United States ex rel Thompson v. Dye, supra; United States ex rel Almeida v. Baldi, supra; United States ex rel Montgomery v. Ragen, 86 F. Supp. 382. The suppression of evidence vitiates the proceeding if it was material in any respect to guilt or punishment irrespective of good or bad faith on the part of the government. See Brady v. State of Maryland, supra, and cases cited in Point B, supra. Nor will it be held that lack of diligence on the part of defense counsel or his failure to demand the protection of the suppressed evidence is a ground for denial of relief. See United States v. Wilkins, supra.

E. The prosecution's resort to any devices to contrive a conviction, whether by misrepresentation, the making of false or misleading statements and exaggerated claims or knowing reliance on false or perjured testimony in statements to the court and jury render the conviction and sentence void for want of due process.

The standards enunciated in Mooney and the cases previously cited as to the nature and quality of the testimony that a prosecutor may tender in the course of a trial are even more applicable to the conduct of the prosecution itself. There is a higher duty to seek justice and to refrain from deceitful and fraudulent devices to obtain a conviction. The obligation of the prosecution to afford the defendant a fair trial arises from the moment of the defendant's arrest and applies thereafter to every stage of a proceeding, both prior and subsequent to the time of conviction and

imposition of sentence.

These standards have been clearly enunciated in Berger v. United States, 295 U.S. 78, at 88. This court particularly referred to these obligations in United States v. Zborowski, supra. In that case this court, after referring to the obligation of a prosecutor to disclose and adverting to Berger, further added:

> "Our standards of fair play in federal criminal proceedings require that the government should present its evidence in its true colors and it should never be a party to withholding any evidence which materially bears upon the credibility of a witness it places on the stand." (271 F.2nd 661,668).

See Mesarosh v. United States, 352 U.S. 1; Smith v. United States, 223 F.2d 750; Brady v. State of Maryland, supra.

If the prosecution disseminates false and misleading statements and information prior to and during the trial as to the nature of the crime allegedly committed and compounds that grievous error by making similar statements to the jury in opening and summation and in the course of presenting evidence, as well as at the time of sentencing, the entire proceeding becomes tainted and any conviction so obtained must be set aside and be held subject to collateral attack.

If by representation, imputation or suggestion a prosecutor dealing with a charge relating to national security falsely

declares that the alleged crime involved the transmission of dreadful secrets imperiling the existence of this nation, and false attributes authenticity, accuracy and vital importance to evidence unworthy of such characterizations, and makes grossly exaggerated, alarming claims as to the ultimate result of the alleged offense in order to establish the truth of that which he knows to be false or in order to establish or enhance the credibility of his chief witness, with the object of proving that a conspiracy existed and achieved its objective, a conviction which may possibly have been so obtained is subject to collateral attack and must be set aside.

POINT II

THE STANDARDS USED IN DETERMINING WHETHER OR NOT A HEARING SHOULD BE GRANTED PURSUANT TO TITLE 28, U.S.C. SECTION 2255

The fundamental issue raised in this appeal is whether or not, upon the files and records of this case and the present motion and supporting papers containing facts and circumstances de hors the record, it was error for the lower court to deny appellant a hearing. The lower court failed to correctly apply the principles of law applicable to a 2255 proceeding.

A district court is required to grant a prisoner a hearing unless, in the words of the statute, the motion and the files and records of the case conclusively show that the prisoner is not entitled to any relief. Sanders v. United States, 373 U.S. 1; United States v. Hayman, supra; Townsend v. Sain, 372 U.S. 293; Fay v. Noia, 372 U.S. 391; Commonwealth of Pennsylvania v. Claudy, 350 U.S. 116; Chessman v. Teets, 350 U.S.3; Machibroda v. United States, 368 U.S. 487; Marchese v. United States, 304 F.2d 154, vacated and remanded 374 U.S. 101; Bone v. United States, 304 F.2d 722, vacated and remanded 374 U.S. 503; Haire v. United States, 334 F.2d 715.

In any petition charging knowing use of false or perjured evidence, suppression of evidence or false statements or representations by the prosecution there must inevitably be an inconsistency between the files and records of the case and the extrinsic evidence presented by the application for 2255 relief. The denial of a hearing on the grounds that the extrinsic evidence is contrary to that of the files and records of the case would of itself constitute a denial of due process and the deprivation of the benefits of the writ. See Brown v. Mississippi, supra; Davis v. United States, 210 F.2d 118; Sanders v. United States, 205 F.2d 399. This rule is particularly applicable where the extrinsic evidence, for whatever reason, was unknown to the petitioner at the time of his trial. Where an application for relief raises factual issues extrinsic to the record then the prisoner must be afforded an opportunity to prove these allegations in the course of a "judicial proceeding", an evidentiary hearing. Sanders v. United States; United States v. Hayman; Commonwealth of Pennsylvania ex rel Herman v. Claudy; Pyle v. Kansas, all supra; Price v. Johnston, 334 U.S. 266.

A hearing means the traditional judicial proceeding, an evidentiary hearing with all the powers to compel the production

of witnesses and documents, confrontation and examination. An ex parte proceeding by affidavits cannot constitute a valid substitution for a hearing - a judicial proceeding. United States v. Hayman, at pp. 219, 220; Walker v. Johnston; Price v. Johnston, all supra; Kyle v. United States, 297 F.2d 507 (C.A.); United States ex rel Almeida v. Baldi, supra.

If the facts are in dispute the dispute may only be resolved by an evidentiary hearing.

Even if the government does contest the factual allegations and supporting affidavits they must be accepted as true in determining the legal and factual sufficiency of the petition. United States v. Rosenberg, 200 F.2d 666 (C.A.2).

The passage of time, the doctrine of laches, waiver or estoppel do not apply in habeas corpus proceedings any more than would lack of diligence on the part of the petitioner or his counsel, although application of such objections has been fully negated herein (p.). Commonwealth of Pennsylvania v. Claudy, supra; Price v. Johnston, supra; United States v. Tateo, 214 F. Supp. 560 (D.C.N.Y.); United States v. Morgan, 346 U.S. 502; Haywood v. United States, 127 F.Supp. 485 (U.S.D.C.)* United

* "Finally, if laches were to constitute an estoppel or defense it would in fact make a dead letter of the ancient writ." p.488.

States v. LaValle, 319 F.2d 308 (C.A.2); United States v. Wilkins, supra; Farnsworth v. United States, 232 F.2d 59 (App. D.C.); United States v. Morgan, 222 F.2d 673 (C.A. 2).

The rule that the doctrine of res judicata is inapplicable to a habeas corpus proceeding has been often clearly and explicitly enunciated. Sanders v. Unites States; Price v. Johnston; Waley v. Johnston, all supra; Smith v. United States, 270 F. 2d 291, (C.A.).

The language of Section 2255 as regards second or successive applications for relief has been particularly scrutinized and applied by the Supreme Court in Sanders v. United States and Price v. Johnston.

In Sanders the court incorporated within the language of Section 2255 the provision of Section 2244 which provides that a hearing and relief will be denied only if the petition presents "no new grounds not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry."

In Price v. Johnston the petitioner had made a fourth application for relief charging the knowing use of false testimony by the prosecution's chief witness. The prior applications, all

denied, brought into issue the same false testimony but no hearing had been had and there had been no prior allegation of knowing use. The court held that the petitioner was entitled to a hearing even though the facts relied on were the same, for the reason that they had not previously been raised properly or in a form to reach constitutional proportions; and further held not merely that res judicata is inapplicable but that prior denials should have no bearing or weight on the disposition of the present petition since the grounds tendered are new. If the government wishes to resist the application on the claim that it could have or should have been raised before, the petitioner would be entitled to a hearing to present adequate reasons for not making the allegations earlier - this of itself becomes an issue of fact which must be resolved by a hearing. The court there held:

> "And if for some unjustifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts it is neither necessary or reasonable to deny him the opportunity of obtaining judicial relief." (p. 291)

If the grounds for relief are sufficient the burden is not on the petitioner to affirmatively allege or prove that he had acquired new information or that he had adequate reason for not raising

the issue sooner. Let the matter be disposed of by a hearing to determine whether at that time his allegations can be borne out by proof so as to entitle him to the ultimate relief. If there be a substantial conflict on the question of abuse that too mandates a hearing in the interest of justice.

In Sanders the court emphasized that the concept of finality of litigation could have no place where life or liberty is at stake and infringement of constitutional rights is alleged. In that case the lower court had denied relief without a hearing on the grounds that, as he had full knowledge of the facts, he could have raised the present grounds for relief in his prior application. The court held, citing Price v. Johnston, that no controlling weight could be given to a prior denial of the writ where new grounds have been tendered for the relief sought. The court restated the principle that it rested with the government to establish with clarity and particularity its contention of abuse of the writ on the grounds that there had been a full prior litigation on all the grounds now tendered and even in that event it was within the court's discretion to grant a new application if the ends of justice would be served thereby.

The court then noted that where identical grounds for

relief are presented in a subsequent application based either on different factual allegations or different legal theory the petitioner is entitled to a hearing, and should any doubts arise they are to be resolved in favor of the applicant.

Any prior denial would be of no consequence if it had not been based upon an adjudication of the merits on the identical grounds presented in the subsequent application. If the grounds tendered raise new factual issues, or if the same facts are presented on new grounds, a prior determination would not warrant any consideration absent an evidentiary hearing. Moreover, if the prior determination by evidentiary hearing was not arrived at fully and fairly the petitioner would be entitled to be heard once again. It is thus clear in light of Price and Sanders that where there has been no prior evidentiary hearing, where new facts are alleged, where new grounds have been tendered, and a different legal theory underlies the application for relief, a second or successive application under Section 2255 is in no way precluded, but rather the court must consider it as if it were the first application.

To deny petitioner a hearing the factual allegations must be clearly and "patently frivolous or false on a consideration

of the whole record." Commonwealth of Pennsylvania v. Claudy, supra. Even if the allegations were improbable or unbelievable when based upon extrinsic evidence that would not serve to deny the petitioner an opportunity to be heard and present evidence. Smith v. United States, supra citing Walker v. Johnston and United States v. Hayman, both supra. A hearing must be granted unless the allegations are merely "vague, conclusory or palpably incredible" ... nor may the court conclude that the allegations are insufficient merely becuase of a delay in the assertion of a constitutional right or a failure to assert it at an earlier time. United States v. LaValle, supra.

It is in this context of the law as enunciated above that one must determine the propriety of the lower court's decision to deny appellant a hearing.

POINT III

THE LOWER COURT IN DENYING APPELLANT RELIEF FAILED TO APPLY THOSE PRINCIPLES OF LAW APPLICABLE TO A 2255 PROCEEDING

A. The facts and grounds for relief and the legal theory upon which the present application is premised have never been presented or heard or determined on the merits in any prior 2255 proceeding.

During the course of the trial the defense, effectively deceived by the prosecution, did not challenge the authenticity or accuracy of Government Exhibit 8 and the Greenglass description of the Nagasaki bomb, and in fact assumed as true the importance and attributes given to it by the prosecution, and for that reason asked that it be impounded. The witness, Derry, after being qualified by the trial court's interrogation, was not challenged as an expert and his evidence was accepted as true and correct. At the same time the defense did not challenge the testimony of the witness, Gold, accepted his testimony insofar as it related to the existence of a June 3rd meeting in 1945 with the Greenglasses and stipulated to the claim of the prosecution that Exhibit 16 was in fact a photostat of an original hotel registration card establishing that Gold had stayed at the Hotel Hilton on June 3, 1945. Appellant's co-defendants challenged only the testimony of the Greenglasses.

Prior to the execution of the Rosenbergs, all the post-trial applications for collateral relief were initiated by their attorneys and joined in by appellant.

The first 2255 motion was directed toward the question of prejudicial climate; a claim of perjury by Greenglass (based on acceptance of the government's false claims and Derry's false testimony regarding Exhibit 8), and a challenge to the power of the government to classify under the Espionage Act the activities it was engaged in at Los Alamos in the development of the atomic bomb. The climate branch of the motion was denied on the ground that it had been waived and had not been timely raised. The claim of perjury by Greenglass was premised on the contention that Government Exhibit 8 and its description was so authentic, accurate and substantially complete that it was beyond his capacity to recall any such scientific data or to prepare it for trial without the aid of experts and technical material. The court held that opinions as to Greenglass' competency and power of recall could not be litigated in a post-trial proceeding in that the exhibit and testimony at issue had never been seen by the experts who rendered their opinions, and the testimony of Derry was not challenged by them. Finally, the court held that the government did not act capriciously or arbitrarily in classifying the

information and that it had the right to keep secret during time of war that it was working on the development of an atomic bomb. (See footnote p. 36 supra)*.

The second 2255 application related to newly discovered evidence concerning a console table previously owned by the Rosenbergs, and the discovery that Greenglass had lied in the course of his testimony in concealing the fact that he had stolen uranium from Los Alamos and in that his testimony was in conflict with his pre-trial statement to his attorney. The application was denied, as the former one, without an evidentiary hearing.

Just prior to the execution of the Rosenbergs, an application was made to the Supreme Court by writ of habeas corpus seeking to set aside the sentence of death imposed against them on the ground that it was not authorized by the Atomic Energy Act of 1946 which superseded in the field of atomic information the Espionage Act of 1917. That proceeding was initially instituted by strangers to the case. Justice Douglas granted a stay of execution after the Supreme Court had recessed, to afford

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* The lower court found that since it had been determined that the material could be classified as secret, there had been a prior determination that this material had been held to be of value. In fact no such finding was made by this Court. See United States v. Rosenberg, 200 F.2d 666, 108 F.Supp. 798. The district court, as did this Court, merely cited Derry's testimony to establish secrecy. In any event, res judicata is not applicable, and new extrinsic evidence is now presented for the first time.

the parties an opportunity to make initial application to the District Court and to have the matter reviewed by the Court of Appeals. A special term of the Court was called. At the request of the Attorney General the matter was set down for argument the ensuing day, and the stay was vacated.

In 1956 Sobell instituted a 2255 motion charging that the prosecution had knowingly used perjured testimony in introducing evidence to the effect that he had been deported from Mexico and had returned against his will. It was further argued that the abduction of Sobell deprived the court of jurisdiction, thus requiring the setting aside of the judgment of conviction. Relief was denied by the District Court without evidentiary hearing, affirmed by the Court of Appeals, and certiorari was denied.

In 1962 a 2255 motion was made in behalf of the appellant on two grounds: a) that the court was without power to impose a war-time sentence in that there was no finding by the jury that appellant had allegedly joined the conspiracy in time of war, and b) that in light of the decision of the Supreme Court, United States v. Grunewald, 353 U.S. 391, the cross-examination of Ethel Rosenberg relating to her assertion of the Fifth Amendment at the time she appeared before the Grand Jury was so grossly unfair as

to deny her, along with her co-defendants, a fair trial. This motion was denied as a matter of law by the District Court. Its denial was affirmed by this Court and certiorari was denied.*

It thus can be seen that the present application is based upon new facts and grounds not presented in a prior 2255 proceeding. It should also be noted that no evidentiary hearing was ever held and the Supreme Court has never reviewed the fairness of the trial.

*The government, in the course of argument before this Court, acknowledged that had Ethel Rosenberg's original conviction been considered on appeal in light of Grunewald, a reversal of her conviction would have been required.

B. The lower court ignored the circumstances present in this case and the facts alleged on this motion which require the granting of the relief sought.

The lower court fails to refer to or discuss facts set forth in the moving papers and the files and records of the case which establish the special circumstances underlying the grounds for the relief sought and which mandate an evidentiary hearing.

No reference is made to the fact that the defendants were deprived of an opportunity,prior to the time of the actual offer in the course of trial, to look at the evidence to be tendered by the prosecution, the sketches and drawings of Greenglass, on the grounds that it was stated by the government that its disclosure was foreclosed "under any conditions" in that it would imperil the national security. (See pp. 15-16 supra). No mention is made of the fact that the government throughout the trial falsely insisted not only that the material was of vital importance but that it was of such a top secret character that it was only temporarily declassified for the purposes of the trial and would be reclassified whether the defense asked for its impounding and sealing or not. No mention is made of the prosecution's false statements that the material relating to Government Exhibit 8 was of such transcendent importance to the security of the nation that

the question whether the government could afford to proceed with the prosecution and disclose these vital secrets was reviewed at the highest governmental levels. Equally, there is silence concerning false statements and representations made by the prosecution to the trial court at the time of sentencing, and the justification of the imposition of the extreme penalty.

Ignored in the court's opinion are the events of April to August of 1966 when the government persisted in maintaining the mystery and the myth of the great secrets of the atom bomb contained in Exhibit 8 and as described by Greenglass. Yet it is a fact that at the time of the unsealing of the evidence in April and the presentation of the material to the court in July, the government once again reasserted with the same force and vigor and with an equal lack of truth that disclosure of this material would imperil our national security today and that any proceedings must be held in camera.

The lower court ignores the fact that when the first 2255 motion was made with whatever defects it is said to have had, the government emasculated the writ, deceived the court, and once again denied the appellant and his co-defendants due process in the collateral proceeding itself. At that time it was obliged as

a matter of due process to come forward with the facts it always knew, that the testimony and evidence was not as represented by the government in the course of the trial.

Now that there has been disclosure and the prosecution misconduct was, for the purposes of this motion, excised by the lower court from the files and records of the case the court ignores the fraud charged and founds its decision on the erroneous theory that the appellant argues that solely the degree of culpability in law is involved in whether the data allegedly transmitted was more or less valuable. But it is quite to the contrary. Appellant, with full factual support alleges that his very conviction was procured by the government's knowing use of false and perjured testimony, by suppression of evidence and a deliberate program of false statements and representations both in and out of the courtroom and by deceptive characterizations of the evidence tendered. This, the appellant charges and substantiates by fact, was the means to effect a gross fraud to obtain the conviction.

