FD-36 (Rev. 12-13-56)

FBI

Date: 1/4/62

Transmit the following in _____ (Type in plain text or code)

Via AIRTEL RM (Priority or Method of Mailing)

Mr. Tolson
Mr. Belmont
Mr. Mohr
Mr. Callahan
Mr. Conrad
Mr. DeLoach
Mr. Evans
Mr. Malone
Mr. Rosen
Mr. Sullivan
Mr. Tavel
Mr. Trotter
Tele. Room
Mr. Ingram
Miss Gandy

TO : DIRECTOR, FBI (101-2483)

FROM : SAC, NEW YORK (100-37158)

SUBJECT : MORTON SOBELL aka
ESP-R

AUSA EDWARD R. CUNNIFFE, SDNY, advised that on 1/3/62 a notice of motion on behalf of MORTON SOBELL was served on U.S. Attorney, Southern District of New York. The motion of SOBELL, filed by attorneys Donner, Perlin and Piel, 342 Madison Ave., NYC, moves to set aside the sentence of SOBELL as illegal and is returnable U.S. District Court, SDNY, on 1/15/62. The motion was made under Section 2255 of Title 28, U.S. Code.

The major grounds of the motion are, first, that the trial court failed to charge the jury at subject's trial with respect to an essential element of the offense, that is, "in time of war". The second ground of the motion alleges that at the trial the Government was permitted to repeatedly examine co-defendant ETHEL ROSENBERG concerning her taking the Fifth Amendment before the Federal Grand Jury with respect to questions she answered at the trial.

For information. Bureau will be advised of developments.

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 4/27/80 BY 3040 PNT/lmw EX-115

101-2483-1480

REC-127

3 - Bureau (101-2483)(RM)
1 - New York (100-107111)(SOBELL COMMITTEE)(41)
1 - New York (100-37158)(331)

JAN 5 1962

ESP-R

KFM:HC (331)
(6)

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

57 JAN 15 1962

Mr. W. C. Sullivan January 10, 1962

Mr. J. A. Baumgardner

COMMITTEE TO SECURE JUSTICE
FOR MORTON SOBELL
INTERNAL SECURITY - C
INTERNAL SECURITY ACT OF 1950

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 4/27/82 BY 3042 PWT/lr

Washington Field Office advised today Rose Sobell, mother of Morton Sobell, arrived at the White House today to engage in a civil disobedience campaign. She sat down in the White House driveway, apparently hoping to be arrested. The White House guards allowed her to sit until she became cold and wet, whereupon she moved to the White House fence and again sat down. The guards did not disturb her and so she proceeded to the Northwest Gate and pushed her way through. The guards asked her to leave and she refused. The guards then pushed her out of the gate area. Shortly thereafter she returned to her hotel, apparently discouraged that no one had arrested her.

Rose Sobell is on the Security Index and has been active on behalf of captioned Committee to stir up interest in obtaining the release of Morton Sobell. Appropriate dissemination, including letters to the Attorney General and Honorable F. Kenneth O'Donnell, has been made of information concerning these activities of the Committee to Secure Justice for Morton Sobell and Rose Sobell, and the activities of this date will also be furnished to pertinent agencies. Mrs. Sobell was at the White House from 10:45 a.m. to 11:30 a.m.

ACTION:

This is furnished for your information.

100-387535
101-2483 (Morton Sobell)
100-429455 (Rose Sobell)

1 101-2483
NOT RECORDED
170 JAN 12 1962

- Mr. Belmont
- Mr. Sullivan
- Mr. Baumgardner
- Mr. Krupinsky
- Mr. Lee
- Mr. Rampton

WMR:bgc (9)

205

51 JAN 17 1962

100-387535-

ORIGINAL COPY FILED IN

36 (Rev. 12-13-56)

FBI

Date: 1/12/62

Transmit the following in _____ (Type in plain text or code)

Via AIRTEL RM (Priority or Method of Mailing)

TO : DIRECTOR, FBI (101-2483)

FROM : SAC, NEW YORK (100-37158)

SUBJECT : MORTON SOBELL, aka
ESP-R

ReNYairtel 1/4/62.

AUSA EDWARD R. CUNNIFFE, SDNY, advised 1/12/62 that the return date on subject's motion had been adjourned for one week. CUNNIFFE confidentially advised that he and other members of USA's staff were conducting intensive research in preparation of legal papers to answer ground of motion that essential element of offense was not mentioned by trial court in charge to jury.

For information.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 4/27/80 BY 3042 PWT/lmw

1-D

3 - Bureau (101-2483)(RM)
1 - New York (100-107111)(SOBELL COMMITTEE)(41)
1- New York (100-37158)

EFM:HC (331)
(6)

REC-14 101-2483-1481

17

25 JAN 18 1962

EX 104

ESP REC.

Approved: _____ Sent _____ M Per _____

Special Agent in Charge

C C - Wick

1 - Lee

1/16/62

AIRTEL

TO: SAC, New York (100-37158)

FROM: Director, FBI (101-9483) - 1481

MORTON SOBELL
ESPIONAGE - R

REC 14 EX 104

Reairtel 1/12/62.

You should attempt to obtain through your source a copy of the motion papers filed by Sobell and submit same to the Bureau.

JPL:jes
(4)

NOTE: Sobell is currently serving a term of 30 years for conspiracy to commit espionage. He was convicted along with Julius and Ethel Rosenberg in April, 1951. He has filed motion for a new trial. It is believed the Bureau should obtain and review a copy of the papers filed by Sobell.

MAILED 27
JAN 18 1962
COMM-FBI

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 4-20-82 BY 3042 PWT/IMW

Tolson
Belmont
Mohr
Callahan
Conrad
DeLoach
Evans
Malone
Rosen
Sullivan
Tavel
Trotter
Tele. Room
Ingram
Gandy

180
51 JAN 22 1962

MAIL ROOM ☑ TELETYPE UNIT ☐

CONFIDENTIAL

January 19, 1962

BY LIAISON

Honorable P. Kenneth O'Donnell
Special Assistant to the President
The White House
Washington, D. C.

1 - Mr. Belmont
1 - Mr. Evans
1 - Mr. Sullivan
1 - Liaison
1 - Mr. Lee
1 - Mr. Baumgardner
1 - Mr. Rampton

My dear Mr. O'Donnell:

This will confirm information orally furnished to Miss Pauline Fluet of your office on January 18, 1962, by Special Agent Orrin H. Bartlett of this Bureau. On January 18, 1962, a confidential source who has furnished reliable information in the past advised that on January 17, 1962, the Committee to Secure Justice for Morton Sobell decided to hold a mass demonstration and picket line in New York City on January 19, 1962, for the purpose of embarrassing President Kennedy before the Nation and the world. This action of the Committee was based upon information in the Committee's possession that President Kennedy was to be in New York City on January 19, 1962, to meet Secretary General U Thant of the United Nations at an informal dinner at the Waldorf-Astoria Hotel. The Committee planned to meet at the northeast corner of 50th Street and Lexington Avenue at 12:45 p.m., January 19, 1962, and march in a body to the private entrance of the hotel and set up a picket line. The demonstration was scheduled to be led by Rose Sobell, mother of Morton Sobell.

This information has been furnished to the New York City Police Department and the United States Secret Service.

100-387835
1 - 101-2483 (Morton Sobell)

Sincerely yours,

RJR:blw (10)

NOT RECORDED
126 JAN 23 1962

SEE NOTE PAGE TWO

51 JAN 26 1962

CONFIDENTIAL

Honorable P. Kenneth O'Donnell

NOTE ON YELLOW:

New York Office telephonically furnished the above information on 1-18-62 and SA Bartlett notified Pauline Fluet on the same date. SA Bartlett checked with the U. S. Secret Service, White House Detail, and determined that they had already received the information contained in this letter from their New York service. George Jukes, Assistant Special Agent in Charge, U. S. Secret Service in New York City was advised 1-18-62 by the New York Office.

The letter is classified "Confidential" as it contains information from a confidential source, the unauthorized disclosure of which could be prejudicial to the defense interests of the Nation. In previous correspondence with the White House concerning this matter the Committee, Morton and Rose Sobell have been characterized.

FD-36 (Rev. 12-13-56)

FBI

Date: 1/19/62

Transmit the following in PLAIN TEXT
(Type in plain text or code)

Via AIRTEL RM
(Priority or Method of Mailing)

TO : DIRECTOR, FBI (101-2483)

FROM : SAC, NEW YORK (100-37158)

SUBJECT: MORTON SOBELL
ESP-R

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 4/27/80 BY SP4 PAT/lmw

ReBuairtel, 1/16/62.

Enclosed is one copy of motion papers filed by subject's attorney.

AUSA EDWARD R. CUNNIFFE, SDNY advised on 1/19/62, that argument on motion now set for 1/29/62. He will complete his reply to motion on 1/24/62.

Copy of Government's reply will be obtained and forwarded to Bureau.

Bureau will be advised of developments.

(3) Bureau (101-2483) (Encls. 1) - 1 Rm 643 RB
1- New York (100-107211) Sec. 41
1- New York (100-37158)

EFM:rar
(6)

ENCLOSURE ATTACHED

REC-29 101-2483-1482

EX-109

10 JAN 22 1962

50 JAN 29 1962

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

Sir :—

Please take notice that the within is a true copy of a

this day duly entered herein in the office of the Clerk

Dated, N. Y., 19

Yours, etc.,

DONNER, PERLIN & PIEL

Attorneys for

Office and Post Office Address

342 MADISON AVENUE

BOROUGH OF MANHATTAN NEW YORK 17, N. Y.

To , Esq.

Attorney for

Sir :—

Please take notice that the within

will be presented for settlement and signature herein to the Hon.

one of the judges of the within named Court, at

in the Borough of

City of New York, on the day of

19 , at M.

Dated, N. Y., 19

Yours, etc.,

DONNER, PERLIN & PIEL

Attorneys for

Office and Post Office Address

342 MADISON AVENUE

BOROUGH OF MANHATTAN NEW YORK 17, N. Y.

To , Esq.

Attorney for

Index No. Year 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

MORTON SOBELL,

Defendant.

NOTICE OF MOTION AND PETITION

DONNER, PERLIN & PIEL

Attorneys for Petitioner

Office and Post Office Address

342 MADISON AVENUE

BOROUGH OF MANHATTAN NEW YORK 17, N. Y.

MURRAY HILL 2-8286

To , Esq.

Attorney for

Due and timely service of a copy of the within is hereby admitted.

Dated, N. Y., 19

Attorney for

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

V.

MORTON SOBELL,

Defendant

No. C 134-245

NOTICE OF MOTION

S I R S:

PLEASE TAKE NOTICE that upon the annexed petition of Morton Sobell, dated January 3, 1962, and upon the record and files in this case and upon all the proceedings heretofore had herein, the undersigned will move this Court, at a Criminal Motion Part thereof, at the United States Courthouse, Foley Square, City of New York, on the 15th day of January, 1962, at 10:30 A.M., or as soon thereafter as counsel can be heard, for an order pursuant to Section 2255 of Title 18, U.S.C. and Rule 35 of the Federal Rules of Criminal Procedure:

(1) Granting a hearing to determine the issues raised herein and make findings of fact and conclusions of law with respect thereto; and upon such findings of fact and conclusions of law,

(2) Vacate and set aside the sentence and judgment of conviction and discharge petitioner from detention and imprisonment; or, in the alternative,

(3) Grant petitioner a new trial; or, in the alternative,

(4) Vacate and set aside that portion of petitioner's sentence which is in excess of that authorized by law and direct that petitioner be resentenced; and

(5) For such other and further relief as to the Court may seem just and proper in the premises.

Dated: New York, N. Y.
January 3, 1962.

Yours, etc.

DONNER PERLIN & PIEL
Attorneys for Petitioner
Office & P.O. Address
342 Madison Avenue
New York 17, New York

By Eleanor Jacobson Piel

To: Hon. Robert M. Morgenthau
United States Attorney for
the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

MORTON SOBELL,

Defendant

No.

PETITION PURSUANT TO TITLE 28, U.S.C., SECTION 2255 AND RULE 35 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

TO THE HONORABLE JUDGES OF SAID COURT:

The petition of MORTON SOBELL respectfully represents:

1. The petitioner is unlawfully, unjustly and illegally detained by D. M. Heritage, Warden of the United States Penitentiary at Atlanta, Georgia, acting as the agent and under the direction of the Attorney General of the United States and his authorized representative, to whose custody he was commended, under and by virtue of a judgment entered and commitment issued by the United States District Court for the Southern District of New York, dated and filed April 5, 1951.

2. The indictment against petitioner, returned on January 31, 1951, charged in a single count that he had conspired with others, "the United States of America then and there being at war," to transmit to the Union of Soviet Socialist Republics "documents, writings, sketches, notes and information relating to the national defense of the United States" in violation of Section 32(a) of Title 50 of the U.S. Code. */

The petitioner entered a plea of not guilty and has since that time steadfastly maintained his innocence.

*/ The provisions of Section 32 of Title 50 are now contained in Section 794 of Title 18.

3. Petitioner was tried, together with co-defendants Julius and Ethel Rosenberg before judge and jury from March 6 to 29, 1951, on which date the jury returned a verdict of guilty against the petitioner.

4. On April 5, 1951, petitioner was sentenced and committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of thirty years, under the wartime provisions of the Espionage Act.

5. Petitioner duly appealed to the United States Court of Appeals for the Second Circuit from the aforesaid judgment of conviction. On February 25, 1952, that Court affirmed the judgment of conviction, Judge Frank dissenting. The court's opinion is reported at 195 F. 2d 583. On April 8, 1952, the Court denied a petition for rehearing, 195 F. 2d 609-611.

6. Petitioner duly petitioned the Supreme Court of the United States for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit. On October 13, 1952, the United States Supreme Court entered an order denying said petition, 344 U.S. 838. On November 17, 1952, the United States Supreme Court entered an order denying petitioner's petition for rehearing, 344 U.S. 889.

7. On November 26, 1952, after petitioner had been incarcerated in the Federal House of Detention and Atlanta Penitentiary, the Attorney General, through his authorized representative, caused and ordered the transfer of petitioner to Alcatraz Penitentiary. Petitioner was imprisoned in Alcatraz from November 26, 1952 to February 24, 1958, on

which date he was transferred to Atlanta, where he is presently incarcerated.

8. Petitioner makes this application praying that his sentence be vacated and set aside and that he be discharged from detention and imprisonment pursuant to the provisions of Section 2255 of Title 28 of the United States Code, on the ground that his conviction was unjustly, unlawfully and illegally procured in violation of the Constitution and laws of the United States, and that the sentencing court was without jurisdiction to impose sentence, the said judgment being subject to collateral attack.*/

---

*/ Title 28, United States Code, Section 2255:
Federal Custody; remedies on motion attacking sentence.
"A prisoner in custody under sentence of a court of the United States 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."

9. Petitioner prays in the alternative that his sentence be corrected pursuant to Rule 35 */ of the Federal Rules of Criminal Procedure on the ground that the sentence imposed was illegal on its face being in excess of what the sentencing court could lawfully impose.

10. Petitioner makes this application on the following grounds:

a. That the trial court's failure to charge the jury with respect to an essential element of the offense, that of "in time of war," the one element which could be the basis for a death sentence or term of imprisonment for 30 years, constituted a denial of due process of law and thereby ousted the court of jurisdiction. **/

b. That the trial court's failure to instruct or explain to the jury concerning the aforementioned element of the offense, deprived the jury of any standard by which it could find the petitioner guilty of the offense charged and thereby constituted a denial of due process of law.

---

*/ "The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari."

