deliberately suppressed evidence relating to the alleged abduction and made misrepresentations to the Court about it. (Id. at 3-18.) Judge Kaufman carefully considered each of these contentions and denied the motion on its merits, 142 F. Supp. 515 (S.D.N.Y., June 20, 1956). He found neither perjury, nor suppression nor misrepresentation. Id. at 527-31. Once again he observed:

> "It is difficult to find a case in the history of American jurisprudence, or indeed in the judicial annals of any other country, where the defendants' convictions and contentions have received the attention of so many judges at so many levels of a judicial system." Id. at 519.

Finally, Judge Kaufman indicated to Sobell's counsel, three of whom have brought the petition now before this Court, that they should consider the effect of "repeated abuses of . . . [the] processes" of the writ of habeas corpus and Section 2255 on the meaning of this great writ and the consequences of unfounded attacks on all associated with the prosecution of this case. Id. at 531-32.

Judge Kaufman's decision denying both motions was affirmed on May 14, 1957, 244 F.2d 520 (2d Cir.). Petition for rehearing was denied on June 3, 1957, Docket Nos. 24299 and 24300. Petitions for certiorari and for rehearing were denied on November 12, 1957 and January 6, 1958, 355 U.S. 873, 920.

A fifth motion by Sobell under Section 2255 was denied by Hon. John F.X. McGohey on April 5, 1962, 204 F. Supp. 225. No claim of use of perjured testimony was

made in this motion. The denial was affirmed on February 6, 1963, 314 F.2d 314 (2d Cir.) and certiorari was denied on June 17, 1963, 374 U.S. 857.

Sobell's Present Petition

The petition currently before this Court is Sobell's sixth motion pursuant to Section 2255 and comes over 15 years after his conviction. It is his fourth such motion which is premised on the ground that the Government knowingly used perjured testimony at the trial; his third such motion which alleges that David Greenglass perjured himself with knowledge of the prosecution; and his second such motion making a similar claim with respect to the testimony of Ruth Greenglass.

The petition alleges that "the government [vaguely defined in the petition to include all prosecutive and investigative agencies, their agents and representatives, involved in the investigation or prosecution of the case (p. 3 ftn.)] knowingly created, contrived and used false, perjurious testimony and evidence and induced and allowed government witnesses

to give false testimony in order to obtain the conviction of petitioner and his co-defendants" (p. 3; emphasis added). That the "witnesses" referred to are David and Ruth Greenglass and Harry Gold is made clear by petitioner's allegation that "this application is based upon the fact that Gold neither met Greenglass on June 3, 1945, nor registered at the Hotel Hilton on June 3, 1945" (p. 10), meetings testified to in detail by both Greenglasses and by Gold. Though the petition is carefully drawn to obscure the fact that the truthfulness of the Greenglasses' testimony is being attacked, that this is so is further shown: (1) by petitioner's request that he be furnished with the pre-trial statements of Ruth Greenglass, David Greenglass and Harry Gold and (2) by the allegation of petitioner's attorney, William M. Kuntsler, on pages 5-6 of his affidavit of May 9, 1966 in support of that request that "the pitch of . . . [petitioner's] attack in his main motion is that their [Greenglasses and Gold's] trial testimony

was deliberately and wilfully fabricated at the instigation and inducement of the government."*

To show the knowing use of perjury of these three Government witnesses, petitioner further alleges that the Government:

> "a. knowingly suppressed and destroyed or caused to be destroyed evidence [the June 3, 1945 Hotel Hilton registration card] which would have impeached and refuted testimony and evidence given against the petitioner and his co-defendants; and
>
> "b. presented and vouched for the credibility of its main and indispensible witness [apparently Gold; see page 12**] when it knew and knowingly suppressed the evidence that he was a proved and admitted pathological liar, who could not be believed or relied upon" (pp. 3-4)

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* Petitioner also gives himself away by his curious allegation that "No application for similar relief has been founded upon all the facts and the grounds here set forth. The within application, based both upon new evidence and in conjunction with evidence previously obtained mandate that petitioner be granted a evidenciary hearing" (p. 4; emphasis added).

** Compare Sobell's second Section 2255 motion where David Greenglass is referred to as "the Government's witness-in-chief." Sobell Petition, June 5, 1953, p. 22.

The petition is not verified. It is not supported by a single affidavit. Though it refers to Gold's testimony in other proceedings and his pre-trial statements to his attorneys, which are "available to petitioner's counsel" (p. 14), such testimony and statements are not appended to the motion and their substance is only set forth in conclusory form. There is no indication of a single witness who is available to testify for petitioner in the event of a hearing, nor an offer of any other proof that would be adduced thereat. The petition is replete with conclusions of freudulent prosecution repeated so often that they tend to obscure the paucity of factual allegations.

Giving petitioner every benefit of the doubt, the only allegations of the petition which could be described as factual* are:

* As will be shown infra, pages 41-44, in large part these matters were known at the time of trial and all of them were known at the time of Sobell's third Section 2255 motion.

(1) Fuchs' description of the courier he met in the United States differs from the appearance of Gold (p. 10);

(2) Gold testified in this Court that he had lied before a 1947 federal grand jury (p. 10);

(3) The F.B.I. on May 23, 1950 found a Hotel Hilton registration card of Harry Gold dated September 19, 1945 and no other (p. 11);

(4) The Government at the trial did not inform the court and the jury that:

(a) it felt impelled to submit Gold for psychiatric observation and testing;

(b) he testified in open court that he had lied before a federal grand jury;

(c) he had admitted to his attorney that he had lied to another federal grand jury and had woven

a series of fantasies about a make-believe wife and twin children; and

(d) he had made prior inconsistent statements to his attorneys (p. 12).

(5) Between May and December, 1950 Gold faced the danger of the imposition of the death penalty (p. 13);

(6) Gold's pre-trial statements were at variance in some respects from his trial testimony (pp. 14-15);

(7) Gold and David Greenglass were incarcerated in the same jail from the summer of 1950 to March 1951 (p. 15);

(8) An examination of Government Exhibit 16 shows a variance between the handwritten date on the front and the stamped date on the back and that no F.B.I. agent's initials or date of receipt appear thereon (p. 16).

(9) The original June 3, 1945 registration card, of which Government Exhibit 16 is a photostat, was returned to the Hotel on August 4, 1951; the original September 19, 1945 registration card, which was not used at the trial, was not returned to the Hotel but destroyed on Feb. 11, 1960 (pp. 16-17 and Exhibit A); and

(10) Defense counsel at the trial proposed the impounding of evidence; did not cross-examine Gold; did not put petitioner on the stand; and declared publicly the trial of petitioner and his co-defendants was fairly conducted (p. 19).

It is upon these unsupported allegations that petitioner would have this Court direct a hearing on the motion. Patently, if each and every one of them were substantiated thereat, they would not even show perjury, much less knowing use of perjury. It is apparent that petitioner merely seeks to utilize Section 2255 to relitigate the credibility of the Greenglasses and to reverse his counsel's strategy of 15 years ago and cross examine Harry Gold.

RLK:gh
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ARGUMENT

POINT I

The "Ends of Justice" Dictate a Termination of These Continuing Piecemeal Attacks Upon the Credibility of Government Witnesses and the Good Faith of the Prosecution.

Section 2255 provides that:

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

In Sanders v. United States, 373 U.S. 1 (1963), the Supreme Court discussed at length the discretion which the above-quoted language gives the courts to deny repetitive and vexatious applications for relief under the statute. In substance, the Supreme Court there set forth two standards to guide the discretion of the Court in making a determination whether to entertain the motion, discussed under subheadings A and B infra.

A. The Instant Motion is Premised on the Same Ground Previously Heard and Determined On the Merits in Prior Applications.

The Supreme Court in Sanders said that:

> "Controlling weight may be given to denial of a prior application for . . . §2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." 373 U.S. at 15.