A reading of the petition and supporting affidavits demonstrates that they are replete with fact and evidence which if proved at a plenary hearing would result in the vacating of the judgment of conviction.

The lower court ignores these facts concerning Government Exhibit 8, the "atomic bomb", as it does the facts which fully support the allegation that Government Exhibit 16, the photostat of the registration card, was a forged, after-contrived document, and the June 3rd meeting an after-conceived story.

The court compartmentalizes the various factual allegations and refuses to see them in their totality and thus avoids seeing that conviction was fraudulently obtained. Characterize the moving papers as it may, the lower court could not and did not deal with the facts which mandate a hearing. To the extent that the opinion discusses the facts and issues, by ex parte determination it makes summary findings.

As an isolated example is the finding of the lower court that no one, including the jury, could possibly have been misled into believing that Dr. Urey, Dr. Oppenheimer and Dr. Kistiakowski were to be called as prosecution witnesses who would support the prosecution's contentions. Those scientists were not asked to testify and the prosecution did not know or attempt to find out what they would say or whether they would agree to appear. Yet the lower court concludes that since the government did not

divulge explicitly what they would say if called, the declaration of intention to call them must be accepted as true or harmless and not a dissembling, deceitful device.

This issue arose in another form in this very case when the prosecution called a witness in rebuttal not included in the list filed with the court and served upon the defendants. In response to the objections of the defendants this Court held that the prosecution was permitted to call a witness if material testimony was discovered during the progress of the trial and therefore the government was, in that special instance, not bound by Title 18 U.S.C. Section 3432. But this Court stated that the statute did "exact ... [that] the prosecuting officer ... shall in good faith furnish to the prisoner before the trial, the names of all witnesses then known to him and intended to be used at the trial." (Emphasis supplied). United States v. Rosenberg, supra at p. Did the prosecutuon intend to call Urey, Oppenheimer and Kistiakowski? Obviously not, but the lower court ex parte determined to the contrary.

C. The lower court in denying appellant a hearing applied standards clearly not applicable to a 2255 motion.

It is the lower court's contention that the appellant and his co-defendants should have acted with greater diligence in

obtaining evidence to disclose the prosecution's misconduct charged; the defense could have spoken during the trial to Dr. Urey and Dr. Oppenheimer; the defense could have compelled their appearance by subpoenaing them at the time of the trial; the defense could have unimpounded the evidence at an earlier date. The court argues the defense could have cross-examined Gold; it need not have stipulated as to the admission of Government Exhibit 16, the photostat of the June 3rd card; it should have obtained earlier a photostat of the September 19th card, Gold's pre-trial statements and the other material obtained by the Schneirs in their investigation; and it should have called upon document experts at an earlier date. It should have sooner obtained the aid of scientists involved in the development of the atomic bomb. This application should have been made in 1956 rather than in 1966. For these reasons the lower court finds that appellant is not entitled to relief now.

However, the lower court formulates it, it is asserting the doctrines of laches, waiver and estoppel as a basis of sustaining an invalid conviction fraudulently obtained.

As the law clearly shows, the doctrines of laches, waiver and estoppel are not applicable to a habeas corpus proceeding. The imposition of such restrictive concepts "would in fact make a

dead letter of the ancient writ." A judgment void ab initio because of fraud and governmental misconduct "does not become vitalized by passage of time." Haywood v. United States, supra.

We shall not repeat here the factual allegations, the extrinsic evidence which put into issue the falsity of the Derry testimony and the government's knowledge of the same, that the same representations made by the government were in fact false as they well knew, nor do we here repeat the evidentiary support, both direct and circumstantial, which makes a prima facie showing that Government Exhibit 16 was forged and the June 3rd meeting was never held. But it must be stressed that the lower court did not find an absence of fact issues however it may characterize the petition, but rather, that it made fact determinations in the absence of an evidentiary hearing. In any event, it cannot be said that the allegations and supporting papers are "vague, conclusory or palpably incredible - patently frivolous and false." That being so, this Court must afford a hearing to this appellant and put him to his proof, an obligation he does not fear.

The lower court's failure to apply the prevailing and normally accepted standards applicable to a 2255 motion to this case can lead to no other conclusion but that this Court must reverse the order below and direct that a hearing be held forthwith.

CONCLUSION

The appellant has not been silenced by his long incarceration under an unjust conviction and cruel sentence fraudulently obtained. His persistent demand for an oral hearing supported by his faith in the vindication he is certain will result therefrom is not only a struggle for his personal liberty but also an opportunity for this Court at last to meet the claims of history, as Justice Frankfurter urged in 1953.*

The judicial process has its powers of self-correction and redemption and this should remain a shining beacon to pierce prison walls and sustain the hope of a prisoner who demands only that he be afforded an oral hearing at which he may prove the truth of his charges. Section 2255 is the instrument by which the court may exercise such powers in this case. The statute confers upon the court the jurisdiction and the duty to grant appellant a hearing so long as his petition makes a showing which if proved at a hearing would entitle him to the ultimate relief sought. If the government procured the appellant's conviction by impermissible, unconstitutional means, no technical opposition based on allegations of laches, waiver, election or the like can wash away

* See pp. 5-6, supra.

the fraud or immunize the illegal conviction from attack.

For the first time in the long history of this tragic litigation the mantle of phantom secrecy has been lifted from the scientific make-believe whereby from 1950 to 1966 the government alarmed and intimidated court, jury, counsel and the public at large. For the first time scientists have been sufficiently free of "security" restraints to describe the hollow trifle which was Exhibit 8. For the first time there has been exposed the fraud whereby the prosecution "proved" the June 3, 1945 Gold-Greenglass meeting which had never taken place and the hotel registration card which had never existed.

The government's response is a demand for silence. It is a demand that this court abdicate its historic functions. The prosecution is moved by fear of the facts, dread lest its shameful role be exposed for all the world to see. But in seeking to silence the appellant the government wrongs him not nearly so much as it does our Constitution and the administration of justice itself.

The appellant by his tireless and courageous fight for justice is performing one of the highest duties of citizenship and true patriotism. The long-range national interests, as opposed to the transitory policy of a particular administration,

are at one with the individual's right to liberty and due process of law. Even if there were indeed a conflict between the national interest and the defense of the constitutional right of the appellant to a fair trial, the latter must prevail.

By granting to the appellant the hearing to which he is entitled under the Constitution and the statute this court will assert its faith and confidence in our judicial system.

The order appealed from should be reversed and an oral hearing under Section 2255 should be afforded to the appellant forthwith.

Respectfully submitted,

MARSHALL PERLIN

WILLIAM M. KUNSTLER

ARTHUR KINOY

MALCOLM SHARP

BENJAMIN O. DREYFUS

VERN COUNTRYMAN

Attorneys for Appellant

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

UNITED STATES GOVERNMENT

Memorandum

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

TO : Mr. W. C. Sullivan

DATE: June 9, 1967

FROM : W. A. Branigan

1 - Mr. DeLoach
1 - Mr. W. C. Sullivan
1 - Mr. W. A. Branigan
1 - Mr. J. P. Lee

SUBJECT: MORTON SOBELL
ESPIONAGE - RUSSIA

This memorandum reports the filing of an appeal by the attorneys of Morton Sobell on 5/26/67 from the decision of the U.S. District Court, Southern District of New York, 2/14/67 denying Sobell's motion to set aside his conviction.

BACKGROUND:

Morton Sobell was convicted along with Julius and Ethel Rosenberg in 1951 of conspiracy to commit espionage on behalf of the Soviets. The Rosenbergs were executed and Sobell sentenced to serve thirty years in prison. On 5/13/66 Sobell filed his sixth motion 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. On 2/14/67 Judge Edward Weinfeld of the Southern District of New York denied Sobell's motion filing a 79-page opinion.

CURRENT ACTION:

On May 26, 1967, Sobell's attorneys filed an appeal from the decision of Judge Weinfeld. In this appeal they again reiterated all the charges that the Government knowingly used forged documents, perjured testimony, and knowingly withheld evidence which could have proven that Sobell was innocent. In addition, the defense alleges that Judge Weinfeld was in error in denying the motion claiming that he failed to look at all the "factual allegations" made by Sobell and thus avoided seeing the overall picture of fraud in connection with the trial.

ACTION:

EX-103 REC-19 101-2483-1698

New York is following this matter and will advise the Bureau when the Government files its answer on June 13, 1967.

JUN 12 1967

101-2483

JPL:slc
(5)

57 JUN 19 1967

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 5-1-87 BY 3042 RUTLOB

1 - Griffith
1 - Newbrough

6/14/67

Airtel

To: SAC, New York (100-37158)

From: Director, FBI (101-2483)

MORTON SOBELL
ESP - R
OO: NEW YORK

ReLab report D-516704 AX HO, dated 10/5/66, and New York telephone call on 6/13/67.

Enclosed herewith are the photocopies of Hilton Hotel registration cards numbers 78783 and 65841 as requested in referenced telephone call.

Enclosures (2)

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 3-4-87 BY 3042 pwt/013

WLN:pjh (5)

EX 109

REC 27 101-2483-1699

1 JUN 16 1967

MAILED 6
JUN 14 1967
COMM-FBI

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

57 JUN 23 1967

MAIL ROOM ☐ TELETYPE UNIT ☐

FD-36 (Rev.

FBI

Date: 6/15/67

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

Via AIRTEL _____ (Priority)

TO: DIRECTOR, FBI (101-2483)

FROM: SAC, NEW YORK (105-37158)(P)

SUBJECT: MORTON SOBELL
ESP - R

(OO: NEW YORK)

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 5-4-87 BY 3042 RWT/CLS

Re NY airtel to Director, dated 6/6/67.

Special AUSA ROBERT L. KING, SDNY, advised this date that a hearing was held 6/15/67 before US Court of Appeals for the Second Circuit on appeal filed by subject. The defense was represented by attorney MARSHALL PERLIN, and the government was represented by Special AUSA KING.

KING furnished copies of the Government Brief, one copy of which is enclosed herewith for the information of the Bureau.

PERLIN, in oral argument, indicated that his appeal before the court was in the nature of a habeus corpus proceeding, and was not an appeal for a new trial. He indicated that USDJ WEINFELD's opinion of 2/14/67, was written as though a hearing was held, evidence was examined, and witnesses were called, prior to rendering a decision, but such was not the case. He called for the government to produce the Photostat copies of the Hilton Hotel registration cards for HARRY GOLD, dated 6/3/45, and 9/19/45, and claimed

3-Bureau (Encl. 1)(RM)
1-New York

PFD:mp
(6)

ENCLOSURE

EX-104

REC-6 101-2483-1700

2 JUN 16 1967

cc: Wick

"ENCLOSURE ATTACHED"

SOVIET ESPIONAGE

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

59 JUN 26 1967

that the 6/3/45 card was a fraudulent card manufactured by the FBI in an effort to prove that GOLD was in Albuquerque, N.M. on 6/3/45.

The Court questioned the Government on the availability of these cards, and upon learning they were available in the courtroom, accepted them as exhibits.

PERLIN emphasized that in an effort to prove the transmittal of espionage information from DAVID GREENGLASS to the USSR, the Government had to prove "an alleged meeting" between GREENGLASS and self-confessed courier HARRY GOLD. He stated the Government then intimidated both the court and the jury by submitting a list of 98 prospective Government witnesses, headed by Drs. J. ROBERT OPPENHEIMER, HAROLD C. UREY, and Dr. KISTIAKOWSKI, none of whom were called as witnesses, nor even asked to testify. He said instead, the Government relied on the testimony of JOHN A. DERRY, who testified he was familiar with all parts and phases of the Atomic Bomb.

PERLIN was questioned by the Court whether his point was that DERRY had committed perjury when he testified that the GREENGLASS sketch represented the Atomic Bomb. PERLIN said yes, partially. He said GREENGLASS had never stated what the sketches represented, but that DERRY had said he was familiar with all phases of the bo[illegible] and the sketch represented the same bomb dropped on Nagasaki.

PERLIN was questioned by the Court as to whether this is the first time that the defense has claimed that the GREENGLASS sketch did not represent the Atomic Bomb. He stated this was true.

Special AUSA KING, in behalf of the Government, pointed out that the present proceeding constituted an abuse of Section 2255, and that the court was not required to continually accept motions under this section. He emphasized that DERRY did not testify that the GREENGLASS sketch was a drawing of the A-Bomb. He noted that atomic scientists who had furnished affidavits in behalf of the defense had indicated that the GREENGLASS sketch indicated with substantial accuracy the principle involved in the 1945 A-Bomb, and that Doctor LINSCHITZ had indicated this was the kind of diagram that he would have used to explain the ideas involved in the A-Bomb.

KING presented photostats of the 6/3/45 and 9/19/45 Hilton Hotel registration cards of HARRY GOLD to the Court, pointing out that the 9/19 card was not involved in any way in the record of this case. He stated that no inferences could be drawn from anything presently in the record concerning the obtaining or handling of these cards that would even indicate that there was any fraud connected with the 6/3/45 card. He indicated that the defense had made all sorts of allegations of fraud, but had not produced any facts whatsoever to substantiate their allegations that the Government had committed fraud.

PERLIN requested additional time from the Court to answer the Government brief, pointing out that it had not been received until 6:00 P.M. on 6/14/67.

The Court granted the defense until 6/22/67 to file an answer to the Government brief.

Above for info of Bureau.

To be argued by
ROBERT L. KING

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 31259

MORTON SOBELL,
Petitioner-Appellant,

—v—

UNITED STATES OF AMERICA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT M. MORGENTHAU,
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United States Court of Appeals

FOR THE SECOND CIRCUIT

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—v—

UNITED STATES OF AMERICA,
Respondent-Appellee.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Morton Sobell appeals from the denial by the Honorable Edward Weinfeld of his sixth motion, pursuant to 28 U.S.C. § 2255, to vacate and set aside his judgment of conviction and sentence entered April 5, 1951.

Indictment C. 134-245, filed January 31, 1951, charged appellant Sobell, Julius and Ethel Rosenberg, David Greenglass and Anatoli Yakovlev in one count with conspiring between 1944 and 1950 to violate 50 U.S.C. § 32(a)* 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. The indictment named Harry Gold and Ruth Greenglass as conspirators but not as defendants.

* 40 Stat. 218 (1917), which was recodified in 1948 as 18 U.S.C. § 794(a) and (b), 62 Stat. 737.

On March 6, 1951, following the severance of David Greenglass, who had pleaded guilty, and Anatoli Yakovlev, who had left the United States prior to the return of the indictment, trial commenced before the Honorable Irving R. Kaufman and a jury. On March 29, 1951, the jury returned a verdict of guilty as to each defendant. Appellant was sentenced on April 5, 1951 to the thirty-year term of imprisonment which he is now serving.

The convictions of appellant and his co-defendants were affirmed by this Court, 195 F.2d 583 (1952), and rehearing of the appeal was denied, 195 F.2d 609 (1952). A petition for certiorari to the Supreme Court was denied, 344 U.S. 838 (1952), and rehearing denied, 344 U.S. 889 (1952). In 1954 appellant moved for leave to file a second petition for rehearing, which was denied at 347 U.S. 1021. Again in 1957, appellant moved before the Supreme Court to vacate the orders denying certiorari and rehearing, which motion was denied at 355 U.S. 860.

In addition to seeking the foregoing direct review of his conviction, appellant has instituted numerous post-conviction motions for arrest of judgment, for a new trial and to set aside his conviction and sentence, and has unsuccessfully appealed their denial to this Court and to the Supreme Court. See pages 10 to 17, *infra*.

Appellant's present motion, his sixth pursuant to 28 U.S.C. § 2255 to vacate and set aside his conviction and sentence, was filed August 22, 1966.* By written opinion dated February 14, 1967, Judge Weinfeld denied relief. 264 F. Supp. 579.

* The present motion constitutes an amendment of a similar motion brought by appellant in May, 1966, and later withdrawn on its July 25, 1966 return date, two weeks after the Government had filed voluminous answering papers.

Statutes Involved

TITLE 28, UNITED STATES CODE, SECTION 2255

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

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

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

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

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

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

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

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. (June 25, 1948, ch. 646, 62 Stat. 967; May 24, 1949, ch. 139, § 114, 63 Stat. 105.)

TITLE 50, UNITED STATES CODE (1946 ed.), SECTION 32

§ 32. *Unlawfully disclosing information affecting national defense.*

Whoever with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years: *Provided,* That whoever shall violate the provisions of subsection (a) of this section in

time of war shall be punished by death or by imprisonment for not more than thirty years; . . . (June 15, 1917, c. 30, Title I, § 2, 40 Stat. 218.)

TITLE 50, UNITED STATES CODE (1946 ed.), SECTION 34

§ 34. *Conspiracy to violate preceding sections.*

If two or more persons conspire to violate the provisions of sections 32 or 33 of this title, and one or more of such persons does any act to effect the objects of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided conspiracies to commit offenses under this chapter shall be punished as provided by section 88 of Title 18. (June 15, 1917, c. 30, Title I, § 4, 40 Stat. 219.)

Statement of Facts

A. The evidence at appellant's trial.

A general summary of the evidence adduced at the trial of appellant and his co-defendants was contained in this Court's opinion affirming the convictions.* That summary, 195 F.2d 588-90, was 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

* The specific trial testimony and exhibits which appellant now characterizes in his amended petition (hereinafter, "petition") as perjurious and fraudulent are considered in greater detail in the arguments in reply to appellant's various contentions.

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

to 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."