**/ At the time the petitioner was sentenced, the maximum penalty for peacetime violation of the Espionage Act was twenty years imprisonment. On September 13, 1954, the Act was amended to provide for the death penalty or imprisonment for any term of years or for life irrespective of whether the violation occurred in peacetime or wartime. 68 Stat. 1219

c. The failure of the trial court to either charge or explain to the jury with respect to the one essential element of the offense which was a precondition to the sentence imposed, necessarily resulted in the trial court rather than the jury deciding those issues of fact relating to that element of the offense and thereby amounted to a denial of petitioner's constitutional right to be tried by jury and to due process of law.

d. That by permitting the Government to repeatedly examine the petitioner's co-defendant, Ethel Rosenberg, in the presence of the jury and over defense objections, concerning her taking the Fifth Amendment before the grand jury with respect to questions she had answered on the trial, and indeed with the trial court itself participating in this course of examination, petitioner was deprived of a fair trial in violation of due process of law.

e. That the imposition of a 30 year sentence by the court was illegal in that there could not have been a finding by the jury that petitioner conspired to violate the Espionage Act "in time of war," a necessary prerequisite for the imposition of such sentence.

The Failure to Charge

11. That for the trial court to have imposed a sentence of 30 years imprisonment, the prosecution was required to prove beyond a reasonable doubt, and the jury had to so find, that petitioner conspired to violate Section 32(a) "in time of war". The trial court was obliged under the circumstances of the case, as a matter of due process, to charge the jury with respect to this element. The trial

court's error in failing to charge with respect to this element of the offense was compounded by its charging the jury with respect to every other element. That as a result of this failure to charge, it cannot be determined whether the jury ever considered this aspect of the offense in reaching its verdict. That this omission from the charge served to deprive petitioner of the due process of law.

The Failure to Explain

12. The trial court failed to explain the meaning of the term "in time of war" to the jury. This crucial element involved a complex legal concept and could not be deemed of such common knowledge that the jury could have understood its meaning and significance without assistance from the Court. By explaining the meaning of other elements of the offense and failing to explain "in time of war" to the jury, the trial court compounded its error of not charging the jury with respect thereto. In the absence of both a charge or explanation with respect to this element of the offense, it cannot be said that the jury ever considered it at all in reaching its verdict. That this failure to explain to the jury the meaning of the term "in time of war" served to deprive petitioner of the due process of law.

Denial of Trial by Jury

13. That as hereinabove set forth, petitioner was sentenced under the wartime penalty provisions of the Espionage Act. That by failing to charge the jury with respect to that element of the offense which alone could serve as a basis for the imposition of a thirty year

sentence, and by further failing to explain to the jury the meaning of that element of the offense, the jury possessed no legal standard by which it could find, nor was it instructed to find, petitioner guilty of conspiring to commit espionage "in time of war." By failing to charge with respect to this element, and by imposing a wartime sentence on petitioner the trial court either assumed that the facts underlying this essential element of the offense had been established or withdrew this issue from the jury entirely, in either event depriving petitioner of his right to be tried by jury and further depriving him of the due process of law.

The Cross Examination of Defendant Ethel Rosenberg

14. On the cross-examination of petitioner's co-defendant, Ethel Rosenberg, the Government was permitted, over timely objections, to repeatedly question her as to whether she had invoked the privilege against self-incrimination before the grand jury as to those very same questions which she had answered on the trial.

The trial record reflects not only an attack on the witness' credibility but a calculated plan to utilize this form of cross-examination to establish her ultimate guilt (R. 2004-2018; 2043-2090).*/ The trial court not only participated in this mode of cross-examination, but by its comments effectively destroyed the witness' credibility in the eyes of the jury (R. 2004-2018; 2043-2090).

The credibility of Ethel Rosenberg was crucial to petitioner's defense, inasmuch as her testimony was

*/ References are from the trial record.

directly contrary to that of Elitcher, the only witness to implicate petitioner in the conspiracy. If Ethel Rosenberg's testimony was believed, that of Elitcher's could not have been, and petitioner would have had to have been acquitted.

In light of the crucial significance of Ethel Rosenberg's testimony with respect to petitioner's defense, the constitutionally impermissible cross-examination of Ethel Rosenberg effectively deprived petitioner of a fair trial.

The Illegal Sentence

15. Petitioner was sentenced to a term of thirty years imprisonment for violating the Espionage Act. Such sentence could only be imposed if there was a finding by the jury that the petitioner conspired to violate the provisions of the Act "in time of war."

Inasmuch as the trial court did not charge the jury with respect to that essential element of the offense, nor did it explain the meaning and significance of such term, the jury was not given the opportunity to consider this vital element of the case within any legal standard, if it considered it at all. The Court was therefore without power to impose a wartime sentence on petitioner.

16. That no previous application has been made for relief on the grounds set forth herein.

WHEREFORE, petitioner prays that upon this petition, the Court,

(1) Grant a hearing to determine the issues and make findings of fact and conclusions of law with respect thereto; and upon such findings of fact and conclusions of

law vacate and set aside the sentence and judgment of conviction and discharge petitioner forthwith from detention and imprisonment, or in the alternative, grant him a new trial.

(2) Alternatively, vacate and set aside that portion of the sentence which is in excess of that authorized by law and direct that he be resentenced in conformity with the provisions of the Espionage Act of 1917.

(3) Order that petitioner be present at the aforesaid hearing; and for such other and further relief as to the Court may seem just and proper in the premises.

DATED: January 3, 1962

MORTON SOBELL, Petitioner, By

Donner, Perlin & Piel
Attorneys for Petitioner
342 Madison Avenue
New York 17, New York

by Eleanor Jackson Piel

Of Counsel:
SANFORD M. KATZ

UNITED STATES GOVERNMENT

MEMORANDUM

TO: DIRECTOR, FBI (101-2483) DATE: 1/23/62

FROM: SAC, ATLANTA (65-1361) (P)

MORTON SOBELL, Aka.
ESPIONAGE - R

OO: NEW YORK

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 1-9-85 BY

On 1/3/62, Associate Warden VIRGIL BRELAND, U. S. Penitentiary, Atlanta, Georgia, made available to SA EUGENE D. MURPHY, greeting cards received at the Penitentiary addressed to the above-captioned subject. Inasmuch as these correspondents of the subject were not on the approved mailing list of inmate SOBELL, all cards were confiscated and made available to the Atlanta Office. Mr. BRELAND does not desire that any of these cards be returned to him. These cards are furnished to the respective offices where these correspondents live and there are sufficient copies of this letter enclosed herewith so that they may be made a part of the individual case file, if any such file does exist relating to the correspondent or names mentioned in the correspondence.

No specific action is being suggested for these interested offices as it relates to these correspondents.

It is noted that in some instances the name may not appear on the card; however, street addresses do appear as a return address.

The greeting cards are set forth hereinafter as follows:

2 - Bureau (RM)
7 - Baltimore (Enc. 3)(RM)
(1 - SAMMIE ABBOTT)
(1 - RUTH ABBOTT)
(1 - DAVID HAMMOND)
(1 - SARAH HAMMOND)
(1 - GEORGE MEGROS)
(1 - ALICE MEGROS)
5 - Boston (Enc. 1)(RM)
(1 - RICHARD LOGAN)
(1 - LESLIE LESSINGER)
(1 - PETER WARSHALL)
(1 - PETER BUSCH)

Copies continued on next page:

REC-49 EX 106 REC-4

101-2483-1463

10 JAN 24 1962

EX 104

58 FEB 5 1962

COPIES:

2 - Buffalo (Enc. 1)(RM)
(1 - GERTRUDE KOWAL)
5 - New Haven (Enc. 3)(RM)
(1 - ROLAND H. BAINTON)
(1 - ROBERT EKINS)
(1 - ETTIE EKINS)
(1 - SIDNEY RESNICK)
5 - Newark (Enc. 3)(RM)
(1 - A. CHRISTENSEN)
(1 - R. HUNZING)
(1 - DORA MOROGE)
(1 - LEW MOROGE)
25 - New York (Enc. 19)(RM)
(2 - MORTON SOBELL)
(1 - BILL ALBERTSON)
(1 - LIL ALBERTSON)
(1 - GRAMBS ARONSON)
(1 - JIM ARONSON)
(1 - SAIRA BERGER)
(1 - HILDA BROWN)
(1 - FRANK COGLILAN)
(1 - E. G. FLYNN)
(1 - STEVE PAUKOSITS)
(1 - VIRGINIA GARDNER)
(1 - The GERSONS)
(1 - RONNIE GLUCK)
(1 - JOYCE GLUCK)
(1 - BELLA HALEBSKY)
(1 - HARRIET MAGIL)
(1 - ABE MAGIL)
(1 - JACK MANSON)
(1 - MIKE NEWBERRY)
(1 - MOM U. SCHAPPES)
(1 - FANNIE SCHOELT)
(1 - EDITH SEGAL)
(1 - CYNTHIA SPEARE)
(1 - WILLIAM WEMSTONE)
1 - Atlanta

AFM:cth
(52)

AT 65-1361

BALTIMORE:

1. Greeting card from SAMMIE and RUTH ABBOTT, 7308 Birch Ave., Takoma Park 12, Maryland, postmarked Washington, D. C., 12/20/61.

2. Greeting card from DAVID and SARAH HAMMOND, 8802 Glenville Rd., Silver Spring, Maryland, postmarked Silver Spring, Md., 12/22/61.

3. Greeting card from GEORGE and ALICE MEGROS, 1002 Beaumont Ave., Baltimore 12, Md., 12/26/61, Baltimore, Md., date and place postmarked.

BOSTON:

1. Greeting card from RICHARD LOGAN, LESLIE LESSINGER, PETER WARSHALL, and PETER BUSCH, Harvard University, Lowell House Q-32, R-31, Cambridge 38, Mass., postmarked Cambridge, Mass., 12/19/61.

BUFFALO:

1. Greeting card from GERTRUDE KOWAL, postmarked Rochester, N. Y., 12/22/61.

NEW HAVEN:

1. Note from ROLAND H. BAINTON, 191 King's Highway, Woodmont, Connecticut, postmarked Milford, Conn., 1/1/62.

2. Greeting card from ROBERT and ETTIE EKINS, postmarked Hartford, Conn., 12/29/61.

3. Greeting card from SIDNEY RESNICK, New Haven, Conn., postmarked New Haven, Conn., 12/20/61.

AT 65-1361

NEWARK:

1. Christmas card from A. CHRISTENSEN, Jersey City, N. J., postmarked 12/26/61, at Jersey City, N.J.

2. Christmas card from R. HUNZING, postmarked Passaic, N. J., 12/21/61.

3. Greeting card from DORA and LEW MOROGE, 790 Clinton Avenue, Newark, N. J., postmarked Newark, N. J., 12/22/61.

NEW YORK:

1. Note from BILL and LIL ALBERTSON, 3002 Neptune Ave., Brooklyn 24, N. Y., postmarked Brooklyn, N.Y., 12/21/61.

2. Greeting card from GRAMBS and JIM ARONSON, postmarked New York, N. Y., 12/21/61.

3. Greeting card from SAIRA BERGER, 281 E. 143 St., Bx. 51, N.Y., postmarked New York, N.Y., 12/29/61.

4. Greeting card from (Miss) HILDA BROWN, 384 East 158 St., Bronx 51, New York, postmarked New York 55, N.Y., 12/28/61.

5. Greeting card from FRANK COGLILAN, postmarked New York, N.Y., 12/27/61.

6. Greeting card from E. G. FLYNN, postmarked New York 1, N.Y., 12/22/61.

7. Greeting card from STEVE PAUKOSITS, 407 Audebon Ave., New York 33, N.Y., postmarked New York, N.Y., 12/29/61.

AT 65-1361

NEW YORK:

(Cont'd)

8. Greeting card from VIRGINIA GARDNER, postmarked Jamaica 2, N.Y., 12/29/61.

9. Greeting card from The GERSONS, postmarked New York 1, N.Y., 12/21/61.

10. Greeting card from RONNIE and JOYCE GLUCK, postmarked New York, N.Y., 12/19/61.

11. Greeting card from BELLA HALEBSKY, 2732 Br. Pk. E. Bx 67, N.Y., postmarked New York, N.Y., 12/26/61.

12. Greeting card from HARRIET and ABE MAGIL, postmarked New York 1, N.Y., 12/21/61.

13. Greeting card from JACK MANSON, 1460 Clinsbon St., New York City, N.Y., postmarked New York, N. Y., 12/20/61.

14. Greeting card from MIKE NEWBERRY and Family, postmarked New York 1, N. Y., 12/22/61.

15. Greeting card from MOM U. SCHAPPES, postmarked New York 1, N.Y., 12/30/61.

16. New Year's greeting card from FANNIE SCHOELT, postmarked New York, N.Y., 12/25/61.

17. Greeting card from EDITH SEGAL, 295 St. Johns Place, Brooklyn, 38, N. Y., postmarked Brooklyn, N.Y., 12/28/61.

18. Greeting card from CYNTHIA SPEARE, 336 E. 4 St., N.Y. 9, N.Y., postmarked New York, N.Y., 12/21/61.

19. Greeting card from WILLIAM WEMSTONE, postmarked Hughsonville, N. Y., 12/23/61.

D-36 (Rev. 12-13-56)

FBI

Date: 1/24/62

Transmit the following in _____
(Type in plain text or code)

Via AIRTEL RM
(Priority or Method of Mailing)

TO : DIRECTOR, FBI (101-2483)

FROM : SAC, NEW YORK (100-37158)

SUBJECT : MORTON SOBELL
ESP-R

ReNYairtel 1/19/62.

AUSA EDWARD R. CUNNIFFE, SDNY, advised that additional adjournment on motion had been granted and argument now set for 2/5/62.

Bureau will be advised.

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 4/27/87 BY 3040 PAT/IMW

EX-116

REC-27

101-2483-1484

3 - Bureau (101-2483)(RM)
1 - New York (100-107111)(SOBELL COMMITTEE)(41)
1 - New York (100-37158)

EFM:HC (331)
(6)

19 JAN 25 1962

CC - WICR

FEB 1 1962

Approved _____ Sent _____ M Per _____
Special Agent in Charge

CONFIDENTIAL

1 - Mr. Belmont
1 - Mr. Evans
1 - Mr. Sullivan
1 - Liaison
1 - Mr. Lee
1 - Mr. Baumgardner
1 - Mr. Rampton

January 29, 1962

BY LIAISON

Honorable P. Kenneth O'Donnell
Special Assistant to the President
The White House
Washington, D. C.

My dear Mr. O'Donnell:

On January 19, 1962, I furnished you a confirmation letter containing information orally furnished to Miss Pauline Flint of your office on January 18, 1962, concerning a scheduled mass demonstration and picket line in New York City on January 19, 1962, under the sponsorship of the Committee to Secure Justice for Morton Sobell. The following information furnished by a confidential source who has furnished reliable information in the past may be of interest to you.

Helen Sobell, wife of Morton Sobell, and Aaron Katz, east coast organizer of the Committee, mutually agreed to cancel the picketing of President Kennedy in New York on January 19, 1962. The reason given for this cancellation of picketing activities was information furnished Helen Sobell by Aaron Katz that he had made arrangements for her to meet with a "very important presidential assistant" in Washington, D. C., on January 20, 1962. Mrs. Sobell and Katz agreed the scheduled picketing of the President on January 19, 1962, might be embarrassing and jeopardize this interview. Mrs. Sobell and Katz intend to be present at the interview.

This information is being furnished to the Attorney General.