First, the instant motion is based on the same ground urged in petitioner's first Section 2255 motion, denied by Judge Ryan on December 10, 1952; in his second Section 2255 motion, denied by Judge Kaufman on June 8, 1953; and in his third such motion, denied by Judge Kaufman on June 20, 1956. Each of those motions, together with the present one, sets forth as "a sufficient legal basis for granting the relief sought" the charge that the Government knowingly used perjured testimony in deprivation of petitioner's due process rights. Sanders v. United States,

supra at 16; see Price v. Johnston, 334 U.S. 277, 288-89 (1948).

Nor is it a sufficient answer to say that the present application is predicated on the alleged falsity of the testimony of a witness not previously attacked (Harry Gold). Factually this is not so because the motion attacks the testimony of three Government witnesses, David and Ruth Greenglass and Harry Gold, see pages 27-29 supra, a position which has been urged twice before as to David Greenglass and once before as to Ruth Greenglass. See pages 19-26 supra. More specifically, the motion attacks the testimony concerning the meetings of these three witnesses on June 3, 1945, and in that respect is the same motion in new dress that Judge Kaufman denied on June 8, 1953.

Nor should petitioner legally be permitted to make three separate motions claiming that the Government knowingly used perjured testimony simply by attacking the testimony of three witnesses separately. See the discussions infra concerning the ends of justice and abuse of Section 2255.

Second, each of petitioner's Section 2255 motions were denied "on the merits" as defined by the Supreme Court in Sanders, 373 U.S. at 16. While it is true, as petitioner alleges, that no factual hearings were held on his prior motions, this is only because in each instance it was held that, assuming the truth of each factual allegation pleaded in the application, the motion and the files and records conclusively showed he was entitled to no relief thereunder.

Third, the "ends of justice" would not be served by permitting a redetermination of the same ground.

> "[T]he burden is on the applicant to show that, although the ground of the new application was determined against him on the merits of a prior application, the ends of justice would be served by a redetermination of the ground." 373 U.S. at 17.

Petitioner purports to meet this burden on pages 29-33 of his "Points and Authorities" in support of the petition. In essence, he alleges that his charges are so serious that they fairly shout for an explanation on the part of the Government. Judge Kaufman had a few words to say about this tactic when he denied petitioner's third and fourth motions under Section 2255 in 1956, which bear repeating here:

> "The ease with which the petitioner tars all associated with the prosecution in the face of a clear record which proves the contrary is truly startling. As was recently said of another prisoner who engaged the courts endlessly with meritless petitions. "'He is smart, shrewed, and resourceful." Thus he knows how to make charges so wild . . . as to induce a concern for their refutation that otherwise he would not command.' United States v. Tramaglio, 2 Cir. 1956, 234 F.2d 489.
>
> "From petitioner's unfounded attacks against the men who conducted the prosecution of his case, it is obvious that he believes in the broadside attack, painting with broad stroke and recklessly maligning all who participated in the process of bringing him to justice." 142 F.Supp. at 532.

In affirming, the Court of Appeals also adverted to the charges of "serious and sensational character" which upon examination proved to be "utterly groundless." 244 F.2d at 521.

Additional considerations dictate that this Court not entertain the motion. This attack comes over 15 years after petitioner's trial. As the Court of Appeals observed in 1963 in this very case:

> "[N]ormally it is quite academic to talk of a new trial ten or fifteen years after the event; in most cases to direct one after such an interval is in practical result to order a release from further punishment, although the defendant does not even contend he is entitled to that relief from the courts." 314 F.2d at 325.

Moreover, as appears from the Government's affidavit in opposition to the instant motion, the so-called "facts" adduced in support thereof were in large part known at the time of the trial, and each and every one of them were publicly known at the time petitioner made his third Section 2255 motion in May of 1956. Thus:

> "Litigation is endless if it may be indefinitely continued by the asserted afterthoughts of able counsel." Latham v. Crouse, 347 F.2d 359, 360 (10th Cir. 1965).

This Court cannot go on endlessly entertaining meritless applications in this case, when it already has accorded to petitioner more judicial attention than in any known case, for in view of "the practical demands of over-crowded dockets",

> "Holding evidentiary hearings in cases where no substantial reason has been advanced for holding one interferes with the effective disposition of meritorious applications . . . ."

United States ex rel Hicks v. Fay, 230 F. Supp. 942, 947 (S.D.N.Y. 1964).

B. The Instant Motion Constitutes An Abuse of Section 2255

Even were petitioner not urging the same ground herein as in his prior motions, Section 2255 empowers this Court to decline to entertain the motion on the basis that it is abusive. Sanders v. United States, 373 U.S. 1, 17 (1963).

> "Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay." Id. at 18.

In Sanders, supra, at 18, the Supreme Court held this principle would be applicable

> "if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason . . . ."

See also Haith v. United States, 221 F. Supp. 379, 381 (E.D. Pa. 1963).

Even at the time of trial, when Sobell's retained counsel deliberately chose not to cross examine Harry Gold, the following facts, alleged in support of the instant petition, were publicly available:

(1) Gold testified before this Court on November 17, 1950 in United States v. Brothman (S.D.N.Y., C. 133-106)* that he had lied before a 1947 federal grand jury;

(2) Gold testified on November 17 and 20, 1950 in United States v. Brothman that he had lied to Brothman about a fictitious wife and twin children;

(3) That in connection with Gold's sentencing in Philadelphia on December 7, 1950, a psychiatric examination was made of Harry Gold;**

(4) Gold faced the possible imposition of the death sentence from May to December, 1950; and

(5) An examination of Government Exhibit 16 shows

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* Judge Irving R. Kaufman also presided at the Brothman trial.

** United States v. Gold (E.D. Pa. Cr. 15769). In disclosing the psychiatric examination, Judge James P. McGranery added "you need have no fear as to his mental situation."

a variance in dates on front and back and contains no F.B.I. initials or date of receipt.

Defense counsel also knew the danger of a vigorous cross examination of Gold, for that strategy had unsuccessfully been adopted in United States v. Brothman, supra.

The remaining "facts" on which the instant motion is predicated became publicly available as follows, if not before:

(1) Fuchs description of Gold, with the publication in May, 1951 of F.B. I. Director J. Edgar Hoover's article "The Crime of the Century" in the Readers Digest;

(2) That Gold and Greenglass were incarcerated together in the "Tombs" prior to trial was specifically alleged in the Rosenberg Petition, November 24, 1952, p. 57, in which Sobell joined;

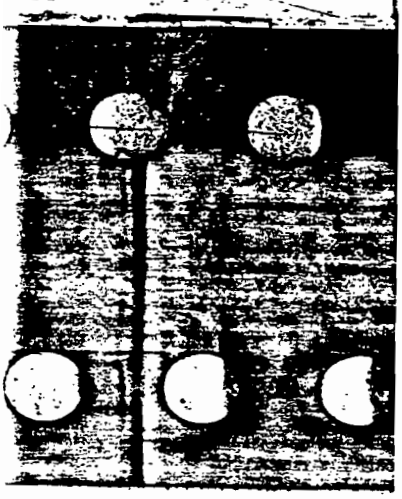
(3) That the Government had in its possession a photostat of the September 19, 1945 Hotel Hilton registration card of Gold was revealed in "The Judgment of Julius and Ethel Rosenberg" by John Wexley, published in 1955; and

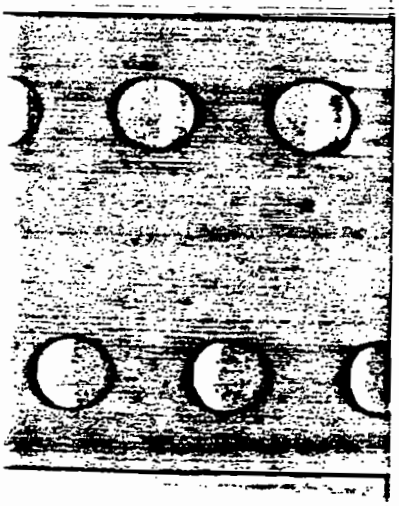
(4) That Gold's pre-trial statements to his attorneys did not contain all the details of the June 3, 1945 meetings that he testified to at the trial became known

on April 26, 1956 with the publication of a report thereon furnished by John Hamilton, Gold's lawyer, at Senate Internal Security Subcommittee Hearings on the Scope of Soviet Activity in the United States, 84th Cong., 2d Sess., Part 20, pp. 1084-85 (April 26, 1956).

