CONFIDENTIAL

September 27, 1962

BY COURIER SERVICE

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

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

My dear Mr. O'Donnell:

The following information furnished by a confidential source, who has furnished reliable information in the past, concerns the latest activity of the Committee to Secure Justice for Morton Sobell.

The Committee held a national conference recently in New York City where plans were discussed to further the campaign to obtain the freedom of Morton Sobell. The Committee decided to send someone abroad in February, 1963, to contact important people in Europe in an effort to persuade them to come to the United States in May, 1963, and call upon President John F. Kennedy and ask him to free Sobell. It was also decided to have the Sobell family call upon President Kennedy for an audience on the occasion of the feast of Yom Kippur on October 8, 1962. On Thanksgiving Day, November 22, 1962, Rose Sobell, mother of Morton Sobell, will make an attempt to see President Kennedy at the White House. She expects to capitalize on publicity which will result from this attempt. Finally, the Committee agreed to contact well-known women to initiate a letter-writing campaign to Mrs. Jacqueline Kennedy on behalf of Morton Sobell.

This information is being furnished to the Attorney General.

Sincerely yours,

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

101-2483
NOT RECORDED
167 SEP 28 1962

RJR:mar
(11)

SEE NOTE ON YELLOW PAGE 2

53 OCT 3 1962

ALL FBI OFFICES
ADVISED BY ROUTING SLIP(S): Washington Field
DATE 5-23-78

DECLASSIFIED BY 3043 PWT/lmw
ON X
ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 4/26/84 4/28/84

CONFIDENTIAL

original filed in 100-387835-29A3

CONFIDENTIAL

Honorable P. Kenneth O'Donnell

NOTE ON YELLOW:

The information contained in this letter was furnished in the memorandum enclosure to New York airtel 9/24/62 captioned "Committee to Secure Justice for Morton Sobell, IS - C, ISA-50." The information was furnished by [redacted] and the letter is being classified "Confidential" as it contains information from this source, the unauthorized disclosure of which could tend to identify the source and thus be prejudicial to the defense interests of the Nation. b2 b7D

The Committee to Secure Justice for Morton Sobell and Morton Sobell have been characterized in previous correspondence with the Attorney General and O'Donnell. This information has been disseminated to the military intelligence agencies and Secret Service.

CONFIDENTIAL

OPTIONAL FORM NO. 10

UNITED STATES GOVERNMENT

Memorandum

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

TO : MR. BELMONT

DATE: October 24, 1962

FROM : C. A. EVANS

SUBJECT: MORTON SOBELL
ESPIONAGE

In connection with the Morton Sobell case, Mr. Richard Chappell, Chairman of the Parole Board, called to advise that a hearing will be held for Sobell on October 30, 1962. Mr. Chappell expressed his appreciation for the valuable information which his office has been receiving from the Bureau in connection with the activities of the Committee to Secure Justice for Morton Sobell. Mr. Chappell stated that he wanted the Bureau to know of this contemplated hearing and to extend an invitation to the Bureau to have someone present at the hearing if we so desired. Mr. Chappell indicated there would be a number of witnesses, possibly of all varieties, which undoubtedly would be produced at this hearing.

The Bureau is fully aware of the activities of the Committee to Secure Justice for Morton Sobell and we have been furnishing the Department with considerable information on an up-to-date basis regarding this organization.

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 4/25/87 BY 3042 PWT/mw

ACTION:

It is not believed that the Bureau should have anyone present at any such hearing as referred to by Mr. Chappell. Mr. Chappell was thanked for his appreciative remarks concerning the information which has been received by him emanating from the Bureau, and he was advised that considering the circumstances, it was not believed desirable for the Bureau to have someone present at this contemplated hearing. Mr. Chappell stated he fully understood and would, of course, furnish the Bureau with any pertinent information which might be of interest to us.

A copy of this memorandum has been designated for the Domestic Intelligence Division who is fully aware of the Committee to Secure Justice for Morton Sobell and is following this matter closely.

50 NOV 2 1962

1 - Mr. Sullivan
1 - Mr. Rampton

CHS:dlb
-6-

EX-113 REC-1

101-2483-1502

50 OCT 26 1962

File cc in 100-387835

Enclosure copy 100-387835

DEPARTMENT OF SOCIAL ACTION

NATIONAL CATHOLIC WELFARE CONFERENCE
1312 MASSACHUSETTS AVENUE, N.W., WASHINGTON 5, D. C.
CABLE ADDRESS: ENNSEE TELEPHONE: REPUBLIC 7-3553

October 24, 1962

Mr. William C. Sullivan
Federal Bureau of Investigation
Washington 25, D. C.

Morton Sobell

Dear Bill:

The enclosed is another communication sent to me at my house. You may wish to have this for your files.

With warm personal regards, I remain

Sincerely yours,

[redacted]

b7C
b7D

JFC/mfl
Enclosure

2 ENCLOSURES

Info in attached previously received in WFO LHM, 10-24-62 which was disseminated to G-2, ONI, OSI, AAG yearly, Parole Board on 10-25-62 and names marked for indexing. LHM was under CSJMS caption. 101-2483-1503

REC-22

13 OCT 29 1962

File in Morton Sobell File

5

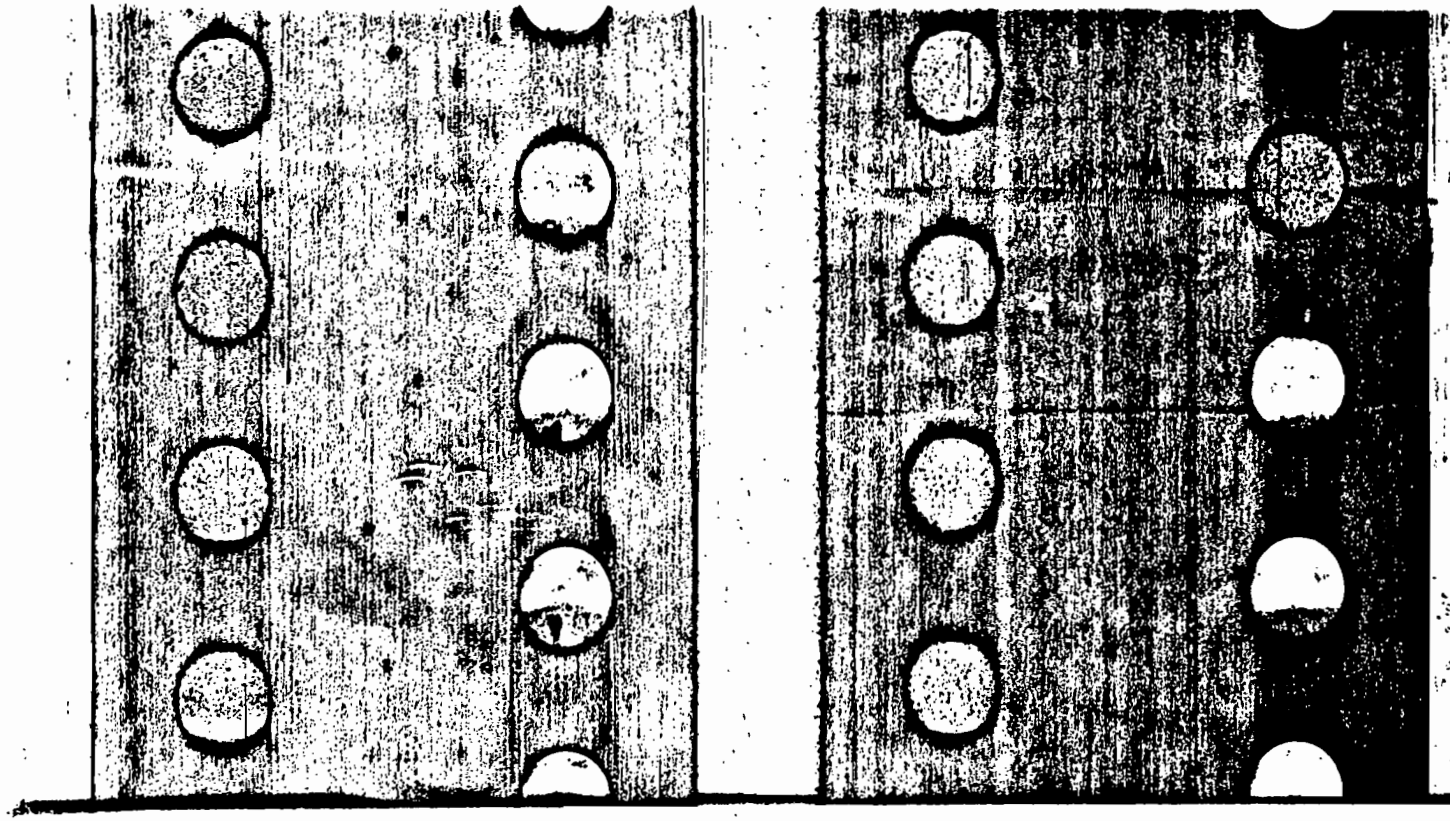
File
101-2483

You are cordially invited to attend a reception for Rev. David Andrews; Baltimore, Maryland; Prof. Lloyd H. Donnell, Chesterton, Indiana; Rev. John E. Evans, Columbus, Ohio; Rev. Erwin A. Gaede, Ann Arbor, Michigan; Rabbi Philip Horowitz, Cleveland, Ohio; Dr. Tom Levin, New York, New York; Dwight MacDonald, New York, New York; Malcolm Sharp, Chicago, Illinois; and Gerhard Van Arkel, Washington, D. C., who will be in Washington, D. C. to appear at a Parole Board hearing on behalf of Morton Sobell on the following day.

RECEPTION: INTERNATIONAL HOUSE
1825 R STREET, N.W.
WASHINGTON, D. C.

MONDAY, OCTOBER 29, 1962 8:30 P. M.

ENCLOSURE



It is urgent that you write a letter to the Parole Board urging favorable action on Sobell's petition.

Please write and urge others to write to

U.S. BOARD OF PAROLE
H.O.L.C. BUILDING
FIRST & D STREETS, N.W.
WASHINGTON 25, D. C.

ENCLOSURE

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

FBI

Date: 10/26/62

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

Via AIRTEL
(Priority or Method of Mailing)

TO: DIRECTOR, FBI (101-2483)

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

SUBJECT: MORTON SOBELL aka
ESP-R
(OO: New York)

Enclosed herewith is one copy of Government's brief on appeal and one copy of appendix to Government's brief in this matter to the U.S. Circuit Court of Appeals, Second Circuit.

AUSA ROBERT J. GENIESSE, SDNY, advised on 10/26/62, that oral argument of the appeal has not as yet been scheduled by the CCA but he expected to have the matter ARGUED in the latter part of November 1962.

Since only one copy of the enclosures was obtained no copies are being retained NYO.

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

EFM:rmp
(6)

ENCLOSURE
ENCL. BEHIND FILE

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 4-9-85 BY 3042 PWT

REC-25 101-2483-1504

15 OCT 29 1962

ESP-SEC.

cc Wick

Approved: NOV 6 1962 Sent _____ M Per _____
Special Agent in Charge

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 1/29/83 BY [illegible]

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. [illegible]

UNITED STATES OF AMERICA,

[illegible]

MORTON SOBELL,

[illegible]

On Appeal From the United States District Court for the Southern District of New York

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BRIEF FOR THE UNITED STATES OF AMERICA

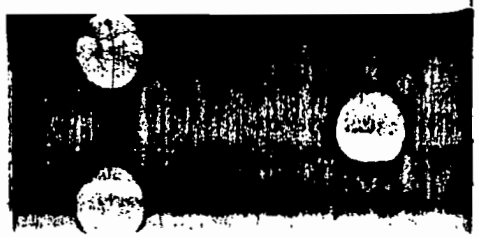
VINCENT L. BRODERICK,
United States Attorney for the Southern District of New York,
Attorney for the United States of America.

[illegible] J. [illegible]
ARTHUR I. [illegible]
Assistant United States Attorneys,
Of Counsel.

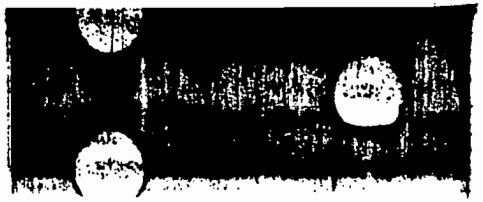
INDEX

TABLE OF CITATIONS

Cases



STATUTES, RULES AND OTHER AUTHORITIES



United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 27558

UNITED STATES OF AMERICA,

Appellee,

– v –

MORTON SOBELL,

Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Morton Sobell appeals from an order of the Honorable John F. X. McGohey denying a motion, pursuant to Title 28, United States Code, Section 2255, to set aside the judgment of conviction and sentence imposed upon appellant, and pursuant to Rule 35, Federal Rules of Criminal Procedure, to correct said sentence. Judge McGohey's opinion is reported at 204 F. Supp. 225.

Indictment C 134-245, filed January 31, 1951, charges Julius Rosenberg, Ethel Rosenberg, Morton Sobell, David Greenglass and Anatoli A. Yakovlev with conspiring to commit espionage on behalf of the Soviet Union in violation of Title 50, United States Code, Sections 32 and 34.

Greenglass pleaded guilty prior to the trial and Yakovlev left the United States in December 1946 and has never been apprehended. On March 29, 1951, after a trial of fourteen days before the Honorable Irving R. Kaufman and a jury, appellant Sobell and Julius and Ethel Rosenberg were found guilty. On April 5, 1951, Sobell was sentenced to thirty years' imprisonment.

The convictions were affirmed by this Court on appeal, *United States* v. *Rosenberg*, 195 F. 2d 583 (2d Cir.), *rehearing denied*, 195 F. 2d 609 (2d Cir. 1952), and petitions for certiorari were denied by the United States Supreme Court, 344 U.S. 838, *rehearing denied*, 344 U.S. 889 (1952).

Following the original denial of certiorari, a large number of collateral attacks and original proceedings were commenced on behalf of Sobell and the Rosenbergs. A summary of these post-trial proceedings is set forth in the Statement of Facts.

The motion herein was filed on January 3, 1962, over ten years after Sobell's sentence was imposed; it is the fifth motion by Sobell pursuant to Section 2255. The motion attacks the sentence on the grounds that (a) the Trial Judge failed to charge the jury that they must find that Sobell joined the conspiracy "in time of war" and (b) the cross-examination of Ethel Rosenberg improperly elicited the fact that she had invoked the Fifth Amendment before the Grand Jury to some of the same questions which she answered at trial.

Statutes and Rules Involved

TITLE 28, UNITED STATES CODE, SECTION 2255

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

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

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

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

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

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

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

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. (June 25, 1948, ch. 646, 62 Stat. 967; May 24, 1949, ch. 139, § 114, 64 Stat. 105.)

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

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

Whoever with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any

document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years: *Provided*, That whoever shall violate the provisions of subsection (a) of this section in time of war shall be punished by death or by imprisonment for not more than thirty years; . . . (June 15, 1917, c. 30, Title I, § 2, 40 Stat. 218.)

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

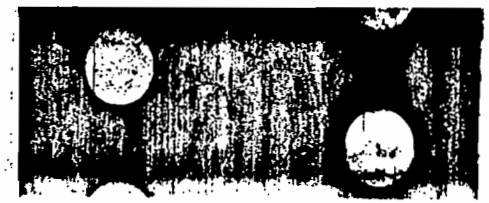
§ 34. *Conspiracy to violate preceding sections.*

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

RULE 30, FEDERAL RULES OF CRIMINAL PROCEDURE

Instructions.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse par-



ties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

RULE 35, FEDERAL RULES OF CRIMINAL PROCEDURE

Correction or Reduction of Sentence.

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.

Statement of Facts

The Time of the Conspiracy—1944-1950

The indictment on which the jury returned its verdict of guilty charged that "on or about June 6, 1944, up to and including June 16, 1950, * * * the defendants herein, did, the United States then and there being at war, conspire * * * to violate subsection (a) of Section 32, Title 50, United States Code * * *" (1a).* Twelve overt acts were

* References with the prefix "R" are to the record on appeal. Those with the prefix "SA" are to appellant Sobell's appendix. All other references are to the Government's appendix.

alleged, the last of which occurred on January 14, 1945, well prior to the end of World War II hostilities.* The Government expressly alleged, in response to a motion for a bill of particulars, that Sobell joined the conspiracy on or about June 15, 1944 (SA. 19).

The Supreme Court found, in a *per curiam* opinion vacating a stay granted to the Rosenbergs by Mr. Justice Douglas on the basis of the possible applicability of the Atomic Energy Act, that: "A conspiracy was charged and proved to violate the Espionage Act in wartime." *Rosenberg* v. *United States*, 346 U.S. 288, 289 (1953). A concurring opinion by Mr. Justice Jackson, joined in by Mr. Chief Justice Vinson and Mr. Justices Reed, Burton, Clark and Minton, observed: "The crime here involved commenced June 6, 1944." *Id.* at 290. Mr. Justice Frankfurter, in a dissenting opinion on the same issue, concluded: "Only one conspiracy could have been found by the jury to have existed, and that was the conspiracy averred in the indictment, a conspiracy continuous from a date certain in 1944 to a date certain in 1950." *Id.* at 304.

The Nature of the Conspiracy

The conspiracy charged and proved at trial had as its "single unified purpose * * * the transmission to the Soviet Union of any and all information relating to the national defense * * *." *United States* v. *Rosenberg*, 195 F. 2d 583, 601 (2d Cir. 1952). Its most notorious success was the theft and transmission of secret information relating

* Japan surrendered on August 14, 1945. The end of World War II hostilities was declared by Presidential proclamation on December 31, 1946, but the proclamation expressly stated that "a state of war still exists." Proclamation No. 2714, 61 Stat. 1048 (1946).

to the development of the atomic bomb. Of equal importance, however, was the obtaining of other categories of national defense information and the recruitment of new members for the espionage ring.

In the Fall of 1944 the Rosenbergs enlisted the services of Mrs. Rosenberg's brother, David Greenglass, to obtain information about the atomic experiments being conducted at Los Alamos, New Mexico. Greenglass was then stationed at the Los Alamos experimental project as an Army machinist (R. 549-52). The proposal was first made to Greenglass' wife, Ruth, who was about to visit her husband in New Mexico (R. 589-93, 971-76). Julius Rosenberg stressed that the atomic bomb should be shared with "our ally," the Soviet Union (R. 973-74).

Ruth Greenglass transmitted the Rosenbergs' proposal to her husband and on her return to New York conveyed to the Rosenbergs the first data supplied by Greenglass, including the location of the Los Alamos project and the security measures in force there (R. 592-95, 979-81).

In January (R. 596-982) and again in September 1945 (R. 689-90, 1007) David Greenglass came to New York on furlough. On the first visit he gave the Rosenbergs handwritten notes and sketches describing atomic equipment (R. 596-98, 612-15, 982-84) and, at their request, passed technical data relating to atomic equipment to an unknown Russian (R. 633-37). On the second occasion he supplied notes concerning the atom bomb, and a sketch of a cross-section of the bomb (R. 700-01, 1009-1010). On each occasion his handwritten notes were typed by Ethel Rosenberg (R. 621, 632, 722-23, 985, 990, 1010).

In June 1945, Greenglass delivered further information to Harry Gold, who had come to New Mexico and identified himself in a manner previously agreed upon by Greenglass and Julius Rosenberg (R. 637-47, 737, 1002-06, 1191-98). Gold, who had been engaged in espionage activities on behalf of the Soviets since 1935 (R. 1161), transmitted the information to his superior, Yakovlev (R. 1158, 1171, 1199-1201).

In addition to information about the atomic bomb, Greenglass was requested by Julius Rosenberg to furnish the names of scientists working on the Los Alamos project (R. 593-94, 597, 975), and of personnel at Los Alamos who might be recruited into the conspiracy as additional sources of information (R. 613). Such information was supplied by Greenglass both to Julius Rosenberg (R. 594, 597-98, 613, 979-81) and Harry Gold (R. 644). When Greenglass was discharged from the Army in February 1946, Rosenberg suggested that he attend, with Soviet financial assistance, one of several educational institutions for the purpose of cultivating the friendship of nuclear scientists he had known at Los Alamos and acquiring new friends as well (R. 729-30).

From 1946 to 1949 Rosenberg also subsidized American students and supplied to the Soviet Union information obtained from contacts in Ohio and upstate New York, including the General Electric plant at Schenectady (R. 731-731a) where Sobell was working during 1946 and part of 1947 (R. 329-42).

Sobell's Role in the Conspiracy—1944-1948

Sobell's role in the conspiracy was that of supplying information to Julius Rosenberg for transmission to the Soviet Union and recruiting new sources of information. His participation was conclusively shown by the testimony of Max Elitcher and by evidence of his flight to Mexico in 1950.

Sobell and Elitcher were high school and college classmates (13a, 36a, 39a-40a, R. 256, 282, 286). From April 1939 to September 1941 they roomed together in Washington, D. C., where both worked for the Bureau of Ordnance of the Navy Department (12a-13a, 48a-50a, R. 255, 296-97). In 1939 Sobell recruited Elitcher into the Communist Party (20a-25a, 49a-51a, R. 264-68, 297-99). As chairman of Elitcher's Communist Party group, Sobell instructed the members to support the cause of Soviet Russia (50a-57a, R. 299-305). Sobell remained in the group until he left Washington in September 1941 (50a-51a, 56a, R. 297, 305). Between that time and 1944, Elitcher and Sobell saw each other twice, on occasions when Sobell visited Washington (62a, R. 312).

Julius Rosenberg was also a college classmate of Elitcher, but Elitcher did not know him as well as he knew Sobell (26a, 40a, R. 270, 286). Rosenberg's first contact with Elitcher after their graduation in 1938 was a visit in June 1944 to Elitcher's home in Washington, D. C. (26a, 62a-64a, R. 270, 312-13). At that time, Rosenberg told Elitcher, who was working on anti-aircraft and missile control equipment (27a-31a, R. 27-76), that the war effort of the Soviet Union was being impeded by the withholding of military information by the United States

(26a-27a, R. 270-71). To counteract this, he explained, many people were furnishing the Soviet Union with classified information about military equipment. Rosenberg then asked Elitcher to turn over plans, blueprints and the like to him for micro photographing (26a-31a, R. 270-76). He said that any such information would be returned and that precautions would be taken to prevent the microfilm from falling into the wrong hands (30a, 64a, R. 275, 314). To reassure Elitcher, Rosenberg confided that Sobell was among those who were giving him military information for transmission to the Soviet Union (65a-67a, R. 315-17).

In September 1944 Elitcher told Sobell of the conversation with Rosenberg and that Rosenberg had told him that Sobell was contributing military information (69a-70a, R. 320-21). Sobell became very angry and said: "[H]e should not have mentioned my name. He should not have told you that" (70a, R. 321). Elitcher tried to persuade Sobell that Rosenberg knew of their close relationship and therefore felt safe in confiding in him, but Sobell insisted: "It makes no difference, he shouldn't have done it" (70a, R. 321).

In September 1945 Rosenberg visited Elitcher in Washington. He again inquired whether Elitcher, who was now working on sonar fire control devices (75a-77a, R. 327-29), would supply information. Elitcher answered equivocally (75a, 77a, R. 327-29).

In the course of his Navy Department duties, Elitcher from time to time visited the General Electric plant in Schenectady, New York, where Sobell was working (72a, R. 329). On one of those visits, in the early part of 1946,

Sobell inquired whether Elitcher could obtain reports regarding a fire control system on which Elitcher was working (77a-80a, R. 329-32). Elitcher replied that a descriptive pamphlet was in the course of preparation (81a, R. 333). On another visit later in 1946 Sobell again asked about the status of the pamphlet. Upon learning that the pamphlet was not yet completed, Sobell suggested that Elitcher see Julius Rosenberg in regard to it (82a, 203a-04a, R. 334-35, 492-94).