Sincerely yours,

100-387835

1 - 101-2483 (Morton Sobell)

RJR:dew
(10)

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 4/27/78 BY SP4 PWT/lmw

SEE NOTE ON YELLOW PAGE TWO

1 101-2483
NOT RECORDED
145 JAN 30 1962

CONFIDENTIAL

67 JAN 31 1962

CONFIDENTIAL

Honorable P. Kenneth O'Donnell

NOTE ON YELLOW

The information above was furnished by [redacted] (b)(a) (b)(1)(D) and was contained in New York airtel 1-25-62 captioned "Committee to Secure Justice for Morton Sobell." This information has been disseminated to the military intelligence agencies and the United States Secret Service.

This letter is classified "Confidential" as it contains information from a confidential source, the unauthorized disclosure of which could be prejudicial to the defense interests of the Nation. In previous correspondence with the White House concerning this matter the Committee, Morton and Helen Sobell and Aaron Katz have been characterized.

CONFIDENTIAL

CONFIDENTIAL

The Attorney General

January 29, 1962

1 - Mr. Belmont
1 - Mr. Evans
1 - Mr. Sullivan
1 - Mr. Lee
1 - Mr. Baumgardner
1 - Mr. Rapten

Director, FBI

COMMITTEE TO SECURE JUSTICE
FOR MORTON SOBELL
INTERNAL SECURITY - C

The Committee to Secure Justice for Morton Sobell previously planned to hold a mass demonstration and picket line in New York City on January 19, 1962, in connection with President Kennedy's visit to that city to meet Secretary General U Thant of the United Nations. In connection with this the following information furnished by a confidential source who has furnished reliable information in the past may be of interest to you.

Helen Sobell, wife of Morton Sobell, and Aaron Katz, east coast organizer of the Committee, mutually agreed to cancel the picketing of President Kennedy in New York on January 19, 1962. The reason given for this cancellation of picketing activities was information furnished Helen Sobell by Aaron Katz that he had made arrangements for her to meet with a "very important presidential assistant" in Washington, D. C., on January 20, 1962. Mrs. Sobell and Katz agreed the scheduled picketing of the President on January 19, 1962, might be embarrassing and jeopardize this interview. Mrs. Sobell and Katz intend to be present at the interview.

100-367236

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 4/27/78 BY 3040 PWT/IMW

1 - The Deputy Attorney General
1 - Mr. J. Walter Yeagley
Assistant Attorney General
1 - 100-3483 (Morton Sobell)

1 101-2483
NOT RECORDED
145 JAN 30 1962

(b)(6)(7)(C)

The information above was furnished by [redacted] and was contained in New York airtel 1-25-62, same caption. This information has been disseminated to the military intelligence agencies and the U. S. Secret Service and has been furnished by separate letter to the Honorable P. Kenneth O'Donnell, Special Assistant to the President.

RJR:dew (12)

JAN 31 1962

Declassify WAB/leve #2355 10/21/75

CONFIDENTIAL

NOTE CONTINUED PAGE TWO

The Attorney General

NOTE ON YELLOW (CONFIDENTIAL):

This letter is classified "Confidential" as it contains information from a confidential source the unauthorized disclosure of which could be prejudicial to the defense interests of the Nation. In previous correspondence with the Attorney General concerning this matter, the Committee, Morton and Helen Sobell and Aaron Katz have been characterized.

FD-36 (Rev. 12-13-56)

F B I

Date: 1/25/62

Transmit the following in _____
(Type in plain text or code)

Via AIRTEL _____
(Priority or Method of Mailing)

To Director, FBI (101-2483)

From SAC, Atlanta (65-1361)

Re MORTON SOBELL
ESPIONAGE- R
NY 00

Warden D. M. HERITAGE, USP, Atlanta, Ga., advised 1/25/62 subject's wife, Mrs. HELEN SOBELL, plans a trip to Europe in February and will remain there one month. He stated the subject requested, and he has authorized temporary change of address for subject's wife as follows:

Mrs. HELEN SOBELL
c/o American Express
London, England.

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 4/27/78 BY 3049 PWT/lmw

(3) - Bureau (AM RM) - 1613 CD
2 - New York (100-37158) AM RM
1 - Atlanta

HGR:hs
(6)

REC-14 101-2483-1485

4 JAN 25 1962

ESP SEC.

cc - Mr.

57 FEB 2 1962

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

FD-3c -13-66)

FBI

Date: 1/29/62

Transmit the following in _____ (Type in plain text or code)

AIRTEL RM

(Priority or Method of Mailing)

TO : DIRECTOR, FBI (101-2483)

FROM : SAC, NEW YORK (100-37158)

SUBJECT : MORTON SOBELL
ESP-R

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 4/27/87 BY 3042 PWT/IMW

ReNYairtels 1/19/62 and 1/24/62.

Enclosed is one Photostat copy of each of two legal memoranda prepared by SOBELL's attorneys and filed in support of their motion. These were received from AUSA EDWARD R. DUNNIFFE, SDNY, on 1/25/62.

One memo concerns the trial court's failure to charge "in time of war" as an essential element of the charge on which SOBELL was convicted. The second memo relates to the other ground of the motion, i.e., improper crossexamination of ETHEL ROSENBERG concerning her asserting of her privilege under the Fifth Amendment before the Grand Jury.

It will be noted that the memoranda show BENJAMIN DREYFUS and SANFORD M. KATZ as attorneys associated with previous counsel.

For info.

EX 104

REC 30 101-2483-1486

3 - Bureau (101-2483)(Encls.-2)(RM)
1 - New York (100-107111, SOBELL COMMITTEE)(41)
1 - New York (100-37158)

ENCLOSURE

KFM:MC (331)
(6)

JAN 31 1962

51 FEB 2 1962

Approved: _____ Sent _____ Per _____

Special Agent in Charge

TED STATES DISTRICT COURT
OUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

MORTON SOBELL,

Defendant.

No. 134-245

MEMORANDUM IN SUPPORT OF PETITION PURSUANT TO SECTION 2255 OF TITLE 28 U.S.C. RELATING TO THE IMPROPER CROSS-EXAMINATION BY THE PROSECUTION AND COURT

Statement

This is a memorandum in support of a motion pursuant to Title 28 U.S.C., Section 2255, requesting that upon the files and records of the case the judgment and sentence be set aside and that petitioner be discharged from detention and imprisonment on the grounds that the conviction was obtained and sentence was imposed pursuant to a trial lacking due process of law, all in violation of the Constitution of the United States. The Court and prosecution, to impeach the credibility of Ethel Rosenberg and to prove the guilt of all the charged co-conspirators who testified in behalf of the defense, upon the cross-examination of Ethel Rosenberg elicited the fact that she had asserted her privilege under the Fifth Amendment before the grand jury to the same questions which she answered in her direct testimony and that the jury should consider such assertions of a constitutional privilege in determining the truth of her testimony, all contrary

to the Constitution of the United States and to the prejudice of the petitioner herein, and constituting a denial of due process of law.

Prior Proceedings

The companion memorandum of law sets forth the prior proceedings in the instant action. It should be noted that in the spring of 1957, after the decision of the Supreme Court in United States v. Grunewald, 353 U.S. 391, the petitioner herein filed a motion to vacate the orders of the Supreme Court denying petitions for writs of certiorari and rehearing, and for an order granting said belated petition upon the decision of the Supreme Court in United States v. Grunewald, supra. This was an out-of-time and out-of-term application, made approximately five years after the consideration of the original petition, and was opposed by the United States Government primarily on the grounds that it was belatedly filed, and the issue there raised had not been raised in the original petition for certiorari or the timely petition for rehearing. On October 28, 1957, the motion was denied, 355 U.S. 860.*/

*/Of course the denial of a petition for writ of certiorari, let alone an out-of-term motion to file a belated second petition for rehearing, cannot be considered a determination by the Supreme Court of the United States of the merits or validity of the issues there raised. See State of Maryland v. Baltimore Radio Show, 338 U.S. 912; Bridges v. California, 314 U.S. 252; Pennekamp v. Florida, 328 U.S. 331; Craig v. Harney, 331 U.S. 367; Sheppard v. State of Ohio, 352 U.S. 912; Cf Smith v. U.S., 270 F. 2d 921 (C.A.D.C.).

Pertinent Portions of the Record

On August 17, 1950, an indictment was handed down charging Julius Rosenberg, Ethel Rosenberg and Anatoli A. Yakovlev, of conspiring with each other and with Harry Gold and David and Ruth Greenglass to communicate and deliver information relating to the national defense of the United States to the Union of Soviet Socialist Republics.* (R.4)

On July 17, 1950, Julius Rosenberg was arrested by the Federal authorities (R.2009). On August 7 (R.2010) and 11, (R.2012) 1950, Ethel Rosenberg, wife of Julius Rosenberg, was subpoenaed by the grand jury and after consultations with her counsel, appeared and testified. At the time of her appearance her husband was already charged with conspiring to commit espionage (R.2009) and her brother, David Greenglass, was also under arrest on the same charge (R.2050). On August 11, 1950, immediately following her second appearance before the grand jury, Ethel Rosenberg likewise was arrested.

The majority of the witnesses produced by the Government testified solely against Ethel and Julius Rosenberg. They were: David Greenglass, Ruth Greenglass, Walter Koski, Barsky and Louis Abel, Harry Gold, George Bernhardt, John Lansdale, Jr., John A. Derry, Elizabeth Bentley and Lon Adamian.

The one witness who sought to implicate Sobell in the charged conspiracy was Max Elitcher, who also sought to implicate

---

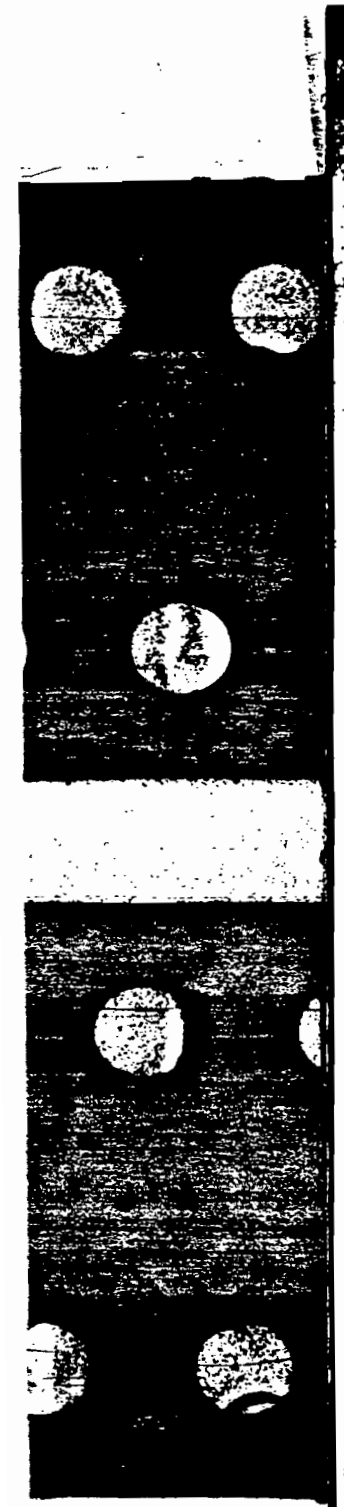
*Sobell was not indicted at that time, [illegible] specified him as one of the [illegible] gave to the trial [illegible]

Julius Rosenberg. The testimony of Elitcher was adduced for the purpose of linking the Rosenbergs and Sobell in the charged conspiracy.

The defense case rested upon the testimony of Julius and Ethel Rosenberg. Both defendants categorically denied the testimony of the Greenglasses as well as the testimony of Max Elitcher.

The testimony of Julius Rosenberg and Max Elitcher was diametrically opposed. If Rosenberg were telling the truth, Sobell would have had to be acquitted. Julius Rosenberg denied that he was engaged in any conspiracy. He denied the testimony of Elitcher and Greenglass. If Rosenberg were not in the conspiracy, Sobell a fortiori was not involved in such criminal activity.

Ethel Rosenberg, testifying in behalf of the defense, similarly denied any involvement on the part of her husband or herself in any espionage activity, maintaining that the testimony of Elitcher and Greenglass was false. Thus, the testimony of Julius and Ethel Rosenberg was mutually consistent. If the jury were to believe Julius, of necessity the testimony of Ethel was true. Likewise, if the jury were to believe Ethel Rosenberg, the testimony of her husband must have been true. The nature of the testimony adduced against them was such that either both were innocent or both were guilty. Further, if their testimony was true, the inevitable conclusion was that there had been no conspiracy in which Sobell could have been involved. If their testimony was



believed, [illegible]

required to return a verdict of guilty as charged [illegible]

Indeed, in his charge to the jury, the Court stated:

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

Thus, the crucial issue at the trial was one of credibility — who would be believed — the prosecution witnesses or the defendants. The two stories were completely irreconcilable. As stated by the Court in its charge to the jury:

> "Now on the other hand, the defendants' version of this case is as different as night is from day. The two versions are not reconcilable. You must determine which one you will believe. The defendants Julius and Ethel Rosenberg categorically deny that they or any of them ever conspired among themselves or with anyone else, to obtain secret information pertaining to the national defense..." (R.2356) (emphasis supplied)

And further, the Court stated:

> "Now, sharp issues of fact are presented for determination and to a great extent the decisions depend upon the veracity of certain witnesses and the support or lack of support that they receive from other evidence and circumstances..." (R.2362)

The testimony of the Rosenbergs directly put into issue the veracity of Elitcher. The Court's stress upon the issue of credibility in determining guilt or innocence heightened the significance of the attempt by the Court and the prosecution to impeach the credibility of Ethel Rosenberg.

The main thrust of the cross-examination of Ethel Rosenberg was an attempt by the Court and prosecution to destroy her credibility and as we shall see below, the Court's participation in certain aspects of the cross-examination only compounded

the grievous error and destroyed the credibility of this key defense witness. The attack upon her credibility was accomplished by one simple device: the Court and the prosecution repeatedly elicited the fact that when she had appeared before the grand jury, after her husband's arrest and prior to her arrest and indictment, she had asserted the privilege under the Fifth Amendment to many questions which she answered in a manner consistent only with innocence on direct testimony in the course of the trial.

The prosecution within minutes after it commenced cross-examination of Ethel Rosenberg, directed the trial jury's attention to the fact that she had appeared before the grand jury and asserted the Fifth Amendment privilege. Thereafter, more than one-half of the cross-examination was directed solely to her assertion of the privilege before the grand jury and the adverse inferences to be drawn from that fact. More than 125 questions were asked of Mrs. Rosenberg relating to her appearance before the grand jury, her refusal to answer on the grounds of self-incrimination, all as a means of impeaching her credibility and as evidence of her guilt. The nature of her responses in her direct testimony before the trial jury, if believed, served to establish her innocence. The Court and the prosecution sought to establish the falsity of her testimony on the grounds that she was now answering questions consistent only with innocence to which she had asserted the privilege before the grand jury. The trial jury was led to believe that if

Mrs. Rosenberg asserted the privilege, there was a contradiction or doubt of the truthfulness of her trial testimony.

The prosecution repeatedly sought to establish that the assertion of the privilege by Mrs. Rosenberg before the grand jury was inconsistent with answers establishing her innocence, and that either the privilege was not honestly asserted before the grand jury or she was not being truthful before the trial jury. In either event, it destroyed the value of her testimony.

The trial court went further. It not only indicated to the jury that there was an inconsistency between an innocent answer and a prior assertion of the privilege; the Court indicated that if she honestly asserted the privilege before the grand jury, she had something to hide and that the assertion was evidence of her guilt. The Court, operating on the basis that there was an inconsistency, repeatedly asked the witness how could she explain her asserting of the privilege if she was in fact innocent.