Not only were all these facts publicly available over ten years ago, but they were drawn together in a book, "The Judgment of Julius and Ethel Rosenberg", by John Wexley published by Cameron and Kahn, New York, in 1955, which can best be described as a extensive brief in support of the instant motion.* That Sobell's counsel were aware of this book is shown by the acknowledgment to Benjamin Dreyfus in the forefront thereof -- the same Benjamin Dreyfus who represented Sobell both in the May, 1956 motions under Section 2255 and in the drafting of the present motion. It is also shown by the book of Malcolm Sharp, who appeared for Rosenbergs in their June, 1953 motion and now appears for petitioner, "Was Justice Done", Monthly Review Press, 1956,

* The book, like the present motion, contends that the June 3, 1945 Gold — Greenglass meetings never occurred and that the Hotel Hilton registration card is a contrived document. See the Government's affidavit in opposition to the motion.





which devoted an Appendix to the Wexley book. In fact, the May, 1956 motion was itself predicated on a point raised in Wexley's 1955 book, i.e., that the prosecution knowingly used the perjured testimony of James S. Huggins.

Thus a theory which apparently even petitioner apparently thought insubstantial in 1955 and 1956 has now been elevated to a new motion under Section 2255.

It is evident from the foregoing that the instant motion is an abuse of Section 2255. The facts known at time of trial plus the opportunity thereat to cross examine and demand any inconsistent pre-trial statements of Gold show that Gold's credibility, if it was to be challenged to all, should have been tested at trial. In any event, the deliberate withholding of the present theory of relief at the time of the 1956 motion should bar this present motion.

In determining whether the motion is abusive, consideration should also be given to methodology of the motion. Once again, as in 1956 and before, petitioner, represented by three of the same counsel, seeks to "tar all associated with the prosecution in the face of a clear record which proves the contrary". 142 F. Supp. at 532.

For example, they ask this Court to conclude on the basis of a letter from the Department of Justice (Exhibit A to the Petition) stating that the original June 3, 1945 Hilton registration card was returned to the hotel on August 4, 1951, that such a card never existed but was manufactured by the Government. They also ask this Court to conclude that petitioner's trial counsel were disabled from effectively defending him upon the basis of a public declaration of those same trial counsel that the trial "was fairly conducted" (Petition, p. 19). Judge Kaufman's admonition to three of Sobell's present counsel in 1956 of their duty as officers of the court "to insure that this great writ shall not be stripped of its deep meaning through a corrosive process caused by repeated abuses of its processes," 142 F. Supp. at 531, apparently fell on deaf ears.

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POINT II

Sobell's Petition Does Not Raise Any Issue of Fact Which Warrants a Hearing on his Allegation of Knowing Use of False and Perjured Evidence, Suppression of Evidence and Misrepresentations to the Court.

The instant petition is best characterized by the following description set forth in United States v. Kyle, 171 F. Supp. 337, 340 (S.D.N.Y.), aff'd, 266 F.2d 670 (2d Cir.), cert. denied, 361 U.S. 870 (1959):

> "It is plain that the defendant seeks a retrial of matters explored at the original trial of this action and on appeal. He embellishes his plea by violent attacks upon the prosecutor, a timeworn device usually resorted to in extremis. The papers abound with broad charges that the prosecutor wilfully suppressed evidence, wilfully introduced false and misleading testimony, wilfully participated in causing a witness to testify falsely and wilfully made misrepresentations to the Court."

That this Court is not required to accept as true these broad conclusionary charges of fraud is by now hornbook law. Sanders v. United States, 373 U.S. 1, 4, 19 (1963); United States v. Rosenberg, 200 F.2d 666, 668 (2d Cir. 1952), cert. denied, 345 U.S. 965 (1953); United States v. Mathison, 256 F.2d 803, 805 (7th Cir.), cert.

denied, 358 U.S. 857 (1958); Taylor v. United States, 229 F.2d 826, 833 (8th Cir.), cert. denied, 351 U.S. 986 (1955); United States v. Pisciotta, 199 F.2d 603, 606 (2d Cir. 1952); United States v. Sturm, 180 F.2d 413, 414 (7th Cir.), cert. denied, 339 U.S. 98c (1950); United States v. Brilliant, 172 F. Supp. 712, 713 (E.D.N.Y. 1959), aff'd, 274 F.2d 618 (2d Cir.), cert. denied, 363 U.S. 806 (1960):*

> Section 2255 is in essence a civil remedy.
>
> "Rule 9(b) of the Rules of Civil Procedure, 28 U.S.C.A. requires 'particularity' in averments as to 'fraud.' To procure a judgment by known use of perjury is a fraud against the opposing party. Hence, the rule would require this appellant to set forth facts sufficient to inform the Government as to what he relies upon to establish this 'fraud' against him." Taylor v. United States, supra at 833.

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* See also United States v. Bradford, 238 F.2d 395, 397 (2d Cir. 1956), cert. denied, 352 U.S. 1002 (1957); Martinez v. United States, 344 F.2d 325, 326 (10th Cir. 1965); United States v. O'Malley, 311 F.2d 788, 789 (6th Cir. 1963); Hammond v. United States, 309 F.2d 935, 936 (4th Cir. 1962); Wilkins v. United States, 258 F.2d 416, 417 (D.C. Cir.), cert. denied, 357 U.S. 942 (1958); United States ex rel Swaggerty v. Knoch, 245 F.2d 229, 230 (7th Cir. 1957); Walker v. United States, 218 F.2d 80, 81 (7th Cir. 1955).

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While the requirement of specification has sometimes been relaxed in the case of pro se practitioners, on the ground that:

> "we cannot impose on them the same high standards of the legal art which we might place on the members of the legal profession,"*

no relaxation is called for by the present petition, where Sobell is represented by six attorneys.

The present petition abounds in "vague conclusional charges of fraud and collusion," with no "specific facts" but merely "unsupported assertions." Davis v. United States, 311 F.2d 495, 496 (7th Cir.), cert. denied, 374 U.S. 846 (1963). Sobell has produced:

> " . . . neither affidavits nor statements from witnesses or others, nor has he suggested that he could produce evidence of any kind which might support his bare assertion that the testimony was perjured and that the government prosecutors were aware thereof and coerced the giving of such testimony . . . . [His] bare assertion . . . with nothing more is a mere ipse dixit and does not entitle such a party to a hearing under §2255." Dunn v. United States, 265 F.2d 544, 545 (6th Cir. 1959).

The allegations of fraud are not "substantiated by allegations of fact with some probability of verity,"

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* Price v. Johnston, 334 U.S. 266, 292 (1948).

O'Malley v. United States, 285 F.2d 733, 735 (6th Cir. 1961); Malone v. United States, 299 F.2d 254, 256 (6th Cir.), cert. denied, 371 U.S. 863 (1962), but are purely a "matter of speculation." United States ex rel Darcy v. Handy, 351 U.S. 454, 462 (1956).

The sparse allegations of fact alleged in the petition are patently based on hearsay information, which "does not qualify as proper evidentiary material to support a petition under §2255 . . . and could not be used at a hearing." United States v. D'Ercole, F.2d (2d Cir., May 19, 1966); United States v. Picciotta, 199 F.2d 603, 607 (2d Cir. 1952); United States v. Orlando, 327 F.2d 185, 189 (6th Cir.), cert. denied, 379 U.S. 825 (1964); Green v. United States, 158 F. Supp. 804, 809-10 (D. Mass.), aff'd, 256 F.2d 483 (1st Cir.), cert. denied, 358 U.S. 854 (1958).