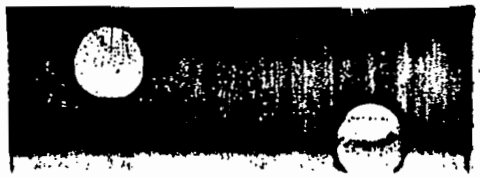
Elitcher followed Sobell's suggestion and visited Rosenberg in New York. At that time, however, Rosenberg stated that there might be a "leak" in his espionage system and that he preferred Elitcher not to visit him until he was notified to do so. He also told Elitcher to discontinue his Communist Party activities (85a-89a, R. 338-42).

In the latter part of 1947 Morton Sobell left the General Electric Company in Schenectady and began working for the Reeves Instrument Company in New York City. He continued, however, to work on classified projects (89a, R. 342-43). At about this time Elitcher visited the Reeves Company and saw Sobell, who inquired whether Elitcher knew of any "progressive" engineering students or graduates who would be safe to approach on the question of getting classified information for espionage purposes. Elitcher replied that he did not but that if somebody came along he would let Sobell know (31a-34a, 90a, R. 276-79, 344). Elitcher then described to Sobell certain difficulties he was having with his wife. Sobell was concerned and asked Elitcher whether his wife knew anything about "this espionage business" (91a, R. 344). Elitcher said he thought she might know something but that he wasn't sure. Sobell replied, "Well, that isn't good." (91a, R. 345).

In June 1948 Elitcher told Sobell that he wanted to find a job in private industry in New York. Sobell arranged a meeting with Julius Rosenberg at which both Rosenberg and Sobell tried unsuccessfully to dissuade Elitcher from leaving Naval Ordnance because they needed a source of information there (91a-95a, R. 345-49).

In July 1948 Elitcher drove his family from Washington, D. C., to New York City, and on the way noticed that he was being followed. In New York, he went to Sobell's house, where he planned to stay. When Sobell learned that Elitcher might have been followed, he became angry and said that Elitcher should not have come to his house under the circumstances (96a-98a, R. 351-53). Sobell then insisted on delivering to Rosenberg that night a 35-millimeter film can which "was too valuable to be destroyed and yet too dangerous to keep around" (98a, R. 354). They drove to Manhattan, and while Elitcher waited in the car, Sobell left to deliver the film can to Rosenberg. When he returned, Elitcher asked him what Rosenberg thought about Elitcher's being followed. Sobell replied that Rosenberg had said that he "once talked to Elizabeth Bentley on the phone but he was pretty sure she didn't know who he was and therefore everything was all right" (99a, R. 355). Elizabeth Bentley at that time was revealing to the authorities her prior espionage activities (99a-100a, R. 355-56).

In October 1948 Sobell again asked Elitcher whether he knew any engineering students who would be likely sources of military information. This time, however, Sobell said that in order to avoid suspicion he wanted



students who were not involved in any progressive activities (R. 345-46).

Sobell's Flight to Mexico—1950

The espionage activities of the Rosenbergs and Sobell ended in 1950 after the arrest of Dr. Klaus Fuchs, the British atomic scientist, for espionage on behalf of the Soviet Union. In February of that year Rosenberg told Greenglass that the man who had contacted him in New Mexico (Harry Gold) was also a contact of Dr. Fuchs and that the latter's arrest would eventually lead to Greenglass. Rosenberg warned Greenglass to make plans to leave the country and promised that the Soviets would furnish money to pay Greenglass' debts (R. 741-44).

In May 1950 Harry Gold was arrested. Rosenberg warned Greenglass that Greenglass would be next and that he and his family would have to leave the country shortly. He gave Greenglass $1,000 and outlined an escape route by way of Mexico City to Vera Cruz, and then to Czechoslovakia by way of Sweden. The Soviet Union itself was the ultimate destination (R. 744-51, 1018-19). Rosenberg informed the Greenglasses that he and his wife likewise were going to flee and that they would meet in Mexico. Rosenberg did in fact take the preliminary steps of ascertaining from his physician what inoculations were needed for a trip to Mexico (R. 1235) and of having passport pictures taken of himself and his family (R. 2126-31).

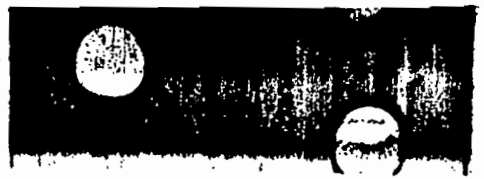
A week later Rosenberg gave David Greenglass $4,000 more and asked Greenglass to repeat the flight instructions, which Greenglass did (R. 756-57).

In June 1950 Sobell and his family fled from this country to Mexico. For a time they lived in Mexico City (R. 1344-47). There Sobell asked a neighbor named Rios whether he knew how one could leave Mexico without having his papers in order. He told Rios that he was worried because the military police were on the lookout for him to take him back into the United States Army, and that he was afraid to return to the Army because he had already experienced one war. He then asked Rios for instructions on how to go to Vera Cruz (R. 1348-50). The statement by Sobell that the military police were looking for him was untrue. Sobell had not served in the Army during the war but had at all times been in a deferred classification (R. 1417-19).

While outside Mexico City Sobell sent two letters to his wife in envelopes addressed to Rios and bearing no return address; one was postmarked from Vera Cruz, and the other from Tampico, Mexico's two leading seaports (R. 1351-53). In his travels to these seaports and return to Mexico City, Sobell used no less than five aliases (R. 1358, 1362-63, 1365-67, 1370, 1371-72). He also sent two letters from Mexico City to relatives in the United States. He used ficticious return addresses and sent the letters to William Danziger, a friend in New York City (R. 1252-58). Sobell's apprehension and expulsion to the United States by the Mexican police in 1950 thwarted any further plans for escape (R.1516-26).

The Relationship between Ethel Rosenberg's Testimony and Sobell

David and Ruth Greenglass and Harry Gold were the Government's principal witnesses against the Rosenbergs. It was the testimony of the Greenglasses which implicated Ethel Rosenberg.



Max Elitcher was the principal witness against Sobell. Six other witnesses, including Rios and Danziger, testified regarding Sobell's flight and activities in Mexico.

At the close of the Government's case, both Julius and Ethel Rosenberg took the witness stand. Sobell did not testify and called no witnesses in his own behalf.

Elitcher's testimony, outlined above, did not refer to Ethel Rosenberg nor to events which took place in her presence. His testimony involved entirely different transactions from those related by the Greenglasses in their testimony against Ethel Rosenberg. The Greenglasses at no time mentioned Elitcher's name (R. 547-1133, *passim*); nor did Elitcher refer to the Greenglasses except to deny, on cross-examination, that he knew them (R. 474). Finally, at no time while she was on the stand did Ethel Rosenberg refer to Sobell or to Elitcher, nor did she testify about any of the events referred to in Elitcher's testimony.

The Wartime Factor during the Trial

The fact that the indictment charged a wartime conspiracy to commit espionage and that the case therefore involved capital punishment was apparent throughout the trial.

Prior to the trial, a list of potential Government witnesses was given to the defense (6a, R. 11); the defense was allowed thirty challenges to the jury panel (7a, R. 13); potential jurors were questioned on their views of capital punishment and some members of the panel were excused on this ground (8a-10a, R. 37, 153-55, 175).

In its opening the prosecution stated:

> "The significance of a conspiracy to commit espionage takes on added meaning where the defendants are charged with having participated in this conspiracy against our country, at this, the most critical hours in our history in time of war, around 1944." (11a, R. 221)

Most of the testimony related to the period of actual hostilities. Indeed, Julius Rosenberg's avowed purpose when he was trying to persuade the Greenglasses and Elitcher to join the conspiracy was to assist "our wartime ally" (26a-27a, R. 270-71, 592, 973-74). During the direct and cross-examination of Julius Rosenberg there were references to the war effort of the allies, particularly that of the Soviet Union (246a, R. 1610), to the opening of the second front (256a, R. 1734) and to the advances the Soviet army made in the winter campaign against the Nazi army (258a-59a, R. 1743-44). David Greenglass was cross-examined on his knowledge that the penalty for the crime charged was death (241a, 242a, R. 768, 794).

In summation, counsel for the Rosenbergs referred to the fact that Julius Rosenberg had expressed certain views about the Soviet Union "which may have been all right when the Soviet Union and the United States were Allies, but today it is anathema" (270a, R. 2207). Rosenberg's avowed interest in a second front was also referred to (271a, R. 2230).

The death penalty was also referred to on summation by counsel for the Rosenbergs (269a, R. 2173, 2197), by counsel for Sobell (272a-73a, R. 2241, 2242, 2245, 2254), and by the Government (274a, R. 2285). After the Court

had instructed the jury to disregard counsel's references to punishment, counsel for Sobell stated in his summation (273a, R. 2242):

> "All I know is what I read in the statute, and that, I presume is something that I can comment on, and the statute says for this crime that Mr. Elitcher is trying to prove Mr. Sobell guilty of, he can get up to thirty years or death. That is what the statute says."

Excerpts from the Charge to the Jury Relating to the Time of the Conspiracy and to Sobell

At the beginning of the Trial Court's charge the entire indictment was read to the jury (R. 2331-34). As noted above, the indictment alleged the existence of a conspiracy "On or about June 6, 1944, up to and including June 16, 1950, * * * the United States of America then and there being at war * * *" (1a). Further, the indictment was, with the consent of defense attorneys, sent to the jury room after the charge (R. 2373).

The Trial Court also charged at the outset:

> "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. 2341-42),

and that one of the overt acts alleged in the indictment had to be proved beyond a reasonable doubt.

As to Sobell, the Court charged in part:

> "To determine whether Morton Sobell was a member of the conspiracy you are only to consider the testimony of Max Elitcher, William Danziger and the testimony relating to the defendant Sobell's alleged attempt to flee the country.
>
> "If you do not believe the testimony of Max Elitcher as it pertains to Sobell, then you must acquit the defendant Sobell" (R. 2355).

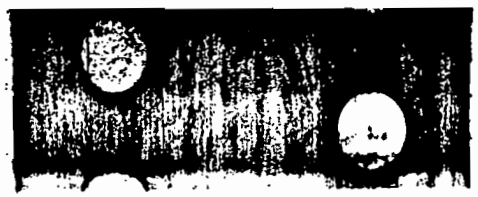
The Court concluded the recital of the evidence as follows:

> "The defendant Morton Sobell has entered a plea of not guilty to the charge in this case. By doing so he has put in issue every material allegation in the indictment, and the Government must prove each and every material allegation beyond a reasonable doubt.
>
> "Counsel for Sobell contend that Sobell was not a member of the conspiracy, that Elitcher is a perjurer who should not be believed, and that the Government has failed to prove Sobell guilty beyond a reasonable doubt as required" (R. 2359).

None of the requests to charge submitted by defense counsel (R. 1771) related to the wartime element (R. 2314-24); nor was any issue raised with respect to the charge on the wartime element in any of the exceptions taken to the charge by defense counsel (R. 2367-71).

Post-Trial Proceedings

The convictions of Sobell and his co-defendants were followed by an extraordinary number of judicial proceedings, including six prior motions pursuant to Section 2255. Each of appellant's present contentions has been raised in at least one of the prior proceedings.



a. *Prior Raising of the Grunewald Point*

The convictions were first affirmed by this Court in a detailed opinion which commenced:

> "Since two of the defendants must be put to death if the judgments stand, it goes without saying that we have scrutinized the record with extraordinary care to see whether it contains any of the errors asserted on this appeal." *United States* v. *Rosenberg*, 195 F.2d 583, 590 (2d Cir. 1952).

One of the contentions urged on appeal and specifically rejected by this Court was that the conduct of the Trial Judge had deprived the appellants of a fair trial. *Id.* at 592-95. The Rosenbergs' brief on appeal cited as an alleged example of partisan conduct the cross examination of Ethel Rosenberg now urged as one ground for the relief sought herein. *Brief for Appellants (Rosenbergs)*, pp. 98-99, *United States* v. *Rosenberg*, No. 22202, 2d Cir., 1951.*

Sobell's brief adopted the Rosenbergs' arguments. *Brief for Appellant (Sobell)*, p. 59, *United States* v. *Rosenberg*, No. 22202, 2d Cir., 1951. The same point was alleged in the Rosenbergs' original petition for certiorari and the

* The language of the brief was as follows:

"The prosecutor had pounded away at Ethel's invocation of privilege against self-incrimination before the Grand Jury in her two appearances in August, 1960, and continued to cling to the subject (R. 2048, 2051-2). Then the court, despite a thorough exploration of the questions involved, refastened on the jury's mind that the witness answered questions on the trial whereas she declined to answer on the grounds of self-incrimination before the Grand Jury (R. 2070) and then iterated (R. 2073), reiterated (R. 2077), reaccented (R. 2082) and re-emphasized (R. 2085) the same subject."

appendix thereto. *Petition for Certiorari (Rosenberg)*, pp. 16, 31-39, *Rosenberg* v. *United States*, No. 111 (October Term 1952); *Appendix*, p. 38. Sobell's original petition for certiorari also expressly adopted the argument. *Petition for Certiorari (Sobell)*, p. 10 n. 6, p. 44, *Sobell* v. *United States*, No. 112 (October Term 1952).

On September 11, 1957, following the decision in *Grunewald* v. *United States*, 353 U.S. 391 (1957), Sobell moved the Supreme Court to vacate its prior orders denying certiorari and to grant certiorari and order a new trial. The fourteen page motion and thirty-six page appendix filed in connection with the motion raised the same issue as to cross-examination, and cited substantially the same portions of the trial transcript, as are now, nearly five years later, urged as grounds for collateral attack by the same attorneys who represented Sobell in connection with his 1957 motion.* *Motion and Appendix*, filed September 11, 1957, *Sobell* v. *United States*, No. 112 (October Term, 1952).

The motion, which was opposed by the Government both on the merits and on the ground that it was untimely, *Memorandum for the United States in Opposition, Sobell* v. *United States*, No. 112 (October Term, 1952), was denied by the Supreme Court without opinion. *Sobell* v. *United States*, 355 U.S. 860 (1957).**

* The motion in the Supreme Court stated, at p. 11, that while the appeal from the conviction "did not present the precise question disposed of in *Grunewald*, it did refer to the questioning of the defendant Ethel Rosenberg as one of the reasons why the trial lacked essential fairness," and, at p. 12, that "the issue was presented in a similar posture in this Court."

** Contrary to appellant's claim, *Appellant's Brief*, p. 55, there is no reference to Section 2255 in the Government's Memorandum.

b. Prior Raising of Time-of-War Point

On January 6, 1953, following the original denial of certiorari and rehearing in the Supreme Court, *United States* v. *Rosenberg*, 344 U.S. 838, 889 (1952), Sobell moved in the District Court pursuant to Rule 35 for reduction of his sentence (R. 3913-24). The same argument now being urged, nearly ten years later, as a ground for collateral attack was presented at that time as a ground for reduction of sentence. The argument was as follows:

"Mr. Meyer: • • •

"There is one additional factor which, apart from everything else that I have said, and you might say as a contingent alternative to what I have said I would like your Honor to take into consideration in considering the sentence on Morton Sobell. And I am talking now in terms of the evidence given by Max Elitcher, which your Honor is so fully familiar with that I am not going to go over it in detail. But if we take the evidence which Elitcher gave, which was directly binding in law upon Sobell, we find that the first instance of direct proof of an alleged attempt to persuade Elitcher to turn over some pamphlet was in 1946, after the hostilities had ceased during the war.

"The only evidence that makes it possible to say that Sobell was a participant in wartime rather than peacetime espionage is, as your Honor knows, that Elitcher said that the co-defendant had said to him that Sobell was helping him.

"Now, not only may Elitcher have lied when he said that, but the co-defendant may have lied; and he would have had a motive for lying in saying that if

it is believed that he had the motive and purpose to secure Elitcher's acquiescence, and certainly the record does not show that in that period Sobell himself in any manner, way, shape or form attempted to persuade Elitcher to assist in any form.

"There is an interesting question of law which isn't before the Court as to whether, supposing it were quite clear that this were a single continuing conspiracy and Sobell had only joined, let us say, in 1946—quite clear beyond a shadow of a doubt—whether or not the Court would have been authorized to impose a 30-year sentence or rather only a 20-year sentence measured by the nature of his complicity. I don't know. I am sure there is no case on it. It is a unique type of problem because of the unique times of variance in these periods of sentence provided for in this statute" (R. 3955-56).

The motion was denied by the District Court, *United States* v. *Sobell*, 109 F. Supp. 381 (S.D.N.Y. 1953), and no appeal was taken.

In June 1953 the contention that the Trial Court failed properly to charge the jury on the wartime element of the statute was raised by intervenors on behalf of the Rosenbergs in slightly different form. Whereas the appellant presently contends that the jury should have been instructed to find whether he joined the conspiracy "in time of war", the intervenors alleged that it was error not to charge that the conspirators had to have intended to *transmit* defense information "in time of war." Two habeas corpus petitions raising this and other arguments were presented to Judge Kaufman by attorneys acting for one Irwin Edelman, as "next friend" of the Rosenbergs. The first petition (R. 4352-4416, at 4384-88) was denied on June 15,

1953, on the ground of lack of standing (R. 4422-24). The second petition (R. 4230-95, at 4259-63) was rejected on June 19, 1953, on the merits as well as on procedural grounds (R. 4296).*

A substantially identical application was submitted on June 16, 1953, to Mr. Justice Douglas, who granted a stay on the sole ground of another argument contained therein relating to the applicability of the Atomic Energy Act. The Supreme Court, finding the question of the applicability of the Atomic Energy Act not substantial, vacated the stay on June 19, 1953. *United States* v. *Denno*, 346 U.S. 271 (1953).

c. *Prior Section 2255 Motions*

In addition to the above proceedings, and several stay applications by the Rosenbergs to the Supreme Court or to individual Justices thereof, all of which were denied, see *United States* v. *Rosenberg*, 345 U.S. 989, 346 U.S. 271-324, there have been six motions brought pursuant to Section 2255 on a variety of grounds other than those urged on the instant appeal. All have been denied.

The first was brought pursuant to Section 2255 by Sobell and the Rosenbergs. In denying the motion, Chief Judge Ryan concluded that:

> "• • • the sentences imposed were authorized by law and are not otherwise open to collateral attack on any

* Without going into detail on the intervenor's contention which is not urged here, suffice it to say that, in addition to the prior rejections of the attack on the charge on this basis, it clearly would have no merit. The Trial Court charged the jury that acts actually done are the best evidence of intent (R. 2340, 2352-53), and the record here is replete with passing of secret information during the period of actual hostilities as well as during the state of war throughout the indictment period (R. 634-37, 1200-01).

> of the grounds urged by the petitioners, and that full and complete enjoyment of the constitutional rights of petitioners has been extended them and has in no way been denied or infringed." *United States* v. *Rosenberg*, 108 F. Supp. 798 (S.D.N.Y.), *aff'd*, 200 F. 2d 666 (2d Cir. 1952), *cert. denied*, 345 U.S. 965 (1953).

The second was brought by the Rosenbergs alone under Section 2255 and Rule 35 (R. 3983-3997). It was denied by Judge Kaufman on June 1, 1953 (R. 4010-4059), *aff'd per cur.*, *United States* v. *Rosenberg*, 204 F.2d 688 (2d Cir. 1953).

The third was brought by Sobell and the Rosenbergs under Section 2255 and Rule 33 (R. 4069-4150, 4151-4156), and denied by Judge Kaufman on June 8, 1953 (R. 4150, 4156), *aff'd per cur.*, *United States* v. *Rosenberg*, 204 F.2d 688 (2d Cir. 1953) and *United States* v. *Sobell*, No. 22885 (2d Cir. 1953), *cert. denied*, 347 U.S. 904 (1954).

The fourth was brought under Section 2255 by the Rosenbergs alone (R. 4176-4180), and denied on June 19, 1953 (R. 4180). An appeal was withdrawn by stipulation (R. 4426).

In 1956, the fifth and sixth motions were made by Sobell under Section 2255 and denied. *United States* v. *Sobell*, 142 F. Supp. 515 (S.D.N.Y. 1956), *aff'd*, 244 F.2d 520 (2d Cir.), *cert. denied*, 355 U.S. 873 (1957).

At the time, on June 19, 1953, when the Supreme Court vacated the stay previously granted by Mr. Justice Douglas, Mr. Justice Clark observed in a concurring opinion, joined in by Mr. Chief Justice Douglas and Mr. Justices Reed, Jackson, Burton and Minton.

"Beginning with our refusal to review the conviction

and sentence in October, 1952, each of the Justices has given most painstaking consideration to this case." *Rosenberg* v. *United States, supra,* 346 U.S. at 293.

In denying Sobell's last two motions Judge Kaufman concluded with justification:

> "It is difficult to find a case in the annals of American jurisprudence, or indeed in the judicial annals of any other country, where the defendants' convictions and contentions have received the attention of so many judges at so many levels of a judicial system • • •." *United States* v. *Sobell,* 142 F. Supp. 515, 519 (S.D. N.Y. 1956).

ARGUMENT

POINT I

Appellant's Sentence Was Properly Imposed under the Wartime Penalty Provision of the Espionage Act and May Not Be Vacated or Reduced under Section 2255 or Rule 35 on the Basis of Alleged Error in the Charge to the Jury Which Was Neither Objected to at Trial nor Raised on Appeal.

Appellant was convicted of a conspiracy to violate Section 32(a) of Title 50, United States Code (1946 ed.), which carries a peacetime penalty of imprisonment for not more than twenty years, but provides that:

> "• • • whoever shall violate the provisions of this subsection in time of war shall be punished by death or by imprisonment for not more than thirty years • • •."

The punishment for such conspiracy is the same as that

provided for the substantive offense. 50 U.S.C. § 34 (1946 ed.).*

Appellant contends that the Trial Court improperly failed to charge the jury on the question whether he joined the conspiracy "in time of war" and urges this alleged error as grounds for relief under both Section 2255, Title 28, United States Code and Rule 35, Federal Rules of Criminal Procedure. This argument is based upon the premise that time of war ceased with the end of "actual hostilities," *Appellant's Brief,* p. 62, presumably some time in 1945, *id.,* pp. 24, 63, although appellant nowhere in his brief defines "actual hostilities."** As will be shown below, this premise is false and the wartime penalty provisions of Section 32 remained applicable until the war with Japan was terminated by Presidential proclamation on April 28, 1952. Moreover Rule 35 is completely inapplicable and the principles governing collateral attack apply at the threshold to preclude relief under Section 2255.

A. Alleged Omissions in the Charge to the Jury on the Question of Time of War Do Not Constitute Grounds for Relief under Section 2255.

No factual issue with respect to the time of appellant's participation in the conspiracy was raised at the trial; no instruction was requested, nor was any objection made to the charge on this point. The issue now being urged ten years later is a matter which should have been raised, if

* In 1948, Sections 32 and 34 of Title 50 were repealed and corresponding provisions were consolidated in Section 794 of Title 18, United States Code. 62 Stat. 683, 737 (1948). The Reviser's Note indicates that no substantive changes were made at that time. 18 U.S.C.A. §794, p. 29.