[redacted]

and a subsequent response to the same question. In reply and in the presence of the trial jury, the Court made the following comment:

> "Do you also contend that that would not be something for the jury to consider on the question of credibility?" (R.2046)

And later,

> "Supposing a question is asked today which the witness answers, the same question asked previously which the witness refused to answer on the ground that it may tend to incriminate her; now, my query is, might not that be something which the jury would consider on the question of credibility?" (R.2046,2047)

The Court, pursuing this line, went on to ask Ethel Rosenberg

> "Q. The fact of the matter is that you have no objection today to giving the answer to that?
> A. That's right.
>
> Q. And what was your answer today as to when you consulted your lawyer?
> A. Sometime after my husband had seen him, the day, the evening of the day he was interrogated by the FBI.
>
> Q. And today you feel there is nothing incriminating about that answer?
> A. No.
>
> Q. But at that time, before the grand jury, you did?
> A. I must have had some reason for feeling that way.
>
> Q. Now, what was the reason?
> A. I couldn't say at this time.
>
> The Court: In your own interest, I think you ought to think about it and see if you can give us some reason.
>
> The Witness: I really couldn't say." (R.2048,2049)

Thus, the Court was advising the jury that there was an inconsistency in asserting the privilege before the grand jury and answering the same question during the course of the trial. It impressed the jury with the fact that she might well now be lying, that she was less afraid of perjury and more concerned with an acquittal in this case at the risk of perjury. By implication the Court was importing to the jury that the only reason she had asserted the privilege before the grand jury was that her answers would involve her in the charged conspiracy and that the very assertion itself was evidence of guilt.

While the Court in its charge to the jury stated that the prior assertion of the privilege could be considered only in respect to credibility (R. 2365, 2366), the implications of the Court's comments throughout her cross-examination impressed the jury with the idea that the prior assertion was of itself evidence of guilt.

The prosecution then continued this line of questioning and sought to establish that if Ethel Rosenberg were truly innocent, she should not have feared answering questions before the grand jury; if she were innocent, no answer could incriminate her. Thus, the cross-examination did more than attack her credibility. It sought to establish her ultimate guilt because she asserted the privilege before the grand jury.

After referring to an alleged contradiction created by her assertion of the privilege before the grand jury and a response in the trial court, Mrs. Rosenberg was then asked a question by the Court:

"Now, let me ask a question. If you had answered at that time that you had not spoken to David, for reasons best known to you, you felt that that could incriminate you?

The Witness: Well, if I used the privilege of self-incrimination at that time, I must have felt that perhaps there might be something that might incriminate me in answering.

The Court: All right, proceed." (R. 2052, 2053)

Then the prosecutor immediately asked:

"Q. As a matter of fact, at that time you didn't know how much the FBI knew about you and so you weren't taking any chances; isn't that it?" (R. 2053)

By this argumentative question, the prosecutor was saying to the jury that the witness had guilty knowledge and was not giving any information until she saw whether or not the FBI had the evidence, and now confronted with the evidence she was trying to save herself and her husband by testifying on the trial at the risk of perjury to establish her innocence.

Pressing this question again, the prosecutor asked:

"Of course you didn't know, so you weren't taking any chances in implicating yourself or your husband?" (R. 2053, 2054)

At this stage, counsel for Mrs. Rosenberg moved for a mistrial. (R. 2054) The motion was denied. (R. 2054) Thus, the prosecutor, once again, was pressing the point that the sole reason for not answering before the grand jury was that the witness was conscious of her guilt and was seeking to avoid apprehension or conviction. In this way the prosecutor was equating the assertion of the privilege with flight from prosecution, both importing guilty knowledge, and once again, claiming that

the assertion of the privilege was inconsistent with innocence, the prosecutor posed the following question:

> "Would you explain, please, how the fact of whether or not you had talked with David Greenglass regarding this matter applied to possible incrimination if you had had nothing to do with his activity?" (R. 2055)

In the face of an objection by the defense to this whole line of inquiry, the prosecutor stated, once again in the presence of the jury:

> "I think on the general pattern of the case I have a right to proceed in continuity without interruption, to show the contrast between the witness's position before the grand jury and her position here, and the jury can best judge, on the panorama that I point as I go along." (R. 2058)

Before the grand jury Mrs. Rosenberg was asked whether she recollected a furlough visit of her brother to New York (R. 2058, 2059). She asserted the privilege to that question (R. 2059). On direct examination she had answered that question (R. 1957). The Court thereupon brought out the fact that she had for some reason changed her position. The following ensued:

> "By the Court: Q. You did answer that question here in Court, didn't you? You did remember the furlough visit?
> A. Yes.
> Q. So that you had no objection here upon any grounds, whether it is incrimination or anything else, to answering that question?
> A. That's right.
> [illegible]"

Q. You mean you didn't feel it would incriminate you?
A. Well, if I answered that I didn't want to answer the question on the grounds that it might incriminate me, I must have had a reason to think that it might incriminate me." (R. 2059, 2060)

Thereupon, the prosecution sought to establish that Mrs. Rosenberg was fearful that her answers might involve her personally in a criminal prosecution, and culminated this line of inquiry with this question:

"All right, then your concern solely was as to whether or not you might be incriminated, isn't that so?" (R. 2061)

Whereupon the Court interjected again:

"Has something transpired between the time you were questioned before the grand jury and the date of this trial which makes you feel that your answers at this time, at the trial, to those particular questions are not incriminating, and if so, what is it?" (R. 2061)

By this question the Court was suggesting to the jury that unless something intervened, there was an obvious inconsistency in invoking the privilege before the grand jury and answering the question before the trial jury. As previously implied by Court and prosecutor, the only intervening event was her arrest and prosecution, and that since Mrs. Rosenberg was unsuccessful in avoiding prosecution she was willing to perjure herself to avoid her just conviction.

Then the prosecution returned to the same old theme and asked the following series of questions:

"Q. Do you remember this question and this answer: 'Did you invite your brother David and his wife to your home for dinner? I

mean during the period while he was on furlough in January of 1945? A. I decline to answer on the ground that this might incriminate me.' Do you remember giving that testimony?
A. Yes, I remember.

Q. Was it true at the time you gave it? Yes or no?
A. It is not a question of it being true." (R. 2062)

Mrs. Rosenberg in giving that latter answer was responding correctly, that the assertion of the privilege can be true and appropriate even in light of a subsequent answer which is exculpatory. A categorical answer to that question was legally and factually impossible. Nevertheless, the prosecution requested that he have a categorical answer (R. 2062). The Court complied with this request (R. 2062). Prior to the witness's answer in which she stated it was impossible to give a yes or no answer (R. 2062) the Court commented in such a manner that it was clear to the jury that it was attacking Mrs. Rosenberg's credibility stating:

"The Court: However, when a witness freely answers questions at a trial, the answers to which, the answers to the very same questions to which the witness had refused to answer previously upon a ground assigned by that witness, I ask you, is that not a question then for the jury to consider on the question of credibility?" (R. 2063, 2064)

Thereafter the Court instructed the witness to answer the previous question, "Was that true, Yes or no." The question of what was true related to the honesty of her assertion of the privilege. Thus, the prosecution and Court were telling the jury if she honestly asserted the privilege she had something to fear

and her present testimony was merely a belated attempt to avoid conviction, or that the assertion was not truthful, and hence, her credibility was placed in doubt. That such was the import of the inquiries is established by the subsequent question wherein her assertion of the privilege was categorized as a refusal to confess her guilt. The prosecutor asked:

> "What you are saying is that you were under no compulsion to confess your guilt in respect to this conspiracy?" (R. 2066)

Her response that that she had no guilt to confess (R. 2066) was in the minds of the jury refuted by the prosecutor's question and the Court's clear implication that she could only assert the privilege if she did have guilt to confess.

Mrs. Rosenberg in the course of her direct testimony had denied knowledge of Harry Gold (R. 1970, 1971). The prosecution elicited the fact that before the grand jury she asserted the privilege to the question: "Have you ever met Harry Gold?" (R. 2067) She was then asked to explain how a denial before the grand jury could possibly have incriminated her (R. 2069). After the prosecution sought to point out the inconsistency of the two answers, the Court interjected with the following series of questions:

> "Q. But you did answer it here in Court, isn't that true?
> A. That is right.
>
> Q. And your answer here was that you never met him until he took the witness stand?
> A. That is correct.
>
> Q. So that you didn't assert any privilege with respect to that here in this courtroom?
> A. No." (R. 2070)

The error of the trial court and prosecution in attempting to point up this alleged inconsistency was even more serious when it is noted that no evidence was ever adduced by the prosecution that Harry Gold knew or had ever met Ethel Rosenberg. In Mr. Gold's direct testimony he did not once allude to any personal knowledge or relationship with either Ethel Rosenberg or her husband.

The Court and prosecution used the witness' prior assertion of the privilege not merely to cast doubt upon her testimony and credibility, but also sought to imply that the testimony of Gold was true and that her assertion of the privilege corroborated Gold's testimony. When it is realized that the prosecution's case would collapse without Gold, this false and improper corroboration became error of the most prejudicial sort to all of the defendants.

Thereupon there followed a series of questions by the prosecution relating to Greenglass' activities in Los Alamos and the alleged transfer of information. The only rationale for asking these questions was to establish a contradiction in the minds of the jury. Her direct testimony in response thereto established her innocence. Her assertion of the privilege before the grand jury constituted, according to the Court and prosecution, a contradiction of her testimony. After pointing up the "contradiction" the prosecutor in each instance would pose the question, "Was it truthful?" (R. 2071 et seq.) The prosecution then framed a question, the sole import of which was that the prior assertion of the privilege before the grand jury

was evidence which should refresh her recollection to the extent that she could now acknowledge her implication in the conspiracy. The prosecutor thus asked:

> "In spite of the fact that you have denied these things here in Court, does this testimony perhaps refresh your recollection that perhaps you did talk with Greenglass in 1944 and 1945 about the atom bomb and nuclear fission, and things like that?" (R. 2077, 2078)

After quoting from the grand jury minutes wherein she had declined to answer a question importing knowledge of the alleged Soviet courier Yakovlev, the following question was asked:

> "Q. And yet you had never met Yakovlev in your life?
> A. That is right.
>
> Q. Would you care to explain how you might be incriminated on the basis of that question and answer?" (R. 2078)

Over objections by defense counsel to this series of questions, the Court made the following comment to the jury:

> "I want the jury to understand that I am permitting this question, as I said before in answer to counsel's objection, on the question of the credibility of the witness. The witness has answered the question here in Court and on previous occasion had asserted privilege. As I said before, there is no interest (sic) to be drawn from the assertion of the privilege against self-incrimination, but it is something the jury may weigh and consider on the question of the truthfulness of the witness and on credibility, and in the charge proper, my main charge, I will have more to say about how you judge the credibility of witnesses." (R. 2079)

Terminating these questions, the prosecutor asked:

"Q. Is it not a fact that after consultation with your lawyer, in the course of your two appearances before the grand jury you refused to answer any questions asserting your privilege against self-incrimination insofar as you were asked questions relating to the employment, the activities of your brother David at Los Alamos in 1945 and 1945, insofar as concerned his wife, insofar as concerned Harry Gold and insofar as concerned Yakovlev, and insofar as concerned your association and your husband's association in connection with these people whom I have mentioned relating to the theft from Los Alamos of material relating to the development and production of the atomic bomb and the objective of delivery to the Soviet Union?" (R. 2080, 2081)

* * * *

"A. It is a fact that I exercised my privilege against self-incrimination wherever I felt the need to do so."

By the Court:

Q. But you did not exercise that privilege here in court with respect to that same subject matter?
A. No.

By Mr. Saypol:

Q. That need you felt was necessary for assertion by you so that you would not incriminate yourself, is that right?
A. I said that I used the right against self-incrimination.

Q. Is it not a fact that at the conclusion of the grand jury proceeding at which you were present as a witness this was said to you:

'Q. Is there anything else you want to tell us about this entire matter? A. No.
'Q. Any statement you want to make to the jury? A. No.'

Q. Did that occur?
A. Yes.

Q. Did you make any statement?
A. No.

Q. Did you make any answer?
A. No.

Q. You knew by that time that your husband was under arrest in connection with this crime?
A. Yes, he was under arrest.

Q. You knew at that time, too, that you were suspect, did you not?
A. I really didn't know if I knew it.

Q. Didn't you think it appropriate at that time to make a complete statement such as you have made here denying any possible connection or complicity in this matter?
A. I had gone to the grand jury to answer any question they might put to me and that I did. It didn't occur to me that it was something I was supposed to do, to make any kind of statement.

Q. Without exception you have refused to answer these questions because of the privilege which you had been advised you enjoyed?
A. Not without exception.

Q. You mean you told the name of your lawyer -- (R. 2081-2083)

* * * *

Q. Without going into detailed questions in that regard, is it not a fact that with respect to every question that was asked of you at that grand jury relating to membership or activity or participation by you or your husband, the defendant, David Greenglass, the defendant, or Ruth Greenglass in the Communist Party, you similarly asserted your privilege against incrimination, is that so?
A. I asserted my privilege against self-incrimination.

Q. In respect to those matters concerning membership or activity or participation in the Communist Party by those I have mentioned? (R. 2083)

* * * *

A. I don't recall that there were any such questions asked me concerning my brother or his wife. (R. 2084)

It was recognized by all that the prosecution's use of the witness' prior assertion of the privilege combined with the trial court's comments and interrogation, had destroyed completely the value of her testimony. In attempting to rehabilitate her, defense counsel to no avail directed his redirect examination to this area alone (R. 2084-2087). Counsel for Mrs. Rosenberg asked her whether she believed herself guilty of espionage at the time of her assertion of her privilege before the grand jury or at the time of her testimony in the course of the trial (R. 2084-2087). Her answer in essence was no (R. 2084-2087). The Court quickly interjected and asked:

> "So there was no difference in your position then than there is today?" (R. 2085)

This question must be considered in the context of previous remarks by the Court that unless there was some significant change in circumstances since her appearance before the grand jury, the assertion of the privilege contradicted her trial testimony, and that her assertion implied consciousness of guilt on her part. In the face of an avowal of innocence made by Mrs. Rosenberg in response to that question, the Court in effect argued:

> "The point is, you answered these questions at the trial and refused to on the ground that it would tend to incriminate you before the grand jury." (R. 2085)

The re-cross examination was again limited to her assertion of the privilege before the grand jury, as was the second re-cross examination (R. 2087, 2088; 2088-2090)

After the testimony of Mrs. Rosenberg, the defense rested (R. 2090).