The petitioner has the burden of showing not only that material perjured testimony was used to convict him but that it was knowingly and intentionally used by the prosecution in order to do so. This burden is not met by pointing out trivial inconsistencies in the evidence. United States v. Spadafora, 200 F.2d 140, 142-43 (7th Cir. 1952); Enzor v. United States, 296 F.2d 62, 63 (5th Cir. 1961),

cert. denied, 369 U.S. 854 (1962); United States v. Schultz, 286 F.2d 753, 755 (7th Cir. 1961); Wilkins v. United States, 262 F.2d 226, 227 (D.C. Cir.), cert. denied, 359 U.S. 1002 (1959); Boisen v. United States, 181 F.Supp 349, 351 (S.D.N.Y. 1960).

If, despite the lack of evidentiary foundation, the "facts" concerning Harry Gold alleged in the petition be accepted as true, they at most show that he changed his testimony in some respects between his arrest and the trial.

> "Obviously this in itself does not warrant a charge of fraud" Price v. Johnston, 334 U.S. 266, 290-91 (1948).

Certainly these inconsistencies afford no basis for a finding either of perjury or of knowing use thereof. See Burns v. United States, 321 F.2d 893, 896-97 (8th Cir.), cert. denied, 375 U.S. 959 (1963); Application of Landeros, 154 F.Supp. 183, 198 (DN.J. 1957).

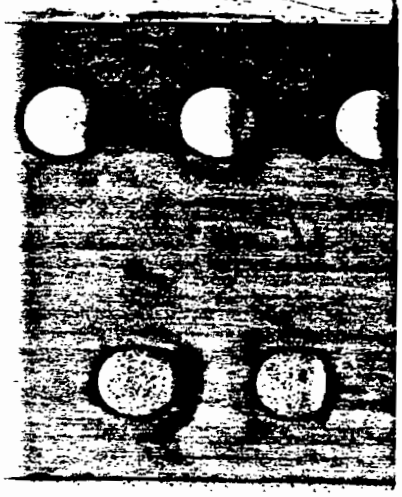
When similar discrepancies by David Greenglass in his pre-trial statements to his attorneys were made the basis of a Section 2255 motion charging knowing use of his perjured testimony, Judge Kaufman in his oral opinion of June 8, 1953 stated:

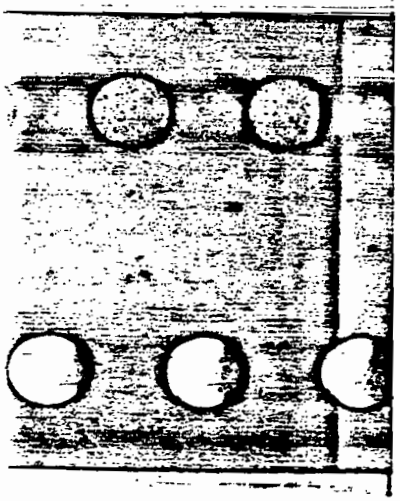
> "I do not accept the conclusion that perjury has been committed, but aside from that, even if I were to draw such conclusion from the alleged facts . . . no element of proof offered supports the allegation that the Government knowingly used perjurious testimony." Transcript, June 8, 1953, p. 132.

Moreover, these discrepancies at most raise a question of credibility which could have been pursued at the trial by cross-examination of Harry Gold. See United States v. Abbinanti, 338 F.2d 331, 332 (2d Cir. 1964); McGuinn v. United States, 239 F.2d 449, 451 (D.C. Cir. 1956), cert. denied, 353 U.S. 942 (1957); United States v. Edwards, 152 F. Supp. 179, 183 (D.D.C. 1957), aff'd, 256 F.2d 707 (D.C. Cir.), cert. denied, 358 U.S. 847 (1958).

> "[I]t is apparent from the face of the record that the petitioner merely seeks by his Section 2255 petition to relitigate the credibility of the witnesses." Hill v. United States, 236 F. Supp. 155, 159 (E.D. Tenn. 1964).

Having made a deliberate choice not to cross-examine Gold, Sobell "cannot now by way of motion under §2255 assert a defense which was available but not presented at the trial." United States v. Branch, 261 F.2d 530, 533 (2d Cir. 1958), cert. denied, 359 U.S. 993 (1959); see





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United States v. Smith, 306 F.2d 457, 458 (2d Cir. 1962).

Had he chosen to cross-examine Gold, Sobell could have laid the foundation for a demand for examination of any pre-trial statements of Gold containing inconsistencies with his trial testimony, as was done in the case of the witness Klitcher. Judge Kaufman turned over to the defense three statements given by Klitcher to the F.B.I. and his grand jury testimony. See Record, pp. 516-17, 600-02. Had a similar cross-examination of Gold been undertaken, there is thus every reason to believe Judge Kaufman would have made Gold's pre-trial statements available as well. Moreover, even if a demand had been made for Gold's pre-trial statements and denied by the trial court, that would not be the type of error which could be corrected by a motion under Section 2255, United States v. Angelet, 255 F.2d 383, 384 (2d Cir. 1958); Boisen . United States, 181 F. Supp. 349, 350 (S.D.N.Y. 1960). Where no demand at all was made, a fortiori petitioner's claim is lacking in substance.*

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* Since petitioner's allegations are woefully insufficient to require a hearing, his requests (1) for release on bail or production at the hearing, (2) for authority to take Gold's deposition, and (3) for all pre-trial statements of Gold and the Greenglasses and the confession of Fuchs, must also be denied. It is apparent from the record that demands (2) and (3) above are "no more than a fishing attempt." Smith v. United States, 252 F.2d 369, 371-72 (5th Cir.), cert. denied, 357 U.S. 939 (1958).

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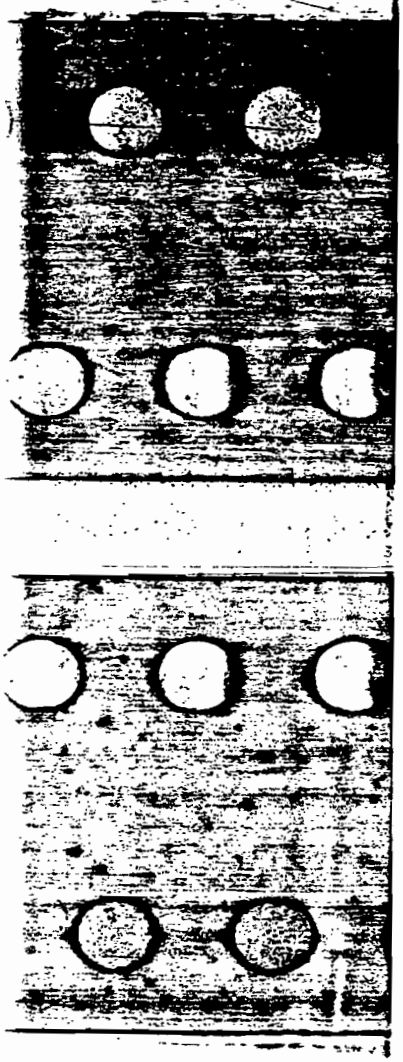
The Hotel Hilton Registration Card

Petitioner's brazen allegation of the manufacture of the Hotel Hilton registration card is again the bare statement of a conclusion. The fact that the card bears a different date on front and back, if it proves anything, proves its genuineness. Even those with the frame of mind to accuse the F.B.I. of dishonesty do not accuse it of being completely incompetent, which it would have to be if it made the idiotic mistake of placing inconsistent dates on a card it allegedly manufactured. Moreover, it would be unreasonable to assume that the F.B.I. and the prosecution would have jeopardized the entire case by manufacturing such an insignificant item of evidence. Nor does the absence of initials and date of receipt on the photostat (which is Government Exhibit 16) signify anything. In any event, those are matters which counsel could have explored at the trial. The face and reverse side of the card were exhibited and read out in open court (R. 1262).