** As noted above, the end of World War II hostilities was not declared by the President until December 31, 1946. See footnote at p. 7, *supra.*

at all, on appeal. Clearly there was no deterrent to appeal, for the charge, like other aspects of the conduct of the trial, was a matter of record; in fact, the charge was attacked on appeal in several other respects. *United States* v. *Rosenberg*, 195 F. 2d 583, 597, 600-01 (2d Cir. 1952). Thus, appellant is met at the outset with well-settled principles governing collateral attack which preclude relief in such circumstances.

In *Kyle* v. *United States*, 266 F. 2d 670 (2d Cir.), *cert. denied*, 358 U.S. 937 (1959), suppression of evidence by the Government was alleged as the basis for a motion under Section 2255. This Court assumed that the allegation was true but affirmed the denial of the motion, stating:

> "The appellant knew or had ready at hand the means of knowing as much about the missing letters as he knows now. • • • He had the opportunity to raise this point both at the trial and on appeal. • • •
>
> The appellant claims that because he is raising the constitutional issue for the first time, he may utilize § 2255. But the remedy afforded by §2255 is not a substitute for appeal, 'to correct errors committed in the course of the trial, even though such errors relate to constitutional rights.' United States v. Walker, 2 Cir. 1952, 197 F. 2d 287, 288; United States v. Rosenberg, supra. The section 'may not be used to retry the case or to raise questions which might have been raised on appeal.'" 266 F. 2d at 672.*

* This Court reversed the denial of a subsequent motion relative to the same evidence. *Kyle* v. *United States*, 297 F.2d 507 (2d Cir. 1961). There, however, the allegation was that the evidence which the Government had represented at trial to be unavailable was actually discovered long after trial in Government files. Thus, the grounds presented were truly appropriate for collateral relief, i.e., the subsequent discovery of new evidence which raised serious questions as to the fairness of the trial itself.

The same principles were applied by this Court in affirming the denial of the first Section 2255 motion by Sobell and the Rosenbergs. *United States* v. *Rosenberg*, 200 F. 2d 666, 668 (2d Cir. 1952), *cert. denied*, 345 U.S. 965 (1953).

It is fundamental that collateral relief is not available for the correction of most trial errors. The error must be of such magnitude as to result "in a complete miscarriage of justice • • • [or] an omission inconsistent with the rudimentary demands of fair procedure." *Hill* v. *United States*, 368 U.S. 424, 428 (1962). See also *Sunal* v. *Large*, 332 U.S. 174 (1947). The rule was phrased by this Court in *United States* v. *Angelet*, 255 F. 2d 383, 384 (2d Cir. 1958), as follows:

> "A motion under § 2255 cannot ordinarily be used in lieu of an appeal to correct errors committed in the course of a trial. • • • It will lie only if the trial court's error was jurisdictional or deprived the defendant of constitutional rights under '*exceptional circumstances*' which may justify a relaxation of the general rule. • • • Only where there has been a deprivation of rights so fundamental as to amount to a denial of a fair trial can the conviction and sentence be set aside under § 2255." (Emphasis added.)

See also *Howell* v. *United States*, 172 F. 2d 213, 215 (4th Cir.), *cert. denied*, 337 U.S. 906 (1949).

The alleged error in this case hardly partakes of the "exceptional circumstances" required for collateral attack. Indeed, even on direct appeal, an alleged error in the charge to the jury will not ordinarily be considered where, as here, no request was made, and no exception was taken to the charge pointing the error out to the trial court at a

time when it could have been corrected. Rule 30, Federal Rules of Criminal Procedure. Judicial objections to raising on direct appeal alleged errors in the charge not excepted to at trial apply, *a fortiori*, when such objections are raised for the first time on collateral attack.

Kenion v. *Gill*, 155 F.2d 176 (D.C. Cir. 1946), involved a collateral attack on a conviction for second degree murder, where the charge to the jury "was short and omitted many refinements in definition and instructions which are customary in the federal courts in capital cases," including a failure to define reasonable doubt. 155 F.2d at 178-79. Petitioner also alleged that the trial court failed to define clearly the various degrees of homicide and failed to explain their essential elements. In affirming the denial of a writ of habeas corpus, the Court applied the following test:

> "[T]he question presented upon petition for habeas corpus is not whether the charge was erroneous in its inadequacy; the question is whether the inadequacy amounted to denial of due process and therefore ousted the court of jurisdiction to enter judgment, and also whether the errors were open to review upon appeal." 155 F.2d at 179.

The Court noted that the defendant relied entirely at trial on the defense of self defense and inferred that for strategic reasons the defense was apparently satisfied with the charge on lesser included offenses. No request for further instructions had been made, no exception had been taken to the charge, and no appeal had been taken. 155 F.2d at 179. The Court concluded that although it did not approve the charge, 155 F.2d at 180, "we are not called upon to decide whether we would have affirmed or reversed if

an appeal had been taken." 155 F.2d at 179. *Accord*, *United States* v. *Jonikas*, 197 F.2d 675, 678-79 (7th Cir.), *cert. denied*, 344 U.S. 877 (1952); *United States ex rel Luscomb* v. *New York*, 153 F. Supp. 1 (S.D.N.Y. 1957); *cf. United States* v. *Angelet*, 255 F.2d 383, 384-85 (2d Cir. 1958).

Appellant attempts to overcome these limitations on collateral attack by seeking to raise the alleged error in the charge to the level of a denial of due process and of the right to trial by jury. *Appellant's Brief*, pp. 47-52, 59-64. But no case is cited by appellant, and none has been found by the Government, where the requirements of Section 2255 have been met by alleging error in a portion of a charge to the jury relating only to aggravated circumstances of the crime charged that affect the maximum sentence.*

To the contrary, the limitations on Section 2255 relief have been held to preclude such an attack. In *Banks* v. *United States*, 287 F.2d 374 (7th Cir.), *cert. denied*, 366 U.S. 939 (1961), the defendant was charged in a one count indictment with robbing a post office clerk and, in the course of committing the robbery, putting the clerk's life in jeopardy by use of a dangerous weapon,** in violation of Section 2114, Title 18, United States Code. The jury returned a general verdict of guilty and the Trial Judge

* In *Jordan* v. *United States*, 233 F.2d 362 (D.C. Cir.), *rev'd on other grounds*, 352 U.S. 904 (1956), relied on by appellant, the sentence was vacated as in excess of the maximum authorized by law. There, however, the trial court had based the sentence on an aggravating circumstance not even charged in the indictment.

** The indictment is reproduced in part in an earlier opinion, *Banks* v. *United States*, 239 F.2d 409 (7th Cir.), *cert. denied*, 353 U.S. 960 (1957).

sentenced the defendant to twenty-five years' imprisonment, a sentence permitted only for the aggravated offense. The defendant sought to correct his sentence on the grounds that the Trial Judge failed to charge the jury as to the meaning of "jeopardy," and to submit a special interrogatory (not requested) to the jury on whether the defendant was guilty of the aggravated circumstance. The Court of Appeals affirmed the denial of the motion without discussing its merits, concluding:

> "An attack on allegedly defective instructions is properly raised on appeal and not by a motion under Section 2255. • • • Petitioner was granted leave in 1953 to file his appeal out of time, but at his request the appeal was dismissed . He cannot now assert such errors in the instant proceeding." 287 F.2d at 375.

See also *United States* v. *Stevens*, 260 F.2d 549 (3d Cir. 1958).

In *Williams* v. *United States*, 238 F.2d 215 (5th Cir. 1956), *cert. denied*, 352 U.S. 1024 (1957), the defendant was charged in a one count indictment with a conspiracy to violate seven enumerated provisions of the liquor laws, six of which were felonies, while the seventh was a misdemeanor. The Trial Judge charged the jury that they could find a conspiracy to violate any one of the seven provisions. No requests to charge were made and no objection was made to the Court's charge. The jury returned a general verdict of guilty and the defendant was thereafter sentenced to three years' imprisonment. 238 F.2d at 217-18.

The defendant attacked the sentence on direct appeal, arguing that since the indictment included both felonies

and a misdemeanor, and the jury's general verdict did not specify which objects of the conspiracy had been proved, he should be sentenced under the most lenient alternative. The Court of Appeals held the defendant was precluded from raising the matter, pointing out that he could have objected to the form of indictment before trial, or requested a special verdict or a verdict indicating the degree of the offense, or objected to the charge, or asked for clarification after the general verdict was returned. 238 F.2d at 218-19. The Court stressed that:

> "• • • it was only after the jury's verdict had been recorded and the jury discharged that the court's attention was called to the possible jeopardy to accused of letting the case go to the jury in the manner it did." 238 F.2d at 219.

In the instant case all of the actions open to the defendant in *Williams* were open to Sobell, and none of them were taken at trial. The defendant in *Williams* was properly foreclosed from raising alleged error in the charge on direct appeal. *A fortiori*, Sobell is precluded from raising the error alleged here as grounds for collateral attack.

A similar situation was presented in *Herzog* v. *United States*, 235 F.2d 664 (9th Cir.), *cert. denied*, 352 U.S. 844 (1956). The charge was income tax evasion and the defendant asserted that the Trial Judge's charge on wilfulness was erroneous, under another decision in the same Circuit. No objection had been made below, and the issue in the case was not one of wilfulness but "squarely one of credibility—whether the accused did or did not receive 'side' money through his sales to used car dealers." 235 F.2d at 668.

The Court affirmed the conviction on appeal holding:

> "In determining whether the giving or the failure to give an instruction warrants a reversal, the courts are not to consider the instruction in isolation. They are obliged to examine the charge as a whole in light of the factual situation disclosed by the record. Such is the course followed even in the normal criminal case, where the accused has preserved his right of review by timely and appropriate objection on the trial." 235 F.2d at 667.

Since "the issue was squarely one of credibility", the Court said:

> "Thus in respect of this major issue the instruction on wilfulness was at worst purely innocuous." 235 F.2d at 668.*

The results in *Williams* and *Herzog* apply here, and are consistent with the finding of this Court in an analogous situation in *United States* v. *Galgano*, 281 F.2d 908 (2d Cir. 1960), *cert. denied*, 366 U.S. 960, 967 (1961). There the defendants collaterally attacked an indictment as duplicitous on the ground that two statutes were cited as those violated and the punishment imposed was permissible only under one. In denying relief this Court discussed a District Court case which reached a contrary result based upon the differences in maximum sentences, and observed:

> "The prior cases offer no support for this distinction and we think it peculiarly inapposite where no defense has been offered that would rationally permit a verdict

* *Herzog* has been followed with approval in this Circuit. *United States* v. *Simmons*, 281 F.2d 354 (2d Cir. 1959).

> of guilty under the statute which imposes the lesser penalty • • • but not under the statute which imposes the greater penalty • • •." 281 F.2d at 911.

The strict rules pertaining to the availability of collateral attack when the matters complained of relate to the Court's instructions to the jury, as well as the requirements of Rule 30, are particularly compelling in this case. Here all of the factors are present which individually or in combination required denial of relief in the cases discussed above.

The indictment charged a conspiracy during a period from 1944 to 1950, "the United States then and there being at war," yet no attack was made on the indictment by appellant on the ground it alleged both peacetime and wartime offenses, with differences in the applicable penalty provision. The fact that the charge was one of wartime conspiracy and that it was therefore a capital case was stressed throughout the trial, from the selection of jurors, through the substantial evidence that actual hostilities were going on during a portion of the conspiracy as charged, to the summations of defense counsel which showed complete awareness of the consequences of the wartime factor. In his charge, the Trial Judge read to the jury the indictment which charged that the offense was committed in time of war and specifically charged that the jury must find that the conspiracy existed during the time period charged in the indictment.

The same witness, Elitcher, whom the Trial Judge charged the jury they had to believe in order to convict Sobell, presented all of the testimony relating to Sobell's participation throughout the indictment period, except for

Sobell's flight in 1950 which the Court specifically charged could not itself justify a finding of guilt (R.2354-55). A substantial part of Elitcher's testimony against Sobell related to the period prior to the end of World War II hostilities as declared by the President on December 31, 1946.* The evidence of Sobell's participation prior to that time was as compelling as the evidence of his subsequent acts, and it was highly improbable that the jury would believe one part of Elitcher's testimony and not the other. See *United States* v. *Gillette*, 189 F. 2d 449, 452 (2d Cir.), *cert. denied*, 342 U.S. 827 (1951).

Faced with this state of the evidence, Sobell did not contend at trial that he may have joined the conspiracy after the end of "time of war." As in *Herzog* and *Galgano*, no defense was presented which would have applied to the wartime aspect of the conspiracy but not to the period now alleged to have been in peacetime. Similarly, defense counsel did not submit any request to charge related to the wartime element. Nor was there any objection to the charge or request for clarification of the jury's general verdict at the trial, when the Trial Judge could have corrected any error which existed.

* The statement at p. 24 of Appellant's Brief that Elitcher's testimony regarding Sobell covered a period from early 1946 to the Summer of 1948 is erroneous, as is obvious from the later reference at p. 63 thereof to Elitcher's conversations with Rosenberg and Sobell in June and September 1944, respectively. The suggestion at pp. 63-64 that Rosenberg's statement to Elitcher that Sobell was among those supplying information was inadmissible against Sobell is frivolous. It was clearly made in furtherance of the conspiracy, *i.e.*, to encourage Elitcher to join it. *Cf. United States* v. *Rosenberg, supra*, 195 F. 2d at 596. Moreover, when Sobell later in 1944 was told of the statement he did not deny it but grew angry and said that Rosenberg should not have revealed his name, thus permitting an inference that he adopted the statement as an admission.

Not only was no issue presented with respect to the wartime factor, but the strategy adopted by Sobell at trial and the position taken by the defense on appeal was flatly inconsistent with the present contention that a division of time must be made with respect to Sobell's participation. The thrust of the argument to the jury by Sobell's attorney was that Elitcher was the only witness whose testimony implicated Sobell in the conspiracy, that his testimony was not true and that Sobell was not a member of the conspiracy at any time (R. 2239-65). All counsel, including Sobell's, stressed in their summations the dire consequences in terms of penalty which resulted from the fact that this was a wartime conspiracy. In summation and on appeal, *United States* v. *Rosenberg, supra*, 195 F. 2d at 604, counsel for the Rosenbergs stressed that at the most they had, out of idealistic motives, given information to the Soviet Union when it was our wartime ally.

In view of these circumstances, the fact that the Trial Judge did not submit the question of the time of Sobell's participation to the jury in more detail can hardly be said to have deprived appellant of a fair trial.

The lack of merit in appellant's present contention is also revealed by a finding of this Court on his direct appeal. Sobell there argued that the Trial Judge should have charged the jury that they could find that two conspiracies existed, one for the purpose of transmitting atomic secrets in which the Rosenbergs, but not Sobell, participated, and another for the purpose of transmitting non-atomic secrets, of which Sobell was a member. This Court, Judge Frank dissenting, found that there was one conspiracy with "a single unified purpose," and held that

it was not error to have omitted a charge on the issue of two conspiracies. *United States* v. *Rosenberg, supra,* 195 F. 2d at 600-02.

Sobell now argues, ten years later, that the question when he joined the conspiracy was a "vital element of the offense" and a "crucial question of fact" which should have been elaborated in the charge to the jury. *Appellant's Brief,* p. 63. But the Trial Judge might also have charged on conspiracies for atomic and non-atomic secrets, as Sobell argued on appeal; or a conspiracy involving the Rosenbergs and Greenglass and a separate conspiracy involving Elitcher and Sobell. However, the court is under no duty to conjure up all possible variations and charge the jury with respect to any or all of them unless an issue was created, either factually or legally, and unless the defense requested such a charge in accord with its theory of the case. As shown above, there was no basis either in the evidence or in the legal theories advanced at the trial in this case for a charge as to a possible peacetime conspiracy.

Sobell first belatedly advanced his present contention in connection with a motion to reduce sentence in January, 1953. See pp. 22-23, *supra.* In effect, he urges that his sentence be set aside so that a strategy which was obviously rejected at the trial and of which at least one of his attorneys has been aware since 1953 may now be employed. This he may not do:

> "[It is] of the essence of orderly trials that the right to counsel accorded to defendants by the constitution be not regarded, as the argument here would seem to regard it, as a mere one way street such that,

> if the strategy and tactics of his trial counsel, in determining not to raise constitutional questions, prove unsuccessful, defendant * * * may many years later set it aside in order that, on another trial with another counsel, an other course raising these questions may be taken, and so on *ad infinitum.*" *Bowen* v. *United States,* 192 F. 2d 515, 517 (5th Cir. 1951), *cert. denied,* 343 U.S. 943 (1952).

In affirming the denial of another of appellant's motions, a post-trial motion in arrest of judgment, this Court noted that Sobell had in his possession at the time of trial all of the information on which he based the motion. The Court's conclusion is applicable here:

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

B. Rule 35 Is Not Available to Correct the Sentence, Which Was Clearly Authorized by the Statute.

Alternatively, appellant urges error in the Trial Judge's charge as ground for correction of sentence under Rule 35, Federal Rules of Criminal Procedure. However, since an omission in the charge is at most an error in the conduct of the trial, and is not an error appearing on the face of the judgment of conviction and sentence, it is not ground for relief under Rule 35.

The Supreme Court has stated with respect to Rule 35:

> "Sentences subject to correction under that rule are those that the judgment of conviction did not auth-

orize." *United States* v. *Morgan*, 346 U.S. 502, 506 (1954).

> "The errors of law which were thus subject to examination were only those disclosed by the record, and as the record was so drawn up that it did not show errors in the reception or rejection of evidence, or misdirections by the judge, the remedy applied 'only to that very small number of legal questions' which concerned 'the regularity of the proceedings themselves.' • • •" *United States* v. *Mayer*, 235 U.S. 55, 68 (1914).

See also *United States* v. *Bradford*, 194 F. 2d 197, 200-01 (2d Cir.), *cert. denied*, 343 U.S. 979 (1952).

Appellant attempts to bring this case within *Heflin* v. *United States*, 358 U.S. 415 (1959) and *Prince* v. *United States*, 352 U.S. 322 (1957), apparently on the ground that statutory interpretation is involved. *Appellant's Brief*, pp. 70-71. But both of those cases involved imposition of consecutive sentences for the same conduct, an error apparent on the face of the judgment.

The Supreme Court, in *Hill* v. *United States*, 368 U.S. 424 (1962), made it abundantly clear that *Heflin* and *Prince* do not allow the correction under Rule 35 of alleged errors appearing only in the trial record. In *Hill*, the Court refused to consider under Rule 35 an allegation that the defendant had not been accorded the right of allocution prior to sentencing in violation of Rule 32(a). The Court held:

> "It is suggested that although the petitioner denominated his motion as one brought under 28 U.S.C. §2255, we may consider it as a motion to correct an illegal sentence under Rule 35 of the Federal Rules of Criminal Procedure. This is correct. *Heflin* v. *United States*, 358 U.S. 415, 418, 422. But, as the Rule's language and history make clear, the narrow function of Rule 35 is to permit correction at any time of an illegal sentence, not to re-examine errors occurring at the trial or other proceedings prior to the imposition of sentence. The sentence in this case was not illegal. The punishment meted out was not in excess of that prescribed by the relevant statutes, multiple terms were not imposed for the same offense, nor were the terms of the sentence itself legally or constitutionally invalid in any other respect." 368 U.S. at 430.
>
> • • • •
>
> "In that case [*Heflin*] Rule 35 was invoked in a situation where we unanimously recognized that the only issue was whether 'the sentence imposed was illegal on its face.' 358 U.S. at 418 (Court opinion), 422 (concurring opinion)." 368 U.S. at 430, n. 9.

That Rule 35 is not a proper method for attacking an alleged error in the charge is also the holding in *Green* v. *United States*, 274 F. 2d 59 (1st Cir. 1960), *aff'd*, 365 U.S. 301 (1961). There the defendant had been sentenced to maximum sentences on each of three counts of an indictment charging bank robbery, the sentences to run concurrently. Two of the sentences were for twenty years' imprisonment and that on the third count was for twenty-five years. Defendant did not appeal, but seven years after conviction he moved under Rule 35 to vacate the twenty-five year sentence because of alleged error in the

charge. The Court of Appeals for the First Circuit affirmed a denial of this and other branches of the motion, stating:

> "Rule 35 is for the correction of illegal sentences, 'those that the judgment of conviction did not authorize,' United States v. Morgan, • • • not for the correction of improper convictions. • • • Any errors committed in the charge • • • were reviewable on appeal." 274 F. 2d at 60-61.

The Supreme Court, in affirming, disposed of this aspect of the motion as follows:

> "Petitioner further complains of an improper charge to the jury on Count 3. Rule 35 does not encompass all claims that could be made by direct appeal attacking the conviction, but rather is limited to challenges that involve the legality of the sentence itself." 365 U.S. at 306, n. 3.

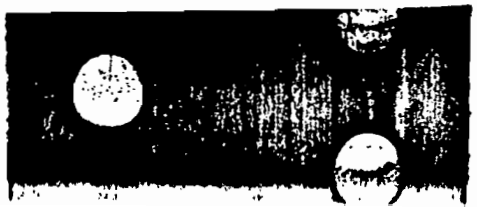
Here, the indictment charges a wartime conspiracy. There was ample evidence to justify the verdict of guilty on that charge, and the sentence imposed was clearly within the limits authorized by the statute. *United States* v. *Rosenberg, supra*, 195 F. 2d at 603. As in *Hill* and *Green*, appellant's motion under Rule 35 seeks to reexamine alleged errors in the trial, and was properly denied.

C. Sentence Was Properly Imposed under the Wartime Penalty Provision.

Assuming that appellant is not barred from seeking relief, the Government submits that his contention is without merit and that sentence was properly imposed for a wartime violation.

The jury returned a verdict of "guilty as charged" against appellant (R. 2389). The indictment charged a wartime conspiracy commencing well before the end of World War II hostilities, and the testimony was ample to support a finding that Sobell joined the conspiracy before that time. In fact, the evidence is not reasonably susceptible to the inference that Sobell joined the conspiracy after the end of hostilities, for the testimony of Elitcher as to Sobell's pre-1946 acts was as compelling as that relating to his subsequent acts. See pp. 10-14, *supra*. The jury's verdict plainly signifies that it sustained the wartime element of the charge, as well as all the other averments of the indictment. *Williams* v. *United States*, *supra*; *St. Clair* v. *United States*, 154 U.S. 134 (1894); *Huff* v. *United States*, 192 F. 2d 911 (5th Cir. 1951), *cert. denied*, 342 U.S. 946 (1952).

In *Williams* v. *United States, supra*, where defendant was charged in one count with conspiring to commit seven different violations, there was evidence from which the jury could have found him guilty of a conspiracy to commit each of the seven. But he argued that under its general verdict of guilty, the jury might have found him guilty only of the misdemeanor conspiracy for which a lesser penalty was authorized, and that the Court could not state with certainty that the jury actually found him



guilty of any of the felony conspiracies for which a five year sentence was permissible. The Court rejected this argument, and, in words applicable to the instant case, held:

> "The sentence was a valid sentence on a verdict of guilty of felony conspiracy. The verdict must be read as guilty 'as charged in the indictment,' • • • and here the indictment, even if perhaps technically defective, charged a felony • • •. The rule appears to be that if a verdict is patently ambiguous some rules of construction may be applied to it, principal among which is the rule of guilty of the highest degree of the crime charged, *Craemer* v. *Washington*, 168 U. S. 124 • • •." 238 F. 2d at 220.

Similarly in this case, the jury's general verdict of guilty must be read as guilty as charged in the indictment, and as authorizing a sentence under the wartime penalty provision.