B. Appellant's present motion.

The Section 2255 petition which Judge Weinfeld denied alleged generally that the Government * "knowingly created, contrived and used false, perjurious testimony and evidence and intentionally and wilfully induced and allowed government witnesses to give false, misleading and deceptive testimony in order to obtain the conviction of petitioner and his co-defendants" (A. 211a-12a).**

While the petition's allegations were found by the court below to be "highly repetitious, voluminous, argumentative and conclusory" (A. 434a), five separate, but interrelated, charges against the Government are discernible. Thus, it is contended that the Government 1) knowingly used perjured testimony of David and Ruth Greenglass, John A. Derry, and Harry Gold; 2) knowingly presented false, misleading and deceptive evidence in the form of GX. 8, the sketch of the atomic bomb under development at Los Alamos in 1945; 3) made false representations at trial concerning the authenticity of the scientific information passed by Greenglass to Russia; 4) manufactured and presented a false and forged piece of evidence in the form of GX. 16, a June, 1945 Hilton Hotel registration card for Harry Gold, and then knowingly destroyed or permitted the destruction of the card to hide the fraud; and 5) knowingly suppressed the pre-trial statements of Harry Gold.

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* Appellant vaguely defines the Government to include all "prosecutive, investigative and other agencies of the United States," and their agents and representatives, involved in the investigation or prosecution of this case (A. 211a).

** References with the prefix "A." and "G." are to the appellant's and the Government's Appendix, respectively. Appellant's Brief is referred to as "App. Br.," and Government Exhibits are cited "GX." In the portions of the trial transcript reproduced in the Government's Appendix, the number in parentheses designates the page of the printed transcript filed with the Supreme Court on June 7, 1952, and the number in brackets, preceded by "fol.", refers to the page of the stenographic transcript.

The motion consisted of the following documents, filed piecemeal prior to the court's decision: 1) the petition itself, filed August 22, 1966, and attached affidavits of Henry Linschitz, Philip Morrison, and Walter and Miriam Schneir (A. 208a-362a)*; 2) an affidavit of Marshall Perlin, with an annexed "Report" of Elizabeth McCarthy dated September 9, 1966, and affidavits of Malcolm Sharp, Harold Clayton Urey, and Walter Schneir, all filed on the motion's September 12, 1966 return date (A. 387a-421a); and 3) an affidavit of Robert F. Christy (A. 422a-25a), and seven transcripts of five recorded interviews of Harry Gold conducted by his attorneys from June to August, 1950, together with related documents obtained from Gold's attorneys (portions of which are reproduced at G. 206a-34a), all filed October 13, 1966.

The affidavits of Linschitz, Morrison, Urey and Christy and the second Walter Schneir affidavit were submitted to support appellant's allegations that the Government knowingly permitted David Greenglass and John Derry to lie concerning GX. 8, and that GX. 8 was a false and misleading document.

The Perlin affidavit (with the attached report), the Schneirs' first affidavit and the Gold transcripts were submitted in connection with the allegations that the June 3, 1945 meetings between Greenglass and Gold never took place and that GX. 16 is a forged document.**

C. Appellant's prior post-conviction proceedings.

This is appellant's sixth attempt by collateral attack under Section 2255 to set aside his judgment of conviction

* Hereafter, the affidavits will be cited by the affiant's name only.

** The Sharp affidavit is no more than an account of the personal views of one of appellant's counsel.

and sentence. The following is a summary of his prior attempts to upset his conviction, including a summary of the grounds urged by him where they are either the same or similar to the grounds of his present motion.

On April 5, 1951, the date upon which Sobell and the Rosenbergs were sentenced, counsel for Sobell made a motion in arrest of judgment, claiming that Sobell's conviction was obtained upon false testimony about which the FBI must have known (R. 2402-19).* Judge Kaufman denied the motion and sentenced Sobell to 30 years imprisonment (R. 2425, 2462).

One of the attacks on the direct appeal of the Rosenberg and Sobell convictions 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 583, 592 (2d Cir. 1952). 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), this Court declined to enter the jury's province and consider the matter of credibility. 195 F.2d at 592.

Appellant and the Rosenbergs joined in the first motion under 28 U.S.C. § 2255 in late 1952. Among the grounds of the Rosenberg motion, which Sobell adopted, was the contention that "the prosecuting authorities knowingly used false testimony to bring about petitioners' conviction"

* 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, Sobell submitted an affidavit alleging in substance that he had been forceably kidnapped from Mexico (R. 2406-14).

References with the prefix "R." are to the stenographic transcript of the trial. Where portions of the transcript appear in the Government's Appendix, the Appendix is cited.

(Rosenberg petition, November 24, 1952, p. 5). See 108 F. Supp. at 800 n.1.* In support of the claim of knowing use of perjured testimony, it was contended, first, that David Greenglass lied when he testified that he had cooperated with the authorities from the time of his arrest on June 15, 1950 (Rosenberg petition, *supra* at 60-64). Secondly, Greenglass allegedly perjured himself when he testified that GX. 2, 6, 7 and 8 (replicas of sketches of atomic bomb information turned over by Greenglass to Rosenberg and Gold) were prepared from his memory alone without scientific aid. To "demonstrate" the falsity of this testimony, petitioners submitted affidavits of scientists saying it was "impossible" or "improbable" that Greenglass, lacking scientific qualifications, could have prepared these sketches solely from memory; and petitioners alleged that Gold had assisted Greenglass while both were lodged at the New York City prison (Rosenberg petition, *supra* at 64-68). Finally, petitioners asserted that rebuttal witness Ben Schneider committed perjury when he testified on March 28, 1951 that the last time he saw Julius Rosenberg 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 identify Rosenberg (Rosenberg petition, *supra* at 68-70).

The Rosenbergs and appellant also alleged in their 1952 motion that "the evidence failed to show that all the information which they conspired to transmit was of such a character as could properly be classified as secret." 108 F. Supp. at 807. In this branch of their motion, petitioners attempted to demonstrate the following:

* 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 4). See 108 F. Supp. at 800 n.1.

"[The petition] . . . will first indicate the general problem of atomic bomb production in order to show the overall process and the interrelations of its many parts. It will demonstrate that the details of the detonation mechanism are but a miniscule part of the whole gigantic operation. It will also show that the details of any particular detonating element need not be known to produce the bomb because there are many alternative paths.

"It will then prove that the secret of the detonating mechanism—allegedly the secret transmitted by David Greenglass to the U.S.S.R.—is no secret at all. At the time of the trial, it was held by the Government and its witness, Walter S. Koski, that the theory of 'implosion' utilized for the purpose of assembling the critical mass of fissionable metal was invented and developed at the Los Alamos Project. The falsity of this statement will be shown by direct reference to the scientific and patent literature available prior to the initiation of the Manhattan Project." Rosenberg petition, *supra* at 73-74.

". . . The ability of any country to produce an atomic bomb rests upon its ability to mobilize the hundreds of thousands of scientists, technicians and laborers and its ability to make available the vast industrial plant required. It does not rest on stealing the 'secrets' of the United States." *Id.* at 98.

". . . [T]he U.S.S.R. did in fact have the necessary scientists and technology for doing the job and . . . the principal reason that it could not make atom bombs during the course of the war was that all of its available manufacturing facilities were devoted to the more immediate necessity of producing well tested implements of war. It did not need any American 'secrets' to produce a bomb." *Id.* at 82.

In addition to a list of various treatises and texts on nuclear physics, this phase of the motion was supported by an affidavit of John Desmond Bernal, professor of physics at Birkbeck College, University of London, and a former Scientific Advisor to the Ministry of Home Security, 1939-1942, and to Combined Operations, 1942-45.

The motion was denied by Chief Judge Sylvester J. Ryan on December 10, 1952, 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, appellant made a similar motion based on 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).

The alleged newly-discovered evidence consisted of a console table said to belong to the Rosenbergs, about which David and Ruth Greenglass had testified, and certain pre-trial statements of the Greenglasses to their attorneys and inter-office memoranda which had been stolen from the office of those attorneys. The following contentions were made: 1) the Government knowingly sponsored perjury in the testimony of Ruth and David Greenglass concerning the console table, and suppressed the console table, knowing

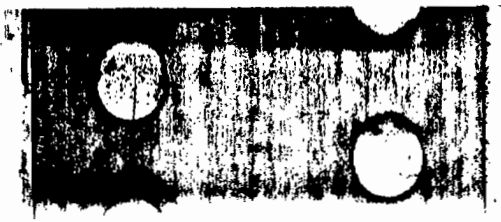
* A further motion of the Rosenbergs under Section 2255 and Rule 35, F.R. Crim. P., was denied by Judge Kaufman on June 1, 1953, affirmed June 5, 1953, 204 F.2d 688 (2d Cir.). A motion by Sobell under Rule 35 to reduce sentence was denied by Judge Kaufman on January 9, 1953, 109 F. Supp. 381.

that it could expose that perjury (Rosenberg petition, *supra* at 13-15); 2) David Greenglass was a "hysteric" and a habitual liar (*id.* at 15-17); 3) the Government suppressed the fact that Greenglass was questioned in February 1950 concerning the theft of uranium from Los Alamos (*id.* at 17); 4) Greenglass's pre-trial statements to his attorneys did not mention the portions of his trial testimony tending to connect Julius Rosenberg to the conspiracy, *e.g.*, he told his attorney 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 orally denied 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 held that the evidence adduced was no proof whatsoever of knowing use of perjury, but 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 per-

* 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).



sistence 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 notices of motion, dated May 8, 1956 and May 25, 1956, appellant brought his third and fourth Section 2255 motions. The grounds for relief in the May 8 motion again 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 8, 1956, p. 2).

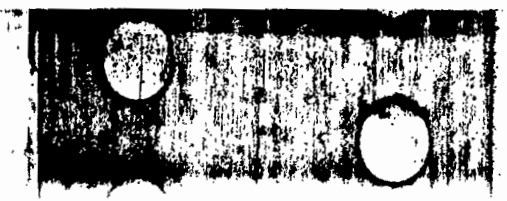
Renewing the claim that he had been kidnapped from Mexico at the time of his arrest, appellant again claimed the prosecution had suborned perjury when it introduced evidence to show he had been "deported" from Mexico. He further asserted that the Government deliberately suppressed evidence relating to the alleged abduction and made misrepresentations to the Court about it (*id.* at 3-18). Judge Kaufman found neither perjury nor suppression nor misrepresentation and denied the motion on its merits. 142 F. Supp. 515, 527-31 (S.D.N.Y., June 20, 1956). 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 District Judge John F. X. McGohey on April 5, 1962, 204 F. Supp. 225. The denial was affirmed by this Court on February 6, 1963, 314 F.2d 314, and certiorari was denied on June 17, 1963, 374 U.S. 857.



ARGUMENT

POINT I

Appellant's petition should be denied as a flagrant abuse of Section 2255.

Section 2255 provides in pertinent part that "the court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." The Government submits that failure to dismiss appellant's motion as an abuse of Section 2255 would have the result of virtually eliminating this language from the statute. See *Sanders* v. *United States*, 373 U.S. 1 (1963). 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.

Measured by these criteria, this Court clearly may give "controlling weight" to the denial of Sobell's prior collateral applications and summarily dispose of his present petition.

First, the instant motion is based on the same grounds urged in appellant'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. Thus all four motions charged as "a sufficient legal basis for granting the relief sought" that the Government knowingly used perjured testimony in violation of appellant's constitutional rights. *Sanders* v. *United*

States, 373 U.S. at 16; see *Price* v. *Johnston*, 334 U.S. 277, 288-89 (1948). In addition, the 1952 motion challenged, as does the present one, the secrecy and value of the atomic information passed by Greenglass to Russia. And while that branch of the motion was not then cast as an alleged knowing use of perjured testimony, there can be no doubt that the argument was the same. Thus, the situation here is no different from that in 1956 when appellant unsuccessfully tried to reargue that he was illegally abducted from Mexico by casting his motion in terms of subject matter jurisdiction to avoid a prior unfavorable ruling on a personal jurisdiction claim. 142 F. Supp. at 520-25. Certainly it is not the law that appellant can attack the Greenglass-Gold meetings in three separate motions simply because the three persons present all testified at trial. Nor can he twice attack the scientific testimony authenticating the atomic information supplied by Greenglass simply because two different witnesses gave such testimony.

Secondly, each of appellant's previous Section 2255 motions were denied "on the merits" as defined in *Sanders*, 373 U.S. at 16. Factual hearings were not granted because in each instance it was held that, assuming the truth of the factual allegations pleaded, the motion and the files and records conclusively showed he was entitled to no relief thereunder.

Thirdly, the "ends of justice" would not be served by permitting a redetermination of the same grounds previously raised. "[T]he burden is on the applicant to show" otherwise, *Sanders* v. *United States*, 373 U.S. at 17, and appellant has made no effort to meet this burden other than to claim that the impounding of the Greenglass testimony and GX. 8 effectively precluded evaluation of this evidence by qualified scientists for the defense during or after the trial (A. 270a-71a). However, this contention, as Judge Weinfeld found, is meritless (A. 471a-73a; 264 F. Supp. at 593-94). At the time of the impounding the court assured counsel that "the stenographer will read it [the Greenglass testi-


mony] back to you at any time you want it" and "I may say to the defense, for any subsequent proceeding it will be made available" (G. 107a-08a). In this regard, it should be noted that the same defense counsel represented the defendants on appeal and in connection with their 1952 motion (195 F.2d at 590; Transcript, December 1 and 2, 1952, p. 1; 108 F. Supp. at 799). Emanuel Bloch again represented the Rosenbergs with respect to the 1953 motion* and Howard Meyer, who was of counsel on the first appeal, represented appellant (Transcript, June 8, 1953, p. 1). Moreover, any attorney concerned with the veracity of Greenglass, Koski and Derry, as appellant's 1952 counsel obviously were, could have requested that this evidence be made available to him. Indeed, when petitioner's counsel made a request in March of this year, the Government did not oppose it (A. 10a-12a).

Nor were the reviewing courts denied access to the impounded evidence. On the direct appeal, the Government informed this Court of the impounding and stated that "if this Court desires to inspect that testimony, it will be necessary to direct the court reporter to read his notes to the Court." Government's Brief, p. 11 n. And, of course, the trial judge, who also decided Sobell's three Section 2255 motions in 1953 and 1956, was always available to unimpound the evidence.

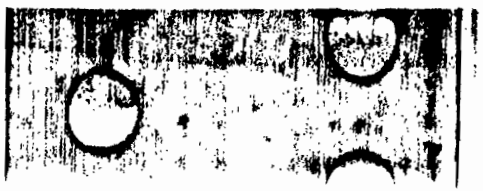
Indeed, even were appellant now urging grounds different from those contained in his prior motions, Section 2255 empowers this Court to dismiss the motion as abusive. "Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay." *Sanders v. United States,* 373 U.S. at 18.

* Among the Rosenbergs' other counsel was Malcolm Sharp, one of appellant's present counsel.

The records and files of this case show that the so-called "facts" adduced in support of the petition were in large part known, and with due diligence should have been known, at the time of appellant's prior post-conviction proceedings, if not sooner. See *Chapman* v. *United States,* Dkt. No. 31149 (2d Cir. April 21, 1967). Thus the lower court's opinion summarizes the resemblances between the atomic branch of the present motion and appellant's 1952 motion under Section 2255 (A. 442a-47a; 264 F. Supp. at 584-86), and concludes that the petition fails to allege facts which could not have been presented on prior applications and appeals (A. 471a-73a; 264 F. Supp. at 592-93).

Nor is there anything new about the attack on the credibility of Gold and the Greenglasses concerning their June, 1945 meetings and the legitimacy of the Hilton card.* The petition totally lacks any adequate explanation why appellant should now be permitted to assert these claims when: 1) defense counsel at the trial not only failed to cross-examine the Greenglasses and Gold concerning the Albuquerque meetings, but conceded that they took place; 2) in attacking the credibility of David Greenglass in the 1952 and 1953 motions and of Ruth Greenglass in the 1953 motion, appellant failed to challenge this aspect of their testimony; and 3) appellant waited over fourteen years to inquire about the original of the photostatic copy of the hotel card his counsel had stipulated into evidence at trial.

* In great measure, the basis for Sobell's belated attack on Gold's veracity rests upon transcripts of certain pre-trial interviews Gold had with his attorney. See Point II, B *infra.* These transcripts can hardly be said to be newly discovered. The substance of these statements was contained in Gold's October 11, 1950 statement to his attorneys (see G. 226a-33a) which was published in December, 1956 (A. 356a, 384a-86a). Moreover, even at the time of trial in 1951, the matters which appellant now points to as indicative of Gold's lack of credibility were known to defense counsel (See A. 501a-02a; 264 F. Supp. at 601). As an example, in November, 1950, four months before appellant's trial, Gold had testified in a trial in this district that he had lied before a grand jury (A. 290a, 364a-67a).



With respect to this branch of appellant's motion, Judge Weinfeld observed,

> "that matter now claimed as newly or recently discovered has been known or available to him for many years, some of it as far back as the trial itself" (A. 478a-79a; 264 F. Supp. at 594).

The basis for the present motion is not any "newly-discovered evidence" but a further shift in strategy by appellant's counsel premised upon fifteen years of accumulated hindsight and failure and characterized by continued charges of "serious and sensational character" which upon examination prove to be utterly groundless." 244 F.2d at 521. What the district court said in denying appellant's third and fourth motions under Section 2255 in 1956, is singularly appropriate 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. . . . 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.

Appellant now asks this Court to conclude from affidavits which, to the extent they are relevant, support the testimony of Dr. Koski and Major Derry, that Derry's testimony was perjured and that the perjury was suborned. He further asks this Court to conclude on the basis of a Department of Justice communication (not even attached to the petition) stating that the original June 3 registration card was returned to the hotel in 1951, that the card was manufactured by the Government. 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 continues to fall upon deaf ears. It would be difficult to find a petition more ripe for summary disposition as an abuse of the remedy provided by Section 2255.