Nor is anything sinister indicated by the fact that two registration cards, obtained by the F.B.I. on different dates, were handled in a different manner. And the letter from the Justice Department showing that the original registration card was returned to the hotel, far from showing



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manufacture of evidence, shows precisely the opposite. It is perhaps unnecessary to note that the original of Government Exhibit 16 (i.e., the photostat introduced at the trial) has been preserved to this day.*

* The Government certainly could not have anticipated that any significance would be attached to the original card when (1) no objection was offered to the introduction of the photostat, (2) Rosenbergs' counsel stated "I am certainly not going to insist on strict technical testimony", (3) at the same time the registration card was offered, Rosenbergs' counsel made a specific request to look at bank records which the Government proposed to offer in evidence, and (4) Rosenbergs' counsel stated in his summation that Gold had told "the absolute truth " (R. 1258-59, 2215). Ironically, had petitioner not so long delayed the bringing of his present motion, the original of one and perhaps both of the registration cards would have been available.

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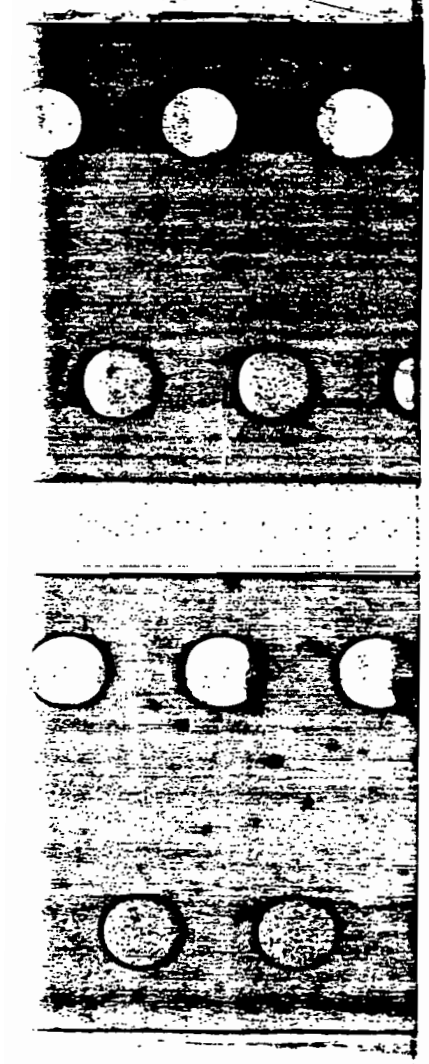
POINT III

Sobell's Claim That His Two Retained Counsel Did Not Provide "Effective Representation" at the Trial is Clearly Frivolous.

No longer content to tar merely the prosecution, petitioner turns his attack on his own retained trial counsel as well, claiming their conduct "rendered the trial offensive to common and fundamental ideas of fairness and right, and resulted in reducing the trial to a sham." (Petition, pp. 18-19.)

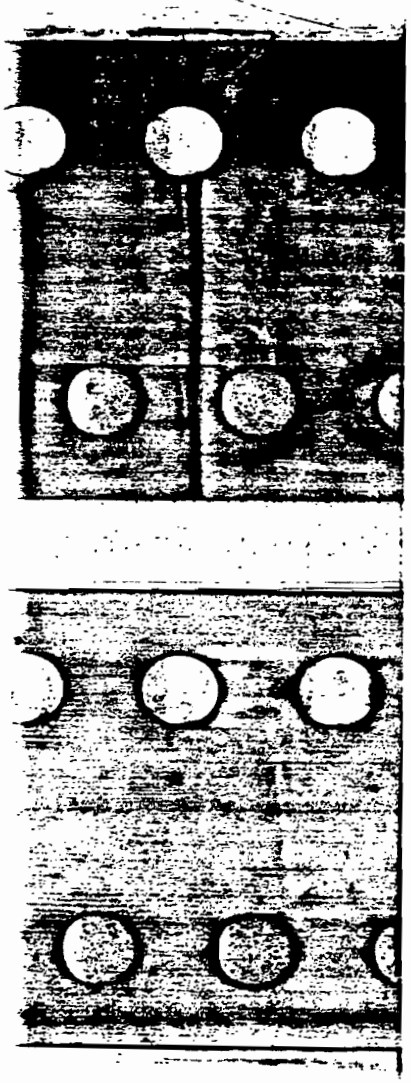
Sobell was represented at trial and on appeal by Harold M. Phillips and Edward Kuntz. The quality of the representation provided has been considered before. Thus, the Court of Appeals in affirming the judgment of conviction, observed "the record shows that defendants' counsel were singularly astute and conscientious." 195 F.2d at 596 n.9. Judge Ryan, in denying Sobell's first Section 2255 motion, stated: "The trial record reveals a defense intelligently conducted by able counsel of petitioners' own choice and selection." 108 F. Supp at 800. And Judge Kaufman, who presided over the trial and was therefore in unique position to know, stated:



> "[The] verdict was returned at the end of an exhaustive trial, at which Sobell's two extremely able attorneys and the able lawyers of his co-defendants, Julius and Ethel Rosenberg, skillfully but vainly tried to stem the avalanche of evidence against them." 142 F. Supp. at 517.

In substance, the petition alleges in conclusional form that the trial was conducted in an "atmosphere of terror deliberately induced by the Government" which disabled defense counsel from conducting an effective defense. Certain trial strategy is singled out for criticism, including the decision not to cross examine Harry Gold.

Petitioner does not even begin to meet his burden of showing that "the purported representation by counsel was such as to make the trial a farce and a mockery of justice." United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949); see United States v. Garguilo, 324 F.2d 795, 796 (2d Cir. 1963); United States v. Gonzalez, 321 F.2d 638, 639 (2d Cir. 1963); Mitchell v. United States, 259 F.2d 787, 793 (D.C. Cir.), cert. denied, 358 U.S. 850 (1958). To justify his claim for relief, petitioner must demonstrate "a total failure to present the cause of the accused in any fundamental respect." United States v. Garguilo, supra at 796.



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This burden is not met by "merely complaining of alleged tactical errors or mistakes in strategy." Id. at 797; see United States v. Gonzalez, supra at 639; United States v. Duhart, 269 F.2d 113, 115 (2d Cir. 1959); Mitchell v. United States, supra at 793; Frand v. United States, 301 F.2d 102, 103 (10th Cir. 1962).

Moreover, before he is entitled to a hearing, petitioner "must state with particularity sufficient facts to constitute a ground of relief." Gordon v. United States, 216 F.2d 495, 498 (5th Cir. 1954). Motion papers containing "merely conclusory allegations of innocence and miscarriage of justice" will not suffice. United States v. Pisciotta, 199 F.2d 603, 606 (2d Cir. 1952). The allegations on pages 18 and 19 of the petition are plainly insubstantial under the above authorities. See also O'Malley v. United States, 285 F.2d 733, 735 (6th Cir. 1961); United States v. Trumblay, 256 F.2d 615, 617 (7th Cir. 1958), cert. denied, 358 U.S. 947 (1959); Green v. United States, 256 F.2d 483, 485 (1st Cir.), cert. denied, 358 U.S. 844 (1958).

Nor is this the first time Sobell has raised a claim concerning the "atmosphere" in which the trial was conducted. In his first Section 2255 motion he joined with the Rosenbergs in claiming the trial atmosphere of

prejudice and hostility resulting from pre-trial newspaper publicity and other mass media precluded the selection of an impartial jury. See 108 F. Supp. at 800 n.1. When confronted with the obvious answer -- if this is so why didn't you seek a continuance or a change of venue or at least make a complaint at the trial? -- the answer in the reply papers was that counsel were unaware of such publicity. See 108 F. Supp. at 802 & n.7. Now, with no supporting evidence, petitioner would have this Court conclude precisely the contrary and further, that their awareness significantly influenced their conduct at the trial.

Conclusion

Petitioner's motion under 28 U.S.C. §2255 should be denied in its entirety.

Respectfully submitted,

ROBERT M. MORGENTHAU,
United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.