Appellant contends that "time of war" should have been defined in detail by the Court. But the wartime provision is located in Section 32, following the definition of the crime and the elements thereof, as a proviso relating only to sentencing. On its face, therefore, it appears to be a factor for the Court to determine for the purpose of imposing sentence. Appellant cites no persuasive authority in support of the construction that "time of war" is an essential element of the crime, which must be explained to and found by the jury. He relies exclusively upon *Stilson* v. *United States*, 250 U.S. 583 (1919), and *Schaefer* v. *United States*, 251 U. S. 466 (1920), *Appellant's Brief*, pp. 45-46. But each of those cases involved statutes which

differ significantly from Section 32, in that "time of war" is clearly expressed as an integral element of the crime prerequisite to a finding of guilt.*

In addition, whether an integral element of the offense or a matter relating only to sentencing, it seems clear that "time of war" is a concept which may be determined from general information. This becomes apparent from the opinion in *Stilson*, when the charge on the question of "time of war," quoted in part by appellant, see *Appellant's Brief*, p. 46, is examined in full. The Trial Court there charged:

> "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. • • •
>
> "Whenever you are asked as a jury to pass upon anything which is a matter within common knowledge, common information, things which people ordinarily know, which are generally and practically universally known, when you are passing upon such questions, you have the right to call upon your general knowledge and information. You must determine, for instance, the question of whether or not we are at war, because unless we are, this indictment goes for nothing. You may determine that from your

* The statutes in *Stilson* and *Schaefer* provide, respectively, as follows:

"• • • whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination • • • shall be punished • • •." *Stilson* v. *United States, supra*, 250 U. S. at 584.

"Whoever, when the United States is at war, shall wilfully make or convey false reports • • • shall be punished • • •." *Schaefer* v. *United States, supra*, 251 U. S. at 476-77.

general information, this is something of which, in the phrase of the law, the law takes judicial notice." *Stilson* v. *United States, supra,* 250 U.S. at 587.

The issue was whether the question of wartime should have been left to the jury's general information. In sustaining that charge, the Supreme Court simply states:

"Certainly no prejudice could arise from an instruction that the jury might be supposed to know the fact that the country was at war." *Id.* at 588.

The charge in *Schaefer* was similar to that in *Stilson* and was also approved in this respect by the Supreme Court. *Schaefer* v. *United States, supra,* 251 U.S. at 472-73.

Moreover, in a number of cases decided after *Stilson* involving the concept of "time of war" in penal statutes, the courts have properly treated the concept as a legal question. In these cases statutes applicable only in wartime were applied to events which took place well after World War I hostilities had ended. See, *e.g., United States* v. *Steene,* 263 Fed. 130 (N.D.N.Y. 1920), *rev'd on other grounds,* 255 U.S. 580 (1921); *Carney* v. *United States,* 283 Fed. 398 (8th Cir. 1922); *Sichofsky* v. *United States,* 277 Fed. 762 (9th Cir. 1922).

Certainly, a detailed charge was not needed in this case for the jury to have found from their general knowledge that the conspiracy existed during a state of war. The indictment, which was read to the jurors as part of the charge and sent into the jury room, charged that it did. There was considerable evidence at trial that armed combat was going on during a portion of the period of the

conspiracy. And defense counsel repeatedly stressed the wartime alliance with the Soviet Union and the factor of capital punishment. No juror serving in the Southern District of New York in 1951 needed to be told by a Judge that the United States was at war during this period.

If Sobell wanted a specific jury finding as to whether he was a participant during actual hostilities, he should have made some effort to seek clarification of the verdict. *Williams* v. *United States, supra.*

D. A State of War Existed as a Matter of Law During the Entire Period of the Conspiracy Charged in the Indictment.

Appellant's entire argument is based upon the assertion that "in time of war" means a period of actual hostilities. However, the relevant statutory materials and judicial authorities establish that, for the purpose of the penalty provisions of Section 32 and similar statutes, "time of war" existed until formal termination of World War II by Presidential proclamation of the termination of the state of war with Japan on April 28, 1952. See Proclamation No. 2974, 66 Stat. c31 (1952).

Appellant does not cite a single authority for the proposition that time of war as used in the statute is limited to "actual hostilities", nor does he anywhere define "actual hostilities." Rather, appellant relies upon negative assertions that the "entire question of when a state of war exists * * * has long troubled the courts, the Congress and leading experts in the field," *Appellant's Brief,* p. 47, and is "confusing," *id.,* at p. 49, in an effort to invoke the

doctrine of lenity in the construction of ambiguous criminal statutes.* None of the authorities cited by appellant supports these assertions.

In the very article from which appellant quotes an introductory statement, *Appellant's Brief*, p. 48, Professor Manley O. Hudson concludes as to the category of legislation within which Section 32(a) falls:

> "It would not seem improper * * * to set March 3, 1921 [the effective date of a joint congressional resolution which, well after the cessation of hostilities, terminated wartime legislation after World War I], as the date of the end of the war for the purpose of applying much of America's war-time legislation * * *." Hudson, *The Duration of the War Between the United States and Germany*, 39 Harv. L. Rev. 1020, 1045 (1926).

Similarly, the statement by Congressman Latham during 1954 debates on the Espionage Act does not support appellant's position. Congress was considering the unprecedented situation presented by the Korean emergency and the "cold war," where no well-defined traditional state of war existed, rather than the termination of a formal state of war such as World War II.

*Appellant also refers to an incidental remark of the Trial Judge at the time of sentencing to the effect that the existence of a maximum twenty-year penalty for the offense of espionage in peacetime "most likely means" that the maximum punishment which could be imposed for espionage in 1951 would be twenty years. *Appellant's Brief*, pp. 27, 48. In view of the fact that evidence of the conspiracy in large part related to the period of actual hostilities—1944-1946—and that the position of the defense was that no conspiracy existed, not that one existed only after 1946, the question of at precisely what date the state of war ended was not raised at trial.

Appellant relies heavily upon *Lee* v. *Madigan*, 358 U.S. 228 (1959). *Appellant's Brief*, pp. 48, 64-66. However, that case rests upon special considerations which are totally inapplicable to the instant case.

The question before the Supreme Court in *Lee* v. *Madigan* was a narrow one—whether a military court-martial had jurisdiction to try a charge of conspiracy to commit a murder which occurred in California on June 10, 1949, in view of a proviso in Article of War 92, 10 U.S.C. §1564 (1946 ed., Supp. IV), that prohibited a military trial of any such charge if committed within the United States "in time of peace". The holding of the Court was that June 10, 1949, the date of the alleged crime, "was 'in time of peace' as those words were used in Article 92". 358 U.S. at 236. In so holding, the majority stated that terms such as "state of war" and "in time of peace" must be subjected to a "particularized and discriminating analysis" and "must be construed in light of the precise facts of each case and the impact of the particular statute involved". 358 U.S. at 230-31.

The analysis suggested by *Lee* v. *Madigan* is made herein, see pp. 52-59, *infra*, and amply supports the contention that "time of war" in the Espionage Act extends until formal conclusion of peace. Nor is *Lee* v. *Madigan* inconsistent with this result. The subject of the statute there was the jurisdiction of military tribunals to try non-military offenses—a matter which has always been held to be related to the time of actual hostilities rather than a formal state of war. See *Appellant's Brief*, p. 65, footnote. Moreover, as the majority opinion observed, the purpose of the proviso before the Supreme Court was to limit the jurisdiction of military tribunals and preserve

the right of trial by jury for individual citizens. This purpose, as well as the Court's traditional reluctance to grant to military tribunals authority to try nonmiltiary offenses, required a broad definition of "in time of peace." See 358 U.S. at 232-35.

These considerations do not apply to the Espionage Act, whose major concern, like that of the other statutes cited at pp. 52-59, *infra*, is protection of the public interest not only during the time of actual combat but also in the aftermath of hostilities, when, as the proof in this case demonstrates, critical problems of security continue to exist. This is a category of statutes which the majority in *Lee* v. *Madigan* recognizes as distinct from the statute considered there. 358 U.S. at 231-32.

Finally, appellant invokes the rule of lenity in the construction of ambiguous criminal statutes, stated in *Bell* v. *United States*, 349 U.S. 81 (1955) and related cases. *Appellant's Brief*, pp. 67, 70. But in all of the cases cited by appellant which apply the rule,* *Heflin* v. *United States*, 358 U.S. 415 (1959), *Ladner* v. *United States*, 358 U.S. 169 (1958), *Prince* v. *United States*, 352 U.S. 322 (1957) and *Bell* v. *United States*, 349 U.S. 81 (1955), the statutes being construed were ambiguous,** legislative history either was found inadequate to resolve the ambiguity,* or was found to support the Court's construction,** and the imposition of multiple penalties for separate aspects of the same criminal act was involved. See discussion in *Callanan* v. *United States*, 364 U.S. 587, at 596-97 (1961). Thus, a construction favorable to the Government would have required the Supreme Court to find, in the face of ambiguous statutory language and either inadequate or flatly contrary legislative history, an unusually harsh intention on the part of Congress.

* Three of the cases cited by appellant, *Callanan* v. *United States*, 364 U.S. 587 (1961), *United States* v. *Bramblett*, 348 U.S. 503 (1955), and *Kordel* v. *United States*, 335 U.S. 345 (1948), only advert to the doctrine of lenity and hold precisely contrary to the position urged by appellant in this case. *Appellant's Brief*, p. 67.

** Indeed in *Prince* and *Bell* there was a conflict between the Courts of Appeals as to the proper constructions of the statutes considered. See *Prince* v. *United States*, *supra*, 352 U.S. at 324-25; *Bell* v. *United States*, *supra*, 349 U.S. at 82.

As indicated by the majority opinion in *Callanan* v. *United States*, *supra*, the principle of lenity has extremely limited application:

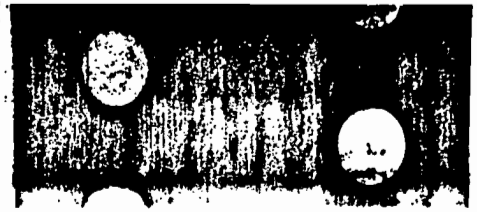
> "• • • that 'rule', as is true of any guide to statutory construction, only serves as an aid for resolving an ambiguity; it is not to be used to beget one. • • • The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers. That is not the function of the judiciary." 364 U.S. at 596.

The rule of lenity does not apply here, for there is neither ambiguity, inadequacy of legislative history, nor the unique problem common to the four cases cited by appellant. See *id.* at 597.

Contrary to appellant's unsupported assertions that the term "in time of war" relates to a period of actual hostilities, the use of the term in congressional debates on the original Espionage Act and subsequent interpretations by

* *Ladner* v. *United States*, *supra*, 358 U.S. at 174-75, 177; *Prince* v. *United States*, *supra*, 352 U.S. at 327-28; *Bell* v. *United States*, *supra*, 349 U.S. at 83-84.

** See *Heflin* v. *United States*, *supra*, 358 U.S. at 419-20.



Congress and the courts of that and similar statutes indicates that "in time of war," as used in Section 32(a), was intended to extend until formal conclusion of peace by treaty or declaration.

Section 32 was enacted on June 15, 1917, as part of an omnibus wartime bill, H.R. 291. During the congressional debates in 1917, several leading members of both the Senate and House of Representatives indicated their understanding that limiting phrases such as "in time of war" used throughout H.R. 291 would cover the entire period from commencement of the war to formal conclusion of peace by treaty and declaration.

For example, the manager of the omnibus wartime bill in the House stated in debate on a proposed wartime censorship provision that the war between Germany and the United States would last until a formal peace treaty.*

* The censorship provision was applicable in wartime but only if the President also proclaimed the existence of an emergency. Congressman Webb opposed a proposed deletion of the proclamation requirement and explained that if that requirement were deleted, the statute would be applicable throughout the period of the war, even after a truce:

"Mr. TOWNER. • • • Certainly • • • an emergency is a temporary passing thing, and it is not intended that this bill should operate only in such phase, but it should certainly operate during the existence of this war.

"Mr. WEBB. • • • It may not be necessary to have this proclamation during the entire existence of the war, only in an emergency. You might have a cessation of hostilities and let down the bars. You might have a truce. That was the idea in leaving it to the President to make a proclamation that an emergency exists.

"Mr. TOWNER. I grant you that, but the condition of war would not exist between the United States and Germany then.

"Mr. WEBB. Yes, it would. A war will exist between the United States and Germany until there is a treaty of peace, strictly and technically speaking." 55 CONG. REC. 1598 (1917).

A major amendment adopted by the Senate would have terminated the applicability of the entire omnibus wartime bill, including the Espionage Act, "Whenever the present war shall cease by the conclusion of peace between the United States and its enemies in the present war, [and] the President shall so declare by a public proclamation to that effect • • •." 55 Cong. Rec. 1942 (1917). The amendment was deleted from the bill by House and Senate conferees just prior to enactment. However, the explanation of the deletion by the manager of the bill in the Senate to the proponent of the amendment indicates clearly that wherever individual provisions, such as Section 32(a), were limited to wartime, that concept was understood to have the meaning given to it by the proposed amendment.*

* "Mr. OVERMAN. I wish also to state that what is known as the Reed amendment was stricken from the bill, but in rearranging the bill, as the Senator from Missouri will see, we made his emergency measure apply to war time.

• • • •

"Mr. REED. • • • An amendment which I offered to the entire bill limited the bill for the period of the war, and I was very much in earnest about that amendment. The Senator from North Carolina [Mr. Overman] states that, in his opinion, the amendment has been made to apply to all parts of the bill where it should apply, and as to other parts it has been so arranged that there is no application • • •.

"Mr. OVERMAN. • • • Half the chapters are neutrality chapters, and where anything applies of an emergency nature, if I may call the Senator's attention to page 5, we put in 'when the United States is at war.' We added that because we thought it was in compliance with the Senator's amendment. • • • Take his amendment, for example, on page 3, section 3, 'Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements.' Then, in section 6, 'The President, in time of war or in case of national emergency.' • • • So I think the Senator will see we have covered everything his amendment really ought to cover. • • • I think the Senator will find that where that clause is not used the language ought to apply in time of peace. • • • Four or five of these chapters are nothing but neutrality laws. However, in some matters we thought it ought to be limited to the time of war, and we have done that in carrying out the amendment of the Senator from Missouri." 55 Cong. Rec. 3439 (1917).

This original understanding has been repeatedly confirmed by congressional resolutions and debates following World War I and World War II in which Congress itself, well after cessation of hostilities but prior to formal conclusion of peace, recognized that statutory provisions applicable "in time of war," including the wartime penalty provision of Section 32(a), would continue to be effective, absent some formal action by Congress or the President, until conclusion of a peace treaty.

Although the World War I Armistice was announced by President Wilson on November 11, 1918, 56 Cong. Rec. 11537, 11541 (1918), Congress recognized that many wartime statutes continued in effect. Thus, in 1921, Congress resolved by joint resolution that "any Act of Congress, or any provision of any such Act, that by its terms is in force only during the existence of a state of war • • • shall be construed and administered as if such was • • • terminated on the date when this resolution becomes effective • • • [March 3, 1921]." It was this resolution, and not the end of hostilities which terminated wartime legislation. *Ex parte Sichofsky*, 273 Fed. 694 (S.D. Cal. 1921), *aff'd sub nom. Sichofsky* v. *United States*, 277 Fed. 762 (9th Cir. 1922).*

Again, after the surrender of Japanese forces in World War II, congressional resolutions and debates indicate Congress' understanding that statutes contingent upon a state of war, including specifically the penalty provi-

* Statements made during the congressional debate on this resolution reflect the view that, barring adoption of such resolution, legislation, including the Espionage Act, contingent upon the construction of terms such as "in time of war" would continue to be effective until conclusion of a peace treaty. See 60 Cong. Rec. 291-92 (1920).

sion in Section 32(a), continued in effect until formal termination of the war.*

Hostilities were declared at an end on December 31, 1946, but the Presidential proclamation expressly stated that "a state of war still exists." Proclamation No. 2714, 61 Stat. 1048 (1946). The state of war was not terminated until promulgation of the Japanese Peace Treaty on April 18, 1952. Proclamation No. 2974, 66 Stat. c31 (1952).

In 1947, a joint resolution was enacted repealing certain wartime statutes, S.J. Res. 123, 61 Stat. 449 (1947), but not the penalty provision in Section 32(a). The accompanying committee report indicated that the maximum penalty was in effect at that time and concluded that it should be "retained."**

In 1951, when a joint congressional resolution terminating the state of war with Germany was being con-

* This was also the Attorney General's conclusion in an opinion rendered for the President on September 1, 1945:

> "As will appear in the attached compilation, certain of the wartime statutes are made effective only 'in time of war,' or 'during the present war,' or 'for the duration of the war.' Still other expressions may be found of similar character.
>
> "Speaking generally, I believe that statutes of the type just mentioned should be considered as effective until a formal state of peace has been restored, unless some earlier termination date is made effective by appropriate governmental action." 40 Ops. Att'y Gen. 421, 422 (1945)

** "Special punishments are prescribed *'in time of war'* for certain offenses, such as communicating plans of defense to foreign governments, making false statements to interfere with operation of national forces, etc., under the Espionage Act.

• • • •

"The committee took no action which would have the effect of terminating the increased punishments provided for in this act effective in time of war. It was the committee's view that the increased limitations on penalties provided by this act should be retained for the time being." S. Rep. No. 339, 80th Cong., 1st Sess. 88 (1947).

sidered,* the proponent of the resolution represented that statutory provisions depending upon the existence of a state of war would not be affected because the United States was still at war with Japan.**

When, immediately prior to the promulgation of the Japanese Peace Treaty in 1952, Congress recognized that all wartime legislation would be terminated thereby, it enacted by joint resolution the "Emergency War Powers Interim Continuation Act." The resolution expressly acknowledged "the existing state of war with Japan" and provided that certain provisions considered essential by Congress, including 18 U.S.C. §794 (the successor of Sections 32 and 34 of Title 50), would remain in effect notwithstanding declaration of peace with Japan. H.J. Res. 423, 66 Stat. 54, 57 (1952). The debates which preceded its enactment confirm the construction that statutes such as the penalty provision of Section 32(a) whose effectiveness depended upon the existence of a time of war were by their terms continuously operative until the Japanese Peace Treaty. See 98 Cong. Rec. 3775 (1952).

The effectiveness of Section 794 and certain other legislation was further extended by Congress. With each of

* War with Germany was terminated on October 19, 1951, by a joint resolution of Congress, see H. J. Res. 289, 65 Stat. 451 (1951), and a proclamation by the President, see Proclamation No. 2950, 66 Stat. c3 (1951).

** "Many of our domestic statutes contain operative provisions that rest upon the existence of a state of war. These will not be affected by the enactment of this resolution. The reason is that we are still in a state of war with Japan. Until that state of war is terminated, existing domestic statutes are unaffected. Ending the state of war with Japan is to be the subject of negotiations in the near future. At that time an orderly rearrangement of domestic statutes will be made." 97 Cong. Rec. 9040 (1951)

these extensions, Congress affirmed that it regarded the statutes covered thereby as having been continuously operative since the beginning of World War II.*

Appellant's unsupported contention that "in time of war" must be limited to the duration of actual hostilities, has consistently and emphatically been rejected by the courts both in cases defining the proper scope of the war power; see, *e.g., Ludecke* v. *Watkins*, 335 U.S. 160 (1948) (Alien Enemy Act); *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138 (1948) (wartime rent control); *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U.S. 111 (1947) (Emergency Price Control Act); see also *National Savings & Trust Co.* v. *Brownell*, 222 F. 2d 395, 398 (D.C. Cir.), *cert. denied*, 349 U.S. 955 (1955); and in cases construing the termination date of legislation applicable in wartime, see *e. g., United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950) (exclusion of aliens without hearing); *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146 (1919) (War-Time Prohibition Act); *McElrath* v. *United States*, 102 U.S. 426, 438 (1880) (authority of President summarily to dismiss military officers); *In re Miller*, 281 Fed. 764 775-76 (2d Cir.), *appeal dismissed*, 262 U.S. 764 (1922) (Trading With the Enemy Act); *cf. United States* v. *Anderson*, 76 U.S. (9 Wall.) 56, 70 (1869). See also, Note, *Judicial Determination of the End of the War*, 47 Colum. L. Rev. 255, 259 (1947); 40 Ops. Att'y Gen. 421-22 (1945).

* See S. J. Res. 156, 66 Stat. 96 (1952); H. J. Res. 477, subdivision (a)(29), 66 Stat. 330, 333 (1952); 18 U.S.C. §798. The House Report which accompanied H. J. Res. 477 discusses the wartime penalty provision of Section 794, H. R. Rep. No. 2401, 82d Cong., 2d Sess. pp. 1-2 (1952), and states that the resolution, which extended that Section, deals only with legislation which had been continuously in effect and not "with war powers which have already ceased to exist, lapsed or been repealed." *Id.* at 24.

The same rule is applied in the construction of penal statutes, including the Espionage Act, whose prohibitions are limited to wartime.

The issue whether "time of war" as used in the Espionage Act expired with the end of actual hostilities was squarely presented in *United States* v. *Steene*, 263 Fed. 130 (N.D.N.Y. 1920). There, the defendant demurred to an indictment charging a violation of the anti-sedition provision of the Espionage Act, which applied "when the United States is at war." He argued that since the alleged violation occurred after the end of hostilities, "no offense was committed, because the United States was not at the time at war with the Imperial German Government and the Austrian-Hungarian government." 263 Fed. at 131. The court overruled the demurrer without discussion, finding that "this contention cannot be sustained." 263 Fed. at 132.*

Carney v. *United States*, 283 Fed. 398 (8th Cir. 1922), also involved violation of the anti-sedition provision of the Espionage Act which allegedly occurred on November 14, 1919. The lower court charged the jury that at that time, the United States and Germany were still at war. The Court of Appeals noted that the alleged offense occurred a year after the Armistice and found that the United States was then at war with Germany, but reversed the conviction on other grounds. 283 Fed. at 399-400.

* On motion of the Solicitor General for the United States, the *Steene* case was subsequently reversed on confession of error and remanded for further proceedings. See 255 U.S. 580 (1921). However, the records of the Department of Justice indicate that the confession of error was based upon the opinion that there was not sufficient evidence in the case to establish a violation of the statute. Reversal by the Supreme Court did not, therefore, affect the lower court's construction of "at war."

Cases involving similar statutes have reached the same result. Thus, in *Sichofsky* v. *United States*, 277 Fed. 762 (9th Cir. 1922), the contention was made that a person who entered the United States on August 23, 1920, after announcement of the November 10, 1918, Armistice but before the effective date of termination of the war (March 3, 1921) as declared by Congress, could not be prosecuted under the applicable statute because such statute was operative only during the period of war. The Court rejected the contention, concluding:

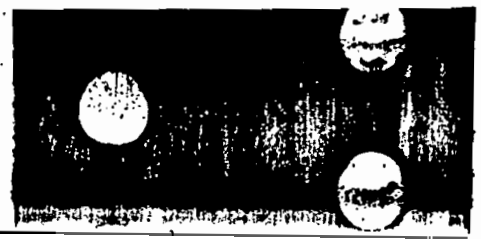
> "At the time when sentence was imposed upon the appellant, the United States had made no treaty of peace with Germany, nor had Congress repealed the declaration of war." 277 Fed. at 764.*

See also *Weisman* v. *United States*, 271 Fed. 944 (7th Cir. 1921); *United States* v. *Meyers*, 265 Fed. 329 (E.D. Mich. 1920).**

* The lower court in *Sichofsky* concluded that, for the purpose of the statute, the war terminated on March 3, 1921. It also stated:

> "It is common knowledge of course that no treaty of peace has been ratified by this government, that no repeal of the declaration of war has been had, and that, subject only to the terms of an armistice, American troops are still on foreign soil. In such event, as I understand the law, there is no formal state of peace. * * * Neither may the court say * * * that substantially and operatively we are at peace, and that therefore the validity possessed by the statute during wartime has failed, and that the reason for its original enactment has ceased. * * * The reason has not yet ceased. We have as yet no peace with Germany. Our troops are yet upon her soil." *Ex Parte Sichofsky*, 273 Fed. 694, 695-96 (S.D. Cal. 1921).