POINT II

Judge Weinfeld properly rejected without a hearing all of Sobell's unsupported and conclusory allegations that the Government knowingly used perjury, forgery, false evidence and fraudulent devices, and suppressed evidence to secure Sobell's conviction.

Appellant's contention that Judge Weinfeld erred in denying his sixth Section 2255 motion without an evidentiary hearing is without merit, for Sobell's conclusory charges of fraud, forgery, perjury and prosecutorial misconduct were not only totally unsupported by factual allegations but rested almost entirely upon bald conclusions and repeated distortions of the records and files in this case. As Judge Weinfeld correctly observed:

> "The constant repetition through the petition's 100 paragraphs of allegations of fraud, perjury, concealment of evidence and like epithets, and the 'upon information and belief' charges make it desirable to state what ordinarily would be assumed—that reiteration of unsupported charges and conclusory allegations is no substitute for factual allegations" (A. 434a-35a; 264 F. Supp. at 582).

In seeking collateral post-conviction relief,

> "The petitioner has the burden of overcoming the validity of the judgment of conviction which carries with it the presumption of regularity and is not lightly to be set aside." *United States* v. *Russell*, 146 F. Supp. 102, 103 (S.D.N.Y. 1955), *aff'd*, 238 F.2d 605 (2d Cir. 1956).


Numerous authorities sustain the correctness of Judge Weinfeld's action below in refusing to accept as true or direct a hearing upon such broad conclusory charges of fraud as Sobell advanced. *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. 1962); *United States* v. *Sturm*, 180 F.2d 413, 414 (7th Cir.), *cert. denied*, 339 U.S. 986 (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). Since Section 2255 is in essence a civil remedy, Rule 9(b), F. R. Civ. P., requiring "particularity" in averments as to fraud is applicable.

> "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.

Tested by these standards, Sobell's allegations are in all respects deficient.

A. Not only did appellant fail to specify facts supporting his claims of fraud and knowing use of perjury in connection with Government Exhibit 8, but the files and records of this case conclusively show he is not entitled to relief.

(1) Appellant's claims.

Appellant alleges fraud and the knowing use of perjury in connection with GX. 8 (A. 313a A), a replica of the cross-

section sketch of an implosion-type atomic bomb that Greenglass gave the Rosenbergs in New York in September, 1945 (G. 87a-91a), and the testimony in which Greenglass summarized the written descriptive material that he gave the Rosenbergs with the sketch (G. 90a-91a, 106a-08a). Representative of appellant's allegations are the following:

> "[T]he government . . . knowingly presented false, misleading and deceptive evidence in the form of Government Exhibit 8 and its description by Greenglass, and compounded this fraud by presenting one John A. Derry, an employee of the Atomic Energy Commission as an 'expert' confirming witness to 'authenticate' and establish the 'substantial accuracy' of the aforesaid evidence as a description and cross-section of the atomic bomb dropped at Nagasaki in August, 1945, although the government knew that the confirmation, authentication, and testimony in support of 'substantial accuracy' were in fact false" (A. 212a-13a);
>
> "[T]he government . . . knowingly by false statements, testimony and evidence and by other deceptive and fraudulent devices, falsely established in the minds of the trial court and jury that the Russians had obtained 'the very bomb itself' . . . that Greenglass had passed 'the atomic bomb secret'" (A. 212a); and
>
> "[T]he testimony of Greenglass and Derry was clothed, in the eyes of the court and jury, with a false and fictitious cloak of authenticity, accuracy and full scientific approval" (A. 214a-15a).

Appellant attempts to support these claims with out-of-context quotations and misquotations from the trial record, and with the Linschitz, Morrison, Urey and Christy affidavits, which in fact establish neither perjury or fraud, but, to the extent they are relevant, confirm the veracity of the trial testimony.

(2) Trial testimony of Greenglass, Koski and Derry relating to Government Exhibits 2, 6, 7 and 8.

David Greenglass testified that he graduated from high school in New York City and thereafter attended for brief periods Haaren Aviation School, Brooklyn Polytechnic and Pratt Institute (G. 2a, 116a-18a). While he never obtained a degree in science or engineering and was "no scientific expert", he did "know something about" the basic theory of atomic energy (G. 118a).

After induction into the Army he was stationed, beginning in August, 1944, at Los Alamos, where he was assigned to a machine shop in a group under Dr. George B. Kistiakowski concerned with high explosives (G. 2a-4a, 6a-7a). Starting as a machinist, he later became foreman of the shop, which prepared equipment required by the Los Alamos scientists in their atomic energy experimentation (G. 8a-10a). In the fall of 1944, he moved to a new shop but continued in the same duties (G. 10a-11a). Part of Greenglass's work included the preparation of flat type lens molds and other molds with which Dr. Walter S. Koski was experimenting (G. 19a).

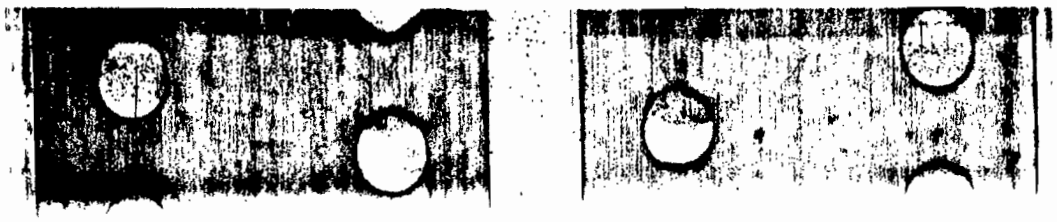
In November, 1944, his wife Ruth told him of Julius Rosenberg's request for information for the Russians, and Greenglass complied by supplying information about the project at Los Alamos, including its general layout, buildings, number of people and the names of scientists working there (G. 20a-25a, 126a-27a). All of this information he was forbidden by regulation to divulge (G. 11a-14a, 17a; R. 1280-1317).

When in January, 1945, Greenglass came to New York City on a 15-day furlough, he wrote up, at Julius Rosenberg's request, what he knew about the atomic bomb under development at Los Alamos, and gave the materials to Rosenberg, including sketches of various types of lens molds

(G. 25a-26a, 28a-30a). GX. 2 (G. 201a), prepared by Greenglass at the time of trial, is a replica of a sketch of a lens mold used in connection with experimentation on the atomic bomb which Greenglass furnished to Julius Rosenberg in 1945 (G. 30a-34a). In addition, Greenglass gave Rosenberg written material explaining the meaning of the letters appearing on the sketch (G. 33a-34a). Also during Greenglass's January, 1945 furlough, Julius Rosenberg arranged for him to discuss the high explosive lens with an unidentified Russian (G. 43a-44a). The Russian and Greenglass were together for about twenty minutes, during which the Russian asked Greenglass about "the formula of the curve on the lens," "the H.E. [high explosive] used," and "the means of detonation." But, Greenglass testified, "the things he wanted to know, I had no direct knowledge of and I couldn't give a positive answer" (G. 45a-46a).

On June 3, 1945, Greenglass met with Harry Gold in Albuquerque and gave him written information about Los Alamos experiments relating to the atomic bomb, including sketches of a high explosive lens mold and of an experiment with the mold (G. 47a-59a). GX. 6 and 7 (G. 202a-05a), prepared June 15, 1950 and at the time of trial, respectively, are replicas of the sketches turned over to Gold on this occasion (G. 53a-59a). Greenglass also gave Gold, on another sheet of paper, an explanation of the lettering on GX. 7 (GX. 57a-59a).

At this point Greenglass's testimony was suspended and the Government called Dr. Koski to testify concerning GX. 2, 6 and 7. Dr. Koski identified himself as an associate professor of physical chemistry at Johns Hopkins University, a consultant in nuclear chemistry at Brookhaven National Laboratories, and an engineer at Los Alamos from 1944 to 1947 (G. 60a-61a). Dr. Koski's work at Los Alamos was associated with implosion research on high explosive lenses, including flat type lenses (G. 63a,



66a).* The lens mold designs that he prepared were taken to Greenglass's machine shop for mechanical work incidental to their manufacture (G. 64a-66a). Dr. Koski testified that all work done at Los Alamos was of a highly classified and secret nature (G. 62a, 66a).

According to Dr. Koski, GX. 2 and 6 were substantially accurate representations of sketches made by him and submitted to the shop where Greenglass worked during the latter half of 1944 and the first six months of 1945 (G. 67a-69a). He also testified that GX. 7 was a rough sketch of an experimental set-up at Los Alamos for studying cylindrical implosion (G. 71a). The sketch and the information given by Greenglass to Gold in connection therewith were reasonably accurate descriptions of the experiments and their details as Dr. Koski knew them at the time (G. 71a-72a).

Dr. Koski stated that his experiments and their results would have been of value to a foreign nation for, to his knowledge, there was no information concerning them in

* He explained the concept of "implosion" by contrasting it with "explosion," stating:

". . . in an explosion the shock waves, the detonation wave, the high pressure region is continually going out and dissipating itself. In an implosion the waves are converging and the energy is concentrating itself" (G. 63a).

In that connection Dr. Koski experimented with high explosive lenses, including flat type lenses, defined by him as:

". . . a combination of explosives having different velocities and having the appropriate shape so when detonated at a particular point, it will produce a converging wave.

"Q. Well, once again, so that we as laymen might understand, I take it our common conception of a lens is a piece of glass used to focus light, is that right? A. Yes, that is right.

"Q. What is the distinction between a glass lens and the type of lens you were working on? A. Well, a glass lens essentially focuses light. An explosive lens focuses a detonation wave or a high pressure force coming in" (G. 64a).

text books or technical journals, as they constituted a new and original field of study (G. 72a-73a).

On cross-examination by the Rosenbergs' counsel, Dr. Koski stated that GX. 2, 6 and 7 were rough sketches and "not quantitative", in that they omitted the relative dimensions, but illustrated "the important principle involved"—"the use of a combination of high explosives of appropriate shape to produce a symmetrical converging detonation wave" (G. 76a-77a). Sobell's counsel did not cross-examine Dr. Koski.

On redirect examination, Dr. Koski testified that a scientific expert could ascertain from GX. 2, 6 and 7 the nature and object of the activity at Los Alamos in relation to the production of an atomic bomb (G. 77a-79a). Finally, on recross, he noted that construction of the lenses "had to be a precision job" (G. 80a).

Greenglass then resumed his testimony. Preliminarily, he recalled that during his January, 1945 furlough Rosenberg had given him "a description of the atom bomb" which Greenglass later discovered "was the type of atom bomb that was dropped on Hiroshima", so that Greenglass would know what he was to look for (G. 82a, 85a, 86a). Thereafter, Greenglass attempted to gather information concerning the bomb (G. 86a). He said that he "would usually have access to other points in the project and also I was friendly with a number of people in various parts of the project and whenever a conversation would take place on something I didn't know about I would listen very avidly and question . . . the speakers as to clarify what they had said" (G. 86a-87a). When he returned to New York on furlough in September, 1945, he told Rosenberg, on the basis of the accumulated information "I think I have . . . a pretty good description of the atom bomb" (G. 82a, 88a). At Rosenberg's request, Greenglass supplied him with that description (G. 88a-90a). He testified that the bomb he

described to Rosenberg was not "the same type atom bomb" Rosenberg had described to him but a type "that worked on an implosion effect" and that "was manufactured at Los Alamos, to [his] knowledge, after the Hiroshima bomb was no longer in process of manufacture" (G. 87a-88a).

Greenglass gave the Rosenbergs about 12 pages of material, including a sketch of the atomic bomb and a description of the sketch (G. 90a-91a). He identified GX. 8 as a sketch of the bomb that he prepared prior to trial, which was the same as the original sketch he had given to the Rosenbergs except for "maybe a little difference in size" (G. 91a).*

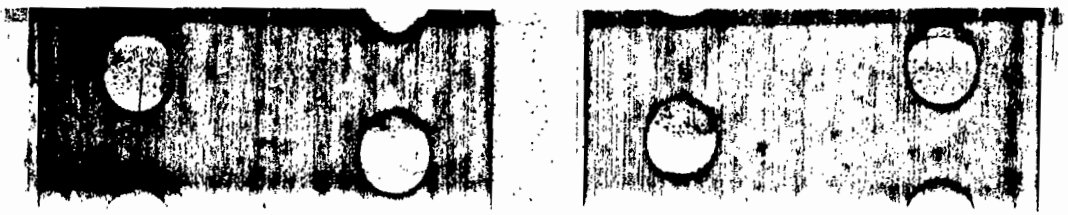
Immediately upon the Government's offering Exhibit 8, the Rosenbergs' counsel moved that it be impounded (G. 91a). Appellant's counsel agreed, and the court ordered that the exhibit be sealed after it was shown to the jury (G. 92a). Government counsel asked Greenglass to state what he had written in the descriptive material furnished to the Rosenbergs with the sketch (G. 93a). The Rosenbergs' counsel asked for a bench conference, and expressed their willingness that the substance of the descriptive material "also be kept secret" (G. 93a). The court proposed that the parties stipulate that the descriptive material was secret and related to the national defense (G. 94a). The Rosenbergs' counsel agreed (G. 95a). Appellant's counsel declined (G. 96a-97a, 105a), but concurred in the original proposal that the public be excluded from this portion of Greenglass's testimony (G. 97a). Accordingly, with the consent of all counsel, the public were excluded from the court during Greenglass's summary of the descriptive material that accompanied the cross-section sketch (G. 97a-108a).

* It is not clear whether the words at the bottom of the sketch "CROSS-SECTION A BOMB NOT TO SCALE" were on the sketch given to the Rosenbergs, but defense counsel made no objection at trial to their retention on the exhibit (G. 92a).

After Greenglass and several other witnesses had testified, John A. Derry testified as a Government witness in connection with GX. 8. He is a graduate of Rose Polytechnic Institute with a B.S. degree in electrical engineering (G. 184a). After several civilian positions in electrical construction, he became an active Army officer in April, 1942 (G. 185a). In April, 1944, he was assigned as liaison officer between General Leslie Groves, Commanding General of the entire Manhattan Engineer District Project, and the Los Alamos Laboratory (G. 185a-86a). His assignment was to keep General Groves informed of the technical progress on the research, development and production phases of the atomic bomb project at Los Alamos and it was his "job to know what went into the parts" of the bomb (G. 187a, 191a). For that purpose he visited Los Alamos for about one to six days each month (G. 187a). He testified that the entire Manhattan Project was classified, with Los Alamos more classified than anything else (G. 188a).

After viewing GX. 8 and listening to Greenglass's testimony about it, Derry testified that the sketch and Greenglass's description relate to the atomic weapon in development in 1945 and "demonstrate substantially and with substantial accuracy the principle involved in the operation of the 1945 atomic bomb" (G. 190a-92a). From the Greenglass material, a scientist, Derry said, could perceive to a substantial degree what was the actual construction of the bomb, information which was classified top secret and which related to the national defense (G. 192a). In response to a question whether the documents Greenglass turned over to the Rosenbergs "concern[ed] a type of atomic bomb which was actually used", Derry replied, "It does. It is the bomb we dropped at Nagasaki, similar to it (G. 193a).

During cross-examination by Rosenberg's counsel, the following took place:



"Q. Just one further question, Mr. Derry: If you were asked to give a written description elucidating this sketch in Government's Exhibit 8 so that any scientist or any person of intelligence interested might understand what you were talking about and trying to describe, could you compress a description of that within 12 pages?

"A. You could give substantially the principle involved.

"Q. That would not, of course, be a complete description, would it? A. You would have the principle. That is what is intended here.

"Q. Would you say from what Mr. Slavin [the court reporter] read to you from the testimony of Mr. Greenglass where Mr. Greenglass described the various things on that sketch, including the initials, that that would represent a complete description of the cross-section of the atomic bomb and the function of the atomic bomb and how it works and the principles under which it works?

"The Court: I don't think it was offered on the theory that it represented a complete—is that true, or am I mistaken?

"Mr. Saypol: Indeed not. As I said when I had the witness Koski on the stand, the import of this whole thing is that there was enough supplied to act upon——

"The Court: That was my understanding of the question.

"Mr. Saypol: You remember, your Honor, I used the colloquialism, tip off.* That is exactly—

"The Court: I don't think it was offered as a complete or as a detailed description.

"Mr. E. H. Bloch: That is right.

*Mr. Saypol was here referring back to his redirect examination of Koski, where he used the term "tip off" in the sense of "indicating" or "revealing" what was going on at Los Alamos (G. 77a-79a).

"The Court: But just as the witness has testified it is a description of a principle upon which it works.

"Mr. E. H. Bloch: Now what I am trying to do, your Honor, is to use this question for a few follow-up questions.

"The Court: I thought you said before you had one more question.

"Mr. E. H. Bloch: I didn't know what the answer was going to be. I thought the answer might have been that this was a complete description, and that would have been my last question. Now that the answer is that it is not complete I have further questions.

"By Mr. E. H. Bloch:

"Q. This is not a complete description?

"A. This substantially gives the principle involved.

"Q. Would you say as a scientist, a graduate engineer who has received college courses and obtained a degree in engineering, and had the experience that you have detailed to us here, that a machinist without any degree in engineering or any scientist would be able to describe accurately the functions of the atom bomb and its component parts——

"The Court: Objection sustained.

"Q. Both in relation——

"Mr. E. H. Bloch: May I finish it?

"The Court: Yes.

"Q. Both in relation to their independent functions and to their inter-related functions?

"The Court: Objection sustained.

"Mr. Saypol: I would like the record to show that it is the jury who will judge from Greenglass's testimony; not this witness.

"The Court: Yes, we have had a bit of summation right now. So we will take that out of the final summation.

"Mr. E. H. Bloch: It wasn't intended as a summation, your Honor. That is all" (G. 196a-198a).

Sobell's counsel did not cross-examine Derry.