ROBERT L. KING
STEPHEN F. WILLIAMS,
Assistant United States Attorneys

Of Counsel.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MORTON SOBELL,	:	66 Civ. 1328
Petitioner,	:	GOVERNMENT'S AFFIDAVIT IN
-v-	:	OPPOSITION TO MOTION UNDER
UNITED STATES OF AMERICA,	:	§2255
Respondent.	:	

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

ROBERT L. KING, being duly sworn deposes and says:

1. I am an Assistant United States Attorney in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York. I am in charge of the above-captioned proceeding for the United States of America.

2. I make this affidavit in opposition to the motion of Morton Sobell, returnable July 25, 1966, pursuant to 28 U.S.C. §2255 to vacate and set aside his sentence and judgment of conviction in United States v. Julius Rosenberg et al, S.D.N.Y., C. 134-245.

3. The record facts and the grounds of the Government's opposition to the motion are set forth in the Government's accompanying Memorandum of Law and will not be here repeated. This affidavit is submitted to show that matters set forth in the petition

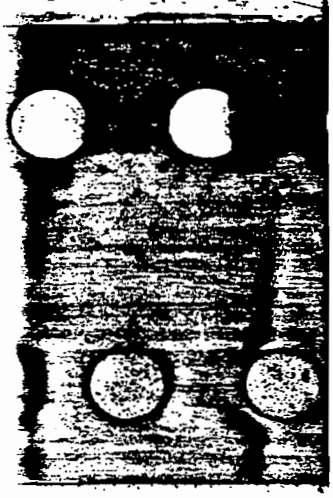
were publicly known in 1951 at the time of the trial of this case and that all matters set forth therein were publicly known at the time petitioner brought his third Section 2255 motion in May, 1956.

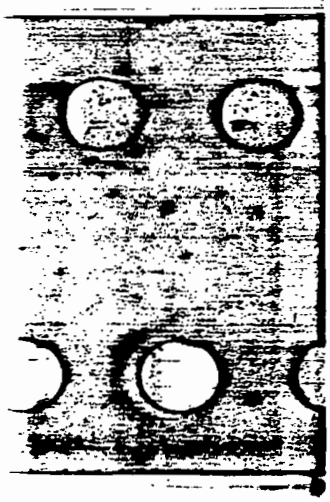
The Government contends that the ends of justice would not be served should this Court entertain petitioner's motion and that the motion is an abuse of Section 2255.

4. The case of United States v. Abraham Brothman et al., S.D.N.Y.,C. 133-106, was tried in this Court on November 10-22, 1950, before Honorable Irving F. Kaufman and a jury. The indictment charged in two counts that (1) Brothman and his co-defendant Miriam Moskowitz conspired to obstruct justice, in violation of 18 U.S.C. §88 (1946 ed.), and (2) Brothman influenced Harry Gold in his testimony before a federal grand jury, in violation of 18 U.S.C. §241 (1946 ed.). Trial Transcript (hereinafter "Tr."), pp. 65-69.

5. Admitted in evidence as Government's Exhibit 6 at the trial was a written and signed statement of Harry Gold to the FBI, dated May 29, 1947 (Tr. 199). Concerning this statement, Gold testified:

> "Q Was it true or false as indicated in your statement, Exhibit 6, that in October, 1940, you were introduced to a man by the name of John Golish, -- G-o-l-u-s-h or G-o-l-i-s-h? A. That was a lie.





"Q In the same vein, was it true or false that such an introduction had been made by one Carter Hoodless?

"A That was a lie.

"Q Was it true or false that such an introduction had taken place at a meeting of the American Chemical Society at the Franklin Institute in Philadelphia, Pennsylvania? A That was false. It never occurred.

"Q Was it true or false that after that meeting, this Golish or Golush and you went to a restaurant on Broad Street and remained there until 2:30 a.m.?

"A That was a lie. That event never took place.

"Q Was it true or false that on such an occasion Golish or Golush made the following proposition to you, that you were to telephone Abe Brothman, a chemical engineer in New York City, and make an appointment to see him and you were to discuss two chemical processes with him and to obtain blueprints from him which you were to evaluate against the chemical soundness of the processes?

"A That whole business was a lie.

"Q Was it true or false that as a result of this meeting with Golush you telephoned to Brothman in New York City and made an appointment to see him about two weeks after October 1940? A That never took place. It was a lie.

"Q Is it true or false, as you say in this statement, Exhibit 6, 'I saw Brothman the first time in November, 1940, and obtained the blueprints. This meeting was in the evening and took place in New York City in a restaurant in the downtown section.'?

"A That was a lie.

"Q In truth and in fact, when for the first time did you meet Brothman? A I met Abe somewheres between Sixth and Seventh Avenues, somewheres in the high 20's, in his car on the night of September 29, 1941.

* * *

"Q Was it as a result of your conversation with Abe Brothman, which you have testified, that you made these false statements in Government's Exhibit 6?

"A Yes.

"Q Was that the only reason for the making of the false statements? A That was the only reason for making the statements that I made" (Tr., November 17, 1950, pp. 643-45)

6. Later on the same day, November 17, 1950, Gold testified:

"Q Did you tell the [1947 federal] grand jury in substance the same sort of a false story as is described in Government's Exhibit 6? A Yes, I did.

* * *

"Q More particularly, did you tell the grand jury the same sort of a false story as you told to Agents Shannon and O'Brien as is contained in Government's Exhibit 6, regarding the time and circumstances under which you and Brothman first met? A Yes, I did." (Tr. 681-82)

7. Gold also testified about what he had told Brothman about his marital status:

"Q Did you say anything at that time to Abe about your personal, your marital status?

"A I told Abe that I was married and had a wife and two children, twins.

"Q Was that true? A That was a lie." (Tr., November 15, 1950, p. 503.)

"A I told him [Brotman] that contrary to the story which he had believed up to the present moment on this night or a day or two before Memorial Day of 1947, contrary to that story, that I actually had no wife and two twin children, that I was a bachelor and had always been one." (Tr., November 17, 1950, p. 650.)

"[Cross-examination:] Q But when you first met Abe, you told him about your family, didn't you? A On orders from Sam.

"Q Just answer my question. Did you tell him about your family? A Yes, I did.

"Q Did Sam tell you to tell him that you had twins?

"A Sam said, Tell him you have a wife and children.

"Q Did he give you the names of Essie and David to give to Brothman? A Sam left the details to me.

* * *

"Q You also told him rather intimate details about your two non-identical twins, Essie and David, is that true?

"A That was on orders from Sam, who said, Dress it up." (Tr., November 20, 1950, p. 821.)

"Q Did you not also tell details of your wife and family, this fictitious wife and family, to the young ladies who worked for Messrs. Quick? A I never volunteered any details. On occasion I would be asked and I would answer. I would have to keep up this web of lies in which I had become enmeshed.

"Q But you told it to a great many people, didn't you? A A great many people knew of it.

"Q And you started building up and telling more lies from 1946 on, until you left the Abe Brothman Associates in 1948; is that right? A That is not exactly it.

* * *

"THE WITNESS: Here is the point. Over a period of eleven years or rather - the relationship with Abe was the only one of all the Americans I knew and who gave me information for the Soviet Union, the only one where it was permitted to deteriorate, and that they became aware of my true identity. They all knew me by a name, Martin, Raymond, any old thing. They didn't know where I lived, they didn't know who I was. Some of them had an idea I was a chemist. Abe was the only case where this relationship had deteriorated to the extent that when I came to work for him and not until I came to work for him, I asked him, 'What do you think my true name is?' And he said 'Frank Kessler'. I said 'No, it is Harry Gold'. By this time I had become so tangled up in this web of lies that it was easier to continue telling an occasional one than to try and straighten the whole hideous mess out. It is a wonder steam didn't come out of my ears at times --" (Tr., November 20, 1950, pp. 830-31.)

"Q But if you and Abe Brothman had been working together for a common end, as you told us, why did you not tell him then, 'Abe I am sorry, all this nonsense about having a wife and children was pure fabrication'?
A Because there was so much that had to be straightened out, that it was far easier to continue the fiction. The reason that I was told to give the fiction and to continue it was that one sad experience in the past when I had shown myself as a single man and the person involved had not been very cooperative, he thought I was too unstable; so that was the reason for the fiction - one of the reasons." (Tr., November 20, 1950, p. 836.)