The prosecution fully realized that it must destroy the credibility of the defense witnesses. The "device" used by the prosecution was Mrs. Rosenberg's assertion of the Fifth Amendment privilege before the grand jury to questions she had responded to on direct examination on the trial. Indeed, the prosecution opened its summation by declaring:

> "If there has been any fooling, you will remember that one of the defendants made blanket negatives, blanket answers, in denial as to whether she knew Harry Gold, as to whether she had ever talked to David Greenglass about his work at Los Alamos, as to whether she or her husband ever talked about atomic bombs, and yet I showed you that in the grand jury, on the advice of her counsel, she refused to answer those questions on the ground that to answer them would be self-incriminating.
>
> In the grand jury:
>
> 'Did you ever know Harry Gold? A. I refuse to answer on the ground that it tends to incriminate me.
> 'Q. Did you consult your counsel, Mr. Bloch, before you made that answer? A. Yes.'
>
> "I leave it to you as to who may have been fooled." (R. 2268)

The Court in its charge to the jury concluded by referring to the assertion of the privilege by Ethel Rosenberg, stating:

> "The defendant Ethel Rosenberg was cross-examined concerning her refusal to answer certain questions when she appeared before the grand jury on the ground that the answers might tend to incriminate her. Her failure to answer such questions is not to

> be taken as establishing the answers to any questions she was asked before the grand jury, but may be considered by you in determining the credibility of her answers to those same questions at this trial." (R. 2366)

Counsel for the defense, throughout the cross-examination of Ethel Rosenberg, objected to the prosecution's use of the defendant's assertion of the Fifth Amendment as a means of discrediting her testimony and as a means of implying her guilt. Counsel for the defense objected to the Court's charge in this respect stating:

> "I except to that part of your Honor's charge, where you charged that the answers given by the defendant Ethel Rosenberg before the grand jury, may be taken in consideration by them in respect to her credibility, and I ask you to charge that if the answers were given in good faith, before she was charged with the crime or indicted or arrested, and she felt that she, in answering those questions, might tend to incriminate herself, the fact that she answered these questions here, has no bearing on the matter, because here she is charged with the crime; she is on trial and in order to defend herself she has answered the questions." (R. 2368)

The Court refused to comply with the defense request (R. 2369). On appeal from the judgment of conviction, the defense attacked the fairness of the trial. See Rosenberg's brief to the Court of Appeals incorporated by reference in Sobell's brief, pp. 59-60. This issue was raised in a general fashion in the petition for writ of certiorari. See No. 2(c) of questions presented of Sobell petition and No. 4 of questions presented of the Rosenberg petition for writ of certiorari, and

p. 38 of the Appendix to the petition for writ of certiorari of the Rosenbergs, which in turn was incorporated by reference by Sobell.*/

POINT I

THE REPEATED QUESTIONING BY THE PROSPECUTION AND TRIAL JUDGE OF THE DEFENDANT ETHEL ROSENBERG CONCERNING HER PLEADING HER FIFTH AMENDMENT PRIVILEGE BEFORE THE GRAND JURY WITH RESPECT TO THE SAME QUESTIONS THAT SHE ANSWERED ON THE TRIAL, DEPRIVED HER AS WELL AS THE PETITIONER, MORTON SOBELL, OF A FAIR TRIAL IN VIOLATION OF THE DUE PROCESS OF LAW

To urge at this all too late date that the Rosenbergs were deprived of a fair trial has that "appearance of pathetic futility" which Mr. Justice Frankfurter alluded to in his dissenting opinion in Rosenberg v. United States, 346 U.S. 273,310.

We are intensely aware of the enormous burden which we are imposing upon this Court in urging it to find that the dead as well as the living were deprived of their constitutional rights. But, as was so eloquently stated by Mr. Justice Frankfurter, "the capacity to counteract inevitable, though rare, frailties is the mark of a civilized legal mechanism". Ibid. (In this context, see, also, Mr. Justice Black's dissenting

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*/ The fact that there was a less precise attack upon the cross-examination of Ethel Rosenberg might well be explained by the apparent state of the law at the time of the appeal. See U.S. v. Klinger, 136 F. 2d 677, cert. denied, 320 U.S. 746; U.S. v. Gottfried, 165 F. 2d 360. See also majority opinion in U.S. v. Grunewald, 233 F. 2d 556, at 568 (C.A. 2) and Raffel v. U.S., 271 U.S. 494.

opinion in Rosenberg, supra, at p.301.) We deem it appropriate at the outset to call attention briefly to the climate which prevailed during the time the trial was held. The Korean War was then at its height. Excesses and hysteria about loyalty and security permeated the American political scene which was bound to have an impact upon every aspect of our society and government. One manifestation of this political period was the opprobrium heaped on any individual who invoked his constitutional privilege against self incrimination. This applied particularly in the area of political dissent and those accused of communist associations. Indeed, the Supreme Court was keenly aware of the tendency to equate a Fifth Amendment plea with guilt. See e.g. Ullman v. United States, 350 U.S. 422, 426; Slochower v. Board of Higher Education, etc., 350 U.S. 551, 557; Grunewald v. United States, 353 U.S. 391, 424; Rogers v. United States, 340 U.S. 367, 376 (dissenting opinion).

Need we speculate on the impact on the jury made by repeated references and comments by both the prosecution and court relating to Ethel Rosenberg's assertions of her constitutional privilege before the grand jury? It was precisely the nature of the crime for which the defendants were being tried and the penalty which could be imposed that dictated a rigid adherence to the constitutional standards of due process. In light of the conduct of both the prosecuting attorney and the trial court, there was such a departure from the norms of due process as to deprive the defendants of any semblance of a fair trial.

What merely had "grave constitutional overtones" in Grunewald v. United States, supra, at p. 423, here possesses the dimensions of constitutional invalidity.

In Grunewald one of the defendants, Halperin, appeared before a grand jury and asserted the privilege against self-incrimination. During the course of the trial Halperin took the stand and on cross-examination was asked by the prosecuting attorney whether in fact he had invoked the Fifth Amendment before the grand jury as to some of the very same questions he had previously answered on such cross-examination.

In reversing Halperin's conviction, the Supreme Court held that it was error, in the context of the case for the trial court to have permitted the prosecution to disclose to the trial jury the defendant's prior assertion of his Fifth Amendment privilege before the grand jury.

We submit that the facts of this case present infinitely stronger grounds for reversal of the judgment of conviction than in Grunewald. The prejudicial impact here was so great, in comparison, that the conviction becomes susceptible to collateral attack.

In Grunewald, the defendant Halperin, along with two other defendants, was convicted of conspring to defraud the United States with respect to certain tax matters. The defendant Halperin was also convicted of corruptly endeavoring to influence certain grand jury witnesses. In the trial Halperin took the stand as a witness. On cross-examination a series of eight questions, as to which he had previously taken the Fifth

Amendment when testifying before the grand jury, were put to him. 353 U.S. 416, fn. 27 Each of these questions was answered by Halperin. The prosecuting attorney then proceeded to ask Halperin whether he had in fact invoked his constitutional privilege against self-incrimination when asked the substantially identical questions before the grand jury.

It is apparent on its face that the "impermissible impact on the jury" (Grunewald v. United States, supra, at p. 420) of some one hundred twenty-five references made by the court and government to Ethel Rosenberg involving the Fifth Amendment when she appeared before the grand jury, (see p. supra) was greater than could possibly have been the case in Grunewald. But it is not merely this quantitative difference which requires a setting aside of the judgment of conviction. There were vast differences in the manner and scope of Ethel Rosenberg's cross-examination relating to her previously invoking the Fifth Amendment and that of Halperin in Grunewald, differences which have constitutional significance and which require vacating of Morton Sobell's judgment of conviction.

Unlike the approach of the prosecuting attorney in Grunewald, the Government was studiously engaged in painting a "panorama" (R. 2058) of untruthfulness on the part of the witness premised on her invoking the privilege against self-incrimination. The method employed was a simple one. Not content with merely asking Ethel Rosenberg whether she had been asked a particular question and had given a particular response when appearing before the grand jury, the prosecution then

further sought to destroy her credibility by two very ingenious expedients.

On the one hand, after first asking the witness whether she recalled being asked the particular question and invoking the Fifth Amendment in response thereto, the prosecuting attorney inquired as to whether her invoking of the privilege was the truth. This was not done for the purpose of ascertaining whether or not Ethel Rosenberg was admitting that such invocation of the privilege was in fact her sworn testimony before the grand jury but for the sole purpose of eliciting from the witness whether in truth she would have been incriminated if she had answered the question without taking the Fifth Amendment.

Thus, when Ethel Rosenberg was being cross-examined concerning David Greenglass, she was asked whether she had discussed this case with him (R. 2049), to which she responded in the negative. The Government then inquired whether she recalled being asked the substantially identical question before the grand jury, to which she had invoked the Fifth Amendment (R. 2049). After admitting she had so testified before the grand jury (R. 2049), she was then asked whether that answer was true (R. 2049).

The rephrasing of the question by the prosecuting attorney reflects the true purpose behind the entire inquiry into her previous grand jury testimony:

"Q. Will you please tell me whether the answer, when you gave it to the grand jury as to whether or not you had spoken to your brother, David Greenglass, to the effect that the answer might tend to incriminate you, was true then or false?" (R. 2050.)

Any response to this type of question would be destructive of the witness' credibility. Obviously, by persistently asking this type of question, the Government was seeking to create the impression that if the privilege against self-incrimination was truthfully taken, then all of the witness' testimony on the trial denying any criminality with respect to the crime of which she was charged was untrue. Conversely, if she persisted in testifying in a manner consistent with her innocence, her credibility was likewise destroyed as was the case with respect to the question relating to Greenglass. After testifying that her answer was truthful, Ethel Rosenberg was asked:

"Q. How would that incriminate you, if you are innocent?" (R. 2050)

In other words, the Government was imparting to the jury that Ethel Rosenberg's testimony which was consistent with her innocence was not to be given credence in light of her untruthfulness in taking the Fifth Amendment before the grand jury.

This was not merely an isolated instance. The method was employed over and over again; the purpose was self-evident. It was to convince the jury that if Ethel Rosenberg took the Fifth Amendment before the grand jury because she truthfully felt that any answer might incriminate her, then her testimony on the trial which was consistent with innocence could not be believed

or, conversely, her trial testimony was not to be given credence because if she was innocent then her invoking the Fifth Amendment was untruthful.

Thus, after testifying as to why she had invoked the privilege against self-incrimination with respect to her discussing the case with Greenglass in response to the question as to whether her so invoking the privilege was truthful, Ethel Rosenberg was thereupon asked:

> "Q. As a matter of fact, a truthful answer at that time would have been that you hadn't talked to him, would it not?" (R. 2052)

The method employed by the Government which we set forth above was not restricted to that one series of questions. No, the prosecuting attorney utilized this tandem approach with respect to each series of questions put to the witness. Indeed, on occasion, the prosecuting attorney went further and would suggest the reasons why Ethel Rosenberg had invoked her privilege against self-incrimination. Following the line of questions relating to her discussion of the case with Greenglass (supra, p.), the prosecuting attorney asked, or more aptly, argued:

> "Q. As a matter of fact, at that time you didn't know how much the FBI knew about you and so you weren't taking any chances; isn't that it?" (R. 2053)

After an objection to the form of the question (R. 2053) had been overruled (R. 2053) the witness responded:

> "A. I didn't know what the FBI knew or didn't know." (R. 2053)

To which the prosecuting attorney immediately retorted:

[redacted]

To insure that [redacted] cross-examination, the prosecution [redacted] ination by asking a grand number question, [redacted] The witness responded that she had in fact taken the Fifth Amendment with respect thereto (R. 2081). Thereupon the prosecution hammered home its thesis that Ethel Rosenberg had indeed taken the Fifth Amendment because she would have been implicated in the conspiracy:

> "Q. That need (to exercise the privilege aghinst self-incrimination) you felt was necessary for assertion by you so that you would not incriminate yourself, is that right?" (R. 2082)

By ingeniously phrasing his questions so as to play on any disfavor existing in the jurors' minds concerning the very taking of the Fifth Amendment, the prosecuting attorney in one brief moment was, by innuendo, stigmatizing Ethel Rosenberg for invoking the privilege against self-incrimination and suggesting that if she were truly innocent, she would not have so invoked the privilege. Thus, on recross-examination:

> "Q. If you had the fear (Ethel Rosenberg had testified on redirect that at the times she appeared before the grand jury she feared that David Greenglass was trying to involve her in the crime of espionage) that you told Mr. Bloch about, why didn't you at that time tell the same story to the grand jury that you have told here to this jury rather than take refuge in your constitutional privilege?" (R. 2087),

and immediately followed by,

"Q. Can you give me any better reason than being aware of these things (i.e. of Greenglass' attempt to implicate her and Julius Rosenberg) as you have just said, why you didn't disclose to the grand jury those things to which you have testified here on your direct examination?"

"A. At that time I didn't know what to believe or not to believe about my brother."

"Q. But you knew what your position was and you had reason to know what your husband's position was in relation to this thing?"

"A. Yes, but my brother was under arrest."

"Q. Nevertheless, you took refuge in your constitutional plea?"

"A. Yes, I did." (R. 2087, 2088)

In Grunewald, the Supreme Court held that "it was prejudicial error" for the trial court to have allowed the Government to cross-examine Halperin on his having taken the Fifth Amendment before the grand jury, (supra, at p. 424), stating that such a procedure followed by the trial court "has grave constitutional overtones." (supra, at p. 423)

A reading of the Grunewald record reveals not one instance of the prosecutor going beyond the point of inquiring whether Halperin had been asked a particular question before the grand jury and invoking the Fifth Amendment with respect thereto. No attempt was made to probe into the reasons why Halperin had seen fit to invoke the privilege. No attempt was made to suggest reasons why Halperin had taken the Fifth Amendment. No attempt was made by implication, form of questions or [illegible] to establish the ultimate guilt of Halperin. See Transcript of Record, Grunewald, v. United States, Nos. 183-186, [illegible]

Apart from the difference in the sheer magnitude in this type of cross-examination, the prosecuting attorney in the case at bar systematically engaged in a plan to destroy Ethel Rosenberg's credibility in a manner far beyond that which was held impermissible in Grunewald and which in conjunction with the active participation of the trial court deprived all defendants of a fair trial in the constitutional sense.

In Grunewald, the trial judge played an extremely limited role in the cross-examination of Halperin regarding his prior assertions of the Fifth Amendment before the grand jury.

After Halperin testified that he had met the defendant Grunewald in Washington, the prosecutor inquired as to whether he had been asked the same question before the grand jury and had taken the Fifth Amendment to which Halperin testified that he didn't recall (G.R. 690)*/ At this point the trial judge asked the witness whether an answer to that question would have incriminated or tended to incriminate him. Upon objection the trial judge withdrew the question. (G.R. 691)

After Halperin had been asked whether he knew one Tobias and answered that he had no recollection, the prosecutor inquired as to whether the same question had been asked before the grand jury and whether Halperin had taken the Fifth Amendment. Halperin replied that he had an independent recollection but stated that if such a response was in the record he would

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*/ References [illegible] the transcript [illegible] Supreme Court in Grunewald v. [illegible]

concede the answer (G.R. 692). The trial judge thereupon asked the witness:

> "Q. And you say the answers given were true?"
>
> "A. Yes, Your Honor. Well, I didn't say -- I said that was the answer." (G.R. 693)

An objection was taken to the question at which point the following colloquy between the Court and counsel took place, the defense contending that the Court was implying to the jury that Halperin's testimony was untrue:

> "The Court: The witness says he testified before the grand jury. I want to find out, when he says the question is there and the answer is there, whether he is also conceding that he was sworn to tell the truth and it was a truthful answer; not that it is merely in the minutes, but that that is the sworn testimony." (G.R. 693)
>
> * * * * *
>
> "The Court: I am not implying that it was untrue I just want to find out whether he is admitting not merely that it is in the minutes but that that is the sworn testimony." (G.R. 693, 694)

The above sets out in full the Court's participation in Grunewald.

The trial judge in the case at bar did not so limit his participation. From the very outset of Ethel Rosenberg's cross-examination, he was actively participating with the Government in an attempt to destroy her credibility. Indeed, the trial court went so far as to impart to the jury that there [illegible] between her testimony on the trial [illegible] Fifth Amendment with respect [illegible]

[redacted] examination, the Court had effectively [redacted] destruction of her credibility by [redacted] obvious inconsistency between her trial and grand jury testimony, and by imparting to the jury that such an inconsistency could only be rectified if she justified her invoking the Fifth Amendment before the grand jury. (R. 2061)

What then are the legal consequences flowing from the line of cross-examination so extensively pursued by both the Government and trial court in the case at bar? At the outset, it must be kept in mind that we are here dealing with a capital case, where indeed, two of the defendants have been executed. Cf. Stewart v. United States, 275 F. 2d, 617, 628 (CADC)(dissenting opinion) rev'd. 366 U.S. 1.