(3) The affidavits accompanying the petition provide no factual support for the allegations of fraud and perjury in connection with Government Exhibit 8.

The affidavits of Linschitz, Morrison, Urey, Christy and Schneir are largely irrelevant to the claims of perjury and fraud contained in the petition. Indeed, to the extent they touch upon relevant questions, they "demonstrate that the essence of Derry's . . . testimony is not contradicted" (A. 460a; 264 F. Supp. at 589) and thus support the authenticity of Exhibit 8. Certainly they provide no factual support whatever for the conclusory allegations of prosecution misconduct contained in appellant's petition.

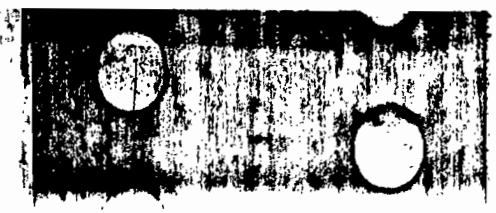
(a) *Major Derry's testimony and appellant's scientists.* Although appellant attacks Derry's testimony as perjurious, the affidavits submitted generally corroborate his testimony. Thus, while he stated that the information contained in the sketch and description were secret and related to the national defense (G. 192a), Dr. Linschitz states that the "words or concepts, 'lens' and 'implosion' " embodied in Exhibit 8 were "then classified" (A. 324a), and neither his affidavit nor any of the others suggests that the information does not relate to the national defense. As to Derry's testimony that the sketch and description "concern a type of atomic bomb which was actually used by the United States" (G. 193a), and that they "demonstrate substantially and with substantial accuracy the principle involved in the

operation of the 1945 atomic bomb" (G. 191a-92a), appellant's affidavits state that:

> ". . . *the description is correct in its most vague and general aspects,* that explosive 'lenses' were used to achieve implosion of a core containing plutonium and beryllium components, the overall system being arranged in an essentially spherically symmetrical configuration. . . ." (Linschitz, A. 317a; emphasis supplied);
>
> ". . . *the sketch* contained in Government Exhibit 8 *illustrates the general points;* the use of explosive lenses to make spherical implosion; the use of electrical detonation for simultaneity; the use of a plutonium sphere, and the use of beryllium as one component. . . ." (Morrison, A. 342a; emphasis supplied);
>
> ". . . The sketch of Exhibit 8 . . . *is a somewhat schematized cross-section* [of an implosion bomb], *which might be called a pedagogical descriptive picture.* . . ." (Morrison, A. 347a; emphasis supplied); and
>
> ". . . The sketch presented is *the kind of diagram I would use to explain the ideas involved in the bomb.* . . ." (Christy, A. 424a; emphasis supplied).

In fact, the scientists' principal objection to Derry's testimony is not that he gave the wrong answers, but that he was asked the wrong questions. For example, Dr. Linschitz concludes that the issue presented to Major Derry, whether the sketch and material "demonstrate substantially and with substantial accuracy the principle involved in the operation of the 1945 atomic bomb", was "highly subjective" and too "vague":

> "After this analysis, what information can one say these drawings finally convey? Essentially, we are left with the then classified words or concepts,



'lens' and 'implosion,' together with a general impression of spherically disposed components and convergent detonations. Does this constitute a 'substantially accurate representation of the principle' of the bomb? In my opinion, no. Nevertheless, it is clear that such a judgment must be a highly subjective one indeed. A diagram that may obviously represent a 'principle' to a research expert who has devoted years of hard work and worry to the problem, and who cannot help but correct and fill in the gaps subconsciously with his own knowledge, may be totally useless to a technician who has actually to construct the device. We undoubtedly have such a situation in Exhibit 8. In addition, we have to contend with the vagueness of such terms as 'substantially accurate'. . . ." (A. 324a-25a).

As Dr. Linschitz and the authors of appellant's other affidavits apparently disapprove of the questions that were posed to Major Derry, they raise two other questions and fault Derry for his failure to answer them: 1) in what respects are the sketch and explanatory material deficient in "accuracy and completeness as a description of the plutonium bomb developed at Los Alamos in 1945" (Linschitz, A. 316a); and 2) ". . . what value could this information have had for the Russians in developing their own bombs?" (Linschitz, A. 325a).

In reply to the first self-propounded question, appellant's scientists find a variety of errors and gaps in the sketch and Greenglass commentary (Linschitz, A. 317a-24a; Morrison, A. 343a-46a). They conclude their analyses with the view that Exhibit 8 was not a complete, error-free blueprint for bomb construction (Linschitz, A. 317a; Morrison, A. 345a-46a; Christy, A. 425a).

However, even though Derry was not asked to indicate the deficiencies of the sketch, no one in the courtroom could

have thought that he had certified that it was such a blueprint. One of the deficiencies that most disturbs Drs. Linschitz and Morrison, for instance, the lack of absolute and relative dimensions (Linschitz, A. 317a-18a, 319a-21a, 323a, 324a; Morrison, A. 342a, 345a-46a), appears on the face of the Exhibit (A. 313aA) and was explicitly noted by the trial court in the presence of the jury (G. 92a). Indeed, Greenglass himself had frankly acknowledged early in his testimony that when Rosenberg introduced him to a Russian who queried him about the details of high explosive lenses, the aspect of the bomb to which his own work was most closely related, he could not give adequate answers (G. 46a). Finally, in colloquy before the jury between Derry, counsel for petitioner's co-defendants, the United States Attorney and the trial judge, it was unequivocally spelled out that the sketch and Greenglass' descriptive material were not offered as a "complete" or "detailed" description, but rather as a "tip-off" to the nature of the American atomic bomb activity at Los Alamos (G. 196a-98a; compare G. 77a-79a).

With regard to the value of the sketch and descriptive information to the Soviet Union, discussed at length in appellant's affidavits (Linschitz, A. 326a-38a; Morrison, A. 348a-49a), this issue was never raised while Derry was on the stand. The nearest that he ever approached the subject was to say that, so far as he knew, no "foreign government had the knowledge which our scientists possessed regarding the development and structure of that weapon, outside of the British and Canadians" (G. 193a). The scientists' comments on the value of the information are therefore wholly irrelevant to Derry's veracity.*

* Moreover, the scientists' evaluations—necessarily—are based on speculation and presumptions as to the progress of the Russians' atomic program and the information available to them from other sources, such as Klaus Fuchs (see, *e.g.*, Linschitz, A. 331a-32a, 338a; Morrison, A. 348a-49a).

(b) *Major Derry's qualifications.* In claiming that Derry gave "false testimony" as to his credentials (App. Br. 10-11, 27, 34-35), appellant typically launches his attack with a spurious allegation. Thus, he asserts that Derry "unequivocally stated that he knew each and every detail of the construction of the bomb" (App. Br. 23), whereas Derry testified only that it was his "job to know what went into parts of it" (G. 191a). Appellant then contends that "Dr. Morrison states categorically that Derry was without scientific background to permit him to have knowledge of the design or construction of the bomb. . . ." (App. Br. 27). However, Dr. Morrison's affidavit reveals that his only basis for denigrating the credentials of Derry, whom he knew "in a casual way" at Los Alamos (A. 346a), is Derry's alleged failure "to correct, or to dissociate himself and his own testimony from the errors in the Greenglass testimony" concerning GX. 8 when it was read back to him (A. 347a). As Major Derry was not asked about any asserted errors in Greenglass's testimony and would have had to volunteer classified information to specify any errors, his failure to do so shows neither perjury nor lack of scientific background. Significantly, neither the petition nor any of appellant's present battery of scientists question the factual basis for Derry's testimony as to his qualifications, namely, his wartime "assignment as liaison officer . . . to keep General Groves informed of the technical progress of the research, development and production phases of the atomic bomb Project at Los Alamos" (G. 187a).* As Judge Weinfeld concluded, "there is no evidential support for the charge that Derry was not an expert or that the Government knew he was not an expert" (A. 456a; 264 F. Supp. at 588).

* Additionally, it should be noted that Major Derry's qualifications were put in issue at the trial upon the ground, according to defense counsel, that he "has failed to qualify as an expert on the ingredients and their functions contained in the statement just read to him" (G. 191a).

(c) *The Government's allegedly "fraudulent devices."* Appellant's claim that the Government, by "deceptive and fraudulent devices," duped defense counsel, the trial court and the jury into believing that Greenglass and the Rosenbergs passed the "secret of the atomic bomb" to the Russians; "trapped" defense counsel into asking that GX. 8 and the Greenglass testimony be impounded; and prevented the defense from challenging Derry's and Greenglass's testimony at trial or thereafter, collapses as each alleged "device" is considered in its context.

> "A review of the entire record reveals that this contention rests upon a distortion of the record, a disregard of the substance of the testimony, reference to matters out of context, and others not presented to or occurring in the presence of the jury and impermissible inferences" (A. 464a-65a; 264 F. Supp. at 590).

Alleged representations as to the "secret" of the atomic bomb. Notwithstanding Major Derry's testimony, appellant erroneously claims that the Government represented that GX. 8, with the Greenglass descriptive testimony, constituted "the secret" of the bomb (A. 212a, 218a-22a). In addition, he now maintains (App. Br. 31) that "the lower court assumes that there is 'a secret and principle of the atomic bomb dropped at Nagasaki (A. 434a)." One need only check the citation to see that Judge Weinfeld was merely summarizing appellant's claims as to the representations supposedly made by the Government. Among the "representations" appellant relies upon is the following excerpt from the prosecution's opening statement at the trial:

> "We will prove that the Rosenbergs devised and put into operation, with the aid of Soviet Nationals and Soviet agents in this country, an elaborate scheme which enabled them to steal through David Greenglass this one weapon that might well hold

the key to the survival of this nation and means the peace of the world, the atomic bomb.

> "The evidence will show how at the behest of the Rosenbergs, Greenglass stole and turned over to them and to their co-conspirator Harry Gold, at secret rendezvous, sketches and descriptions of secrets concerning atomic energy and sketches of the very bomb itself" (R. 230).

Any possible ambiguity created by the first sentence was clarified by the specific reference to "sketches of the very bomb itself" in the second. And, indeed, appellant's supporting affidavits (see, *e.g.*, Morrison, A. 342a, 343a), acknowledge GX. 8 to have been such a sketch (A. 465a, n.42; 264 F. Supp. at 591 n. 42). Appellant nonetheless, constantly quotes the phrase "the very bomb itself" out of context, to suggest that to be what the Government claimed the conspirators transferred (Petition, A. 212a, 220a, 231a, 256a).

In further support of his hypothesis that the Government represented that a single secret was passed, appellant endlessly refers to that portion of Judge Kaufman's charge (R. 2340) where he says "the Government claims that the venture was successful as to the atom bomb secret" (Petition, 212a, 222a, 271a-72a; App. Br. 24), pretending to ignore the fact that this was judicial shorthand to distinguish atomic-related information from the other information which the conspirators sought to transmit.*

* Finally, the petition often cites a statement of the trial judge, at the Rosenbergs' sentencing, that the Rosenbergs' conduct hastened Russia's discovery of the atomic bomb "years before our best scientists predicted" (R. 2451) (Petition, A. 212a, 222a, 250a, 272a; App. Br. 24). To the extent that the petition implies criticism of Judge Kaufman's actions in this case, it is not consonant with the expressions of defense counsel at the conclusion of the trial and at the time of sentencing, nor with the views of this court on appeal. See 195 F.2d at 592-93.

Actually, the record is not only devoid of evidence that the jury was misled or defense counsel intimidated, but contains clear indications that, particularly so far as GX. 8 was concerned, the Government had no intention to produce any such effects. While appellant asserts that the Government called Derry because it "had to support its representations" about the value of the stolen data (A. 249a-50a), the record shows that the United States Attorney was willing to dispense with *any* testimony about Exhibit 8 if defense counsel would stipulate to its secrecy and relation to the national defense (G. 94a-95a). In this regard, it is significant that Derry's direct examination consists simply of a statement of his qualifications and experience (G. 184a-189a), testimony that the sketch related to the atomic bomb under development at Los Alamos (G. 190a-92a) and a statement concerning secrecy and relationship to the national defense (G. 192a).

Uncalled scientific witnesses. Appellant argues that the Government included the names of Drs. Oppenheimer, Urey and Kistiakowski as potential Government witnesses on the list required to be furnished to defendants pursuant to 18 U.S.C. § 3432 and read to prospective jurors on the voir dire, for the purpose and with the effect of leading defense counsel to believe 1) that those scientists "would authenticate the testimony of Greenglass" and 2) that Exhibit 8 "did represent a true and accurate cross-section and description of the atomic bomb." In addition, he claims that this motivated defense counsel to move to impound the exhibit and to forego any challenge to its accuracy (petition, A. 227a-29a, 237a-38a; App. Br. 8, 9, 11, 18, 20, 23, 62, 78-79), and asks this Court to believe that "in the minds of the jury" Derry was testifying "in lieu of" Drs. Urey, Oppenheimer and Kistiakowski (petition, A. 268a).* As the court below correctly found, not a shred

* Appellant apparently does not press on appeal his claim below relating to the Government's failure to secure authentication of GX. 8 from Dr. Koski (A. 231a-32a). Judge Weinfeld concluded that appellant's suggestion that Dr. Koski's testimony "would have differed substantially from Derry's is unsupported" (A. 457a; 264 F. Supp. at 588).

of evidence supports either the alleged sinister intent or the supposed effect. In fact, the record affirmatively shows that no representation was made by the Government as to what these men would say if called, or even as to the general subject of their potential testimony. See A. 467a-70a; 264 F. Supp. at 591-92.

The impounding of Exhibit 8. Appellant's allegation that impounding GX. 8 made it impossible for any "qualified scientist" to examine and evaluate the sketch (petition, A. 226a, 238a, 270a-71a; App. Br. 57), is incredible. Indeed, his trial counsel clearly indicated at the time the sketch was impounded that he felt free to call witnesses to analyse it. In declining to stipulate that it was secret and related to the national defense, he declared:

> "... I do not feel that an attorney for a defendant in a criminal case should make concessions which will serve [sic] the People from the necessity of proving things, which in the course of the proof we may be able to refute" (G. 96a).

That counsel ultimately chose not to call witnesses in relation to Exhibit 8 hardly suggests that the impounding prevented him from doing so.*

Appellant further contends that he could not have compelled the testimony of Dr. Urey, Dr. Kistiakowski or Dr. Oppenheimer by subpoena (App. Br. 36), and that "no knowledgeable scientist who may have had relations with the A.E.C. would dare involve himself in behalf of the defense . . ." (App, Br. 11; see also Petition, A. 217a). As there is no evidence that defense counsel sought scientific

* While the original proposal of the Rosenbergs' counsel was that Exhibit 8 be kept "secret to the Court, the jury and counsel" (G. 91a), that phraseology was obviously not regarded as binding. The exhibit was shown to Derry and the impounded testimony read to him (G. 190a), and there is no basis for concluding that a proposed defense witness would not have been afforded the same opportunity.

assistance, once again appellant's outlandish charges are seen to rest on sheer speculation. Significantly, although appellant has filed affidavits of four atomic scientists, including Dr. Urey, and has cited correspondence with the late Dr. Oppenheimer (App. Br. 28 n. 1), none of them suggests that in 1951 he was so intimidated that he would not have testified truthfully, no matter by whom he was called.

Presence of representatives of A.E.C. and Joint Congressional Committee on Atomic Energy. During some testimony relating to the information passed by Greenglass to the Rosenbergs and Gold, the Government had representatives of the A.E.C. present at counsel table.* In addition, representatives of the Joint Congressional Committee on Atomic Energy were present in the courtroom** for part of the trial (G. 102a, 105a), but, contrary to appellant's assertions (petition, A. 225a; App. Br. 8, 21 n. 2), no mention of this fact was ever made in the jury's presence (see G. 102a, 105a; compare G. 73a, 94a, 99a-100a).

At trial, the Assistant United States Attorney explained the presence of the A.E.C. representatives*** as being "for technical purposes during some of the technical testimony" (G. 1a), and no fact is alleged that would refute that explanation. Yet, four times in his petition and five times in his brief, appellant stigmatizes the procedure as having the purpose and effect of "clothing" Greenglass's and Derry's testimony "with a false and fictitious cloak of authenticity,

* They were: Dr. Dodson, chairman of the Chemistry Department, Brookhaven National Laboratories, at the outset of Greenglass's testimony (G. 1a), Charles Denison [or Denson], chief of litigation for the A.E.C., and a Dr. Beckerley, on the second day of Greenglass's and throughout Dr. Koski's testimony (G. 27a-28a, 95a), and some or all of the above persons during Derry's testimony (G. 184a).

** In his brief appellant mistakenly locates the Joint Congressional Committee representatives at counsel table (App. Br. 8; compare G. 102a, 105a).

*** As the jury was unaware of the presence of representatives of the Joint Congressional Committee, there was no occasion to explain that fact to them.

accuracy and full scientific approval" (Petition, A. 214a-15a, 213a, 225a, 268a; App. Br. 8, 9, 11, 34, 63). Despite the ritual incantation of the label "false", there is no support for inferring either deceit or any improper intent.

B. The court below correctly denied without a hearing appellant's conclusory allegations of knowing use of a forged hotel card to corroborate allegedly perjurious testimony concerning the June 3, 1945 Gold-Greenglass meeting.

(1) Appellant's motion papers.