** An earlier case, *United States* v. *Hicks*, 256 Fed. 707 (W.D. Ky. 1919), is contrary. See also *United States* v. *Switzer*, 6 Alaska 223 (1st Div., Juneau, 1920). Following the decision in the *Hicks* case, the Supreme Court reversed another related deci-



In sum, "time of war" as that term is used in Section 32(a) existed until promulgation of the Japanese Peace Treaty in 1952. The indictment charges a conspiracy during the period from June 6, 1944 to June 16, 1950, and the jury was charged that they must find that a conspiracy existed during that period (R. 2341). Since a state of war existed as a matter of law throughout this entire period, the jury necessarily found appellant guilty of conspiring "in time of war." *Cf. United States* v. *Gillette*, 189 F. 2d 449, 454 (2d Cir.), *cert. denied*, 342 U.S. 827 (1951).

POINT II

Allegedly Improper Cross-Examination of a Co-defendant Whose Testimony Was Totally Unrelated to the Evidence against Appellant Is Not Ground for Collateral Attack on Appellant's Sentence.

Appellant contends that his conviction should now be vacated on the ground that a co-defendant, Ethel Rosenberg, was asked improper questions on cross-examination. In substance, appellant alleges that it was improper to elicit the fact that the co-defendant had invoked the Fifth Amendment before the grand jury as to some of the same questions that she answered at trial.

Such contention clearly fails to meet the "exceptional circumstances" which are required for collateral attack.

sion by the same court. *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146 (1919). In view of the Supreme Court's subsequent holding, the *Hicks* case would seem to have no precedential value.

See Point IA, *supra*. In any event, there is no merit to appellant's claim of unfairness or prejudice. The testimony of Ethel Rosenberg was totally unrelated to the convincing proof of appellant's guilt introduced at trial. Furthermore, both Julius and Ethel Rosenberg repeatedly asserted the privilege against self-incrimination at the trial itself and that fact necessarily had far more significance to the jury than mere testimony that the privilege had been invoked at some prior time.

A. Alleged Error in Cross-Examination Is Not Ground for Collateral Attack under Section 2255.

In accordance with the authorities discussed in Point IA, *supra*, it is clear that trial errors relating to evidentiary rulings cannot ordinarily be made the basis for relief in a motion under Section 2255. Appellant attempts to avoid these limitations on review by asserting that the alleged error in the cross-examination of a co-defendant rises to a constitutional level. Even if he succeeded in bringing his own constitutional rights into issue, however, this would not of itself open the conviction to collateral attack, unless the error were so fundamental as to have deprived him of a fair trial. *E.g., Hill* v. *United States*, 368 U.S. 424, 428-29 (1962); *United States* v. *Angelet*, 255 F. 2d 383, 384 (2d Cir. 1958); *Howell* v. *United States*, 172 F. 2d 213, 214 (4th Cir.), *cert. denied*, 337 U.S. 906 (1949).

No case has been cited by appellant or found by the Government in which improper cross examination has been held to subject a conviction to collateral attack. Appellant relies primarily upon *Grunewald* v. *United*

States, 353 U.S. 391 (1957). But there the issue of improper cross-examination as to prior invocation of the privilege against self-incrimination was raised on direct appeal by the same defendant who had been cross-examined. In *Grunewald,* moreover, the Supreme Court did not treat the alleged error as a constitutional question. Rather, the Court dealt with the issue under its supervisory power over the administration of federal criminal justice. 353 U.S. at 424. Limiting its decision to the circumstances of the case before it, the Court found that the cross-examination should have been disallowed "in the exercise of a sound discretion." 353 U.S. at 420-21. In so ruling, the Court did not hold that such questioning necessarily violates constitutional rights; nor did it establish as a matter of law that a prior claim of privilege with reference to a question later answered at trial is never to be deemed to be a prior inconsistent statement. Indeed, it stressed the need for preliminary scrutiny by the Trial Court. 353 U.S. at 419.

This Court has interpreted *Grunewald* to allow cross-examination on prior Fifth Amendment pleas under certain circumstances:

> "Grunewald requires an *ad hoc* determination by the trial judge, wherein he must balance two competing considerations in the light of all the circumstances of the case—the extent to which the prior claim of privilege affects the credibility of the witness and the possible impermissible impact on the jury occasioned by a showing of the prior plea." *United States* v. *Sing Kee,* 250 F.2d 236, 239-40 (2d Cir. 1957), *cert. denied,* 355 U.S. 954 (1958).

Failure of the Trial Court properly to make that determination might be reversible error on appeal, as in *Grunewald,* but it does not affect the constitutional validity of the trial so as to subject the sentences of all defendants to collateral attack.

It is fundamental that the use or abuse of discretion with respect to such evidentiary rulings cannot be relitigated collaterally under Section 2255. *E.g., Caviness* v. *United States,* 226 F.2d 216 (4th Cir.), *cert. denied,* 350 U.S. 941 (1955); *Boisen* v. *United States,* 181 F. Supp. 349 (S.D.N.Y. 1960); *United States* v. *DeFillo,* 166 F. Supp. 627 (S.D.N.Y. 1958). Of course, as in *Grunewald,* rulings as to the admission or exclusion of evidence may have "constitutional overtones," 353 U.S. at 423, where that evidence may have been obtained in a manner that infringed upon constitutionally protected rights. *E.g., Elkins* v. *United States,* 364 U.S. 206 (1960); *McNabb* v. *United States,* 318 U.S. 332 (1943). But in such cases, the Supreme Court is willing to consider matters of evidence ordinarily within the Trial Court's discretion only under its supervisory power over the administration of federal criminal justice and does not deal with constitutional claims as such. *Elkins* v. *United States, supra,* 364 U.S. at 208, 216; *Grunewald* v. *United States, supra,* 353 U.S. at 420-421, 424; *McNabb* v. *United States, supra,* 318 U.S. at 340-41.

Thus, although a defendant is entitled to have evidence obtained in violation of his constitutional rights excluded at trial and may on appeal win reversal of a conviction if such evidence is improperly admitted, violation of these rules is not ground for a subsequent collateral attack under Section 2255. As to Sobell, any impermissible im-

pact of the cross-examination of Ethel Rosenberg would be in the nature of illegally obtained evidence, and Section 2255 may not be used to make or renew what in essence is a motion to suppress such evidence ten years after the trial. *E.g., United States* v. *Gaitan*, 295 F.2d 277 (10th Cir. 1961), *cert. denied*, 369 U.S. 857 (1962); *United States* v. *Hodges*, 156 F. Supp. 313 (D.C. 1957), *aff'd*, 282 F.2d 858 (D.C. Cir. 1960), *cert. dismissed as improvidently granted*, 368 U.S. 139 (1961); *Kyle* v. *United States*, 266 F.2d 670 (2d Cir.), *cert. denied*, 358 U.S. 937 (1959); *Barber* v. *United States*, 197 F.2d 815 (10th Cir.), *cert. denied*, 344 U.S. 857 (1952).

As a justification for collateral attack appellant urges that *Grunewald*, on which he now relies, was decided subsequent to his appeal. Section 2255, however, does not become available for the correction of errors, not otherwise cognizable under that Section, merely because of an allegation that the arguments did not become apparent to the defense until subsequent appellate decisions in other cases. *Hill* v. *United States, supra; Sunal* v. *Large*, 332 U.S. 174 (1947); *United States* v. *Angelet, supra; United States* v. *Hodges, supra.*

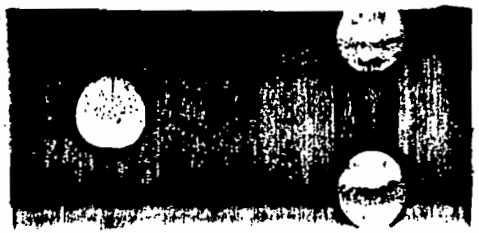
In *Sunal* v. *Large*, the Supreme Court rejected petitioners' argument that their convictions were subject to collateral attack because the Trial Court denied them the opportunity to make a defense which had later been sustained by the Supreme Court. 332 U.S. at 176-178, 181. No direct appeal had been taken from the convictions, because the then existing state of the law indicated that the defense was not available. However, the Supreme Court found that the question had not been definitively settled by it at the time petitioners decided not to appeal.

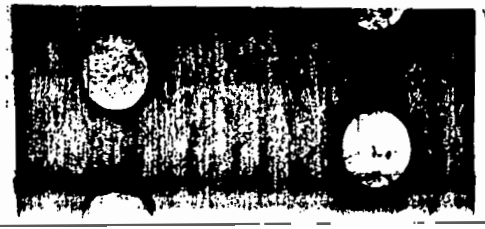
It held that habeas corpus was not available to correct the trial error and observed that petitioners had had the same opportunity to present the question on appeal as the defendants who subsequently obtained the ruling sustaining the defense. 332 U.S. at 181.

Sobell's position with respect to the intervening decision in *Grunewald* is the same as that of the petitioners in *Sunal*, for *Grunewald* did not overrule prior Supreme Court decisions, see 353 U.S. at 420-21, it merely settled a question previously open. Compare *Raffel* v. *United States*, 271 U.S. 494 (1926), with *Johnson* v. *United States*, 318 U.S. 189 (1943).

In *Hill* v. *United States, supra*, the Supreme Court reaffirmed the rationale of *Sunal*. There the petitioner sought to raise collaterally an issue as to the right of allocution suggested by another case decided seven years after his conviction. In holding under these circumstances that relief under Section 2255 was not available, the Court quoted the following from *Sunal*:

> "'We are dealing here with a problem which has radiations far beyond the present cases. The courts which tried the defendants had jurisdiction over their persons and over the offense. They committed an error of law * * *. That error did not go to the jurisdiction of the trial court. Congress, moreover, has provided a regular, orderly method for correction of all such errors by granting an appeal to the Circuit Court of Appeals and by vesting us with certiorari jurisdiction. It is not uncommon after a trial is ended and the time for appeal has passed to discover that a shift in the law or the impact of a new decision





has given increased relevance to a point made at the trial but not pursued on appeal * * *. If in such circumstances, habeas corpus could be used to correct the error, the writ would become a delayed motion for a new trial, renewed from time to time as the legal climate changed. Error which was not deemed sufficiently adequate to warrant an appeal would acquire new implications * * *. Wise judicial administration of the federal courts counsels against such course, at least where the error does not trench on any constitutional rights of defendants nor involve the jurisdiction of the trial court.' 332 U.S. at 181-182." 368 U.S. at 428-29.

In *United States* v. *Angelet, supra*, the defendants sought to have their convictions set aside under Section 2255 on the ground that *Jencks* v. *United States*, 353 U.S. 657 (1957), established a new legal rule subsequent to trial. The court denied relief, stating:

"* * * This argument is flatly contradicted by the decision in *Sunal* v. *Large*, 332 U.S. 174 * * *." 255 F.2d at 384.

Appellant's present contention is that the Trial Judge committed error in overruling certain defense objections, a point which he failed to raise at trial or to stress on appeal, but which was passed on by the Supreme Court in a subsequent case. This alleged error, which was first raised by appellant five years ago in an application to the Supreme Court, see p. 21, *supra*, comes squarely within the rule applied in *Sunal* v. *Large* and cannot be considered a ground for relief on collateral attack.

B. The Cross-Examination of Appellant's Co-defendant Did Not Prejudice Appellant.

Even if the Court should find that allegedly improper cross-examination may be a ground for collateral relief, it is clear that the cross-examination complained of here, concerning a co-defendant whose testimony was totally unrelated to the evidence against appellant, cannot be made the basis for setting aside appellant's conviction.

Appellant contends that *United States* v. *Tomaiolo*, 249 F.2d 683 (2d Cir. 1957), decides the "precise question" of his right to relief for error on the cross-examination of a co-defendant, *Appellant's Brief*, p. 40, and attempts by a labored syllogism to demonstrate that any impeachment of his co-defendant's testimony would have a prejudicial effect on him, *id.* at pp. 39-40, 55. Neither argument has merit.

In *Tomaiolo*, a witness called by defendant Tomaiolo, but also important to defendant Soviero, was improperly cross-examined as to his prior resort to the Fifth Amendment. This Court found errors in the trial in addition to this "so serious and so numerous" as to require reversal of both convictions. 249 F. 2d at 696. The Court found error as to defendant Tomaiolo in five aspects of his own cross-examination, a highly improper remark in the prosecutor's summation and the fact that the witness was also improperly impeached on the basis of his court-martial conviction. These errors alone required reversal of Tomaiolo's conviction. 249 F. 2d at 690. As to Soviero, the Court found that improper references to his prior criminal record alone "made a fair and impartial trial impossible." 249 F. 2d at 695. Clearly, *Tomaiolo* is not

precedent for reversal in the circumstances of this case. See *United States* v. *Stromberg*, 268 F. 2d 256, 269 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959).

Appellant's contention is based on the erroneous premise that the testimony of Ethel Rosenberg, and the impeachment of her testimony on cross-examination, had a prejudicial effect on the case against appellant. Indeed, appellant asserts that Ethel Rosenberg at trial "categorically maintained that Elitcher's testimony was false", *Appellant's Brief*, p. 39, and that "realistically, it was Ethel Rosenberg's credibility that stood between Sobell and conviction." *Id.* at 40. These assertions are without any support in the record.

Appellant's conviction rested on the testimony of Max Elitcher, whom the Trial Judge charged the Jury they must believe in order to convict Sobell. Contrary to appellant's assertion, not the slightest conflict exists between the testimony of Ethel Rosenberg and that of Elitcher against Sobell. Ethel Rosenberg's testimony on direct and cross-examination in no way related to the events and conversations testified to by Elitcher; nor did she at any point even refer to Elitcher or Sobell (R. 1924-2090, *passim*). Elitcher did not refer to her or to events which took place in her presence. See pp. 10-14, *supra*.

Rather, Ethel Rosenberg's testimony on direct examination, apart from life history, primarily related to David and Ruth Greenglass. A large portion of it consisted of simple, flat denials that certain acts and conversations testified to by the Greenglasses ever took place. The allegedly improper references to prior invocation of her constitutional privilege concerned primarily her refusal

before the grand jury to answer questions related to her brother David Greenglass' theft of information on the atomic bomb from Los Alamos (R. 2045-84).

Elitcher's testimony related exclusively to the espionage activities of Julius Rosenberg and Sobell and did not implicate or even mention Ethel Rosenberg. Similarly, the testimony of the Greenglasses which implicated Ethel Rosenberg did not involve Elitcher or Sobell (R. 547-655, 741-1133, *passim*). Elitcher, in turn, made no reference to either of the Greenglasses, except in cross-examination where he denied knowing them (R. 474).

Thus, Ethel Rosenberg's testimony did not in any way affect the credibility of Elitcher, or raise any issue as to whether the events he related had taken place.

Although Julius Rosenberg, in addition to contradicting the Greenglass testimony, had denied committing espionage with Sobell or attempting to recruit Elitcher into the conspiracy (R. 1704-24, 1732-43, 1806-12, 1903-07), his testimony with regard to the latter two points manifestly received no corroboration from his wife's testimony.

Under these circumstances, any impeachment of Ethel Rosenberg's testimony, even assuming its impropriety, would have had no direct effect on the testimony against appellant and could not form the basis for setting aside his conviction on collateral attack. *Cf. United States* v. *Rinaldi*, 301 F.2d 576, 578 (2d Cir. 1962); *United States* v. *Sing Kee*, *supra*, 250 F.2d at 240.

Appellant seeks to magnify the importance of his claim by asserting that the Trial Judge improperly participated in the cross-examination of his co-defendant. *Appellant's Brief*, pp. 36, 55. But the same question was raised by Sobell and his co-defendants on direct appeal and rejected by this Court, which found that "the judge stayed well inside the discretion allowed him." *United States* v. *Rosenberg*, 195 F.2d 583, 593 (2d Cir. 1952).

Appellant also suggests that Ethel Rosenberg's testimony as to her prior invocation of the privilege against self-incrimination had so strong an impact on the jury as to affect fundamentally the fairness of the trial. *Appellant's Brief*, pp. 31-32, 39. But the pleading of the Fifth Amendment privilege already had worked whatever effect it was to have on the jury long before the cross-examination in question. Julius Rosenberg, who testified before his wife, refused on many occasions during his testimony to answer questions on the ground that they might tend to incriminate him. (R. 1602, 1724, 1731-32, 1746, 1757-58, 1761-63, 1899-1900). Ethel Rosenberg herself invoked the privilege against self-incrimination on several occasions (R. 1938-41, 2012-15, 2017-19, 2042-43), and was advised by her counsel in open court of her Fifth Amendment rights (R. 2007), prior to the cross-examination as to her reliance on the privilege before the Grand Jury. These pleas of the privilege against self-incrimination at the trial, in the presence of the jury, necessarily were far more significant than later testimony by the witness that she had invoked the same privilege at some prior time.

CONCLUSION

The order denying the motion should be affirmed in all respects.

Dated: New York, N. Y.
October 23, 1962.

Respectfully submitted,

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Of Counsel.

United States Court of Appeals

FOR THE SECOND CIRCUIT

APPEAL FOR THE UNITED STATES OF AMERICA

INDEX

Indictment

(2494a)

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

No.

UNITED STATES OF AMERICA,

-v-

JULIUS ROSENBERG, ETHEL ROSENBERG, ANATOLI A. YAKOVLEV, also known as "John", DAVID GREENGLASS and MORTON SOBELL,

Defendants.

The Grand Jury charges:

1. On or about June 6, 1944, up to and including June 16, 1950, at the Southern District of New York, and elsewhere, Julius Rosenberg, Ethel Rosenberg, Anatoli A. Yakovlev, also known as "John", David Greenglass and Morton Sobell, the defendants herein, did, the United States of America then and there being at war, conspire, combine, confederate and agree with each other and with Harry Gold and Ruth Greenglass, named as co-conspirators but not as defendants, and with divers other persons presently to the Grand Jury unknown, to violate subsection (a) of Section 32, Title 50, United States Code, in that they did conspire, combine, confederate and agree, with intent and reason to believe that it would be used to

the advantage of a foreign nation, to wit, the Union of Soviet Socialist Republics, to communicate, deliver and transmit to a foreign government, to wit, the Union of Soviet Socialist Republics, and representatives and agents thereof, directly and indirectly, documents, writings, sketches, notes and information relating to the National Defense of the United States of America.

(2494b)

OVERT ACTS

1. In pursuance of said conspiracy and to effect the objects thereof, in the District of Columbia, on or about June 6, 1944, the defendant Julius Rosenberg visited a building at 247 Delaware Avenue, Washington, D. C.

2. And further in pursuance of said conspiracy and to effect the objects thereof, in the Southern District of New York, on or about November 15, 1944, the defendants Julius Rosenberg and Ethel Rosenberg conferred with Ruth Greenglass.

3. And further in pursuance of said conspiracy and to effect the objects thereof, in the Southern District of New York, on or about November 20, 1944, the defendant Julius Rosenberg gave Ruth Greenglass a sum of money.

4. And further in pursuance of said conspiracy and to effect the objects thereof, in the Southern District of New York, on or about November 20, 1944, Ruth Greenglass boarded a train for New Mexico.

5. And further in pursuance of said conspiracy and to effect the objects thereof, in the Southern District of New York, on or about December 10, 1944, the defendant Julius Rosenberg went to 266 Stanton Street, New York City.

6. And further in pursuance of said conspiracy and to effect the objects thereof, in the Southern District of New York, on or about December 10, 1944, the defendant Julius Rosenberg received from Ruth Greenglass a paper containing written information.

7. And further in pursuance of said conspiracy and to effect the objects thereof, in the Southern District of New York, on or about January 5, 1945, the defendants Julius Rosenberg and Ethel Rosenberg conferred with the defendant David Greenglass and Ruth Greenglass.

8. And further in pursuance of said conspiracy and to effect the objects thereof, in the Southern District of New York, on or about January 5, 1945, the defendant Julius Rosenberg gave Ruth Greenglass a portion of the side of a torn cardboard "Jello" box.

(2494c)

9. And further in pursuance of said conspiracy and to effect the objects thereof, in the Southern District of New York, on or about January 10, 1945, the defendant Julius Rosenberg introduced the defendant David Greenglass to a man on First Avenue, New York City.

Indictment

10. And further in pursuance of said conspiracy and to effect the objects thereof, in the Southern District of New York, on or about January 12, 1945, the defendant Julius Rosenberg conferred with the defendant David Greenglass.

11. And further in pursuance of said conspiracy and to effect the objects thereof, in the Southern District of New York, on or about January 12, 1945, the defendant Julius Rosenberg received from the defendant David Greenglass a paper containing sketches of experiments conducted at the Los Alamos Project.

12. And further in pursuance of said conspiracy and to effect the objects thereof, in the Southern District of New York, on or about January 14, 1945, the defendant David Greenglass boarded a train for New Mexico.

(Section 34, Title 50, United States Code).

Excerpts from Testimony

(1)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C. 134-245

UNITED STATES OF AMERICA

vs.

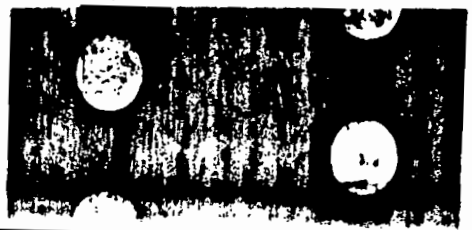
JULIUS ROSENBERG, ETHEL ROSENBERG, ANATOLI A. YAKOVLEV, also known as "John", DAVID GREENGLASS and MORTON SOBELL.

Before: HON. IRVING R. KAUFMAN, D.J., and a Jury.

New York, March 6, 1951; 10.30 o'clock a.m.

APPEARANCES:

IRVING H. SAYPOL, Esq., United States Attorney,
and
MYLES J. LANE, Esq.,
ROY M. COHN, Esq.,
JOHN M. FOLEY, Esq.,
JAMES B. KILSHEIMER, III, Esq., and
JAMES E. BRANIGAN, JR., Esq., Assistant United States Attorneys for the Government.



Colloquy of Counsel

EMANUEL E. BLOCH, Esq.,
Attorney for Julius Rosenberg.

ALEXANDER BLOCH, Esq.,
Attorney for Ethel Rosenberg.

O. JOHN ROGGE, Esq.,
Attorney for David Greenglass.

HAROLD M. PHILLIPS, Esq., and
EDWARD KUNTZ, Esq.,
Attorneys for Morton Sobell.

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(11) • • •

Mr. Saypol: The record should show compliance with the rules, and in compliance with various provisions of statutory law. I take it that the defendants will so concede, first, that they have received copies of the indictment; secondly, that they have received copies of the venire; and finally, they have received a copy of the list of witnesses to prove the indictment, all in due compliance with the statutes.

May we have that concession?