It is, of course, elementary that there could be no implication of guilt drawn from Ethel Rosenberg's invoking her privilege against self-incrimination before the grand jury. Grunewald v. United States, supra, at p. 421; Ullman v. United States, supra; Slochower v. Board of Higher Education of the City of New York, supra.*/ Ethel Rosenberg denied any participation

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*/ The trial judge, in his charge to the jury, informed them that Ethel Rosenberg's invocation of the Fifth Amendment before the grand jury could not be "taken as establishing the answers to any questions she was asked before the grand jury," but could be considered "in determining the credibility of her answers to those same questions at this trial." (2036). This was essentially identical to the charge given by the trial judge in Grunewald (supra, at p. 417, n. 28), and of course in light of the holding in that and subsequent cases cannot be considered curative. See also, United States v. Grunewald, 233 F. 2d, 556, 571, 573 (CA 2) (dissenting opinion of Judge Frank).

in the charged conspiracy and maintained throughout her testimony that she was innocent of any criminal act. Nevertheless, over repeated objections, the prosecution was allowed to bring out the fact that she had invoked her privilege against self-incrimination before the grand jury with respect to questions which she had answered on the trial in a manner consistent with innocence. This line of cross-examination was ostensibly permitted by the trial court on the theory that such prior statements could only be used to impeach Ethel Rosenberg's credibility. (R. 2046) Nevertheless, this form of questioning and comment tended to establish in the minds of the jurors the ultimate guilt of Ethel Rosenberg, in that no truly innocent person would have invoked the Fifth Amendment privilege.

It is in this context that we must consider the impact of the trial court's questions inquiring into her motive for asserting the privilege.*/

We submit that if Grunewald had been decided at the time the trial of the case at bar was held, no extensive argument would be necessary to urge that a reversal would be required. See e.g. United States v. Tomaiolo, 249 F. 2d 683 (CA 2); Travis v. United States, 247 F. 2d 130 (CA 10);

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*/ In the words of Judge Frank,

> "No one who legitimately exercises the constitutional privilege ought to be so placed that he must subsequently justify it to a jury."

United States v. Grunewald, supra, at p. 576 (dissenting opinion).

United States v. Gross, 276 F. 2d 816 (CA 2).*/ Certainly, the the consideration deemed "most important" by the Supreme Court in Grunewald in holding that there was no inconsistency between Halperin's invoking his privilege against self-incrimination before the grand jury and his answers to the identical questions on the trial, is present with respect to Ethel Rosenberg, namely the very nature of the "particular grand jury proceeding." Grunewald v. United States, supra, at p. 423. One month prior to her initial appearance before the grand jury on August 7, 1950, Ethel Rosenberg's husband had been arrested. Likewise, her brother, David Greenglass had been arrested prior to her appearance, and both of them had been charged with conspiring to commit espionage. We need but substitute Ethel Rosenberg for "Halperin" to conclude, as did the Supreme Court in Grunewald, that her invoking of her privilege against self-incrimination could not be deemed inconsistent with her testimony at the trial.

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*/ Of course this Court is bound to follow the holding of Grunewald, and subsequent Supreme Court rulings regardless of the fact that Grunewald and cases following were decided subsequent to the case at bar. The Court of Appeals for the Second Circuit has held in this connection that [illegible]

"For, when Halperin was questioned before the grand jury, he was quite evidently already considered a potential defendant. The taxpayers whose cases had been 'fixed' by the conspiratorial ring had already testified, before the grand jury.,. The scheme was thus in essence already revealed when Halperin was called to testify. Under these circumstances it was evident that Halperin was faced with the possibility of an early indictment, and it was quite natural for him to fear that he was being asked questions for the very purpose of providing evidence against himself. It was thus quite consistent with innocence for him to refuse to provide evidence which could be used by the Government in building its incriminating chain. For many innocent men who know that they are about to be indicted will refuse to help create a case against themselves under circumstances where lack of counsel's assistance and lack of opportunity for cross-examination will prevent them from bringing out the exculpatory circumstances in the context of which superficially incriminating acts occurred."

-- Grunewald v. United States, supra, at p. 423.

On August 11, 1950, immediately following her second appearance before the grand jury, Ethel Rosenberg was arrested.

The teaching of Grunewald is clear. If further elucidation be needed, the Supreme Court has recently put the following gloss on that decision:

"The holding in Grunewald was that the defendant's answers to certain questions were not inconsistent with his previous reliance upon the Fifth Amendment to excuse a refusal to answer those very same questions. Since defendant's testimony placed his credibility in issue, the necessary implication of that holding is that his prior refusal to testify could not be used to impeach his general credibility."

-- Stewart v. United States, 366 U.S.1 (Emphasis added.)

We submit that the trial [illegible] Government, and itself participating [illegible] sively cross-examine Ethel Rosenberg [illegible] tions of the Fifth Amendment before the grand jury [illegible] allowed evidence in having "grave constitutional overtones" (Grunewald v. United States, supra, at p. 423; cf. Ullmann v. Casey, 357 U.S. 468, 479), but was so prejudicial as to deprive Ethel Rosenberg of a fair trial to which she was entitled under the due process clause of the United States Constitution. Indeed, in light of the quantum of such evidence, the nature of the crime of which the defendants were charged, the manner and form in which the questions were framed by both the prosecutor and trial court all suggesting that Ethel Rosenberg's testimony at the trial was not to be given credence, the repeated search for explanations as to why Ethel Rosenberg had invoked her constitutional privilege (cf. United States v. Grunewald, 233 F. 2d 556, 576 (dissenting opinion)), the proffered "suggestions" made by both the prosecutor and trial court as to why she invoked the Fifth Amendment before the grand jury, all served to deprive the defendants of a fair trial.

We need not tarry long to conclude that as a result of the extremely prejudicial nature of Ethel Rosenberg's cross-examination, the petitioner, Morton Sobell was likewise deprived of a fair trial in the constitutional sense. For as we have already pointed out (supra, pp.) the sole witness to implicate Sobell in the conspiracy was Elitcher. It was his

testimony that linked Sobell to the Rosenbergs in the charged conspiracy. Ethel Rosenberg denied any involvement in a conspiracy and categorically maintained that Klitcher's testimony was false. Her testimony corroborated the testimony of her husband, Julius Rosenberg, who likewise denied any membership or participation in a conspiracy, and who also maintained that Klitcher's testimony was false. Thus, if the Rosenbergs' testimony were believed, Sobell would have had to have been acquitted.*/ If their testimony were believed, the inevitable conclusion would have had to have been that there was no conspiracy, and a fortiori, Sobell could not have been convicted. In sum, without Klitcher's testimony, Sobell could not have been convicted. Ethel Rosenberg's (as well as Julius Rosenberg's) testimony in effect categorically denied Klitcher's. Thus, if Ethel Rosenberg (and a fortiori, Julius Rosenberg) would have been believed, Klitcher could not have been. Realistically, it was Ethel Rosenberg's credibility that stood between Sobell and conviction.**/

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*/The trial court instructed the jury that if they did not believe Klitcher's testimony then Sobell must be acquitted (R.2055).

**/The availability of relief under Section 2255 is discussed in our companion memorandum of law.

POINT [illegible]

THE CONDUCT OF THE COURT AND PROSECUTION IN THE CROSS-EXAMINATION OF SOBELL'S CO-DEFENDANT DEPRIVED SOBELL OF A FAIR TRIAL

As we already noted (Point I, supra), [illegible] Rosenberg's credibility was of crucial significance to Sobell. The destruction of her credibility by both the prosecution and trial court was therefore overwhelmingly prejudicial as to him.

The precise question as to whether a co-defendant may raise the "Grunewald point" was decided by the Court of Appeals for this Circuit in United States v. Tomaiolo, supra. In that case, both defendants were indicted and convicted of conspiring to rob a bank. The prosecution in cross-examining a witness on behalf of the defendant Tomaiolo, elicited the fact that this witness — not a defendant — had asserted the Fifth Amendment privilege before the grand jury in response to certain questions which he answered during the course of the trial.

The Court of Appeals held [illegible] Grunewald decision for the prosecution [illegible] attention of the jury, [illegible] take the stand. [illegible] of Doviero. [illegible] tion of Tomaiolo's [illegible]

[illegible]

require reversal. We conclude that on this record Soviero was seriously prejudiced by the whole trial even that part of it which particularly pertained to Tomaiolo and that his conviction should accordingly be reversed.

Where errors as to one defendant are so substantial and of such nature as to affect a co-defendant with whom he is tried jointly, appellate courts have reversed the convictions of both defendants on trial where it seemed that they could not have been fairly tried. United States v. Thomson, 7 Cir. 1940, 113 F. 2d 643, 129 ALR 1291; Feder v. United States, 2 Cir., 1919, 257 F. 294, 5 ALR 370; Smith v. United States, 6 Cir., 1956, 230 F. 2d 935; Nelson v. United States, 1953, 93 U.S. App. D.C. 14, 208 F. 2d 505; Duncan v. United States, 7 Cir., 1928, 23 F. 2d 3." (at p. 696).*/

It is well settled that error committed with respect to one defendant may inure to and become the basis for reversing the convictions of all co-defendants where they too were prejudiced.

In Nelson v. United States, 208 F. 2d 505 (CADC) cert. denied, 346 U.S. 827, 11 defendants were jointly tried and convicted. [illegible] papers belonging to one of the defendants [illegible] over objection that they were obtained [illegible] Fourth Amendment. The Court in [illegible] reversing the conviction, also [illegible] defendants on the [illegible] the erroneous ruling,

[illegible] co-defendants [illegible] examination [illegible] tions were [illegible] the-

holding it was impossible to isolate the prejudicial effect upon one defendant from that of his co-defendants. See also, Anderson, et al v. United States, 318 U.S. 350; Smith v. United States, 230 F. 2d 935 (C.A. 6,); McDonald v. United States, 335 U.S. 451, 456; Blair v. United States, 289 F. 2d 894 (CADC).

The special problems inherent in any conspiracy trial have been detailed by the classic concurring opinion of Mr. Justice Jackson, in Krulewitch v. United States, 336 U.S. 440, 445, 454:

> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together."

The magnitude of the error committed by the trial court relating to the cross-examination of Ethel Rosenberg, not only deprived her of a fair trial in the constitutional sense, it operated also to deprive the petitioner, Morton Sobell, of due process of law.

Respectfully submitted,

DONNER, PERLIN AND PIEL
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Attorneys for Petitioner

Of Counsel:

SANFORD M. KATZ

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v. No. 134-245

MORTON SOBELL,

Defendant.

MEMORANDUM IN SUPPORT OF PETITION PURSUANT TO SECTION 2255 OF TITLE 28, U.S.C. RELATING TO THE TRIAL COURT'S FAILURE TO CHARGE WITH RESPECT TO AN ESSENTIAL ELEMENT OF THE OFFENSE, OR, ALTERNATIVELY, FOR RELIEF PURSUANT TO RULE 35 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE TO CORRECT AN ILLEGAL SENTENCE.

Statement

This is a memorandum in support of a motion pursuant to Title 28, U.S.C., Section 2255, requesting that upon the file and records of the case the judgment of conviction and the sentence be set aside and that petitioner be discharged from detention and imprisonment on the grounds that the sentence was imposed in violation of the Constitution and laws of the United States and that the Court was without jurisdiction to render the judgment of conviction and to impose the sentence, or, in the alternative, that the sentence imposed herein be corrected pursuant to Rule 35 of the Federal Rules of Criminal Procedure on the ground that it was invalid by virtue of being in excess of the maximum punishment provided by statute.

Prior Proceedings

On January 31, 1951, a single count indictment was returned against petitioner charging that he had conspired to commit espionage on behalf of the Union of Soviet Socialist Republics in violation of Title 50, U.S.C., Section 32. (R.C.)*/ Petitioner was tried, together with the two co-defendants Julius and Ethel Rosenberg, before judge and jury; and on March 29, 1951, the jury returned a verdict of guilty against all three defendants. On April 5, 1951, a thirty-year sentence was imposed upon petitioner. The judgment of conviction was affirmed on February 25, 1952 by the United States Court of Appeals for the Second Circuit, Judge Frank dissenting. 195 F. 2d 583. A petition for rehearing was denied on April 8, 1952, 195 F. 2d 609. A petition for a writ of certiorari was denied by the United States Supreme Court on October 13, 1952, with Justice Black being of the opinion that the petition should be granted. 344 U.S. 838. A petition for rehearing was denied on November 17, 1952, with Justice Black adhering to his view that the petition should be granted. 344 U.S. 889.

Subsequent applications were made pursuant to Rule 33 of the Federal Rules of Criminal Procedure and Section 2255 of Title 28 U.S.C. The issues raised therein have never been ruled or considered before, either upon the trial or [illegible] in any subsequent appellate [illegible]

*/ References are to [illegible]

Grounds for Relief

The indictment under which petitioner was convicted charged that he had joined the conspiracy in time of war. The sentence imposed upon petitioner was pursuant to the wartime sentencing provision of the Espionage Act of 1917. However, the trial court failed to charge the jury that it had to find that petitioner joined the conspiracy in "time of war". This essential element of the offense was neither charged nor explained to the jury. Hence, the conviction and sentence are constitutionally deficient and subject to collateral attack.

"Time of war" as applied to the Espionage Act of 1917 refers solely to a period of actual hostilities. The nature of the evidence adduced against petitioner as to alleged wartime membership in the conspiracy was such, as to raise a substantial question of fact which was required to be resolved by the jury. Absent this finding by the jury, the Court was without power to impose a wartime sentence. Therefore, assuming arguendo that the conviction was valid, petitioner is entitled to be re-sentenced under the peacetime provisions of the Espionage Act of 1917, pursuant to Rule 35 of the Federal Rules of Criminal Procedure.

Pertinent Portions of the Record

The superseding indictment under which the petitioner, Morton Sobell, was tried was filed on January 31, 1951,

charging, inter alia, that he, along with Julius and Ethel Rosenberg and others, for a period between June 6, 1944 to and including June 16, 1950, the United States of America then and there being at war, conspired to communicate and deliver information relating to the national defense of the United States to the Union of Soviet Socialist Republics (R.c.).

Pursuant to a motion for a bill of particulars by Morton Sobell (R.h.), the government alleged that Sobell joined the conspiracy on or about June 15, 1944, and that the overt acts of Morton Sobell took place between January, 1946 and May of 1948. No testimony whatsoever was introduced by the government in support of any of the alleged overt acts set forth in the bill of particulars.

The sole witness whose testimony tended to implicate Sobell in the alleged conspiracy was Max Klitcher. The only other testimony adduced against Sobell was that he had fled to Mexico, sought to avoid apprehension, and refused to return voluntarily to the United States. As the Court acknowledged, this letter evidence could not be the basis for the conviction (R. 2354) and if the testimony of Klitcher were disbelieved Sobell had to be acquitted (R. 2355). Klitcher's testimony as it related to Sobell covered a period from some time in the early part of 1946 to the summer of 1948.