At pages 37-38 of his appeal brief, appellant charges that the Government:

> "A. Knowingly permitted and caused Harry Gold and the Greenglasses to give perjured testimony to the effect that there had been a meeting on June 3, 1945 in Albuquerque, New Mexico, arranged by the Rosenbergs, when in fact there had been none;
>
> "B. Introduced into evidence Government Exhibit 16, a purported photostat of an alleged original of a June 3, 1945 registration card of the Hotel Hilton, Albuquerque, New Mexico, when in fact the alleged original and the photostat were to the government's knowledge forged, after-contrived documents, and Harry Gold did not stay or register at the Hotel Hilton on June 3, 1945;
>
> "C. To immunize the exposure of the fraud the government, which had possession of the alleged original, disposed of it in August, 1951, four months after the judgment of conviction, knowing that by reason of such action the 'original' would be destroyed and thereafter not subject to scrutiny or use in any retrial or subsequent proceeding;
>
> "D. Knowingly suppressed and continued to suppress evidence known to it but not known to the appellant or his counsel which would have impeached and refuted testimony given against appellant and his co-defendants (A. 215-216)."

Aside from the broad conclusions and highly repetitive allegations of the petition itself, appellant adduced in support of these charges: 1) an affidavit of Walter and Miriam Schneir (A. 350a-60a), 2) photostatic copies of GX. 16 and the September, 1945 registration card (A. 361a-62a), 3) an unverified handwriting report of Elizabeth McCarthy (A. 387a-95a), and 4) transcripts of recordings of pre-trial interviews of Gold by his attorneys and related documents obtained from those attorneys (portions of which appear at G. 206a-34a). The Schneirs' affidavit alleged that they are "experienced researchers" who consulted "all of the available literature" concerning this case and related subjects during the five years they spent writing a book about this case. As a result of their research, they contend they "were successful in discovering material directly pertaining to the case which had never before been made public," namely, photostatic copies of GX. 16 and another Hilton registration card, dated September 19, 1945,* and the pre-trial statements of Harry Gold to his attorneys. Although the Schneirs acknowledge obtaining the hotel cards in February, 1961 and the Gold statements in May, 1961, they allege they did not make this material "available to anyone connected with the defense until the summer of 1965." Their affidavit concludes that:

> "The allegations set forth in the Petition of Morton Sobell with reference to the newly obtained evidence, are, in all respects, true" (A. 359a).

The affidavit, however, particularized neither the "allegations" referred to nor the Schneirs' basis for concluding that they were true.

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* The existence of this card has been publicly known since 1955 (A. 357a, 376a, 382a).

The McCarthy report, dated September 9, 1966 and bearing the style "Handwriting and Document Expert," was filed on the petition's September 12 return date, along with Marshall Perlin's affidavit vouching for Mrs. McCarthy's qualifications. In the report, Mrs. McCarthy states that, on the basis of an examination on September 7, 1966 of *photostatic copies* of the two registration cards,* (1) she found evidence *on both cards* of erasures of writing, and (2) she was of the "opinion" that Mrs. Larry A. Hockinson (whose maiden name was Anna Kinderknecht and who was not further identified) wrote the date, room number, room rate and the initials "ak." on the September card but did not make the comparable entries on the June 3, 1945 card (A. 387a-95a).

In his petition and the affidavit of the Schneirs attached thereto, appellant sought to convey the impression that Gold's statements to his attorneys about the Greenglass meetings were in complete contradiction with his trial testimony (*E.g.*, A. 276a, 295a) . Thus appellant purported to summarize Gold's statements in his petition, doing so in his typical conclusory form (A. 296a-99a). However, although the petition reveals the Gold recordings had "been made available to petitioner's counsel" (A. 296a; see A.

*It should be noted that this examination which permitted Mrs. McCarthy to arrive at her opinion took place over two weeks after the filing of the petition which charged that the June, 1945 card was a forgery. Moreover, it was the same Mrs. McCarthy upon whom appellant relied in the petition for his assertion that photostatic copies were not subject to meaningful analysis. Thus the petition alleged:

> "Elizabeth McCarthy, a handwriting and document expert . . . stated in an affidavit [not attached to the petition], after examining Government Exhibit 16, the alleged photostat of the 'original' of the June 3 card and the alleged photostat of the September 19, 1945 registration card, that 'it is difficult in a case of this kind for a document expert to arrive at a definitive, conclusive opinion from a study of photostats or photographs alone'." (A. 304a-05a).

388a), he failed to supply transcripts thereof with his motion papers. Not until oral argument of the motion, when it became abundantly clear that the court below would not accept the petition's imprecise characterizations of the contents of the recordings, did appellant's counsel offer "to excerpt the pertinent portions" of the transcripts. (Transcript of Argument, September 12, 1966, page 133 and see pages 49-52, 107-109, 132-35.) Upon the Government's objection to production of anything less than the full recordings (*id.* at 133-35), a procedure was arranged to that end.

In this manner the entire recordings and some additional materials obtained from Gold's attorneys were provided for consideration in connection with the motion. The resultant transcripts turned out to be not at all as represented in the petition. Rather, Judge Weinfeld concluded:

> "A careful reading of the transcripts of the recordings and all other material, rather than supporting petitioner's charges, strongly corroborates Gold's trial testimony" (A. 499a; 264 F. Supp. at 601).

To demonstrate the correctness of the court's conclusion, set forth under sub-headings (2) and (3) below is a comparative summary of Gold's trial testimony and his pre-trial interviews as well as a review of the evidence at trial which confirmed Gold's testimony. In addition, sub-heading (4) (a) specifically demonstrates that the portions of the Gold transcripts cited by appellant in his petition refute, rather than support, his allegations of perjury.* Finally, sub-

*A comparison of Gold's interviews with his trial testimony shows that it is not by accident that the portions of Gold's interviews which relate to the June 3, 1945 meetings appear in the Government's Appendix rather than appellant's (G. 213a-33a). As for appellant, still content to rely on innuendo in the face of a clear record, he alleges in his appeal brief:

> "Many other documents, including those obtained from Gold's attorneys, not incorporated in the petition, but which appellant has preserved for the evidentiary hearing further support the allegations of the petition" (App. Br. 58, n. 1).

heading (4)(b) below reveals the total absence of any foundation for appellant's allegations of forgery and fraud with respect to GX. 16.

(2) Harry Gold's pre-trial statements to his attorneys and his trial testimony.

On June 1, 1950 John D. M. Hamilton and Augustus S. Ballard, members of the Philadelphia bar, agreed to serve as court-appointed counsel for Gold in connection with charges then pending against him in Philadelphia and later that same day Gold informed them that it was his intention to enter a guilty plea (T. (1) 3-6).*

On June 6, 1950, Gold's attorneys began a series of recorded interviews with Gold at Holmesburg County Prison, where he was incarcerated (G. 207a). According to the transcripts of those interviews, their first concern was that Gold understand the charges then pending against him. Thereafter, when Gold, with knowledge of the contents of the complaint against him and the statute on which it was based, reiterated his intention to plead guilty, Mr. Hamilton informed Gold that he would then direct his efforts toward demonstrating to the sentencing court that Gold's offense did not involve an intent to injure the United States and toward bringing forth "any other ameliorating circumstances . . . that might affect the judge in fixing your sentence" (G. 207a-08a, 210a).

Mr. Hamilton then set the pattern generally followed in subsequent recordings by delineating for Gold three areas of discussion which he felt were important to a plea for leniency in sentence: 1) Gold's general background and life, including family, education and work, apart from the

* References with the prefix "T." are to those portions of the transcripts of Gold's recorded interviews not reproduced in the Government's Appendix; the number in parenthesis following the "T." refers to the reel of tape from which the transcript was made.

offenses charged; 2) information about the offenses themselves; and 3) Gold's motives in committing these offenses (G. 212a).

The discussion of Gold's life apart from the charges consumed the entire June 6, 1950 interview and the beginning of a second interview on June 8, 1950. Gold then began a chronological account of the facts underlying the charges, which continued throughout the remainder of the June 8 interview, all of the third interview on June 14, 1950, and a portion of the next interview on June 23, 1950. Discussion of Gold's motives in committing his offenses completed the June 23, 1950 interview. The final interview on August 9, 1950 was divided between a discussion of matters which Gold admitted he had either concealed or deliberately lied about in earlier interviews, and matters which he then wished to relate based upon subsequent recollection.

On March 15, 1951 Gold testified as a Government witness at the trial of this case. His trial testimony substantially accorded with his pre-trial statements to his attorneys nine months earlier, as appears from the following summary of both.

Gold was engaged in espionage work for the Soviet Union from the spring of 1935 until his arrest on May 23, 1950 (Testimony, G. 135a; Interviews, T. (2) Side 2, 18-19, T. (6) 12-15, T. (7) 25-36). From March, 1944 until late December, 1946, his Soviet superior in his espionage activities was Anatoli Yakovlev, whom he knew only as "John" (Testimony, G. 131a, 133a-34a, 136a; Interviews, T. (4) 15-21, T. (5) 27, 45-53, T. (7) 24-25).* Gold had meetings with Klaus Fuchs in June and July, 1944, and January, 1945 in New York and Massachusetts and secured

* Government Exhibit 15 at the trial showed Yakovlev to be a Soviet national and an official of the Soviet government (G. 174a-76a).

information which he reported to Yakovlev (Testimony, G. 136a-40a, 143a-45a; Interviews, T. (4) 9-27, 39-43).

In May, 1945, Yakovlev told Gold he was to meet Fuchs on the first Saturday in June, 1945 (June 2, 1945) in Santa Fe, New Mexico and then to proceed to Albuquerque on another mission (Testimony, G. 146a-47a; Interviews, G. 213a, 220a). Yakovlev gave Gold a piece of paper with the name "Greenglass", an address on High Street in Albuquerque, 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 (Testimony, G. 147a; Interviews, G. 221a, 224a).

Gold met with Fuchs in Santa Fe for a half hour on June 2, 1945 and that evening travelled to Albuquerque (Testimony, G. 149a-50a; Interviews, G. 214a-18a). When he went to the designated address on High Street, he ascertained that the Greenglasses were out for the evening, but could be reached there the next morning (Testimony, G. 150a; Interviews, G. 218a, 222a). He stayed the night at a rooming house and on Sunday morning, June 3, registered at the Hilton Hotel in Albuquerque (Testimony, G. 150; Interviews, G. 218a, 223a, 225a-26a).

At about 8:30 a.m. on June 3 he returned to the High Street address and met David Greenglass. When Gold said "I came from Julius" and showed Greenglass the piece of cardboad Yakovlev had given him, Greenglass produced a matching piece of cardboard. Gold then introduced himself as "Dave from Pittsburgh" and Greenglass introduced Gold to his wife Ruth (Testimony, G. 150a-52a; Interviews, G. 218a, 223-24a). Greenglass told Gold that the information on the atom bomb was not ready, but that it would be completed by 3:00 or 4:00 p.m. that afternoon. Gold gave him the envelope from Yakovlev containing $500 (Testimony, G. 152a; Interviews, G. 218a, 223a, 225a). When Gold returned in the afternoon, 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 return to New York City on his Christmas furlough, and could be contacted there through his brother-in-law Julius. He gave Gold the telephone number of Julius in New York City (Testimony, G. 152a-53a; Interviews, G. 218a, 223a-25a).

Gold returned to New York on June 5, and on the same evening turned over to Yakovlev the information from Fuchs and Greenglass (Testimony, G. 155a-56a; Interviews, G. 219a). Two weeks later, Yakovlev advised Gold that the information had been sent to the Soviet Union and that the information received from Greenglass "was extremely excellent and very valuable" (Testimony, G. 157a).

Gold also mentioned the circumstances of a further meeting with Fuchs in Santa Fe on September 19, 1945 and of several other meetings with Yakovlev in the period from July, 1945 through December, 1946 (Testimony, G. 158a-73a; Interviews, G. 225a, T. (4) 56-73, T. (5) 20-27, 42-43, 46-53). At one New York meeting between Gold and Yakovlev in November, 1945, Gold told Yakovlev that, as Greenglass had said in June that he would likely be returning to New York for Christmas,

> "we ought to make some plan to get in touch with this brother-in-law, Julius, so that we could get further information from Greenglass. Yakovlev told me to mind my own business. He cut me very short" (Testimony, G. 167a; see Interviews, G. 225a, 231a-32a).

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* According to Greenglass's testimony, the envelope contained sketches, including a sketch of a face view of a flat type lens mold and a sketch showing a schematic view of the lens mold set up in an experiment. Replicas of the latter two sketches were admitted in evidence as GX. 6 and 7.

(3) Defense counsel's concession that Gold told "the absolute truth"; corroborating testimony and exhibits.

After an overnight recess following Gold's direct examination, defense counsel elected not to cross-examine (G. 177a). In his summation, Emanuel H. Bloch, Rosenbergs' counsel, made perfectly clear what his trial strategy was: he conceded the June 3, 1945 meetings but emphasized that Gold had never claimed to have met Rosenberg (R. 2205-06; G. 200a), and accepted the Jello-box evidence, except for the Greenglasses' testimony that their half was obtained from the Rosenbergs. Thus, 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?" (G. 200a).* Immediately before that, he had said that Gold:

> "got his 30-year bit [his sentence upon his conviction 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" (G. 199a, emphasis added).**

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

** During oral argument in 1952 of the first section 2255 motion of appellant and his co-defenders, Mr. Bloch elaborated on his decision not to cross-examine Gold. He stated:

> "I didn't interrogate Gold at all because Gold didn't connect my client and I did not feel it necessary . . . .
>
> "The Court: You mean that Gold was not cross-examined?
>
> "Mr. Bloch: Not at all. He involved Greenglass and according to m[y] theories of the case he never involved the Rosenbergs.
>
> "The Court: That was a calculated judgment on your part which involved risks which you accepted.
>
> "Mr. Bloch: It certainly was, certainly was." (Transcript of Argument, December 2, 1952, pp. 106-07.)

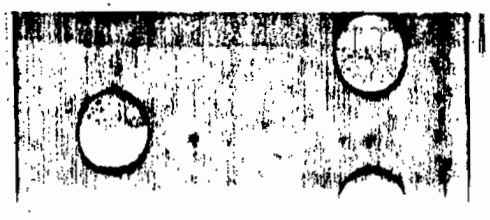
Counsel for Sobell adopted a similar strategy in his summation of not attacking, or indeed even mentioning, Gold (R. 2239-65). Rather, he attacked Government witness Max Elitcher and the evidence relating to Sobell's flight to Mexico, emphasizing that this was the only evidence against his client (R. 2243).

Defense counsels' strategy* was undoubtedly affected by the fact that Gold's testimony concerning his June 3, 1945 meetings received detailed corroboration from the testimony of David and Ruth Greenglass. See G. 48a-55a, 108a-10a, 114a-15a, 120a-22a (David); G. 122a-26a (Ruth). That testimony, in turn, had been confirmed by documentary evidence. Thus, the Government introduced in evidence GX. 16, the photostat of the Albuquerque Hilton card showing Gold's registration on June 3, 1945, and GX. 17, bank records of the Albuquerque National Trust & Savings Bank, showing a $400 deposit to Ruth Greenglass's account on June 4, 1945.** The circumstances of the introduction of these exhibits were as follows:

> 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

* Appellant, in his petition, finds it convenient, and apparently honorable, to attack this and other aspects of the trial strategy of his own counsel and other defense counsel, all now dead. By challenging their competence, he sought by this motion to reverse their strategy of 15 years ago, to cross-examine witnesses not challenged at the trial, to adduce witnesses he failed to call though he had opportunity to do so, to withdraw stipulations and motions of defense counsel, and to litigate at this late date matters which he earlier had full opportunity to explore.

** Ruth Greenglass testified that she deposited $400 of the $500 Gold had given her husband in that bank on the day following the Gold-Greenglass meetings (G. 125a-26a).



if required. I have testimony as to the bank records. Then I have a completely new phase of testimony which I will start. I can't start it until next week. There are witnesses on the way from distant places.

"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 [the Rosenbergs' counsel]: I certainly have no objection to that introduction.

"Mr. Kuntz [Sobell's counsel]: We have no objection.

"Mr. Saypol: I want also to get together the bank records and also that testimony showing the deposits of the various amounts of money as testified to by the witness.

"Mr. E. H. Bloch: Well Mr. Saypol, I certainly am not going to dispute the bank records but I would like to look at them."

"The Court: I think he is entitled to look at them.

"Mr. E. H. Bloch: Yes, before I make the concession.

"Mr. Kuntz: I imagine there will be no problem about that.

"The Court: You are not going to object.

"Mr. E. H. Bloch: Oh, no" (G. 178-79).*

The photostat of the registration card was then received as GX. 16 and the record reflects:

* Since the foregoing proceedings took place outside the presence of the jury, they were repeated when the jury returned (G. 179a-80a).

"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.)" (G. 180a, emphasis added.)

The bank records were also received without objection and read to the jury (G. 181a-82a). At the same time, defense counsel asked for access to the remainder of the transcript of the Ruth Greenglass account, to which Mr. Saypol responded:

"The account was produced by a representative of the bank and we shall be happy to make it available to counsel if they require it" (G. 181a).

(4) Judge Weinfeld correctly held that the amended petition and supporting papers do not establish the basic facts required before inferences of fraud or perjury may be drawn.

Judge Weinfeld, after summarizing appellant's charges and supporting material concerning the Hilton card and the June 3, 1945 meetings, concluded:

"There is not a word of direct evidence to support these serious charges made upon information and belief . . .

"The court has examined all the material relied upon by petitioner and finds that his charges are not sustained, that the contended-for inferences are not warranted; further that the matter now claimed as newly or recently discovered has been known or available to him for many years, some of it as far back as the trial itself.

* * * * *

> "The entire theory of a grand conspiracy is the product of a fertile imagination. The unrestrained hurling of invective, page after page, in the petition does not obscure the lack of evidence. A constant drumfire of vituperation does not establish basic facts which are required before inferences may reasonably be drawn to support charges of fraud and perjury" (A. 478a-79a, 483a; 264 F. Supp. at 594, 596).