Mr. E. H. Bloch: I will concede that the defendants have been duly served with a copy of the indictment. I am not at all sure that I can concede in the form of "duly received" a copy of the list of witnesses or a copy of the panel, because I was served those in piecemeal, and the last batch of panel prospective jurors as well as (12) additional witnesses I don't believe was served on these defendants within the three days or outside the three-day statutory period, but I am going to waive that so there is no dispute about the matter.

Colloquy of Counsel

The Court: All right. In other words, all counsel agree that Section 3432 of Title 18 was complied with.

Mr. E. H. Bloch: Correct.

The Court: All right. Just before calling of the jurors we will take a short recess.

Mr. E. H. Bloch: If the Court pleases, before we take a recess, if you will remember, the other afternoon we addressed an application to your Honor with respect to the number of peremptory challenges.

The Court: Oh, yes, I will deal with that selecting the jury.

Mr. Saypol: May I just supplement that before we adjourn? I take it the concession made by Mr. Bloch will be joined in by Mr. Phillips?

The Court: Oh, yes, all counsel.

Mr. Phillips: That is correct.

(Short recess.)

The Court: Gentlemen, on the matter of challenges, I will hand to the clerk a sheet, indicating the manner in which the challenges are to be exercised, that is, the (13) rounds in which they are to be taken. The defense will have 30 challenges and the Government will have 20 challenges.

Will you hand this down (handing).

I may state that the law provides that both sides, in the ordinary case involving this type of punishment, have 20 challenges each, but the Court in its discretion may enlarge only that of the defense, not of the Government. In view of the fact that there are several defendants on trial, I have enlarged yours by 10 challenges.

(Panel of jurors sworn by the clerk.)

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(37) • • •

The Court: Has any juror any prejudice against the enforcement of a law which makes it a crime to commit espionage or to conspire to commit espionage or against punishment of any person who conspires to commit espionage?

(Prospective jurors indicate in the negative.)

The Court: Do you have any bias, prejudice or scruple against the enforcement of a law the violation of which is punishable by death or against being a juror in a capital case?

Prospective Juror No. 1: Your Honor, I am prejudiced somewhat against capital punishment and I have so stated in the Supreme Court of the State of New York.

The Court: Very well. We will excuse you.

(Prospective juror No. 1 excused.)

• • • •

(153) • • •

(James E. Sexton, called as a prospective juror, takes seat No. 9.)

By the Court:

Q. Is there anything you want to say, Mr. Sexton? A. Yes, there is, your Honor.

Q. What is it? A. In the first place, I was in the United States Army. During the course of that service I was in Czecho-Slovakia. I am a member of the Catholic War Veterans and during the course of my study at school I did (154) hear lectures regarding the fallaciousness of

Communism. Regarding capital punishment, while I am not opposed to it, I would prefer not to serve as a juror with the sentence of death to be meted out by the United States. This however does not constitute an unwillingness on my part to serve as a juror if so selected.

Q. Well, I think there are some things that need clarification. In the first place, on the matter of punishment, and I want all the jurors to hear this: your function is merely to pass upon the evidence. As I said yesterday, you add a column of figures; that is what you do. And when you are through adding that column of figures you have a result and then it is your job to bring in that result. What happens after that result is brought in is completely a matter for me, is completely within my province. There is nothing mandatory about this statute. I can if I see fit in accordance with the facts of the case impose the death penalty. I can also, if I see fit, impose a prison sentence. The Court has wide latitude. I want that to be clear in the minds of the jurors. Their verdict does not necessarily carry with it any mandatory sentence. Now with that in mind, does that in any way change your point of view with respect to that phase of your objection? (155) A. Well, as I stated, your Honor, it was only a preference on my part not to serve if the death sentence could be given out.

The Court: Well, I think, Mr. Sexton, we had better excuse you. You would be sitting there and you would be rather unhappy, wouldn't you, during the course of the trial?

Mr. Sexton: Well, as I said before, your Honor,

it wouldn't interfere with my duties as an American citizen.

The Court: You still feel in your own mind that you could despite these things you have related here today, decide this case on the evidence?

Mr. Sexton: I feel that I could.

Q. And keep your mind open? A. That is right.

Q. Realizing, would you, during your deliberations that you had nothing to do with the sentence or the punishment? A. I would feel so, your Honor.

Q. Well, we will permit you to remain. A. I have some other points, your Honor.

Q. Yes. A. I have friends who are police officers. They are only casual acquaintances. It would not affect me in any way in serving on the jury. In the business where I am employed we do have to work with the Army. On all of these I do not feel I would be biased or prejudiced.

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(175) • • •

The Clerk: Mr. Rader excused by the defense. Louis Boxer, No. 9.

(Mr. Boxer, prospective Juror No. 9, took his seat in the jury box.)

By the Court:

Q. Mr. Boxer, have you heard everything that has transspired? A. I have, your Honor.

Q. Is there anything you care to volunteer to the Court? A. Yes, sir. I would like to say that I am opposed to capital punishment.

The Court: All right, excused.

The Clerk: Mr. Boxer excused by the Court.

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(219) • • •

The Court: We will take a very short recess at this point. Then we will hear the openings and then we will call your first witness.

(Short recess.)

The Court: Proceed.

Mr. Saypol: May it please your Honor, Mr. Foreman, ladies and gentlemen of the jury:

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(220) • • •

We realize that every criminal prosecution has grave implications, both for the defendants and for the (221) people of our country. The facts, as they are developed before you here, will demonstrate that this case, where a Grand Jury has charged a conspiracy to commit espionage in behalf of a foreign power, is one of unusual significance. The significance of a conspiracy to commit espionage takes on added meaning where the defendants are charged with having participated in this conspiracy against our country, at this, the most critical hours in our history, in time of war, around 1944.

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(229) • • •

The evidence will reveal to you how the Rosenbergs persuaded David Greenglass, Mrs. Rosen-

berg's own brother, to play the treacherous role of a modern Benedict Arnold, while wearing the uniform of the United States Army. • • •

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(254) • • •

MAX ELITCHER, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Mr. Saypol: May I proceed, if the Court please?
The Court: Yes.

Direct examination by Mr. Saypol:

Q. Mr. Elitcher, put yourself right back in that chair and relax and speak up so that you address yourself to me and in that way the jury will hear your testimony.

Where do you live? A. 164-18 72nd Avenue in Flushing, Queens.

Q. You will have to talk a little louder than that.

The Court: May I suggest, Mr. Saypol, if it wouldn't inconvenience you too much to move your little table back a little further because the acoustics are very (255) bad in this room.

Mr. Saypol: Yes, they are. Both the light and the acoustics.

Q. Now tell me again, where do you live? A. 164-18 72nd Avenue, Flushing, New York.

Q. Were you ever employed by any agency of the United States Government? A. Yes, I was.

Q. What agency did you work for? A. The Navy Department.

Q. In what branch of the Navy Department? A. The Bureau of Ordinance.

Q. During what time were you employed by the Bureau of Ordinance in the Navy Department? A. From November of 1938 to October of 1948.

Q. Where did you hold that job? A. In Washington, D. C. at the Navy Department.

Q. Do you know the defendant Morton Sobell? A. Yes, I do.

Q. Would you be good enough to point him out in the coutroom if you see him? A. Yes. The man sitting at the end of the table.

Q. That is at the end of the defense counsel table? A. That is right.

Q. With the glasses? A. Yes.

The Court: The record will indicate that the (256) defendant has been identified, Mr. Phillips?
Mr. Phillips: Yes.
(The defendant Sobell stood up.)
The Witness: Yes.

Q. When did you first meet Sobell? A. Well, I probably met him first at Stuyvesant High School.

Q. Did you attend Stuyvesant High School together with him? A. Yes.

Q. And did you afterwards attend another institution with him? A. Yes.

Q. What institution was that? A. The City College of New York.

Q. During what years? A. From 1934 to 1938.

Q. Do you recall a conversation some time in 1939 with Sobell regarding the Communist Party?

Mr. Phillips: Just a moment. That is even prior to the date when the alleged conspiracy is said to have taken place. The date in the indictment is 1944.

The Court: What date? 1934, did you say?

Mr. Saypol: 1939.

Mr. Phillips: 1939 this question was. Are we going back to the beginning of the world?

The Court: Don't argue. Make your objection. You don't have to argue your point.

Mr. Phillips: I beg your pardon, your Honor.

(257)

Mr. E. H. Bloch: If the Court please, before you rule on the point I would like to add an additional objection because it may come up from time to time.

The Court: Will you step up.

(The following took place at the bench.)

The Court: I would like to hear your point on that.

Mr. Saypol: Why, this is all preliminary. It is the opening of a trial. It is incidental to prove acquaintanceship, association with each other, common sympathies and ultimately intent to commit the main crime.

The Court: Do you bring that down, this association in the Communist Party, do you bring it down?

Mr. Saypol: Oh, yes.

The Court: To at or about the time of this conspiracy?

Mr. Saypol: Right into the conspiracy.

The Court: In other words, you don't have a conversation there and break off?

Mr. Saypol: Oh, no, no.

The Court: It is continuous.

Mr. Saypol: Yes, your Honor. I ask your Honor if for no other reason to take it subject to connection. (258) Obviously there must be a starting point.

The Court: On what theory are you offering it? To prove the offense in the indictment?

Mr. Saypol: Oh, indeed not; to prove association, to prove intent, to prove motive for the crime which will be proved.

The Court: Very well. I will overrule the objection.

Mr. E. H. Bloch: I didn't finish my objection. I was going to object upon the additional ground that the question of any witness' affiliation with the Communist Party is incompetent, irrelevant and immaterial to the issues in this case and can only inject an extraneous issue that will confuse the jury and prejudice the defendants in the eyes of the jury.

The Court: Well, I have clarified that yesterday in the opening. I shall clarify it again now by an instruction to the jury as to the purpose for which this is offered.

Mr. A. Bloch: I object to Communism being mentioned at all on the ground that there is no

causal connection between Communism and the crime charged in the indictment. If it is done for the purpose of showing motive, they have to show that there is some causal connection.

(259)

The Court: I agree with you. I agree with you absolutely, and I must accept the good faith of the prosecutor that he will show a causal connection between Communism and the commission of the acts charged in the indictment. Your objection is a good one and I agree with that.

Mr. Saypol: It will be shown.

The Court: But I accept Mr. Saypol's statement that he will show that causal connection.

Mr. E. H. Bloch: Your Honor, just to clarify the record so that there will be no misconception in my mind, and I don't want to get up and object a hundred times to the same line of questioning because I think this objection should go right through. It hits a basic point. I was wondering whether your Honor is taking this evidence here subject to connection, this specific evidence.

The Court: I will take it subject to connection, causal connection, the connection that Mr. Bloch, Sr. has spoken of. I will take it subject to that, and of course purely on the question of motive and not as proving the charge.

Mr. A. Bloch: It is our duty to except, your Honor.

Mr. E. H. Bloch: Yes. May an exception be (260) noted for all the defendants.

Mr. Phillips: May I suggest that before proving

motive it would be logical to prove the commission of the offense.

The Court: Well, I agree, but the point is that this motive apparently occurred prior to the commission of the offense. So you are taking the story backwards.

Mr. Phillips: How are we expected to be prepared to meet something that occurred in 1939 in view of the indictment?

The Court: If the offense is not proven of course the Court will have the power to deal with the charge in the indictment.

Mr. Phillips: But this conversation and everything that goes with it, we are entirely unapprised of.

The Court: That is not unusual. In the course of a criminal case, for example, while it is not applicable here, there will be matters that are brought up that are not in the indictment. For example, in establishing a crime that carries with it intent, the prosecutor can show previous similar acts.

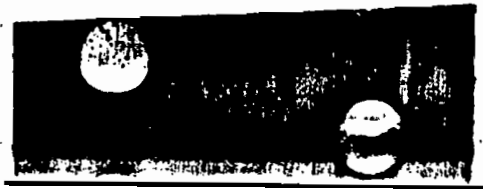
Mr. Saypol: That was affirmed only yesterday in an opinion.

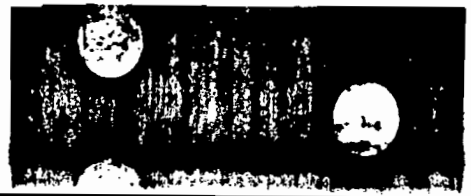
The Court: And yet that isn't any place in the indictment. So that is not an unusual thing.

(261)

Mr. Phillips: Have you notice in this charge it doesn't need to be intent, but reason to believe that it is to the advantage of another country.

The Court: You have to have intent; you have to have criminal intent.





Mr. Saypol: Do you waive my proving intent on the record?

Mr. Phillips: If you examine this statute, every word of it, the statute reads with intent, or reason to believe.

Mr. Saypol: What does that mean?

Mr. Phillips: It means either you intend it to the advantage of the other side, or being immaterial, if you have reason to believe——

The Court: Well, certainly in your favor I would not submit this case to the jury if I didn't believe there was some criminal intent. All right, let us not argue it any further.

Mr. Phillips: In answer to a bill of particulars, in answer to a demand for a bill——

Mr. A. Bloch: Can't we arrange that the exception taken to your present ruling be equally applicable to any further questions that may be asked along similar lines?

Mr. Saypol: You don't have to take an exception.

The Court: He means objection.

(262)

Mr. Saypol: Oh, yes.

Mr. A. Bloch: The objection runs right through on this question of Communism?

The Court: Very well.

Mr. Phillips: May I also point out in answer to a question by order of Judge Ryan, the only thing we were allowed, namely, when did the defendant Sobell join the conspiracy. The answer was in June,

1944. A plain answer on the part of the Government.

The Court: Well, I thought I had already passed on that objection. I had answered that before.

Mr. Phillips: I just wanted to draw your attention to it to show the difficulty we are placed under when he starts to talk about 1939.

The Court: But he is not talking about the offense in 1939.

Mr. Phillips: If it is not connected with the offense, what is it for?

The Court: I didn't say it was not connected with the offense; he is not attempting to prove the charge in the indictment; he is now on the question of motive.

Mr. Phillips: Well, I can see that we are hopelessly divided on this question of law.

The Court: Well, let me ask you this, Mr. Phillips: Have you tried any criminal cases?

(263)

Mr. Phillips: Strange as it may seem, I tried several. I tried one in this very court after the last war.

The Court: I know your specialty is in the real estate field.

Mr. Phillips: Well, after the last war I tried one.

The Court: You would not be surprised if you had tried many criminal cases at some of these questions that come up.

Mr. Phillips: I understand all that and I have looked up the authorities——

The Court: Well, let us not prolong the argument. I get your point. Proceed.

(The following took place in open court.)

The Court: The objection is overruled, and I want to state to the jury again that it appears that during the course of this trial the question of the association or membership in the Party, in the Communist Party, by any of the defendants will arise from time to time. I want you to understand right at the outset that the fact that they were members of the Communist Party does not establish the elements necessary to prove them guilty of the crime charged in this indictment, which is conspiracy to commit espionage. However, I am admitting this testimony (264) on the theory of motive, but the Government will have to establish that there is some connection between Communism and committing the offense charged in the indictment. I hope I make myself clear.

Mr. Saypol: The evidence will make it clear, if the Court please.

The Court: All right.

Mr. Saypol: Will the reporter be good enough to read back the preceding question to which there was objection?

(Question read.)

A. Yes, I do.

Q. Where did that conversation take place? A. In Washington, D.C.

Q. Will you tell us what Sobell said, what you said and what both of you did? A. Well, in 1939——

Mr. A. Bloch: Just one moment. I object to the question as being two questions in one, what he said and what he did.

The Court: All right, tell us what you said.

A. Well, we were living together in an apartment at 4925 7th Street NW, and soon after moving in he asked me about joining the Young Communist League. At the time I said no, and for some period he continued to ask me about it and I finally did make such a move.

(265)

Mr. Kuntz: If your Honor please, that is not responsive. Here he speaks about the Young Communist League and the question was in regard to the Communist Party. I think in another case one of your colleagues ruled recently that the two are certainly not identical, and I think excluded just such evidence.

The Court: Well, I will exclude it unless Mr. Saypol will tell me if he will establish that there is some connection between the two.

Mr. Saypol: He hasn't yet been permitted to finish his answer. He is telling in narrative form what transpired between him and Sobell and will come ultimately to the point where he got into the Communist Party through Sobell. If there hadn't been interruption, it would have been developed.

Mr. Kuntz: If your Honor please, on behalf of the defendant Sobell——

The Court: You want me to strike anything about the Young Communist League.

Mr. Kuntz: I respectfully——

The Court: All right, strike out anything about the Young Communist League. Get to the Communist Party.

By Mr. Saypol:

Q. Will you tell us now the circumstances under (266) which you joined the Communist Party after the conversation with Sobell? A. Yes.

Mr. A. Bloch: One minute. I object to the question as being too general.

The Court: Repeat the question.

Mr. A. Bloch: He has offered a possible answer, wandering in all directions, and it is not pertinent to the issues in this proceeding.

The Court: Overruled.

Mr. A. Bloch: Exception.

The Court: We know the direction in which these questions intend to take the witness. We have discussed it at the bench and I assume it is in that direction that you are going, Mr. Saypol; is that correct?

Mr. Saypol: Yes.

The Court: Proceed.

A. (Continuing) However, when I attended this meeting, it turned out that the group was being organized as a

group or cell of the Communist Party and it was this which I joined.

Mr. Phillips: I move to strike that out as a conclusion of the witness. It is not a statement of fact at all.

The Court: All right, tell us exactly what led you to believe that it was a branch of the Communist Party.

(267)

Mr. Phillips: Did your Honor rule on my motion to strike out the testimony?

The Court: Yes, I am sustaining your motion, I mean, I have asked him to give us the facts which led him to that conclusion.

The Witness: Shall I continue?

The Court: Yes.

A. Well, at the meeting I was told that this was to be a branch of the Communist Party and I was asked if I would take—I mean, if I would agree to such membership. I don't recall the exact oath or whatever procedure was used, and——

Mr. E. H. Bloch: I move—sorry.

The Court: Wait a minute. Let the man finish his answer.

A. —and from that time on, in attending meetings, I knew that I was a member of the Communist Party.

The Court: And is this the meeting to which Sobell had taken you?

The Witness: Yes.

Mr. Phillips: I move to strike out——

Q. Sobell wasn't——

Mr. Phillips: Just a moment, please. I move to strike out all of his testimony which relates what somebody told him at the meeting, and other conclusions.

(268)

The Court: Was that in the presence of Sobell?

The Witness: Yes.

The Court: Denied.

Mr. Phillips: Exception.

Q. Did you thereafter attend meetings of this cell with Sobell? A. Yes, I did.

Mr. E. H. Bloch: I wonder whether Mr. Saypol would fix the time, please?

The Court: Will you fix the time.

The Witness: I can only fix it as some time, let's say, two or three, four months after May of 1944—I am sorry, 1939.

Q. I will come back to that in a little while. Just one question: Did this cell, did you learn from conversations in the presence of Sobell at this first meeting or subsequent meetings whether or not this cell had any associations with any branch, any division or any bureau of the Navy Department? A. No, I didn't.

Mr. A. Bloch: Objected to as leading, your Honor.

The Court: Well, his answer was no.

Mr. Saypol: The answer was negative.

Q. Do you know the defendant Julius Rosenberg? A. Yes, I do.

Q. Do you see him here in court? A. Yes, I do.

(269)

Q. Would you identify him? A. The man with the mustache and glasses in the middle of the table.

The Court: The record shows Mr. Rosenberg identified.

Q. Did anybody ever ask you to obtain classified documents and information from the Navy Department for the benefit of the Soviet Union?

Mr. Phillips: I object.

Mr. A. Bloch: I object to the question on the ground it is improper in form.

The Court: What is improper about the form?

Mr. A. Bloch: It is leading.

Mr. E. H. Bloch: If your Honor please——

The Court: Overruled on that ground.

Mr. Phillips: It calls wholly for a conclusion.

The Court: Overruled.

Mr. Phillips: Of the witness' mind.

Mr. E. H. Bloch: May I just add this——

Mr. Phillips: Your Honor——

The Court: Don't argue. You have stated your point, that is all.

Mr. Phillips: May I ask that the question be repeated?

The Court: Repeat the question.

(Question read.)

(270)

Mr. Phillips: It is clearly objected to for other reasons. It is objectionable that somebody asked him to do something in the interest of the Soviet Union. That involves three different states of facts in one question.

The Court: I will sustain that.

By Mr. Saypol:

Q. Where were you living in 1944, in the summer? A. At 247 Delaware Avenue, SW, in Washington.

Q. About that time did you see the defendant Rosenberg? A. Yes, I did.

Q. Tell us the circumstances under which you saw him? A. Well, one evening, it was early, before supper, I received a phone call from a person who said he was Julius Rosenberg.

The Court: When was this?

The Witness: In June, 1944.

A. (Continuing) He said that he was a former classmate. I remembered the name, I recalled who it was, and he said he would like to see me. He came over after supper, and my wife was there and we had a casual conversation. After that he asked if my wife would leave the room, that he wanted to speak to me in private. She did and he then said to me—he talked to me first about the job that the Soviet Union was doing in the war (271)

effort and how at present a good deal of military information was being denied them by some interests in the United States, and because of that, their effort was being impeded. He said that there were many people who were implementing aid to the Soviet Union by providing classified information about military equipments, and so forth, and asked whether in my capacity at the Bureau of Ordinance would I have access to and would I be able to get such information and would I turn it over to him.

Q. Now, let me ask you this question: In the course of that conversation, was there any talk about the place where you worked or the kind of work that you did? A. Well, in the earlier conversation he asked me, and he spoke to my wife—we all asked each other what we were doing, and it was established that I was working in the Bureau of Ordinance and what I was doing there.

Q. Did you tell him what you were doing? A. At the time I was working on computers—well, I was in the fire control section in the Bureau of Ordinance, and I was working on computers for anti-aircraft control and other computers involving fire control.

Q. Would you just digress for a moment and tell us what you mean or what was meant by the term "classified" information?

(272)

Mr. E. H. Bloch: I object to that upon the ground that this witness has not been qualified as an expert.

Mr. Saypol: I don't think it requires any expertness to describe the term.

Max Elitcher—for Government—By the Court

By the Court:

Q. You said you had been with the Navy for 10 years; is that right, approximately 10 years? A. That's right.

Q. And during that period of time you dealt with information that was characterized as "classified" and "nonclassified"? A. That's right.

Q. As far as Navy personnel was concerned, was that defined for them? A. Yes.

Q. Would you please define it for us? A. Well, the first classification is "restricted," which is information which is—which is not permitted to be released to the public, I believe, only on some specific means, such as press releases. There was "confidential," to which no one but authorized people have any access or any authorized access. Then there is "secret," which is a stage beyond "confidential." The equipment which I worked on varied from "restricted" to "confidential," that is, at that time.

Mr. E. H. Bloch: Now, if the Court please, I (273) press my objection, because from the explanation given by this witness, he hasn't used the word "classified" once. He has merely enumerated three groups of information and I assume that when your Honor propounded the questions to the witness it was to test his qualifications as an expert, but I have heard nothing and I don't think anybody has heard anything——

The Court: All right, you don't have to go along.

Mr. E. H. Bloch: I am sorry. As long as I made my point.

The Court: Please state your objection in short

Max Elitcher—for Government—By the Court

form. You all have a habit of going on longer. Please give me some credit for some intelligence, too.

By the Court:

Q. Did I understand you to mention "classified" also? A. I don't recall that I did, but the terms, the word "classified" was used in the Navy Department, but generally we spoke of something being "confidential" or "restricted," but the terms were used synonymously.