On the other hand the major portion of the trial related to the Rosenbergs. Fourteen of the witnesses produced by the government at the trial testified as to matters relating only to them. The government, through these witnesses, attempted

to establish that the Rosenbergs were involved in atomic espionage during time of actual hostilities in concert with David Greenglass and others. The testimony referred to the alleged transfer of information relating to the development of the atomic bomb from December of 1944 to June of 1945, a period when we were engaged in actual hostilities against Germany and Japan. The Court acknowledged at the time of sentencing that Sobell was not involved in this aspect of the charged conspiracy.*/ (R. 2461, 2462)

At the end of the government's case, counsel for petitioner Sobell moved to dismiss the indictment on the ground that the testimony, even if sufficient and believed, established two separate conspiracies.**/ (R. 1542-1559)

The Court's Charge

The question posed in the instant motion arises out of the charge of the Court to the jury. We set forth below those portions of the charge pertinent to the issues now raised.

The Court first read an excerpt from Section 32 of Title 50, as follows:

> "Whoever, with intent or reason to believe that it is to be used ... to the advantage of a foreign

*/ In setting forth the nature of the evidence against the Rosenbergs and the time factor in respect thereto as it related to time of war, in contrast to the testimony relating to Sobell, we do not in either case concede the truthfulness or sufficiency of the testimony. Sobell, to this date as did the Rosenbergs to the time of their death, insists upon and maintains his absolute innocence.

**/ It was on this ground that Judge Frank, in his dissenting opinion, maintained that Sobell was entitled to a new trial. We do not, by this motion, seek to relitigate that issue.

> 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 representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing ... sketch, ... note, ... or information relating to the national defense, shall be punished according to law." (R. 2330, 2331)

It is to be noted that the Court did not read the wartime sentencing provision of the statute to the jury.*/ The Court went on to charge:

> "The defendants are accused of having conspired to commit espionage." (R. 2337)

The Court charged the jury with respect to the general conspiracy doctrine that once membership in the conspiracy is established the defendant is responsible for acts or statements of his co-conspirators made in furtherance of the conspiracy. (R. 2341)

The Court then defined each of the following terms relating to the offense:

> "espionage", "conspiracy", "relating to national defense","transmit information relating to the national defense to the advantage of a foreign nation" (R. 2337-2345)

The Court at no point defined "wartime". The only reference to the time period of the conspiracy was the charge that:

*/ As relevant here, the indictment states:
"On or about June 6th, 1944, up to and including June 16, 1950, ... [illegible] ... Julius Rosenberg, Ethel Rosenberg, Anatoli A. Yakovlev, also known as 'John', [illegible] ... the defendants [illegible] ... then and there [illegible] ... subsection (c) [illegible] ... Code..."

"You must first determine from all the evidence in the case relating to the period of time defined in the indictment whether or not a conspiracy existed." (R. 2341, 2342)

The Court did not ask the jury to determine when any of the defendants had joined the conspiracy.

The Court, in summarizing the offense charged, excluded the matter of "time of war" and stated:

"As I have stated before, the indictment in effect charges conspiracy or agreement between the defendants now on trial and persons, such as David and Ruth Greenglass, Harry Gold and Anatoli A. Yakovlev, and others to the grand jurors unknown, to deliver to a foreign government, to wit, the Union of Soviet Socialist Republics, information relating to the national defense of the United States, with the intent that such information would be used to the advantage of the Union of Soviet Socialist Republics." (R. 2342, 2343)

The Court then set forth in synoptic fashion the essential elements of the offense, again omitting the element of "time of war":

"So you must find whether a conspiracy did exist and whether this conspiracy called for

(1) (2) the transmitting of secret information relating to the national defense as I have defined it;

(3) to the Union of Soviet Socialist Republics or an agent thereof

(4) intending or with reason to believe that the information was to be used to the advantage of the Union of Soviet Socialist Republics." (R. 2345)

In short, not one reference was made by the Court in its charge to the jury concerning this crucial element of the offense.

Comments of the Court on Sentencing

On sentencing the defendants, Judge Kaufman made the following comment:

> "The incongruent penal provisions of the statute are spotlighted by the 20-year maximum imprisonment provision for commission of the offense of espionage during peacetime. I ask that some thought be given to that for a moment, for it most likely means that even spys are successful in the year 1951 in delivery to Russia or any foreign power our secrets concerning the newer type atom bombs, or even the H-bomb, the maximum punishment that any Court could impose in that situation would be 20 years. I, therefore, say that it is time for Congress to reexamine the penal provisions of the espionage statute.
>
> In the case before me the conspiracy as alleged and proven commenced on or about June 6, 1944 at which time the country was at war. Overt acts were committed during the period of actual hostilities. Therefore, the maximum penalty is death or imprisonment for not more than 30 years." (R. 2448, 2449)

In sentencing Sobell, Judge Kaufman stated:

> "I do not for a moment doubt that you were engaged in espionage activities; however, the evidence in the case did not point to any activity on your part in connection with the atom bomb project." (R. 2461)

POINT I

THE FAILURE OF THE TRIAL COURT TO CHARGE ON AN ESSENTIAL INGREDIENT OF THE OFFENSE CONSTITUTED A DENIAL OF DUE PROCESS INVALIDATING THE JUDGMENT OF CONVICTION

In a criminal case the trial court must, in its charge to the jury, specify, define and explain each and every essential element of the offense. Failure to do so constitutes reversible error. Screws v. United States, 325 U.S. 91; Kreiner v. United States, 11 F. 2d 722 (C.A. 2); United States v. Levy, 153 F.

2d 995 (C.A. 3); United States v. Noble, 155 F. 2d 315 (C.A. 3); Kinard v. United States, 96 F. 2d 522 (C.A.D.C.); Williams v. United States, 131 F. 2d 21 (C.A.D.C.); Morris v. United States, 156 F. 2d 525 (C.A. 9); Tatum v. United States, 190 F. 2d 612 (C.A.D.C.); Benatar v. United States, 209 F. 2d 734, 746-748 (C.A. 9) (dissenting opinion); United States v. Gordon, 242 F. 2d 122, 126 (C.A. 3); Barry v. United States, 287 F. 2d 340 (C.A.D.C.); Austin v. United States, 208 F. 2d 420 (C.A. 5); United States v. Petrie, 184 F. 2d 417 (C.A. 3); Samuel v. United States, 169 F. 2d 787 (C.A. 9); Bloch v. United States, 221 F. 2d 786 (C.A. 9); Lash v. United States, 221 F. 2d 237 (C.A. 1); Mullen v. United States, 263 F. 2d 275 (C.A.D.C.); Mills v. United States, 228 F. 2d 645 (C.A.D.C.).

In view of the importance of a charge in a criminal case, the fact that no exception is taken to a court's failure to so charge does not deprive the defendant from subsequently raising such issue on appeal. Indeed, appellate courts have raised such questions sua sponte.

The Supreme Court in Screws v. United States, supra, referring to the defendant's failure to except to the court's omission, stated:

> "And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a federal crime are entitled to be tried by the standards of guilt which Congress has prescribed." at p. 107

See also, United States v. Atkinson, 297 U.S. 157, 160; Clyatt v. United States, 197 U.S. 207; United States v. Noble, supra; Kinard v. United States, supra; Morris v. United States, supra; Tatum v. United States, supra; Barry v. United States, supra; Lash v. United States, supra; Mills v. United States, supra.

The Court of Appeals for this Circuit has likewise recognized the salutary principle that

> "in criminal cases federal appellate courts have sometimes noticed errors to which no proper objection has been taken 'if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.'"

United States v. O'Connor, 237 F. 2d 466, 472 (C.A. 2); cf. United States v. Stone, 282 F. 2d 547 (C.A. 2); United States v. Barillas, 291 F. 2d 743, 744 (C.A. 2).

Underlying this rule is a fundamental principle of our criminal jurisprudence that to convict a defendant, a jury must find beyond a reasonable doubt that each and every essential element of the offense charged has been proved. See Christoffel v. United States, 338 U.S, 84, 89; Schwachter v. United States, 237 F. 2d 640, 644 (C.A. 6).

A conviction cannot stand when one cannot determine and must leave to surmise whether the jury found all the essential ingredients of the offense present. As stated by the Court in United States v. Noble, supra:

> "...It is self-evident that a jury cannot perform its duty of determining the guilt of [illegible] accused of a crime unless they know the [illegible] ments of the crime which must [illegible]

A. The Trial Court Committed a Fundamental Error in Failing to Charge the Jury That An Essential Ingredient of the Offense Was That It Be Committed in "Time of War"

In the instant case there can be no doubt but that an essential ingredient of the crime of which petitioner was charged and sentenced was that the offense occur "in time of war". The statute under which Sobell was prosecuted was the wartime espionage statute. Section 32 of Title 50 provides in part "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...." It was under this provision of the statute that Judge Kaufman imposed a sentence of thirty years. Had the offense related to peacetime espionage, the statute then provided for a maximum sentence of twenty years imprisonment.*/

While it would seem that precedent need not be cited to support the obvious fact that "in time of war" is an essential ingredient of the offense here charged, we can find authority for such a principle of law in Stilson v. United States, 250 U.S. 583. The Supreme Court there cited with approval the charge of the trial court in a case involving a different section of the Espionage Act, Section 33 of Title 50, U.S.C. By its terms, Section 33 was applicable only "when the United States is at war". The trial court there charged the jury:

---

*/ In 1954 the Espionage Act was amended so as to provide for the death penalty in time of peace as well as in time of war. 68 Stat. 1219.

> "The next question for you to determine is the presence of essential elements. One of them is, for instance, that the United States is at war." ***
>
> "You must determine, for instance, the question of whether or not we are at war, because unless we are, this indictment goes for nothing."

The Supreme Court, in affirming the conviction, found the charge correct and of necessity affirmed the essentiality of this element of the offense. See also, Schaefer v. United States, 251 U.S. 466.

It cannot be said, on the basis of the record in this case and in view of the nature of the Court's charge, that the jury was ever asked to find or even consider the question of whether the offense was committed "in time of war." The only reference to wartime found in the charge was the reading of the indictment to the jury by the clerk of the court. It cannot be seriously argued that because the indictment included the phrase "in time of war" that the jury was advised and instructed that it had to find beyond a reasonable doubt that Sobell had committed this offense during time of war. Cf. United States v. Noble, supra. Indeed, the indictment at best was ambiguous in this respect. The phrase in the indictment "the United States of America, then and there being at war" related to the opening phrase of the indictment "on or about June 6th, 1944". Thus the phrase "the United States of America then and there being at war" did not relate to the phrase in the indictment "up to and including June 16, 1950."

The mere reading of the indictment did not serve to instruct the jury that "in time of war" was an essential ingredient of

the offense. The charge of the Court runs approximately twenty-five printed pages. Every legal aspect of the case was presented and a substantial portion of the evidence reviewed. It is inconceivable that the one mention of the term in the reading of a legally stilted phrase, "the United States of America then and there being at war", constituted advice or instruction to the jury that they must consider this element in determining the guilt or innocence of Sobell.

It is significant that the trial court in failing to charge with reference to "time of war" defined all the other essential elements of the offense and the indictment, itself. See pp. supra.

The exclusion from an otherwise detailed charge wherein all the elements of the offense, save one, were given, only served to remove from the jury's mind the essential element of "time of war". cf. Barry v. United States, supra.

B. Failure of the Trial Court to Explain The Meaning of the Term "In Time of War" to the Jury Service to deprive Petitioner of a Fair Trial.

It will not do to contend that the trial court's failure to charge with respect to this essential element of the offense, indeed, an element which if proved beyond a reasonable doubt, operated as a precondition to the imposition of either a death sentence or a term of imprisonment for thirty years, was cured and rendered harmless by utilizing the fiction that the term "in time of war" was of such common knowledge and easy comprehension

as to be clear to laymen of ordinary intelligence, that it was unnecessary for the trial judge to define or explain it.

On the contrary, the entire question of when a state of war exists in relation to the operability of diverse criminal and civil statutes has longtroubled the courts, the Congress and leading experts in the field. See e.g. National Savings & Trust Co. v. Brownell, 222 F. 2d 395, 397 (C.A.D.C.); compare, for example, Ludecke v. Watkins, 335 U.S. 160 and Hijo v. U. S., 194 U.S. 315, with Lee v. Madigan, 358 U.S. 228 (holding that the term "in time of war" must be construed in light of the particular statute involved -- and that it is the function of the Court to interpret the meaning of the term within the unique context of each statute).

Manley Hudson has observed that,

> "As to the termination of war, one date may be selected for dealing with a question relating to the exercise of special governmental powers, another date may serve in dealing with commercial questions, and a third date may be taken in the construction of a statute or contract provision."
>
> --"The Duration of the War Between the United States and Germany," 39 Harv. L.R. 1020, 1021.

When discussing the 1954 amendment to the Espionage Act, which made espionage a capital offense irrespective of when committed, in time of peace or war, Congressman Latham of the House Judiciary Committee stated the problem as follows:

> "At present the distinction between a wartime and peacetime state of affairs is rather shadowy. Sometimes it is a very close proposition as to whether we are at war or peace. It is was felt that these statutes should be made applicable [illegible] peacetime."
>
> [illegible]

Indeed, it cannot be said that the trial judge was free from doubt as to when a state of peace existed which would render inapplicable the wartime penalty provisions of the Espionage Act. On sentencing the defendants the trial judge's comments that the "incongruent penal provisions of the statute" (R. 2448) would not permit the imposition of a wartime sentence for espionage committed in 1951 (the defendants were sentenced on April 5, 1951) suggest that he was of the view that this country was not in a state of war in 1951. This is of crucial significance, inasmuch as the formal termination of a state of war with Germany did not take place until October 19, 1951 (Joint Resolution of Congress (65 Stat. 451) and Presidential Proclamation (66 Stat. c3), and not until April 28, 1952, was there a formal termination of war with Japan (Presidential Proclamation (66 Stat. c31)).

In view of the confusion existing in the entire area as to when a state of war is terminated, it was vital, indeed, the petitioner's very life and liberty depended on it, that the trial court properly charge and explain the term "in time of war" to the jury. For, "to fail to define the offense attributed to the accused and the essential elements which constitute it, is to assume that jurors are educated in the law -- an assumption which no one would undertake to justify." State v. Butler, 27 N.J. 560, 143 A. 2d 530, 550. But, as we have pointed out, the jury was not given any instructions with respect to this highly complex element of the offense. It is unlikely, in the absence of any guidance by the trial court, whether the jury ever considered this vital branch of the case at all. Cf. Barry v. U.S.,

supra. Not only did the trial court fail to either charge or explain this essential element of the offense, but by imposing the wartime penalty of thirty years imprisonment, it in effect took this essential element from the jury by assuming that they had found beyond a reasonable doubt that the petitioner had joined the conspiracy in time of war.

This, the trial court could not do. It was for the jury to determine the questions of fact encompassing this essential element of the offense, not the trial court. Schwachter v. U.S., supra, at p. 644 and cases thereat.

The trial court by necessity having determined that the petitioner had joined the conspiracy in time of war, a condition precedent to the imposition of a thirty year sentence, deprived petitioner of his constitutional right to be tried by jury and of the due process of law. U.S. v. Ogull, 149 F. Supp. 272 (S.D.N.Y.) aff'd. 252 F. 2d 664 (C.A.2).

We submit, that the failure to charge with respect to this essential element of the offense, an element which served to deprive petitioner of thirty years of his liberty and which could have been used as the basis for depriving him of his very life, amounted to a denial of due process of law. Cf. Kenion v. Gill, 155 F. 2d 176 (C.A.D.C.); U.S. ex rel Luscomb v. State of New York, 153 F. Supp. 1, 2 (S.D.N.Y.).