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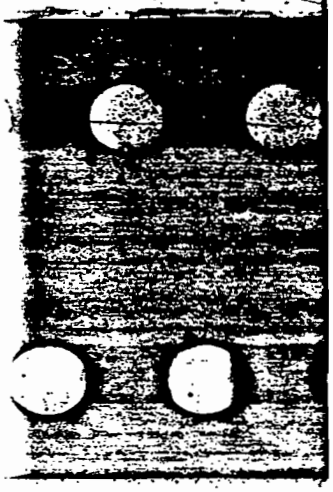
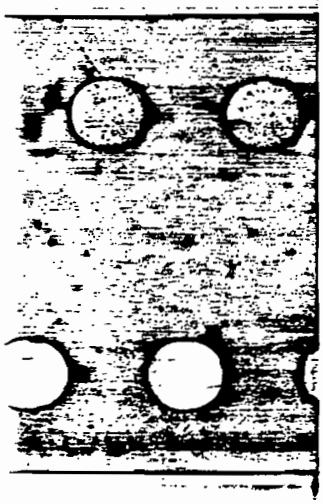
8. Gold also testified at the Brothman trial about his conduct at the time of his arrest, as follows:

> "When I was arrested or rather went into voluntary custody, it was as if there was a mountain in front of me. I fought desperately for time for a week. When the jig was up, I said 'Yes, I am the man to whom Klaus Fuchs gave the information on atomic energy.' But I wasn't going to squeal. I wasn't going to inform. I was going to take the whole - I was simply going to admit what happened with Fuchs. I was going to cover everything up, Sam's identity, everything. I was just going to admit, go before the Judge, say, 'I am guilty,' and let happen what may. There was this mountain in front of me. When I saw my brother, part of the mountain came down. When I saw my father, the rest of the mountain came down." (Tr. November 17, 1950, p. 748)

> "[When the F. B. I. began to question Gold in May, 1950] THE WITNESS: I acted exactly as I decided upon. First, I decided that since Fuchs had already disclosed many of the facts involving our espionage activities, that I would confess completely to my activities with Dr. Fuchs, but that I would not reveal the names of any of my Soviet superiors or anything that I knew about them, and I would not reveal anything about any of my American contacts. In other words, I would, as they say, take the rap myself."

> "I decided that because I wanted to spend as much time with my family as possible and to keep them in ignorance of what I had done, that I would fight for time, and also I wanted as much time as possible to complete the work in the Heart Station, or to get it in as good a shape as possible. That was my course of action and I stuck to it."





"Q You had many reasons then for taking this course of action. Was one of the reasons an effort to save your own life? A Yes, I made full -- the very first statement that I made to the FBI was, 'Yes, I am the man who got information on atomic energy from Dr. Klaus Fuchs.'

"Q Was that not only after you had denied being west of the Mississippi, and they put it to you that you had been in Santa Fe; isn't that right?

"A That is correct.

"Q And it was only then that you admitted your complicity with Dr. Fuchs? A It was then, and I did it for a very good reason. The reason was this: the evidence at that time was purely circumstantial -- purely circumstantial -- and I realized that I could possibly fight this thing. --

"Q You mean lie your way out?

"A That is correct. I realized that I could possibly fight this thing, and I knew if I did that my father and brother, all of my boyhood friends, would rally around me, all of the people at the Heart Station, Dr. McMillan, Dr. Bellet and Dr. Steiger, who trusted me and who had faith in me, would rally around me, but I knew that once the FBI began to probe into the hideous snarl that was my life, once they pulled one thread, the whole horrible skein would become untangled and inevitably -- I knew that inevitably I would be exposed. So I made my choice because I didn't want these people who would rally around me to be so terribly disillusioned.

"Q Yes, but you did not make your choice immediately, did you? A I made it -- I take exception to that, and here is what happened.

* * *

"A I said, 'Yes I am the man to whom Klaus Fuchs gave the information on atomic energy.' And I sat down in a chair in my home, and the FBI man gave me a cigarette and I asked for one minute during which - - and they gave it to me - - during which a thousand things went through my mind, and I didn't even need that minute to come to the decision.

"Q Did you at first deny that you had been west of the Mississippi? A I had denied that the week before.

"Q Beginning with the first time that the FBI spoke to you, at that time you denied any knowledge of Dr. Fuchs; is that right?

"A I stated before that for a whole week I fought desperately for time.

"Q You fought to save your life, didn't you?

"A I fought desperately for time with my family, and I fought desperately for time to complete the work at the heart station.

"Q Would you lie to save your life?
A Now? No.

"Q I didn't ask you about now. Would you lie to save your life when you spoke to the FBI in May of 1950?

"A In May of 1950 I lied desperately."
(Tr., November 21, 1950, pp. 921-24)

9. In United States v. Harry Gold et al., E.D. Pa., C. 15769, Hon. James P. McGranery sentenced Harry Gold to a 30 year prison term on December 9, 1950. The following are excerpts from the sentencing proceedings held two days earlier, December 7, 1950:

"[Judge McGranery:] I think it is very important for me to say, there has been some view that has gone abroad that this case probably was first exposed by Fuchs. That is not true. This matter was uncovered by the Federal Bureau, and Fuchs, as a matter of fact, as I understand it, had never co-operated in any way, shape or form until after the arrest of Harry Gold.

"Am I correct in that?

"[FBI Agent T. Scott Miller, Jr.:] I think the statement is, Your Honor, that the identification of Harry Gold's picture was not made until after Gold signed a confession.

"THE COURT: The point that I make is that Fuchs had never co-operated with the Federal Bureau. I am told that by both the Attorney General and Mr. Hoover.

"MR. MILLER: That is correct, sir."

* * *

"[Judge McGranery:] I had my own privately conducted investigation made. I want to assure Mr. Hamilton [Gold's attorney] that among other things we did have a psychiatric examination made of the defendant, and you need have no fear as to his mental situation."
(Transcript, December 7, 9, 1950, pp. 132-33.)

10. In the May 1951 edition of the Reader's Digest, on pages 149-68, appeared an article entitled "The Crime of the Century" by J. Edgar Hoover. The following are excerpts from the said article:

"Dr. Fuchs disclosed that while in the United States he had dealt with one Soviet agent only. The man's name? Fuchs had never known the agent's name. The man appeared to know chemistry and engineering but was not a nuclear physicist. Fuchs thought he was probably not an employe [sic.] of an atomic-energy installation.

"What did the man look like? Well, he was from 40 to 45 years of age, possibly five feet ten inches tall, broad build, round face, most likely a first-generation American. A description which might fit millions of men!" (p.159).

"Our hopes were high as photographs of Gold were flown across the Atlantic to Dr. Fuchs. The wan prisoner squinted at the American's round face and bushy hair. Then he shook his head. No, he declared, Harry Gold was not his American confederate." (p. 164).

"Even after he [Harry Gold] confessed, he continued for a while to fabricate. To his credit, however, I must say that ultimately he poured out the whole story." (p. 167).

11. In 1955, there was published a book entitled "The Judgment of Julius and Ethel Rosenberg," authored by John Wexley and published by Cameron & Kahn, New York. In the forefront of the book is a page captioned "Acknowledgments," on which the following appears:

"To attorneys Howard Meyer and Benjamin Dreyfus, for their assistance with legal documents."

12. The following are excerpts taken from the Wexley book:

"It will be shown by official records in a later chapter that Greenglass and Gold were lodged together for many months on the 'eleventh floor' of the Tombs (the New York City prison), where they had complete freedom to confer because of the dormitory arrangement instead of cells." (p. 13).

"For example, we have been told that Fuchs definitely named Harry Gold as his chief courier. Yet the official facts disclose that Fuchs never named anyone -- Gold or anyone else. He could not even describe Gold or identify his photographs. Indeed, he identified the photos of a New York engineer whom J. Edgar Hoover has referred to as 'James Davidson,' and who was completely cleared of any suspicion." (p. 20).