By Mr. Saypol:

Q. Well, in fact, these categories that you have described, were generally embraced in the broad term "classified"; that is what "classified" meant? A. That's right.

(274)

Mr. Phillips: I object to the District Attorney telling him what he means.

Mr. E. H. Bloch: I object.

Mr. Saypol: Well, your Honor, it is a matter of public information.

The Court: It is a simple thing. Let us not get too excited.

Q. Now, just to clear the picture a little more, did you tell Rosenberg at the time that the type of work you were on included computers and something about fire control? When you talk about fire control, you mean the control of conflagrations, flames, or something else? A. No, I don't.

Q. What does that mean? A. Well, it has to do with equipment that deals with the eventual aiming and firing of missiles against the targets.

Q. You mean from different types of guns? A. That is correct.

Q. From rifles, from machine guns? A. That is correct.

Q. From cannons? A. That's right.

Q. Well now, having told that to Rosenberg, will you then continue with what he said to you, as you testified a little while ago? I think you told us that he said something about there not being adequate supply to Russia (275) of information of this type, that it could use; will you continue then with what he said? A. Well, he asked about any plans or blueprints or anything that might be of value, and that all these things are needed, and that the choice would not be mine, if I had some such information, they should be turned over and someone would evaluate them. He said that this information, if I would agree to do so, should be taken to New York, to him, and he would have it processed photographically and the material would be returned. He said that this would be done in a very safe manner, that is, would be brought one night; it would be processed immediately and could be returned almost within a short time, so it could be returned before it was missed. He also indicated the security of these means, that is, that the material was to be carried in containers which would offer protection, that is, the film would be exposed if tampened with by unauthorized people, and he generally tried to assure me that the operation would be safe, as far as I was concerned.

Q. We will come back to that again in a little while. I want to go on to another subject momentarily with you. Will you project yourself, if you will now, into the year 1947. At that time do you know whether the defendant

Sobell was employed? A. He was employed (276) some time in '47 at the Reeves Instrument Corporation.

Q. Where was that located? A. At 215 East 91st Street, in New York.

Q. At that time you were still working the Navy Department? A. That is correct.

Q. In the course of your employment in these years that you mentioned, was it incidental to your employment and part of it for you to go to different plants located throughout the country to examine and confer in connection with the work, the type of work you have told us about, that you were working on? A. Yes.

Q. For instance, were there times when you went to the General Electric plant at Schenectady? A. Yes.

Q. Was it in connection with that official purpose of your work that you went at one time to the Reeves Instrument plant, in New York City, where Sobell was employed? A. Yes, that is correct.

Q. Now, at this time in 1947, when you visited this Reeves plant where Sobell was employed, did you have a conversation with him or did he have a conversation with you regarding Soviet espionage? A. Yes.

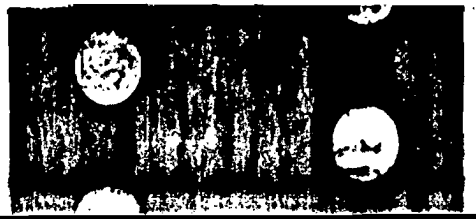
Q. Will you tell us what the conversation was? A. Well, he inquired as to whether I knew of any engineering graduates or students——

Mr. Phillips: I can't hear the witness' answer. (277)

The Witness: I am sorry.

The Court: Speak up; speak up louder.

A. (Continuing) He inquired as to whether I knew of any engineering students or engineering graduates who were



progressive, who would be safe to approach on this question of espionage, of getting material.

Q. Well, in speaking with you about that, concerning these possible recruits, was anything said concerning their association or their ideology or their contacts?

Mr. Phillips: Just a moment. There are too many questions in one, sociology, ideology, contact; which does he mean.

The Court: Overruled. He means either or any of them.

Mr. Phillips: Exception.

A. Well, I don't recall the exact definition that was made of these people, but the indication was that they would be progressive people, whom I knew to be safe, who could be asked about such getting of material.

Mr. E. H. Bloch: I move to strike out the latter part of the answer after "indication" as not being proper words.

The Court: Will you read it back, please, read the question and answer.

Mr. Saypol: Let me——

(278)

The Court: Do you want to strike out the answer?

Mr. Saypol: Yes, let me withdraw the question.

Q. What was the substance of the conversation, if you can't recall the exact words? A. Well, the substance was if I knew of students who were progressive, or, in other

words, safe, safe for someone to ask about getting such information.

Q. When you say "safe" in getting such information, you mean for similar——

Mr. Phillips: Just a minute. I object to the attorney for the people telling him "do you mean" anything. What he says is what he says. That stands, not the lawyer's mentioning what he is interested in.

The Court: You mean, Mr. Saypol can't ask him another question on the same subject?

Mr. Phillips: Not another question which involves saying, "You said so and so; by that do you mean so and so"? That is what I meant.

The Court: Overruled. Ask him what he means by that.

Mr. E. H. Bloch: If the Court please, may I just add the additional objection that the vice is the leading suggestive character of the question, and I rise now, not only in connection with this question, but——

(279)

The Court: I understand you. Ask him what he meant by it.

By Mr. Sapol:

Q. Did Mr. Sobell tell you what he meant when he said that he wanted to get these recruits, for what purpose he wanted to get them, for what purpose they should be gotten, what they were to do? A. You mean, what was the intent of getting these people?

Q. What did he say to you about the intention of getting these people? What were they intended for? A. They would be approached concerning this question of espionage, of getting of classified material, if they could get into position where such material would be available to them.

Q. Well now, having asked you those broad questions, Mr. Elitcher, I shall go into some detail with you. You say that you were born in the City of New York, or did you say? A. Yes.

Q. When? A. September 1, 1918.

Q. Are you married? A. Yes.

Q. When were you married? A. In May of 1943.

Q. Do you and your wife have any children? A. Yes.

Q. How many? A. Two.

Q. What are their ages? A. One is five, a girl; and the other is 14 months, a boy.

(280)

Q. Your wife's name is Helene? A. That is correct.

Q. You had your public school education here in the City of New York, did you not? A. Yes.

Q. Then you attended Stuyvesant High School together with Sobell? A. Yes.

Q. You graduated from the College of the City of New York in 1938; is that correct? A. That is correct.

Q. Were you awarded a degree upon graduation? A. Yes.

Q. What degree did you take? A. Bachelor of Science in electrical engineering.

Q. It was after your graduation with that degree in

1938 that you found employment with the Bureau of Ordinance, in the Navy Department? A. That's right.

The Court: What was that degree?

The Witness: B.S. in electrical engineering.

Q. Just to carry on your employment after 1948, did you have other employment? A. After 1948, yes, I went to work at the Reeves Instrument Corporation in November—October of 1948.

Q. How long did you continue there? A. Until May 2, 1951, last week.

Q. Did you say "May"? A. I am sorry, March.

Q. Are you presently employed? A. No.

(281)

Q. What kind of work was done at the Reeves Instrument Company? A. Well, the company does work, military work, for the Services. Well, they do computing work. There is fire control system work done, some radar work, that is about it,—a broad field.

Q. That is work connected with the national defense? A. That is correct.

Q. That is the same kind of work——

Mr. Phillips: Is it possible to instruct the witness to talk a little louder?

The Court: Yes. Will you please speak a little louder. The acoustics here are very bad.

Mr. Phillips: He begins all right and then drops his voice.

Q. Now, you told us that Rosenberg came to your house in the summer of 1944, June, I think you said? A. Yes.

Q. 244 Delaware Avenue, in Washington? A. That is correct.

Q. Is that the first time you met him? A. After school, yes.

Q. When you say "after school," did you know him at school? A. Yes, he was in the same class at school.

Q. Did he attend any of the classes which you were (282) at, at City College? A. Well——

The Court: Now, when you talk of "school," what school are you talking of?

The Witness: City College of New York.

A. I don't recall him as being a member of any particular class.

Q. Sobell, I think you said, however, you met at Stuyvesant High School? A. Yes.

Q. Did he afterwards attend City College with you, too? A. Yes.

Q. Did you through City College together? A. Yes.

Q. I take it then that Rosenberg, Sobell and you studied engineering at City College together? A. Yes.

Q. While you were at City College, did the three of you have any conversations together, at any time? A. Yes.

Q. What were some of the subjects that you talked about, aside from the technical phases of the studies which you were pursuing?

Mr. Phillips: That is subject to the same objection.

Mr. Saypol: This is again with the same object as was indicated to the Court at the bench.

Mr. Phillips: I wanted to be saved the necessity (283) of objecting.

The Court: Very well. Will you try and fix the period of time for us?

Q. That would be 1937-'38? A. That's right.

Q. Around that time?

Mr. E. H. Bloch: I thought that we had made it clear, your Honor, that our objection to this line of testimony was with respect to political.

The Court: If it pertains to the same subject matter, you have the objection. In other words, if it goes to the question of motive as distinguished from the actual proof of the indictment itself, on this same question of communism, you have your objection.

Q. Tell us what were those conversations of mutual interest to the three of you? A. Well, I had been asked by some students at the School of Technology——

Mr. A. Bloch: A little louder, please? I can't hear you.

The Court: You must remember to talk up. Talk to that marshal in the back of the room.

A. I was asked by some students at the School of Technology—this was near—in the senior year, near graduation—as to whether I would be willing to join some, a

group of young Communist league, a group of the young Communist league, and I recall that Sobell (284) and Rosenberg being two who did inquire about joining such a group.

Q. You mean, they inquired of you whether you were willing to join such a group? A. That is correct.

The Court: Well now, on this business of the young Communist league, I have nothing to indicate before me that there is any causal connection between that and the charge in the indictments.

Mr. Saypol: It leads into that.

The Court: Is there a causal connection between the young Communist league and the Communist Party?

Mr. Saypol: Well, your Honor, if I may recall, his conversation with Sobell in 1939, as a result of which he joined the Communist Party; immediately preceding that was the conversation about the Young Communist League, so it leads right into it.

Mr. E. H. Bloch: I think, your Honor, that this question and answer also have the additional objection that the witness has not connected any of these defendants with what was said to him, and what he did in reliance upon what was said to him. He said, "Some students at the college asked me about it."

The Court: Yes, I am going to sustain the objection.

Mr. Saypol: But he has also said that this was (285) in the presence of the defendant, if the Court please.

The Court: No, I will tell you, on this question of the Young Communist League, unless there is some discussions there that bring it within the four corners of my ruling, I am going to exclude it.

Mr. Saypol: Well, if your Honor pleases, I submit this, whether it is the Young Communist League, or whether it is the Horatio Alger Progressive Club at City College, or whether it is the members of a civic club at City College——

The Court: Regardless; correct, regardless of——

Mr. Saypol: What I am showing is that these people were not strangers to each other, that they had something in common there, as far as this goes, that it ultimately led into the gravamen of the crime.

The Court: I understand that, but their point on objection is, if you mention the Horatio Alger Club, I am sure they would have no objection. Their objection is to the mere mention of that word in connection with the Young—League, that it is of an inflammatory nature, and unless there is some direct connection, or they preach certain principles that would indicate that it was consistent with what they did subsequently, as charged, I am going to exclude it.

(286)

Mr. Saypol: If your Honor pleases, no stigma attaches that way. These were the circumstances of the association. If they had a league there for the reform of counterfeiters and they got together and they talked about those things——

The Court: Did they talk about those things?

Mr. Saypol: Well, he was testifying that they did, the evidence was a common objective.

The Court: I will reframe your question for you.

By the Court:

Q. You were at City College between what years? A. '34 and '38.

Q. During 1934 and 1938 did you meet with the defendants Rosenberg and Sobell on occasions? A. Yes.

Q. Would you say you met with them on many occasions? A. Yes.

Q. How often would you say you met with them? A. Well, with Sobell, I probably met once a day and—possibly—with Rosenberg, less than that. I don't recall very much of him.

Q. I take it that you belonged to certain organizations with him; is that correct? A. Yes.

The Court: Now, without mentioning the organization that he belonged to, will you proceed with your question.

(287)

By Mr. Saypol:

Q. Aside from the association with Rosenberg and Sobell in classes, did you see him at any other places, in connection with the attendance at school? A. No, I did not.

Q. Did you see him at any extracurricular places, at any——

Mr. E. H. Bloch: I object to it upon the ground that the witness has already answered.

Q. Did you attend any meetings with him? A. Well——

The Court: Well, maybe he is jogging his memory.

Q. Did you attend any meetings with him? A. I don't recall attending any meetings with him.

The Court: Now, Mr. Saypol, I want to get this clear now. If you are prepared to establish that the Young Communist League preaches the same principles as the Communist Party, I will permit you to ask these questions.

Mr. Saypol: I think I am, but in order to protect the record, perhaps we might do it at the bench.

The Court: All right, step up.

(The following proceedings took place at the bench, outside the hearing of the jury.)

(288)

Mr. Saypol: Your Honor, we are prepared. That is our objective. I am going to prove the crime; I am trying to prove common association, common purpose.

The Court: Fine, you go right ahead and prove this association, but when you are proving it in an

organization which they contend a mere mention is inflammatory, that is their point. You have a right to prove association.

Mr. Cohn: Your Honor, I don't know whether it is inflammatory or not. I don't know if it has anything to do with it. I think it is admissible and proper.

The Court: No, Mr. Cohn, that isn't true. The inflammatory nature of it might have some weight on whatever point you have to make.

Mr. Cohn: I can't agree with you. I think it is relevant. Your Honor, on this point you have testimony of the witness, a picture that they were in college together in 1944; Rosenberg identified himself as a former classmate and as a friend, and approached him and asked him to engage in these activities. After that he had a conversation with Sobell in '47, in which he was asked to recruit progressive and safe people. I don't think there is any doubt that Rosenberg approached him, and specifically in Sobell's words, the approach to the other people was made on the basis of their having (289) progressive views and on the basis of their being safe, and undoubtedly the approach is made to him on the same basis and the same reason, and I think it is perfectly proper to show they were associated together in activities of that bent and that the two defendants knew he was inclined along those lines.

The Court: I agree with you.

Mr. Cohn: Therefore he was approached as a safe person and he was asked to approach other

persons, people of safe and progressive views, as being safe.

Furthermore, on the question of motives, I don't think there is any doubt——

The Court: There is no difference of opinion on that at all, and I have been asking repeatedly for Mr. Saypol to tell me that the Young Communist League preaches or expounds some principles that would be consistent with the ultimate charge.

Mr. Saypol: The answer is yes.

The Court: I haven't had an unequivocal answer yet.

Mr. Saypol: The answer is yes.

The Court: Well, if I have an unequivocal answer, I will permit the question.

Mr. Saypol: The answer is yes, and there is proof of that if it has to be submitted.

(290)

Mr. A. Bloch: You are taking it subject to connection?

The Court: That's right.

Mr. E. H. Bloch: If the Court please, as I understand the way your Honor is thinking, and especially Mr. Saypol's response, Mr. Saypol is now representing to the Court that he will show the Court that the Young Communist League, as an organization at that time, espoused views consonant with illegality, or which would make it an organization that would bear on the issues in this case, in other words, that there would be that causal and direct and intimate connection.

Mr. Cohn: It can only be shown that it is an organization——

Mr. E. H. Bloch: Oh, well——

The Court: Let him finish.

Mr. Cohn: You said that awfully fast. I am basing it exactly on the testimony that has been adduced by the witness here. He was asked by one of the defendants to approach people who had progressive views and who were safe.

The Court: In 1947.

Mr. Cohn: Undoubtedly, yes, your Honor.

The Court: All right. Now, let's go back. You are talking about belonging to a league in 1937.

(291)

Mr. Kuntz: '34.

The Court: It was easier to say 1937.

Mr. Cohn: I don't know that it is '34 or '37. I think there was continuation of that association in the Communist Party in Washington, when Sobell was down there.

The Court: Now, you are beginning to equivocate again. I want an unequivocal answer. Is there some connection between the Young Communist League—are you going to establish it—and the ultimate principles that were established in it?

Mr. Cohn: I don't think we can establish that the Young Communist League at meetings told members to go out and steal classified information. I certainly think we can establish that the Young Communist League and the Communist Party both were progressive organizations which believed in Soviet Russia as a model and a guide.

The Court: Are you going to establish that?

Mr. Cohn: I don't think there is any doubt about it.

The Court: Are you going to establish that there is any difference between the Young Communist League and the Communist Party?

Mr. Cohn: There is a difference in regard to age.

The Court: Is that all.

(292)

Mr. Saypol: That is all.

Mr. Cohn: Yes, we can offer documentary proof.

The Court: Is that all, again, I ask you?

Mr. Cohn: I don't think there is any difference.

Mr. Saypol: Yes, official documents of the Communist Party describe the Young Communist League as a student party adjunct.

Mr. Kuntz: That was excluded in the Remington case.

The Court: The reason for that was because there Mr. Remington was charged with having committed perjury, in that he lied about being a member of the Communist Party.

Mr. E. H. Bloch: Wouldn't have been logical for the——

Mr. Cohn: It would have been.

Mr. E. H. Bloch: Just following Mr. Cohn's argument——

Mr. Cohn: Your Honor——

The Court: He is making an argument and I would like Mr. Bloch's reply.

Mr. E. H. Bloch: If the Young Communist League is considered to be one of these safe and

progressive organizations, I say, in the Remington case, just in (293) accordance with fixing the minds and the intent of the defendant, the Government should have been able to prove, according to Mr. Cohn, his association with the Young Communist League, but the Court rejected that proposition.

Mr. Saypol: And very properly so, and the reason for that—I shouldn't say "properly," but appropriately—the Court didn't reject it there because our objective was to prove membership in the Communist Party, not the Young Communist League.

Mr. Cohn: I didn't agree with the Court's ruling at the time. I don't think it is in accord with any rulings of any Appellate Courts on the subject.

The Court: There are very few rulings by the Appellate Court. The point I want to get to is, I have no problem at all, if you will tell me—and you run the risk in doing so—that there is no difference between the Young Communist League and the Communist Party, as far as principles that are espoused, in that both have as one of their principles, aiding the Soviet Government, as you have indicated before.

Mr. Cohn: I would say, your Honor, as far as the Young Communist League and the Communist Party are concerned, the Soviet Union experiment is pointed to by all the members and pointed to the direction of all the (294) members as being the ideal something, worthy of the greatest admiration and support.

Mr. Saypol: That is the God that they direct themselves to, both of them.

Mr. E. H. Bloch: Look, your Honor——

Mr. Saypol: Let me say that we are getting ourselves into unnecessary and immaterial collateral matters, in so far as the furor and fuss is being made. I am going to prove that these people committed espionage; I am showing that these associations, as I have said, are for the purpose of showing their intent, showing their purpose, and if there is so much fuss about it I will just pass right over it.

The Court: Well, this is off the record.

(Discussion off the record.)

(295)

Q. After your graduation some time in 1938, did you move to Washington? A. Yes, I did.

Q. And when did you first arrive in Washington, D. C.? A. It was, I believe, the 1st of November, 1938.

Q. Some time toward the end of the year? A. That is correct.

Q. Where did you first live when you got to Washington? A. At, I think it was, 1466 Columbia Road, Northwest.

Q. Did there come a time when you moved to Delafield Place? A. Yes.

Q. When was that? A. In December of 1938. 1316 Delafield Place.

Q. Did you see Sobell around that time? A. Yes.

Q. Where did you see him? A. Well, some time in December he came down to Washington looking for a position. He had not been referred to a particular job but he was looking for one. He had come to Washington to see if he could get close to where jobs were available.

He stayed at a house next door; that is, he slept at the house next door to 1316 Delafield Place, but not part of our own household at 1316.

Mr. Phillips: The witness is talking too low again.

The Court: Yes. Talk to the marshal back there. He wants to hear your story.

(296)

Q. Some time, a month or two thereafter, did you move from Delafield Place? A. Yes. The house broke up in, I think, January of 1939 and I moved to a room at 4925–9th Street.

Q. After that, a month or two or three months beyond that did you move again? A. Yes.

Q. Where did you move to? A. 4925–7th Street on the top floor of a private home, an apartment.

Q. When was that, do you remember? A. It was either April or May. I believe May 1st probably of 1939.

Q. Did you have any conversation with Sobell regarding that move? A. Yes.

Q. What was the conversation? A. Well, he was interested in starting an apartment with someone, with me, and through his inquiring about this, I finally decided to make such a move and take an apartment.

Q. Well, in these intervening two months, I take it, Sobell had remained at 1312? A. I believe so, yes.

Q. Then in April of 1939 did he move again? A. Yes. He moved into the apartment with me.

Q. In other words, the two of you were together. How

long did you stay there? A. We stayed there about a year until May of 1940.

Q. What happened then? A. We then took another apartment, a regular apartment in an apartment house at (297) 2225 N Street, N.W.

Q. How long did you remain there? A. Well, I remained at the apartment until about October of 1941. Sobell left in September to go to the University of Michigan.

Q. Now that was in September, 1941, that he left to go to the University of Michigan, is that it? A. That is correct.

Q. Now, in the interval between December, 1938 and December, 1941, do you know where Sobell was employed? A. At the Bureau of Ordnance.

Q. That is the same place with you? A. That is correct.

Q. Now, you have told us about the conversation with Sobell regarding membership in the Communist Party, is that right? A. Yes.

Q. Do I recall correctly, do I understand correctly that preceding your actual attendance at the first meeting with him the conversation between you was about the Young Communist League? A. Yes.

Q. Now, will you tell us again about the conversation with him leading up to this joining of the party by you? A. Well, he talked to me about the need for joining such an organization in Washington, what its purpose was, what it was to achieve. I don't recall the complete (298) conversation. There were more than one. They all were leading up to my joining this group.

Q. When was it that you finally joined the party? A. I don't know the exact month or date.

Q. About what year? A. Oh, it would be in 1939. Before the end of 1939.

Q. Can you tell us how many constituted membership in the group you joined at Sobell's suggestion? A. Well, the group that I came down to when I joined, I think there were about maybe fifteen people there.

Q. Yes. A. And we were divided up into groups, into smaller groups, and I met—after I met only with four, three or four people at a time.

Mr. A. Bloch: Won't you please keep your voice up? You sink down lower as you go along.

Mr. Saypol: Mr. Bloch, if you will suggest to me, I will address the witness and ask him to do it or so conduct myself that he will.

Mr. A. Bloch: It is done so spontaneously.

Mr. Saypol: Will the Court suggest to Mr. Bloch if he will make the suggestion to me, I will guide the witness accordingly and in that way avoid any interruption.

The Court: Proceed.

Q. Was there anything common about the members of this group of four or five you told us about in respect to (299) their employment? A. Yes. I would say all of them were members of the Government.

Q. Any particular branch of the Government? A. No.

The Court: Will you try to bear in mind—perhaps this will help: Suppose you were addressing a group; will you speak in that tone of voice?

Q. Now, in this group, should I call it a cell? Was it described as a cell at the time? A. I don't believe we use that word. A group or branch.

Q. Did Sobell remain in that group with you? A. Yes.

Q. Or branch? A. Yes.

Q. Will you tell us something about the meetings of that group? Where were they held? A. The meetings were held in the homes of the various members in sort of rotation.

Q. How about the payment of dues? Was there any payment of dues for the membership? A. Dues were paid at the meetings, yes.

Q. To whom were they paid? A. They were paid to someone who was the chairman or called the chairman of the group.

Q. Was there any time when Sobell acted as chairman of the group? A. Yes. At the beginning, at these first meetings he was chairman. I don't recall how long (300) a period that encompassed.

Q. Incident to dues——

Mr. Kuntz: Excuse me, Mr. Saypol, I take it this is all taken subject to our objection?