These findings accurately characterized Sobell's petition. The materials submitted by him below were entirely "conclusory", the repeated charges that the Government knowingly utilized perjured testimony were "bereft of facts", and, accordingly, did not merit a hearing. *Castellana* v. *United States*, Dkt. No. 31150 (2d Cir. May 22, 1967, slip op. at 2246).

Thus, the blanket endorsement of the petition in the Schneirs' affidavit—that "the allegations set forth in the Petition of Morton Sobell with reference to the newly obtained evidence are, in all respects, true"—adds nothing as it is itself the bare statement of a conclusion. Indeed, the affidavit makes clear that the Schneirs' information, if anything, is entirely hearsay, which "does not qualify as proper evidentiary material to support a petition under § 2255 . . . and could not be used at a hearing." *D'Ercole* v. *United States*, 361 F.2d 211, 212 (2d Cir. 1966); see *United States* v. *Pisciotta*, 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).

Moreover, to establish a right to a hearing under Section 2255, it was appellant's burden to show not only the existence of material perjured testimony, but that it was knowingly and intentionally used by the prosecution to obtain

that conviction. *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 (1952); *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). The mere allegation that Gold's account of his meetings with the Greenglasses changed in some respects between his arrest and the time of trial "obviously . . . in itself does not warrant a charge of fraud." *Price* v. *Johnston*, 334 U.S. 266, 290-91 (1948). Any inconsistencies to be found between Gold's pre-trial statements and his testimony 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 (D.N.J. 1957).

In addition, if discrepancies exist between Gold's pre-trial statements and his trial testimony, they at most raise a question of credibility which could have been pursued at the trial by cross-examination of 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). Having made a deliberate choice not to cross-examine Gold, appellant "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 *United States* v. *Smith*, 306 F.2d 457, 458 (2d Cir. 1962).

Certainly if appellant had chosen to cross-examine Gold, he could have laid the foundation for an examination of Gold's pre-trial statements to the Government containing


inconsistencies with his trial testimony, just as was done in the case of the witness Elitcher. Judge Kaufman turned over to the defense Elitcher's three statements to the F.B.I. and his grand jury testimony (R. 516-17, 600-02), and undoubtedly would have made Gold's pre-trial statements available as well if a similar foundation had been laid by cross-examination of Gold. And even if a demand for Gold's pre-trial statements had been made and denied, that would not be the type of error to be corrected by a motion under Section 2255. *United States* v. *Angelet*, 255 F.2d 383, 384 (2d Cir. 1958); *Boisen* v. *United States*, 181 F. Supp. 349, 359 (S.D.N.Y. 1960). Where no demand at all was made, appellant's claim is, *a fortiori*, lacking in substance.

Finally, none of the allegations of fraud and perjury contained in the petition concerning the June, 1945 hotel registration card are "substantiated by allegations of fact with some probability of verity." *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). They are purely a "matter of speculation", *United States ex rel. Darcy* v. *Handy*, 351 U.S. 454, 462 (1956), as a review of the record in this case demonstrates.

(a) *Gold's pre-trial statements to his attorneys.* With respect to Gold's pre-trial interviews with his attorneys, Judge Weinfeld concluded:

> "A careful reading of the transcripts of the recordings and all other material, rather than supporting petitioner's charges, strongly corroborates Gold's trial testimony. The substance of Gold's statement to his lawyer on June 14, one day before [Greenglass's] arrest, is essentially the substance of his trial testimony; the major events, times, places and persons correspond. . . . The omissions and the claimed contradiction do not undermine the fabric of essential matters" (A. 499a-500a; 264 F. Supp. at 601).

The comparison of Gold's statements on June 14, 1950 with his trial testimony establishes that they are substantially in accord with one another. On June 14, 1950 Gold pinpointed the very date of his Greenglass meetings five years earlier; and he related times, places and conversations with substantial accuracy. The most striking feature of Gold's June 14, 1950 interview is not the omissions pointed out by appellant, but the substantial completeness of Gold's account less than a month after his arrest and only two weeks after he first disclosed this incident to F.B.I. agents.* This is particularly significant because Gold's disclosure to his attorneys of the circumstances of the June 3, 1945 meetings preceded by a day the arrest and interview of David Greenglass.** Under these circumstances, how appellant can find in the Gold interviews any support for his claim that the June 3 meetings *never took place* (See App. Br. 37; petition, A. 274a-75a, 278a, 292a-93a) is simply incomprehensible. In his petition, appellant alleged that Gold's June 14, 1950 account was a "reference . . . and then in only the most ephemeral way" to the Greenglass meetings (A. 297a). This allegation, made before appellant felt impelled to produce the transcripts of the Gold interviews, was unquestion-

* The F.B.I. first interviewed Gold on May 15, 1950 (T. (1)6), On May 21 he submitted to voluntary custody, and on May 22 and 23 confessed to espionage activities over the period from 1936 to 1946 (T. (1)7-8; G. 227a-28a). After an initial attempt to limit his confession solely to that area of which the F.B.I. already had knowledge, his relationship with Fuchs, he began to reveal facts concerning the identities of other espionage associates (G. 227a-30a). Some names he deliberately withheld, but he indicated that his failure to reveal Greenglass's name was due to failure of recollection (G. 228a). However, on June 1, 1950, after he spoke to his attorneys for the first time and was advised by them to reveal everything, he told the F.B.I. of Greenglass and others (G. 206a, 231a).

** Greenglass was first interviewed by the F.B.I. concerning his Albuquerque meetings with Gold some time after 2 P.M. on June 15, 1950, the day of his arrest (R. 759, 806-07). Greenglass's only prior interview with the F.B.I. in February, 1950 (R. 801-05), apparently did not relate to his espionage activities with Gold.


ably an attempt to suggest that Gold's pre-trial account was so devoid of facts as to cast doubt on whether the meetings actually took place. Now that the transcripts are before the court, a mere perusal destroys that contention (See G. 213a-26a, 231a-33a).

Undaunted by the apparent contradiction, Sobell goes on to allege that the Gold statements to his attorneys about the Greenglass meetings "were significantly contrary to the testimony given by him [Gold] at the trial" (A. 276a) and were "wholly inconsistent statements substantially and vitally at variance with testimony given at the trial itself" (A. 295a). However, careful examination of the supposedly inconsistent statements set forth in paragraphs 84 to 86 of the petition (A. 296a-99a) discloses that they relate only to omissions in Gold's pre-trial statements. Thus it is alleged that, in his June 14, 1950 statement, Gold *omitted* the following details concerning the meetings which he later testified to at the trial: 1) the name of Greenglass; 2) his address; 3) the exact recognition sign by which Gold identified himself to Greenglass; 4) the jello box; 5) staying at the Hilton on this June trip; 6) being given the name of Julius Rosenberg or his address or phone number (A. 297a-98a). The remaining "inconsistency" alleged in the petition relates to Gold's pre-trial statement that Yakovlev told him or gave him the impression that the Greenglass information was unimportant or of no value as contrasted with his trial testimony that Yakovlev at one point said the information was very valuable (A. 299a). With regard to these claims, Judge Weinfeld held that:

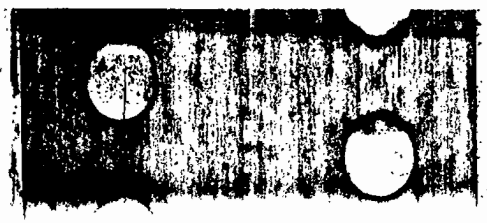
> "The omissions and the claimed contradiction do not undermine the fabric of essential matters. The omissions, in light of the limited purpose of [Gold's] lawyers' inquiry were not material thereto. The omissions and the claimed inconsistency, themselves explained in the very statements submitted by petitioner, do not even approach supporting the charge of perjury—much less the charge of government participation therein" (A. 500a; 264 F. Supp. at 601).

Since the purpose of Gold's lawyers' inquiry was to lay a foundation for a plea of leniency on Gold's behalf at time of sentencing, they were not, as was the F.B.I., seeking to determine each participant, transaction and detail in the espionage scheme and obviously did not get down to the minute details which characterized the F.B.I. questioning. Gold's personal log, showing approximately 162 hours spent with the F.B.I. over the period May 22 to July 19, 1950 in comparison with 10 to 12 hours with his attorneys, is illustrative of the depth and thoroughness of the F.B.I. investigation. And as Gold wrote in his October 11, 1950 statement to his attorneys, the details of his crime had been

> "told with the most meticulous thoroughness to the FBI and, in somewhat less exhaustive detail, to my counsel." (Senate Internal Security Hearings on the Scope of Soviet Activity in the United States, 84th Cong., 2d Sess., Part 20, p. 1058 at 1087 (April 26, 1956), filed with court below October 13, 1966.)

Moreover, the omissions in the statements are largely explained in the very statements themselves. While Gold, on June 14, 1950, did not state Greenglass's name and address and only referred to the "GI and his wife," the recording of that interview shows he was able through his description to direct the F.B.I. to the very house in Albuquerque where he met Greenglass, even though that house had been physically altered after 1945 (G. 225a-26a), and that he was able to identify Greenglass as the GI even though Greenglass had gained considerable weight since 1945 (G. 226a).* While Gold also was unable on June 14 to

* The caution in making a positive identification evident in this portion of the transcript completely belies petitioner's claim that Gold's statements were contrived by his interrogators. It was by virtue of the information supplied by Gold that David Greenglass was located (T. (6)35).



remember the exact recognition sign "I come from Julius", he did remember that a sign involving the name of a man was used and was something on the order of "[man's name] sent me" (G. 224a).* While Gold did not mention staying at the Hilton in his June 14, 1950 interview, he did say in that very statement he had looked at films "starting with the Hilton Hotel" in trying to locate the Greenglass apartment for the F.B.I. (G. 226a). And while he did not mention being given the phone number of Greenglass's brother-in-law Julius,** he did state that he had been given the name and address, or name and phone number of the GI's "father-in-law or possibly an uncle of his who lived somewhere in the Bronx of New York" (G. 224a). In the context of his trial testimony, it is evident Gold in the earlier statement mistook "father-in-law" for "brother-in-law."

There is also no substance to the claimed inconsistency relating to Gold's trial testimony that two weeks after the June meetings Yakovlev told him the information he secured from Greenglass was very valuable, whereas on June 14, 1950 Gold stated that in the late Fall of 1945 Yakovlev told him that there was not much point in getting in touch with Greenglass.*** The "inconsistency" evaporates in light of Gold's trial testimony that in November, 1945, when he suggested further contact with Greenglass, Yakovlev "told me to mind my own business" and "cut me very short" (G. 167a). Thus Gold's trial testimony suggests that

* See 264 F. Supp. at 599, n. 77; A. 494a at n. 77.

** As Gold never testified that Greenglass gave him the name "Julius Rosenberg" (G. 153a), obviously his omission of the name Rosenberg in the interviews could not be an inconsistency.

*** In his petition, appellant tried to tie this claimed inconsistency into his discussion of the value of GX. 8. (A. 268a-69a.) The two should not be confused. GX 6 and 7 were turned over to Gold by Greenglass at the June meetings, and the authenticity of those sketches was testified to by Dr. Koski, whose scientific qualifications and veracity appear to be conceded by appellant (A. 230a-32a).

it was Yakovlev who was being inconsistent, telling him in June, 1945 that the information was valuable and in November, 1945 giving him the impression it was not. That this was the sequence of events is confirmed by Gold's October 11, 1950 statement where, apparently referring to the November, 1945 meeting, he said "Yakovlev had subsequently—and with intent to mislead—told me that the information received was of no value" (G. 231a). (See the discussion of this matter at 264 F. Supp. at 599 n.81; A. 496a n.81).

(b) *The Hilton Hotel registration card.* In asserting in his petition that the Government knowingly introduced into evidence a "fraudulent", "forged" and "after-contrived" hotel registration card to corroborate the June 3, 1945 meetings (A. 274a-75a, 283a, 293a, 300a-06a), appellant relies in part on Gold's pre-trial interviews with counsel and interprets Gold's explicit reference to his stay at the Albuquerque Hilton in September, 1945 as an implicit admission that he did not stay there in June (App. Br. 44-45). Again, the reliance is totally misplaced.

The fact that Gold stayed at the Hilton in September, if it shows anything, makes more likely his stay there in June. Appellant apparently does not contend otherwise but asserts that Gold in his recorded interview:

> "was *explicit* in *clearly stating* he had stayed at the Hilton Hotel *on one occasion only* and that was in September of 1945" (App. Br. 44, emphasis supplied; see also App. Br. 55).

This assertion is not merely incorrect; it is based solely upon a flagrant misquotation from a document in the record of this case. Thus, appellant quotes Gold as saying in the June 14, 1950 interview:

> "I have made one omission with respect to Albuquerque, and this is the fact that I registered at

the Hotel Hilton on the occasion of the second trip, [to see Fuchs] *and have explained why it was necessary to on that one occasion stay at the Hilton*" (App. Br. 45; emphasis supplied).

The italicized words in the above excerpt *do not appear anywhere in the transcript of the interview* (G. 219a-20), but rather are purely an invention of appellant.

Actually, the Gold interviews provide strong evidence of the authenticity of GX. 16. Thus Gold on June 14, 1950, in describing his successful attempt to direct the F.B.I. to the exact location of Greenglass's apartment in Albuquerque, related that:

> "I have gone over and I have drawn a map of the area as well as I know. I have looked at maps of Albuquerque. I have looked at dozens of reels of motion pictures, *starting with the Hilton Hotel* and going all the way past undoubtedly the street where the GI lived" (G. 225a-26a; emphasis added).*

The inference is compelling that Gold looked at pictures starting with the Hilton because he stayed there when he went to the Greenglass apartment. Moreover, additional facts related by Gold to his attorneys corroborate the card's authenticity: 1) he fixed the date of the Greenglass meetings on the day following the first Saturday in June, 1945 (*i.e.*, Sunday, June 3, 1945, the date handwritten on GX. 16); 2) stated that he registered under his own name at hotels on his trips to the Southwest (T. (4) 73); and 3) gave as his address and employer the same information as that appearing on the card (T. (1) 7, 9; T. (4) 75, 77; T. (5) 2).

* In his June 14, 1950 interview, Gold also describes his unsuccessful attempts the night before to find a hotel room (G. 218a).

On the other hand, the additional "facts" offered in support of the card's forgery neither separately nor together warrant an inference of forgery or misconduct on the Government's part: (1) the handwritten date on the face of the card is June 3, 1945, whereas the machine-stamped date on the back is June 4, 1945; (2) no F.B.I. agent's initials or date of receipt appear on the photostat in evidence; (3) the original card (which was not put in evidence) was returned to the hotel on August 4, 1951; and (4) Mrs. McCarthy's report.

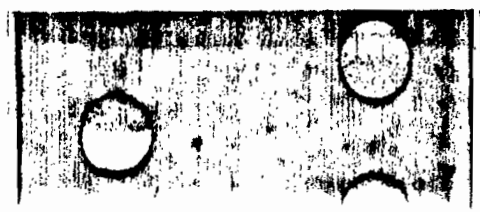
First, the one-day difference in dates on the card was evident at trial when the card was introduced into evidence and both sides read to the jury. No reason appears why the difference in dates should be more significant now than at trial. Certainly Sobell's theory of forgery does not explain the difference; one forging a card to corroborate a June 3, 1945 meeting would hardly machine-stamp June 4, 1945 on the back.* Secondly, the absence of F.B.I. initials on GX. 16 is not even a fact in this record, for the exhibit itself bears the initials "FLB" on its reverse side (A. 361a). Moreover, while appellant now asserts that "the government does not contest the fact that it is standard operating procedure to initial any original document obtained by the FBI with the date of acquisition noted thereon" (App. Br. 53),** this is not "fact" but conclusion. Ap-

* Appellant asserts in his brief (p. 45) that the Government raised a factual issue when on oral argument the Assistant stated:

> "If it comes to that [*i.e.*, a hearing], your Honor, the government will establish that all the June 3rd cards of the Hotel Hilton were stamped June 4th, if it comes to that point" (Transcript of Argument, September 12, 1966, p. 117).

Not only the quote itself, but the context (*id.* at 117-121), show that the Government was pressing its point, which Judge Weinfeld ultimately sustained, that no hearing is required where appellant has produced no facts to support his conclusory allegations of fraud.

** Appellant in his brief repeatedly refers to matters allegedly "not controverted" and "not contestetd" by the Government (*e.g.*, pages 41, 52, 53, 54) to provide factual support for the conclusions in the petition. Obviously the Government is no more compelled to contest or accept the *conclusions* in appellant's petition than was the court below.



pellant's only factual assertion below from which he might derive this conclusion—that "every exhibit obtained by the FBI introduced into evidence except Government Exhibit 16, bore the initials of one or more FBI agents and the date the document came into the hands of the FBI" (A. 301a)—was demonstrably false since GX. 17, the Albuquerque bank records which appellant apparently concedes were obtained by the F.B.I. (App. Br. 42), bear no initials or date of acquisition.* Quite obviously, the absence of F.B.I. initials and date on GX. 16 is no more indicative of fraudulent manufacture and surreptitious destruction than are the similar circumstances with respect to GX. 17.

Thirdly, it should be emphasized, because the petition left some confusion on this point (see Transcript of Argument, September 12, 1966, pp. 57-58), that the original GX. 16, the photostat introduced in evidence, has been preserved to this day. It is intact with the other trial exhibits and was made available in September, 1966 to appellant and Mrs. McCarthy upon request (A. 389a). That the original card (but not the original exhibit) was returned to the hotel on August 4, 1951 (according to information supplied to appellant's counsel by the Department of Justice)** cannot be the source of any inference of fraud. The Government certainly could not then have anticipated that any significance would be attached to the original card when no objection was made to the introduction of the photostat, the Rosenbergs'

* Appellant, in his appeal brief, argues that the original, of which GX. 17 is a copy, "bears a F.B.I. identification to this day" (App. Br. 42). His sole support for this is the Government's reference in its brief below to the fact that the originals with the bank have "attached tags from the F.B.I. laboratory in Washington." Appellant presents no evidence that the original of GX. 16 did not bear similar laboratory tags.