It will not do to look to the evidence (we discuss the nature of the evidence of petitioner's participation in the conspiracy during wartime, infra), in order to rationalize the verdict, since the failure of the trial court to charge and instruct the

jury with respect to this essential element of the offense "destroyed the possibility of a fair trial under the due process of law." Samuel v. U.S., supra, at p. 796; cf. Barry v. U.S., supra, at p. 342; Jordan v. U.S., 233 F. 2d 362 (C.A.D.C.) rev'd. in part on other grounds, 352 U.S. 904.

POINT II

PETITIONER IS PRESENTLY ENTITLED TO RELIEF PURSUANT TO SECTION 2255

There can be no real dispute that the nature of the cross-examination set forth in our companion memorandum of law (hereinafter referred to as the "Grunewald" point) along with the trial court's failure to charge or explain with respect to an essential element of the offense (Point I, supra), would have constituted reversible error if raised on direct appeal from the conviction. The crucial question here posed is whether the errors complained of are of such a nature as to render the judgment of conviction subject to collateral attack. As pointed out by Mr. Justice Frankfurter, a determination of this issue cannot be achieved by merely resorting to the "well-worn formula," that collateral attack cannot be made a substitute for appeal. Sunal v. Large, 332 U.S. 174, 184 (dissenting opinion). A more discriminating analysis is required.

As suggested by Judge Fahy,

> "It would seem clear that a failure to appeal from a conviction does not always save it from collateral attack on a constitutional ground or indeed on other grounds where the court is convinced justice requires a remedy though sought collaterally. In other words ==

> the great writ and Section 2255 are not to be imprisoned within an iron clad rule stated in terms of collateral relief not being a substitute for an appeal."
>
> --Hodges v. U.S. 228 F. 2d 858, 865 (C.A.D.C.)

The scope of Section 2255 is as broad as that of the writ of habeas corpus, U.S. v. Hayman, 342 U.S. 205. However, the precise scope of the writ of habeas corpus and a fortiori Section 2255 cannot be defined with precision. U.S. v. Thompson, 261 F. 2d 809 (C.A. 2). As stated by Judge Hand, no more definite rule as to the availability of the writ can be drawn other than that "the writ is available not only to determine points of jurisdiction stricti juris, and constitutional questions; but whenever else resort to it is necessary to prevent a complete miscarriage of justice." U.S. ex rel Kulick v. Kennedy, 122 F. 2d 642 (C.A. 2). It will always be available "whenever there clearly has been a fundamental miscarriage of justice for which no other adequate remedy is presently available." Sunal v. Large, supra, at p. 189 (dissenting opinion of Mr. Justice Rutledge).

A denial of the due process of law will always render a judgment of conviction subject to collateral attack. In the present case there has been a gross denial of due process. The judgment is therefore constitutionally deficient and subject to collateral attack.

While "the standards of justice" embodied in the concept of due process of law may not be "authoritatively formulated anywhere as though they were specifics" Rochin v. People of California, 342 U.S. 165, 169, it is the duty [illegible] a Court must, when called upon to review a judgment [illegible] exercise (its)

judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offense." Malinski v. People of State of New York, 324 U.S. 401, 416, 417.

It is elementary that "a fair trial in a fair tribunal is a basic requirement of due process". In re Murchison, 349 U.S. 133, 136. Can it be said that the petitioner obtained a fair trial? We think not.

Grunewald Point

It would unduly burden this Court to set forth in extenso what has been fully treated in our companion memorandum of law relating to the cross-examination of the defendant Ethel Rosenberg and its effect upon the petitioner.

The magnitude of the error far surpasses in its prejudicial effect anything heretofore condemned by the Supreme Court. Cf. U.S. v. Grunewald, 353 U.S. 391; Stewart v. U.S., 366 U.S. 1; and see the discussion at pp. of our companion memorandum of law.

Petitioner's entire case, his very life, depended upon the credibility of Ethel and Julius Rosenberg. If their testimony were believed by the jury, a verdict of acquittal would of necessity have had to be returned with respect to all of them (see discussion at pp. of our companion memorandum of law).

The defense case was destroyed and Ethel Rosenberg's credibility was drowned in a sea of improper and unfair questions put to her by the court and prosecution for only that purpose. Along with her was carried the petitioner.

The trial judge's participation in the destruction of Ethel Rosenberg's credibility brought with it the seal of doom for petitioner. The impact on the jury made by the trial court's questions and comments must have been enormous, since it is a truism that any jury gives "great weight" to a judge's "lightest word." Hicks v. U.S., 150 U.S. 442. The practice which was long ago condemned by the Supreme Court in Quercia v. U.S. 289 U.S. 466, 472, namely, the trial judge's "characterization of the manner and testimony of the accused (which) was of a sort most likely to remain firmly lodged in the memory of the jury and to excite a prejudice which would preclude a fair and dispassionate consideration of the evidence", epitomized the trial court's conduct in the case at bar. Not only did it repeatedly pursue a line of questioning in concert with the prosecution as to Ethel Rosenberg's invoking of her Fifth Amendment privilege before the grand jury, it also sought by questions and comments, and by veiled warning to ascertain from her the reasons why she was willing to testify on the trial as to the very same questions to which she previously asserted the privilege against self-incrimination.

We submit that this impermissible cross-examination rendered impossible any semblance of a fair trial to Morton Sobell and served to deprive him of the due process of law.

In the present case, the cross-examination of Ethel Rosenberg was not limited to bringing out before the jury that she had used the privilege and that this cast doubt on the credibility of her testimony. It was used to establish her guilt. Such conduct is so grossly unfair, such a departure from the concept of a fair

trial before a fair tribunal that we are faced here with more than the "grave constitutional overtones" of Grunewald. But, if that case is to have any vitality, if its reversal of the defendant Halperin's judgment of conviction with the stern admonition that the nature of the cross-examination possessed "grave constitutional overtones" (Grunewald v. U.S., supra, at p. 423) bears any germinal significance in the development of the concept of due process (see Stewart v. U.S., supra), then Morton Sobell's judgment of conviction must be set aside.

A. The trial court's failure to charge the jury with respect to an essential element of the offense of which petitioner was charged, or to explain to them the meaning of the term "in time of war" deprived petitioner of the due process of law.

Again, were this point raised on appeal, a reversal of petitioner's judgment of conviction would have been required.

Nevertheless, we submit that the failure of the trial court to charge the jury, or explain to them the meaning of an element of the offense which could serve to deprive petitioner of his life and which did serve to deprive him of thirty years of his liberty constituted a denial of due process. Kenion v. Gill, supra; U.S. ex rel Luscomb v. State of New York, supra (see discussion at pp. infra).

Since the jury returned a general verdict, there is no way of knowing whether they considered this vital branch of the case at all. Cf. Haupt v. U.S., 330 U.S. 631, 641; United Brotherhood of Carpenters & Joiners of America v. U.S., 330 U.S. 395, 408, 409; Barry v. U.S., supra, at p. 342; see also, U.S. v. Ogull, supra.

Obviously, no one can ascertain whether in fact the jury did or did not consider this branch of the case. Nevertheless, constitutional guarantees cannot be preserved by mere speculation. A man's liberty cannot be made to depend on such uncertainties. The record is clear that the trial court did not charge the jury with respect to an essential element of the offense. Equally clear is the trial court's failure to explain the meaning of the element "in time of war." These omissions were highlighted by the trial court's inclusion in its charge and explanations of every other element of the offense.

We must measure petitioner's conviction by the statute which defined the crime. As a consequence of the jury's verdict, petitioner was sentenced to a term of thirty years imprisonment. In order for the trial court to have imposed this sentence, the jury had to find "that all the elements of the crime charged shall be proved beyond a reasonable doubt." Christoffel v. U.S., supra, at p. 89.

Petitioner's "fundamental right that he be convicted only on proof of all the elements of the crime charged against him" (Christoffel v. U.S., supra, at p. 90) was vitiated to the point of constitutional invalidity when the jury was not instructed or advised as to an essential element of the crime (see cases cited in Point I, supra).

In effect, by imposing a thirty year sentence, the trial

completely. In either event, petitioner was denied his constitutional right to be tried by jury, United Brotherhood of Carpenters & Joiners of America v. U.S., supra; Schwachter v. U.S., supra; U.S. v. Ogull, supra; and his judgment of conviction must be set aside.

POINT III

IN ANY EVENT, PETITIONER IS ENTITLED TO RELIEF PURSUANT TO RULE 35 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 35 provides, in part, as follows:

"The Court may correct an illegal sentence at any time."

Putting aside the availability to petitioner of Section 2255, and assuming arguendo that the points raised by petitioner are insufficient grounds to set aside the judgment of conviction, he is, nevertheless, entitled to relief pursuant to Rule 35.

Petitioner was sentenced to a term of thirty years' imprisonment pursuant to Section 32 of Title 50, U.S.C. Section 32 provides, in part as follows:

> "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 communicate, deliver, or transmit to any foreign government... either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be imprisoned not more than twenty years; Provided, That whoever shall violate the provisions of sub-section (a) of this Section in time of war shall be punished by death or by imprisonment for not more than thirty years..."*/

*/ Sections 32 and 34 of Title 50 were repealed on June 25, 1948. 62 Stat. 862. These sections are now contained in consolidated form in Section 794 of Title 18.

It is therefore self-evident that the trial court was without power to impose the wartime sentence absent a determination by the jury that the Government had established petitioner's membership and participation in the charged conspiracy "in time of war" beyond a reasonable doubt. cf. United States v. Ogull, supra; see discussion at p. , supra.

In the instant case the Court did not charge the jury that it had to find that petitioner was a member of the conspiracy during time of war; nor did the Court explain the meaning of this term within the context of the Espionage Act of 1917. The jury therefore was deprived of the opportunity of resolving the issue of whether petitioner had joined the conspiracy in time of war; hence the Court, absent this finding by the jury, was without power to impose a wartime sentence.

As we shall show, the term "in time of war" as it applies to the Espionage Act, relates to a period of actual hostilities and not to a mere technical state of war. The character of the evidence adduced against Sobell was such that, even if believed, may have been legally insufficient to establish membership during time of war. In any event the evidence was of such a marginal nature that it raised a question of fact which the jury, had it been cognizant of the issue, may well have determined that petitioner had not joined the conspiracy in time of war. The marginal evidence adduced as to alleged wartime membership on the part of Sobell only accentuated the error on the part of the trial court in failing to allude to this vital element of the offense charged.

The evidence concerning Sobell during the period of actual hostilities was not only equivocal, but even if believed could hardly be competent to establish membership in the charged conspiracy.

The only testimony relating to the period of actual hostilities was as follows:

(1) There was testimony by Elitcher of a conversation he had with Rosenberg, in the absence of Sobell in June of 1944, wherein he stated Rosenberg told Elitcher that Sobell was also helping in getting information to the Soviet Union. (R. 312-315)

(2) Elitcher testified to a conversation with Sobell while they were on vacation in September, 1944, wherein Elitcher purportedly told Sobell of a previous conversation had with Rosenberg, referred to above. Elitcher testified that Sobell became angry and said "He should not have mentioned my name. He should not have told you that." (R.320, 321)

The testimony of Elitcher, referred to in Paragraph (1) above, as to Rosenberg's conversation in the absence of Sobell, could not be used to establish membership in the conspiracy. Declarations of alleged co-conspirators to a third party are admissible only if there is proof aliunde that the defendant is connected with the conspiracy. Glasser v. United States, 315 U.S. 60, 74; United States v. DeFillo, 255 F. 2d 835 (C.A. 2), cert. denied, 359 U.S. 915; Continental Baking Co. v. United States, 281 F. 2d 137, 152 (C.A. 6); Tripp v. United States, 295 F. 2d, 418, 422 (C.A. 10).

Elitcher's testimony referred to in Paragraph (2) above does not serve to cure this deficiency. It is obvious that Sobell's alleged statement could have impressed the jury as the declaration of an innocent man concerned by a false accusation. While conceivably an adverse inference might be drawn, it was so equivocal in nature that were the testimony against Sobell limited to this the Court may well have been required to dismiss the indictment and direct a judgment of acquittal.*/

But we are not here raising the question of evidentiary insufficiency. Since the Court did not charge the jury that they must find the petitioner was a member of the conspiracy in time of war, it was not given any authority by the jury to impose a wartime sentence.

A. "In Time of War" as Provided in the Espionage Act Must be Construed to Refer to the Period of Actual Hostilities Only.

The recent landmark case of Lee v. Madigan, supra, provides us with the approach to be utilized by the courts when confronted with the problem of interpreting the term "in time of war". The Supreme Court rejected the thesis that since the termination of a "state of war" is a political act, the courts

*/ Under the principle set forth in Thompson v. City of Louisville, 362 U.S. 199, a verdict based on such evidence may be found to be constitutionally invalid. See also, Tot v. U.S. 319 U.S. 463. Likewise, the judgment of conviction [illegible] subject to collateral attack. See Kermick v. U. S. [illegible] 529 (C.A. 8); Morris v. Mayo, 277 F. [illegible] (C.A. [illegible]

are precluded from making an independent judicial analysis regardless of executive fiat, stating:

> "We deal with a term that must be construed in light of the precise facts of each case and the impact of the particular statute involved." p. 231. Cf. Ludecke v. Watkins, 335 U.S. 160, 169.

The Court dealt with and distinguished away those earlier cases which ostensibly stood for the proposition that war does not terminate with the cessation of actual hostilities, but only by treaty, legislation or Presidential proclamation.*/ The Court insisted that a more particularized and discriminating analysis must be made.

The teaching of Lee v. Madigan is clear. The term "in time of war" must be analyzed by the courts in the context of the particular statute in which it appears. "Only mischief can result if those terms are given one meaning

*/See e.g., Ludecke v. Watkins, supra; Kahn v. Anderson, 255 U.S. 1; Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U. S. 146.

regardless of the statutory context." (at p. 231)*/ See also, In re Yokoyama, 170 F. Supp. 467, 469 (S.D. Calif.).

In light of Lee v. Madigan, supra, we must turn to the legislative history of the Espionage Act of June 15, 1917, for it was under this statute that petitioner was convicted and sentenced. As we have pointed out in Point I B, supra, the

*/It is interesting to note that even prior to Lee v. Madigan, supra, the United States Court of Military Appeals had taken a similar approach with respect to the problems involving wartime penalties and the jurisdiction of various military tribunals for offenses committed during the Korean conflict. Notwithstanding the fact that no formal state of war existed it upheld the imposition of punishments which could only be invoked in "time of war", taking the position that:

> "The factors which make certain offenses...more heinous and reprehensible in time of war depend upon the existence in fact of substantial armed hostilities, regardless of whether those hostilities have been formally declared to constitute 'war' by action of the Executive and Congress."

United States v. Gann, 3 U.S.C. M.A. 12, 11 C.M.R. 12 (1953); See, also, United States v. Bancroft, 3 U.S.C.M.A. 3, 11C.M.R.3 (1953); United States v. Ayers, 4 U.S.C.M.A. 220, 15 C.M.R. 220 (1954); United States v. Aldridge, 4 U.S.C.M.A. 107, 15 C.M.R. 107 (1954); United States v. Anderten, 4 U.S.C.M.A. 354, 15 C.M.R. 354 (1954). Conversely, the Court was also faced with the problem as to when the Korean conflict qua "war" terminated. It wisely selected July 27, 1953, the date when an Armistice was effectuated between the United Nations Command and the enemy, its rationale being that the Armistice ended

> "those actual hostilities essential to a finding of 'a time of war'..."
>
> "Armed combat ended and battlefield conditions ceased; there was no more shooting and there were no more battle casualties...."

United States v. Shell, 7 U.S.C.M.A. 646, 23 C.M.R. 110 (1957); Accord: United States v. Bustin, 7 U.S.C.M.A. 661, 23 C.M.R. 125 (1957).