"In Dr. Fuchs' account not one of all his many intermediaries is known to him -- either by name or description -- and, as we shall see, not even his so-called American confederate, Harry Gold." (p. 29).

"[After quoting Mr. Hoover's Reader's Digest statement concerning Fuchs' description of his American courier, supra:] Although Mr. Hoover readily acknowledges the vagueness of this description, let us compare it with that of Gold, such as it is. In Fuchs' description, his courier was a man of broad build, 5 feet 10 inches tall. But Harry Gold, according to Mr. Hoover's article, is a 'little, five-foot six-inch' man! According to Fuchs the courier was 40 to 45 years old. But in the period 1944-45, when Fuchs is supposed to have met with Gold, the latter was only 34 or 35 years old!" (p. 33)

"Not only is he [Fuchs] unable to describe Gold correctly but, according to the Joint Report, even when the FBI showed him various photos of Gold, he still could not 'recall having seen the individual pictured.' In fact, we learn that Dr. Fuchs identified a totally different person!" (p. 33).

"There were other striking features about the Brothman trial . . . .

"For four and one-half days of the one-week trial Harry Gold was on the witness stand and it is from his own direct examination and cross-examination that we have the astounding tale of his romances, courtship, honeymoon, marriage, children, separation and divorce as recounted to Brothman, to fellow employees, to friends and acquaintances over a period of six years. Here, culled from the Brothman trial record, are the highlights as Gold told them 'in intimate detail':

* * *

"In the year 1935 Gold's 'wife' gave birth to twins . . . ."(P. 44).

"Returning to the standard definition given by psychiatry to 'psuedologia phantastica' or the pathology of abnormal lying, we recall that the imposter achieves through fraud and deception those elements of love and affection which he lacks in real life . . . .

"All through the story of Gold's alleged spy career there is the unmistakable evidence of his acting out his phantasies as a compensation for his barren emotional life." (pp. 47-48).

"At the Rosenberg trial, we will see how the same Mr. Saypol produces still another small white card (the Hotel Hilton registration card), this one purporting to be the only concrete evidence that Gold had ever visited Albuquerque. And this card too will be seen to have all the suspicious earmarks of convenient prearrangement." (p. 59).

"After they had handcuffed Sobell and led him off to the Laredo jail, Inspector Huggins chatted a moment with one of the FBI agents. Then, returning to his desk to pick up the 'manifest,' he took out his pen and carefully wrote on 'the bottom of the face side of the card' (Sobell's signature was 'on the reverse side'), the three words

' DEPORTED FROM MEXICO'

"According to Huggins' own testimony at the trial, he admitted having no basis or authority to make this highly damaging notation and that he knew that Sobell had not been deported in any sense of the word, whether officially or otherwise. Nevertheless, Judge Kaufman permitted this 'spurious' notation to be admitted into evidence. And since the jury knew nothing whatsoever about the brutal details of the kidnapping, it appeared quite naturally that Sobell had been arrested, extradited and deported from Mexico in complete accordance with the law." (p. 169).

"What possible reason was there for Gold and Greenglass to be lodged in the same prison unless it was for the express purpose of their collaboration?

* * *

"On the basis of the disclosures quoted above, one can readily visualize the activities of these two bunkmates lolling about the dormitory up there in 'Singers' Heaven' all through the latter half of 1950, and throughout January and February of 1951; indeed, up to the very moment they testified in March." (p. 205).

"But here it is necessary to pause and analyze the two crucial points just emphasized:

1. That Gold registered needlessly at the Hotel Hilton on Sunday morning, after having spent Saturday night in the rooming house, and with no intention of remaining in town over Sunday night.

2. That Gold registered needlessly and dangerously under his true name.

"With regard to the first point, it may be stated that there was absolutely no logical reason for Gold to register except the one we have indicated, namely, that the prosecution had no documentary evidence to corroborate Gold's claims, and that it felt it necessary to produce a hotel registration card in order to prove his presence in Albuquerque." (p. 385).

"At the conclusion of Gold's testimony the record shows another significant fact about this supposedly authentic hotel card. When Saypol introduced it as Government Exhibit 16, he was very careful not to present the original card, but rather a photostatic copy. His excuse was that he had 'the original on the way, together with a witness if required,' and that time would be saved if the defense would accept it as a genuine copy.

"In this manner he avoided the danger that the defense might summon document experts and examine the card for traces of forgery. With a photostatic copy it would be impossible for such experts to examine the age of the ink or paper as they could with an original." (p. 389).

"In our examination of the ensuing testimony we come to another phase of the prosecution's purpose in introducing Government Exhibit 16, Gold's alleged hotel registration card dated June 3, 1945.

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"Why was this particular date so important for the prosecution to establish? Because it had to synchronize with another date, namely an Albuquerque bank record of Ruth Greenglass which showed that she had deposited a sum of $400 on June 4, 1945." (p. 400).

"Since the record does not show what address Gold put down on the card, this writer initiated an inquiry as to this point. The results uncovered the fact that the prosecution had prepared two photostats of two registration cards, one for June 3 and one for September 19, 1945. The photostat of the September 19 card was not introduced in evidence and is not mentioned or referred to in the record. However, it furnishes almost conclusive corroboration of our thesis explaining why the Hotel Hilton in Albuquerque was chosen. Because it turns out that Gold's alleged registration card of September 19 was also at that hotel, despite the fact that he had no reason to be in Albuquerque on that date!" (p. 407).

"By way of a postscript to Gold's testimony, there is the question of why Mr. Bloch decided not to cross-examine him, despite the prosecution's insistence that he was the 'necessary link' in the so-called chain of guilt around the Rosenbergs. The question has been posed to this writer by not a few laymen and therefore bears mentioning in more than a lengthy footnote.

"In a series of interviews this writer had with Emanuel Bloch the problem was frequently discussed in all its ramifications. The attorney explained his decision as follows:

"That in a legal sense Gold had never actually connected Julius Rosenberg with the alleged Yakovlev-Gold-Greenglass conspiracy. That even if one believed Gold's testimony regarding his visit to the Greenglasses his claim was that his half of the Jello box had been given to him by Yakovlev and not by Julius Rosenberg. That although Gold had included the name of a 'Julius' in his password it was not that of Julius Rosenberg and therefore could have been that of any other person or a fictitious name. That Gold never claimed to have met the Rosenbergs or even to have heard about them as members of the alleged conspiracy. And that, in view of these circumstances, it would have been contrary to

all established criminal court strategy -- indeed, sheer folly -- to have challenged Gold in cross-examination and thereby invited that glib and agile witness to involve the Rosenbergs 'spontaneously'.

"In discussing Mr. Bloch's decision and reasons with other attorneys this writer found that the majority sided with Bloch's opinion. . . . "(p. 412).

13. In 1956, Malcolm P. Sharp , one of petitioner's present attorneys, publiched a book entitled "Was Justice Done?", Monthly Review Press, New York. The following are excerpts from that book:

"The appearance in 1955 of two thoughtful books on the subject -- William E. Reuben's The Atom Spy Hoax and John Wexley's The Judgment of Julius and Ethel Rosenberg -- led me to reconsider carefully the thesis of this book. On reexamination, the theories of these recent books and the theory of this book seem to supplement rather than to contradict each other; though on the information available to me, I consider the theory presented here somewhat preferable to the others. My review of the recent books, both of which are strongly recommended to the interested reader, appears as Appendix 4." (Author's Preface, pp. XXXIV -- XXXV).

"The record of the trial became generally available to the public as a result of its publication and sale by the Committee to Secure Justice for the Rosenbergs. Study of the record did not seriously shake my confidence in the verdict or in the decision of the Court of Appeals. . . . The trial appeared to have been fairly conducted, and the opinion of the Court of Appeals explaining its judgment affirming the conviction still seemed persuasive." (p. 9).