** Appellant is apparently willing to accept this as fact although he "in no way accepts as a fact" his information from the same source that the hotel destroyed the card in 1957 (App. Br. 43 n.2). But then he turns around again and accepts as fact the Department of Justice's acknowledgment that the September 19, 1945 card was destroyed in 1960, saying, "No explanation of the difference in the manner of handling the two cards has been offered" (App. Br. 43 n.3).

counsel stated, "I am certainly not going to insist on strict technical testimony" (G. 178a), the Rosenbergs' counsel made a specific request to examine bank records which the Government proposed to offer at the same time as the card, and the Rosenbergs' counsel stated in his summation that Gold had told "the absolute truth" (G. 199a).

Finally, even accepting as true Mrs. McCarthy's opinion that the date, room number, room rate and the initials "ak." on the September, 1945 card were in the handwriting of Mrs. Larry A. Hockinson (Anna Kinderknect) but that those on the June 3, 1965 card were not, appellant has failed to allege facts supporting an inference of either forgery or knowing use of a forged document. In his attempt to prove otherwise, appellant distorts Judge Weinfeld's opinion and states:

> "The court acknowledges that the handwriting of Mrs. Hockinson (A.K.) was on the September 19th card and that Government Exhibit 16 in fact *contained an imitation* of her handwriting and her initials". . . .
>
> "The *falsification* of Exhibit 16 so clearly appears from the card itself that the court below grudgingly remarked 'that it hardly needed an expert to make this observation' " (App. Br. 51, 56; emphasis supplied).

While Judge Weinfeld indicated that the two cards appeared to support Mrs. McCarthy's opinion that they reflect different handwritings (A. 480-81a; 264 F. Supp. at 595), his holding was that such a difference "does not, in one fell swoop, permit the inference that it was 'forged' . . . " (A. 482a; 264 F. Supp. at 595). Thus he acknowledged neither "imitation" nor "falsification".* Be-

* Judge Weinfeld also noted the failure of Sobell to produce an affidavit from Mrs. Hockinson, 264 F. Supp. at 596. See *United States ex rel. Homchak* v. *New York*, 303 F.2d 449, 450 (2d Cir. 1963), *cert. denied*, 376 U.S. 919 (1964); *United States ex rel. Weiss* v. *Fay*, 232 F. Supp. 912, 914-15 (S.D.N.Y. 1965).

sides lacking any evidence that the difference was not wholly proper under then prevailing hotel procedures, the petition fails to impeach in any way the prosecutor's statement, upon introduction in evidence of the photostatic copy, that he had the original card "on the way together with a witness if required" (G. 178a). As the three witnesses who testified that Gold was in Albuquerque on June 3, 1945 were not challenged or cross-examined as to the existence of the June meetings, an inference that the Government knowingly used a forged document, based solely on an opinion as to difference in handwriting, is clearly impermissible.*

* The significance of Mrs. McCarthy's further opinion that *both cards*, including the September 19, 1945 card which appellant apparently deems genuine, contain erasures, escapes the Government, as it did the lower court (A. 485a-86a; 264 F. Supp. at 596).

CONCLUSION

If the "second or successive motion" language of Section 2255 is to have any meaning, this Court should affirm the denial of appellant's motion on the ground that it is abusive of the remedy provided by that statute. In any event, the denial of the motion should be affirmed because appellant has failed to set forth in his petition and supporting papers facts showing that acts or conduct on the part of the Government deprived him of a fair trial.

Respectfully submitted,

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

FBI

Date: 6/27/67

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

Via AIRTEL _____ (Priority)

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

TO: DIRECTOR, FBI (101-2483)

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

SUBJECT: MORTON SOBELL
~~ESP-R~~ ESPIONAGE - RUSSIAN
(OO:NY)

ReNY airtel to Director, 6/15/67.

AUSA STEPHEN F. WILLIAMS, SDNY, advised that on 6/26/67, the US Court of Appeals for the Second Circuit rendered a decision denying subject's appeal and affirming the opinion of USDJ WEINFELD in this matter, dated 2/14/67.

AUSA WILLIAMS advised that he expects that in the near future attorneys for subject will petition the US Supreme Court for a Writ of Certiorari.

The above is furnished for the information of the Bureau.

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 5-4-87 BY 3042/PLOT/CLS

REC-69

ST 101 101-2483-1701

3- Bureau (RM)
1- New York

PFD:mah
(6)

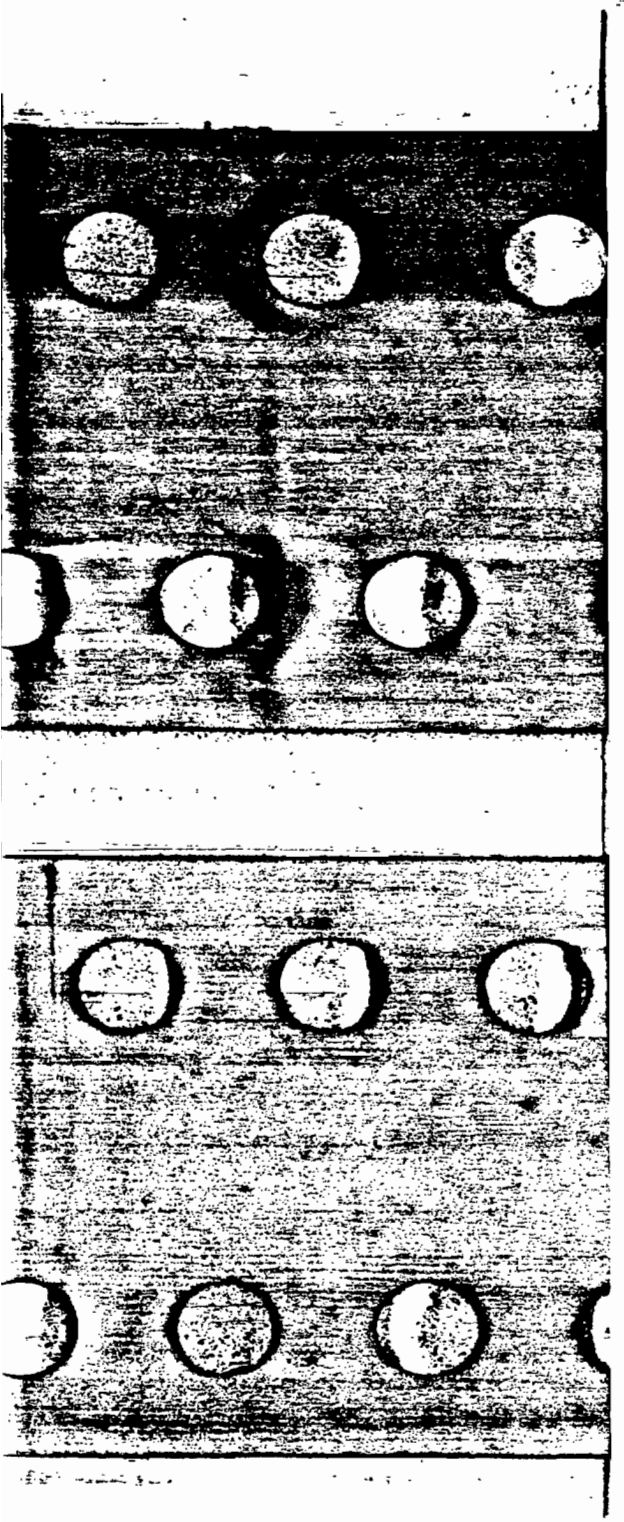
9 JUN 28 1967

FBI

SOVIET SECTION

51 JUN 29 1967

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



5-113a ((9-29-65)

Domestic Intelligence Division

INFORMATIVE NOTE

Date June 28, 1967

Sobell was convicted with Julius and Ethel Rosenberg in 1951 of conspiracy to commit espionage for the Soviets. The Rosenbergs were executed and Sobell sentenced to 30 years in prison. On 5/13/66 he filed his sixth motion in district court to set aside his conviction claiming Government used forged documents, perjured testimony, and refused to divulge evidence which would have proved him innocent. His motion was denied 2/14/67 by Judge Edward Weinfeld of the Southern District of New York. U.S. Court of Appeals, Second Circuit, affirmed the opinion of Judge Weinfeld 6/26/67.

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DATE 5-4-87 BY 3042 PWT/CLS

JPL:slc

XXXXXX
XXXXXX
XXXXXX

FEDERAL BUREAU OF INVESTIGATION
FOIPA DELETED PAGE INFORMATION SHEET

_____ Page(s) withheld entirely at this location in the file. One or more of the following statements, where indicated, explain this deletion.

☐ Deleted under exemption(s) _____ with no segregable material available for release to you.

☐ Information pertained only to a third party with no reference to you or the subject of your request.

☐ Information pertained only to a third party. Your name is listed in the title only.

☐ Documents originated with another Government agency(ies). These documents were referred to that agency(ies) for review and direct response to you.

__1__ Pages contain information furnished by another Government agency(ies). You will be advised by the FBI as to the releasability of this information following our consultation with the other agency(ies). CIA

_____ Page(s) withheld for the following reason(s):

_____

_____

☐ For your information: _____

_____

☑ The following number is to be used for reference regarding these pages:

101-2483-1702

XXXXXX
XXXXXX
XXXXXX

XXXXXXXXXXXXXXXXXXX
X DELETED PAGE(S) X
X NO DUPLICATION FEE X
X FOR THIS PAGE X
XXXXXXXXXXXXXXXXXXX

SECRET

1 - Liaison
1 - Mr. Lee

July 25, 1967

S-4-87

#15581

CLASSIFIED BY: 3042/AWT/Cls
DECLASSIFY ON: OADR

RE: MORTON SOBELL

Reference is made to your memorandum dated July 20, 1967, your reference [redacted](S) captioned "Julius and Ethel Rosenberg." b1

Your reference included a copy of an article which appeared in the "Evening Standard" for July 5, 1967, indicating that the possibility was being explored that the Rosenbergs might be innocent. This article referred to the current motion of Morton Sobell for a new trial in which the Sobell attorneys claimed to have evidence which suggests a major miscarriage of justice.

For your information Morton Sobell was convicted along with Julius and Ethel Rosenberg in 1951 of conspiracy to commit espionage on behalf of the Soviets and while the Rosenbergs were executed, Sobell was sentenced to 30 years in prison. Since that time numerous efforts have been made to upset this conviction without any success. On May 13, 1966, Morton Sobell filed his sixth motion in the United States District Court, Southern District of New York, to set aside his conviction claiming that the United States Government knowingly used forged documents and perjured testimony and suppressed evidence which could have proven that Sobell was innocent.

REC 48 100-24483-1703

On February 14, 1967, Judge Edward Weinfeld of the Southern District of New York filed a 79-page opinion in which he denied Sobell's motion. The Judge pointed out that Sobell's motion could be reduced to two basic points. The points are (1) the prosecution created in the minds of the jurors a belief that Exhibit 8 contained the secret and principle of the Nagasaki atomic bomb and (2) the Government permitted Harry Gold and David Greenglass, Government witnesses, to give perjurious testimony regarding a meeting in Albuquerque, New Mexico, on June 3, 1945, and corroborated this testimony by forging a registration card of the Hotel Hilton, Albuquerque. (Exhibit 8 is a sketch of the atomic bomb and the testimony of David Greenglass concerning it.)

(S) [redacted] b1

1 - [redacted](S)
JPL:sic (5)

56 AUG 3 1967

SECRET

SEE NOTE PAGE TWO.

RE: MORTON SOBELL

Concerning Exhibit 8, the Judge stated that David Greenglass testified that he told Julius Rosenberg he had a "pretty good description of the A bomb" and drew a sketch for Rosenberg. The Judge pointed out that the contents of that sketch and the testimony by Greenglass concerning it, whether correct or not, is not the test of credibility concerning what Greenglass gave to Rosenberg. The Judge pointed out that if every scientist in the world said that the sketch was wrong, it still does not draw into issue the truthfulness of the testimony of Greenglass.

With regard to the second point, the Judge noted that there was not one word of direct evidence to support these serious charges, and he points out that all the material relied upon by Sobell had been examined and the charges were not sustained and the inferences not warranted.

Sobell appealed from this denial of his motion for a new trial, and on June 26, 1967, the Circuit Court of Appeals, Second Circuit, denied this appeal and affirmed the opinion of Judge Weinfeld in this matter. In all probability, this decision will be appealed to the Supreme Court of the United States.

The above is furnished for your information.

[redacted]

b1

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

FBI

Date: 10/18/67

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 5-4-87 BY 3012 PWT CLS

For the information of WFO, subject was convicted on 3/29/51, in USDC, SDNY, of conspiracy to commit espionage on behalf of the Soviet Union, and was sentenced on 4/5/51, to 30 years imprisonment. He is currently serving his sentence in the custody of the Attorney General.

On 9/12/66, attorneys for subject filed in USDC, SDNY, motion under Sec. 2255, Title 18, USC, to vacate the sentence of subject. On 2/14/67, the motion of subject was denied by a decision of the USDC. This decision was appealed by subject to the US Circuit Court of Appeals for the Second Circuit. This court rendered a decision on 6/26/67, denying appeal of subject and affirming the opinion of the USDC.

AUSA STEPHEN F. WILLIAMS, SDNY, has advised that attorneys for subject intend to file a petition with the US Supreme Court requesting a writ of certiorari. AUSA WILLIAMS advised that the defense must file its petition with the Supreme Court by 11/9/67.

EX 104 REC-42 100-2483 1704

3 - Bureau (RM)
2 - Washington Field (101-2316) (RM)
1 - New York

PFD:ehm
(8)

13 OCT 19 1967

SOVIET SECTION

C. C. - Bishop

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

70 OCT 20 235

LEAD

WASHINGTON FIELD

AT WASHINGTON, D. C. Will, through liaison with the Supreme Court and/or the Solicitor General's Office advise the Bureau and NYO of any petition filed by subject and the results of any action taken in regard thereto.

FBI

Date: 11/13/67

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: NEW YORK)

#8618 40

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 5-4-87 BY 3042 PHJ/CLS

AUSA STEPHEN F. WILLIAMS, SDNY, has advised that in connection with subject's appeal to the Supreme Court, his office was contacted by Defense Attorney MARSHALL PERLIN. PERLIN requested that copies of the Hilton Hotel registration cards of HARRY GOLD, dated 6/3/45, and 9/19/45, which were in the possession of the USA, SDNY, be provided to him in order that he could make them available to the Supreme Court for review in connection with subject's pending request for a Writ of Certiorari.

WILLIAMS advised PERLIN that he would not furnish the above to PERLIN, but would have the Clerk of USDC, SDNY, forward them to the Clerk of the Supreme Court.

For the information of WFO, the 6/3/45 card was Government Exhibit #8 at subject's trial. The 9/19/45 card was not used in the trial, but was retained in the file of the USA, SDNY. Both copies were made available to the subject's attorneys for inspection during 1966, and are alleged by subject's attorneys to be fraudulent.

C. C. - Bishop

The above is submitted for information of the Bureau and WFO.

(3) Bureau (RM) 10 Sht
1 - Washington Field (INFO) (RM)
1 - New York

REC 5 101-2483-1705

NOV 14 1967

PFD:dje
(7)

X 104

Approved: _____ Sent _____ M Per _____

Special Agent in Charge

57 NOV 24 1967

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : Director, FBI (101-2483) DATE: 10/31/67

FROM : SAC, Philadelphia (65-4372) (P*)

SUBJECT: MORTON SOBELL
ESP - R

Re Philadelphia letter to Bureau, 5/29/67.

On 10/30/67, THOMAS O. SAVIDGE, MD, Staff Physician, U. S. Public Health Service, U. S. Penitentiary, Lewisburg, Pa., advised there has been no significant change in the mental or physical health of SOBELL since previous check.

LEAD

PHILADELPHIA
AT LEWISBURG, PA.

Will make periodic checks with the U. S. Public Health Service, U. S. Penitentiary, regarding any change in the mental or physical health of the subject and advise the Bureau of results.

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 5-4-87 BY 3042 PWT/cls

REC-42 101-2483-1706

2 - Bureau (101-2483) (RM)
2 - New York (100-37158) (RM)
2 - Philadelphia (65-4372)

EX 106

8 NOV 2 1967

PMM:hcf
(6)

SOVIET SECTION

NOV 9 30

Mr. Bishop
Mr. Casper
Mr. Callahan
Mr. Conrad
Mr. Felt
Mr. Gale
Mr. Rosen
Mr. Sullivan
Mr. Tavel
Mr. Trotter
Tele. Room
Miss Holmes
Miss Gandy

FBI

Date: 10/26/67

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

Via AIRTEL _____ (Priority)

TO: DIRECTOR, FBI (101-2483)

FROM: SAC, WFO (101-2316) (P)

MORTON SOBELL
ESP - R
(OO:NY)

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 5-4-87 BY 3042 PWT/CLS

ReNYairtel 10/18/67.

EDWARD SCHADE, Assistant Clerk, U. S. Supreme Court, on 10/25/67, advised SA RALPH C. VOGEL that on 9/11/67, subject had filed application for extention of time in which to file petition for writ of certiori. This application was granted and time to file for certiori was extended until 11/6/67. As of 10/25/67, petition for the writ had not been filed.

WFO will follow this matter until time for filing has expired or the petition has been filed.

(3) Bureau
2 - New York (100-37158) (RM)
1 - WFO

MAT:tjd
(6)
AIRTEL

C. C. - Bishop

REC-75
EX-113

101-2483-170

12 OCT 27 1967

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

70 NOV 2 1967