The Court: Yes.

Q. Do you recall incident to his presiding or acting as chairman whether any dues were paid to him by you, or did you see others pay dues to him? A. Well, dues were paid to the chairman only. The chairman transferred the dues to other people. I don't recall the payment of the dues to him specifically.

Q. What transpired at these meetings in Sobell's presence?

Mr. A. Bloch: Objection.

Q. (Continuing) Regarding the party or your work? Will you tell us? A. Well, regarding the party there was discussion of news events, specifically from readings of the Daily Worker. There were discussions of Marxist theory, Leninist theory, and also discussions of articles from the Communist. Literature like the——

The Court: Speak up.

The Witness: Literature like the Communist. That made up the bulk of the discussions at the meetings.

Q. Did you receive any official instructions at these meetings? A. Well, there were instructions——

(301)

Mr. Phillips: Just a moment. I object to the expression official instructions. Official from whom?

The Court: Did you receive any instructions?

The Witness: Yes. Some.

Mr. Phillips: Just yes or no.

The Witness: Yes.

Q. Did you receive any of those instructions from Sobell as chairman of the meeting? A. Yes. They would come from the chairman, yes.

Q. Were there any discussions concerning Communist infiltration, including reference to front organizations? A. Well, there was a suggestion, recommendation to join

certain organizations in Washington, organizations that were operating in Washington. One of them was the American Peace Mobilization. When the American Youth Congress had its congress in Washington there was a suggestion to assist them to help in the activity.

Q. At this time do you recall what the situation was in respect to the Hitler-Stalin pact? A. I think——

Mr. E. H. Bloch: Objected to as incompetent, irrelevant and immaterial to the issues in this case.

The Court: Overruled.

Mr. E. H. Bloch: Exception.

The Witness: Well, at the time the pact was in effect, I believe.

(302)

The Court: Will you fix the time? What year was this?

Q. 1939 and 1940? A. Yes, sir.

Mr. Saypol: I have the official date of the existence of that pact if it should go into the record. I think it was August 25, 1939. I think it was August, 1939 to June, 1941.

Q. Were any instructions issued by the chairman with respect to the attitude of the members of the cell in so far as the attitude toward Russia was concerned in the light of the existence of the Hitler-Stalin pact?

Mr. E. H. Bloch: If the Court please, although you have overruled my objection, I would like to

object to the question upon the ground that it is leading and suggestive.

The Court: Overruled.

Mr. E. H. Bloch: I respectfully except.

Mr. Kuntz: I take it, if your Honor please, the ruling on the objection applies——

The Court: I said yesterday that all rulings on any objection taken by Mr. Bloch will apply to your client and vice versa unless you indicate to the contrary that you don't join in the objection.

Mr. Kuntz: Thank you.

(Last question read.)

(303)

The Witness: Well, I know that instructions did come down concerning the attitude on the pact, and they would be transferred by the chairman.

Q. What did the chairman say about the attitude, what your attitude should be or what the group attitude should be?

The Court: Not what he would say; what did he say?

Q. Yes. A. Well, the pact was in effect and support was to be obtained for the pact for the Soviet Union's position, and we were to talk with people and to get general support for the existence of the pact and its aims.

Q. In the course of that pact, of course, Russia was an ally of Hitler, isn't that so?

Mr. E. H. Bloch: I object to the question on the ground that that not only is not the fact; it involves

political controversy and discussion outside of the issues in this case. Historians disagree on that.

The Court: I sustain the objection. Well, the fact is that there was a pact in existence between Germany and Russia at that time, is that correct?

The Witness: That is correct.

Mr. Saypol: That is no different from what I asked, if the Court please.

The Court: Well, he didn't like the way you had asked it. Is this a convenient place to pause?

(304)

Mr. Saypol: Yes.

The Court: Ladies and gentlemen, you may retire to the jury room.

(Short recess.)

Mr. Saypol: May I proceed, your Honor?

The Court: Yes.

By Mr. Saypol:

Q. At these group meetings at some of which Sobell acted as chairman, about which you have testified, did any discussion take place amongst those present regarding the position of the group as a unit of the Communist Party relating to Soviet Russia? A. Yes.

Mr. E. H. Bloch: If the Court please, may I ask the Court to make clear to the jury now that any testimony with respect to Sobell is not binding on the defendant Rosenberg unless the main charge is proved?

The Court: That is quite right. Any testimony concerning this witness's association with Mr. Sobell at this time they are talking about in 1939 and thereabouts is not to be received as against Mr. Rosenberg nor Mrs. Rosenberg.

Mr. Phillips: Likewise that is true the other way.

The Court: That is true the other way, too.

Mr. Phillips: Any conversation relating to Rosenberg——

(305)

The Court: Unless it occurred during the period of the conspiracy.

Mr. Phillips: Yes.

The Court: After the conspiracy has been established.

Mr. Saypol: Likewise I think it should be stated to the jury that there will come a time that I will establish that and all of these objections will prove futile.

Mr. Phillips: I think that is an unfair statement, if the Court please.

The Court: Disregard it. I will give you the proper legal instructions at the proper time.

Mr. Saypol: Now let us get back to the business at hand.

(Last question and answer read.)

Q. What was the discussion and what instructions did you receive as part of that discussion? A. Well, the instructions in regard to this question involved continuous support of the Soviet Union and as the result, I mean from this, through the fact that we were to go out and to

gain support from people around us for the position of the Soviet Union.

Q. How long did you and Sobell continue attending these Communist group meetings? A. Well, it would continue until September, 1941.

(306)

Q. Do you recall the names of some of the persons? In addition to Sobell, do you recall the names of any other persons who attended these meetings? A. Well, at the first meeting I recall a limited number.

Mr. Saypol: May I just interrupt you for a moment. If the defendants do not object, I shall expect the witness to name the individuals who attended. Sometimes there is an objection and in that event I thought I should caution in advance, and suggest that initials alone be given unless I deem it appropriate to bring out the names.

Mr. E. H. Bloch: I am very glad Mr. Saypol was kind enough to state that to the Court. I would object.

Mr. Saypol: All right. I can do it that way, then. That is why I offered to do it that way to avoid any objection.

Q. Do you remember the initials of anybody who was present at these group meetings? A. Well, over this period I only recall two. One was——

Mr. Phillips: Initials are just as objectionable as the person's name.

The Court: I beg your pardon?

Mr. Phillips: I object to any initials because the purpose of giving these initials is to identify the people. Otherwise there is no reason for initials.

(307)

The Court: Do you want the names identified?

Mr. Phillips: No. The names have been excluded. I say initials——

The Court: The names have not been excluded. Both counsel have agreed that they won't do it.

Mr. Phillips: Well, both counsel have agreed. Now I think we should as well agree that initials, though not as grave as names, do carry the import of identity.

The Court: Yes. Now, what is the objection as far as your client is concerned?

Mr. Phillips: I object to initials.

The Court: On the ground that it is prejudicial? Do you claim that?

Mr. Phillips: On the ground that those initials may prove prejudicial.

Mr. Saypol: Maybe Mr. Phillips wants only one initial. Would that help you?

Mr. Phillips: Unless the initial is the initial of one of the defendants. Any other people outside of these defendants are not properly charged here with anything, and the only purpose I can see in anybody's mind for introducing their names or identity by means of one or two initials is certainly——

The Court: Mr. Saypol, is there some relevancy to this?

(308)

Mr. Saypol: I am trying to show what transpired at these meetings. I am trying to show what this witness knows about it. I am trying to establish the form and substance, memory and recollection. I want to show that this witness has a clear recollection of what transpired.

The Court: Go ahead.

Mr. Saypol: In proceeding this way I am providing a fertile field for cross examination.

The Court: Go ahead.

Mr. E. H. Bloch: Just a second. If the purpose of this question is to refresh the recollection of the witness, then I submit——

The Court: He didn't say that, Mr. Bloch.

Mr. E. H. Bloch: I thought he said something about recollection.

The Court: No. He said one of the purposes was to show that this witness had a pretty good recollection of everything that had transpired at these meetings.

Mr. E. H. Bloch: There is no question that has been raised to the——

Mr. Saypol: May I substitute the word knowledge?

The Court: I think he has the right to establish it for the satisfaction of the jury. The jury ultimately will pass upon the question of whether or not this man is telling a credible story, whether his recollec- (309) tion is good, and he wants to establish some of the surrounding facts.

Mr. E. H. Bloch: I think that is true as a general proposition. I am trying to apply it concretely to the specific question. Nobody has raised any question as yet about his recollection.

The Court: But you will raise the question that he is not a credible witness.

Mr. E. H. Bloch: Well, I think that is proper on redirect for Mr. Saypol to try to buttress the credibility of the witness.

The Court: Well, what difference does it make? You will attempt to destroy his credibility.

Mr. E. H. Bloch: I definitely will.

The Court: Well, go ahead.

Mr. Saypol: I will show that he knows what he is talking about. How about the issue of these initials? Will I use one or two or the full name?

The Court: I think you had better use initials. If he is going to go into this subject would you prefer to have initials rather than the full name?

Mr. Phillips: Maybe the initials J. S. somebody will take as Josef Stalin.

The Court: Well, if the initials are J. S., you will stipulate that it wasn't Josef Stalin. Proceed. (310) Would you rather have the full name? Is that what you want?

Mr. Phillips: I would rather have neither names nor initials.

The Court: Now if there are going to be initials, if I have ruled that there will be initials, would you rather have the name or the initials?

Mr. Phillips: If your Honor please, I would rather have the initials but that doesn't lessen my objection.

The Court: Very well. I understand.

Mr. Phillips: In other words, I am choosing the lesser of the two evils.

Mr. Saypol: Doesn't this amount to a statement by Mr. Phillips that he would rather not have the testimony?

The Court: Well, let us not comment on it.

Q. You say you recall two persons at least who attended these meetings? A. That is correct.

Q. Do you recall the initials of one of them? A. Yes.

Q. Will you give them to us? A. S. S.

Q. Was S. S. in the employ of the Government of the United States, do you know? A. Yes.

Q. Where? A. I believe it is the Civil Service (311) Commission.

Q. Do you remember the other? A. I recall one other initial, S. M.

Q. In the employ of the Government? A. I only believe that there was employment in the Government, yes.

Q. Do you know what branch? A. No.

Q. After Sobell left what happened to you in connection with membership in that Communist group? A. Well, there was a change of personnel but I continued as a member of the Communist Party.

Q. Until when? A. Until 1948.

Q. Did there come some sort of change in the identity or in the definition of the members of those groups after 1942? Were they allocated to respective branches of the Government? A. Yes. About that time the members of

the individual groups were made up mainly of employees of a particular agency.

Q. What denomination was applied to the group which you were a member of? A. Navy branch.

Q. Navy branch? Was the word cell used at that time? A. I don't believe so.

Q. Do you remember how many constituted that branch? A. Well, it varied. It started with two.

Q. Approximately? A. About seven or eight. Eight, possibly. I haven't added them up at one time.

(312)

Q. Do you remember the initials of some of the members of that group? A. Yes.

Mr. Kuntz: If your Honor please, I think I gathered from the witness's answer that he is now referring to after, he testified, Sobell left. So obviously, if that is the case, obviously this testimony would be wholly irrelevant.

The Court: Yes. I will sustain the objection.

Q. Now, between 1941 and 1944, did you have occasion to see Sobell? A. Yes. Sobell visited Washington on about two occasions.

Q. Did you see him and talk with him? A. Yes.

Q. Then you have told us there finally came a time in 1944 when you had this meeting with Rosenberg at 247 Delaware Avenue? A. Yes.

Q. Now do you remember in point of time any significant date related to that meeting? A. Yes. It was a short time after D Day.

Q. And it was that night that you received a telephone call from one Julius Rosenberg? A. Yes.

Q. In that conversation he said he wanted to talk with you? A. Yes.

Q. Did you associate him at that time as a former colleague at City College? A. Yes.

Q. I take it that was the basis upon which you agreed (313) to see him and invited him there? A. Yes, that is right.

The Court: You hadn't seen him since your City College days?

The Witness: That is correct.

Q. Did he finally come to your home? A. Yes.

Q. When did he arrive, do you remember? A. It was in the evening. It was after supper. After we had our supper.

Q. I think you told us he first spoke with you together with your wife? A. That is right.

Q. And thereafter he spoke to you alone? A. Yes.

Q. Was it at his request that this conversation was caried on with you privately or just a coincidence?

Mr. E. H. Bloch: If the Court please, I not only object to the form of the question but I object to it on the ground that it has already been asked and answered.

The Court: Yes, that was answered. He said he had asked his wife to leave the room. Rosenberg had asked whether or not Mr. Elitcher's wife would leave the room and she did leave the room.

Mr. Saypol: Is the reference now to the prior

testimony at the outset of the examination or immediately prior to this? I want to go into it in some more detail.

The Court: All right. Go ahead. That parti-
(314) cular question Mr. Bloch said had been answered, and it was answered.

Q. Will you continue to tell us after you started the talking with Rosenberg alone what you said and what he said?

Mr. E. H. Bloch: I object upon the ground that it has already been asked and answered.

The Court: Is that a new field?

Mr. Saypol: There will be additional details brought out to those that I initially developed. I can try to be precise and segregate, although I think with continuity no harm can be done in having the witness tell his narrative.

The Court: Well, maybe we can save some time.

By the Court:

Q. Do I understand Mr. Rosenberg then asked you what type of work you were doing in the Navy and told you that Russia needs help, and asked you to turn over any blueprints which could help, is that correct? A. Yes.

Q. And if there were any film involved that he would have it taken care of in the proper container and all this material could be returned before the next morning so there wouldn't be anything about it? A. Yes.

The Court: Go on from there.

(315)

By Mr. Saypol:

Q. Was anything said—well, all right, suppose you supply it, Mr. Elitcher? A. Well, in the process of convincing me of the perhaps need or the safety of these deeds, he told me that Sobell who had been my former roommate was also——

Mr. Philips: Just a minute. I object to any conversation about Sobell in the absence of Sobell.

The Court: Let us understand this right now: in a conspiracy after it has been established that the conspiracy exists, conversations by one conspirator are binding on the other conspirator even though not in his presence. Your objection is that no conspiracy has been shown?

Mr. Phillips: Precisely.

The Court: The Government can't prove its entire case in one hour.

Mr. Phillips: But they must first prove the thing they must prove first.

The Court: They can't prove their entire case in one hour. Your objection is overruled. It is taken subject to proof that a conspiracy exists.

Mr. Phillips: Exception.

Q. Did Rosenberg say anything to you at that time about the fact that others were getting similar military
(316) information? A. Yes. Well, he had said that other people were——

Mr. E. H. Bloch: I am going to ask Mr. Saypol please not to ask leading and suggestive questions.

The Court: Try not to lead on this subject, Mr. Saypol.

Mr. Saypol: Of course I won't, but sometimes—

The Court: Sometimes you can address the witness's attention to a particular subject, like you have him now in a conversation in June, 1944. Will you exhaust his memory on that?

(Last question read and answer.)

The Court: Complete your answer.

The Witness: Were also helping in this matter.

Q. Did he tell you any more about the way in which they were helping? A. No, he did not.

Q. Now, it was immediately preceding this last answer you gave that you answered my question regarding the fact that others were supplying similar military information to Rosenberg. A. Yes.

Mr. E. H. Bloch: I object to the form of the question. I object on the additional ground that it pre-supposes a state of facts not proved.

The Court: Well, he asked whether it was the fact.

(317)

Mr. Saypol: That was on the record. That is what I intended to have read.

The Court: I thought it would shorten it, but he wants——

Q. What did Rosenberg say to you about that? A. Well, he had said there were others contributing. No

other names were mentioned, but there were others contributing in this way.

By the Court:

Q. In what way? A. In this way, in giving information to him, giving to Rosenberg.

Q. What information? A. Military information.

By Mr. Saypol:

Q. For what purpose? A. For the purpose of transference to the Soviet Union.

Q. Was it at that time that he then mentioned that Sobell was helping in this way? A. Yes.

Q. In the course of the conversation was anything said about other individuals besides yourself? A. No, no other names were mentioned.

Q. I am talking generally. A. Yes.

Q. Was anything said about getting others? A. Yes. He was interested——

Mr. E. H. Bloch: I object to it on the ground the question has already been asked and answered, and (318) I think it is unfair to stress something of this kind.

The Court: It has been asked and answered.

Mr. Saypol: I know it has but I am trying to maintain the continuity. I can't pick these things apart.

Q. What was said finally with respect to the course you should pursue if you had any information to supply?

Mr. E. H. Bloch: Again I object to it on the ground the question has been asked and answered.

The Court: That is correct. Unless there is something else. I understand he was to turn it over to him and he would have it photostated or do whatever was necessary and return it by the morning so it would not be missed.

Q. Did he tell you where you should take your information in order to get it to him? A. Yes.

Mr. E. H. Bloch: I object to the question upon the ground——

The Court: That is overruled. Go ahead.

A. Yes. He said that his name was listed in the Manhattan directory and I could find it there. I believe he also gave me his address, but he said I could find his name in the Manhattan directory.

Q. Did he say anything about the ultimate destination of the material which would be supplied?

Mr. E. H. Bloch: I object to the question upon
(319) the ground that it has been asked and answered.

The Court: I will permit this to be answered.

A. Other than that it would go to Russia, there was nothing else mentioned.

Q. Did he describe to you the type of material that he was interested in getting? A. Well, yes. The interest was mainly for plans or reports or books regarding military equipment, new military equipment, anything that

might think could be of any value, of any assistance to the Soviet Union.

Q. Did that terminate the meeting that night? A. Yes.

Q. Now, after that when did you see Rosenberg next? A. Well, later that summer my wife and I took a trip to New York. Rosenberg had previously said if we were in New York to call him, we might have dinner or we might meet other classmates. So we did call him and he arranged a meeting with other classmates for dinner.

Q. Did you have dinner with him that night? A. Yes.

Q. How many people were present at that dinner? A. About five others.

Q. Was that a public restaurant? A. Yes.

Q. Were others present besides the defendant? A. Yes.
(320)

Q. I take it then that there was no discussion concerning this subject that you have testified to? A. That is correct.

Q. After that do you recall seeing Sobell and his wife? A. Yes.

Q. By that time Sobell had been married? A. No, I don't believe so.

Q. Where did you see him and when? A. Well, we went on a vacation to Kumbabrow State Park in West Virginia.

The Court: When?

The Witness: The week preceding Labor Day, 1944.

Q. Did you stay at that camp or state park, you and your wife and Sobell and his wife? A. Yes.

Q. For how long? A. One week.

Q. While you were there did you have any conversation with Sobell regarding the prior conversation that you testified to with Rosenberg? A. Yes.

Q. That is the one on D Day? A. Yes.

Q. What was said? Before you say that, who was present? Did the women hear this conversation? Were they present? A. No.

Q. Just you and Sobell? A. That is correct.

Q. What was said? A. I told him that—well, I had wanted to tell him so that I could be sure of my position. So I said to him that Julius Rosenberg had (321) visited me some time ago, a short time ago at my home, and had asked me whether I would contribute military information to Russia, and in the course of that he had said you, Sobell, were also helping in this. At this point he became very angry and said he should not have mentioned my name. He should not have told you that. I tried to explain that Rosenberg knew of our close relationship, and you probably knew that he had seen me. So he probably felt safe about it. He said—he was still angry and said, "It makes no difference, he shouldn't have done it."

Q. Now I have referred to the woman who is now Sobell's wife as his wife; at that time they weren't married? A. That is correct.

Q. Subsequently did you attend their wedding in March, 1945? A. Yes.

Q. Where did the wedding take place? A. In Virginia.

Q. When did you see Rosenberg next? A. In the summer of 1945.

The Court: When did you say they were married?

The Witness: In March, 1945.

Q. You say you saw Rosenberg in the summer of 1945? A. That is correct.

Q. Where did you see him? A. At his home.

(322)

Q. What were the circumstances of your visit? A. Well, my wife and I had again taken a vacation of a few days and we were staying in New York. We first stayed at my mother's house. My wife was dissatisfied and we were looking for another place to stay. We had called Rosenberg——

Q. We or you? A. I called, through common discussion about it; I called Rosenberg. In the course of our talk he suggested that we could stay at his place; his wife was in the country, and so we could use his apartment.

Q. Where was that apartment? A. Knickerbocker Village.

Q. Did you stay there? A. Yes.

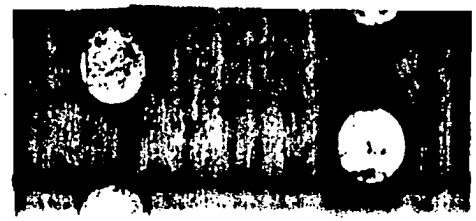
Q. Did you have a talk with him that night? A. Yes.

Q. What was discussed between you?

The Court: Just the two or you or your wife?

The Witness: It was part with my wife and part on the side.

Q. What conversation took place in your wife's presence, and then tell us about that which took place between you alone? A. Well, one of the things we talked about related to this: he apparently—well, I don't know the exact circumstances, but he was either up for dismissal (323) from his job or had been dismissed from his job for security reasons.



Mr. E. H. Bloch: I object to this unless Rosenberg said it. I don't want this witness's idea.

The Court: Yes.

By the Court:

Q. Before you tell us that, where was he working? A. He was an inspector for, I think, the Army or Air Force at some place that was making electrical equipment for them.

Q. Tell us what Rosenberg told you. Did he tell you he was up for dismissal? A. Yes. I don't know whether he was up for dismissal or had been dismissed, but his case was current.

By Mr. Saypol:

Q. You say he was working for some firm doing military work for the Air Force? A. Well, it was military work and I believe he was a Government inspector rather than working for the firm.

Q. You say you don't remember whether he told you he had left or been discharged or whether he was up for discharge? A. That is correct.

Q. But he did say for security reasons? A. That is correct.

Q. What else was said? A. He talked about the (324) case. The union with which he was affiliated was fighting it with him.

Q. Did he have some documentary material with him? A. Yes. He had some paper, some sort of brief regarding the case.

Q. Did he read it to you? A. He read some brief pieces from it.

Q. What do you recall what he read to you?

Mr. E. H. Bloch: If the Court please, I object to any conversation between this witness and the defendant Julius Rosenberg with respect to any subject matter not related to the issues in this case, and I urge that any subject matter concerning Rosenberg's employment or possible dismissal from employment in the Federal Government is not related to the issues in this case, and it only serves to prejudice at this time. I don't now what is going to come up.

Mr. Saypol: Well, the proof will come out.

The Court: The objection is a good one, that nothing should be admitted that is not related to the case.

Mr. E. H. Bloch: Correct.

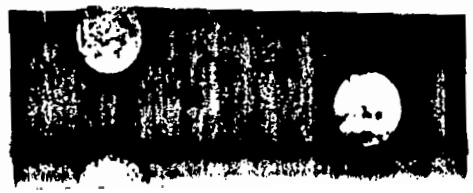
The Court: But Mr. Saypol says that it is related to the case and I must accept his word for it, and if it ultimately appears that it is not, I shall strike it.

Mr. E. H. Bloch: I agree with your Honor with (325) this exception. We already know what the subject matter that was discussed between Rosenberg and this witness was. He has already stated it. What I am objecting to is going into that matter.

The Court: Overruled.

Mr. E. H. Bloch: I respectfully except.

Q. Now, do you recall what the substance of those lines was that he read to you from that document? A. Well, it had to do with——



Mr. E. H. Bloch: My objection stays, your Honor?

The Court: Overruled.

Mr. E. H. Bloch: And if there is going to be any question of a document, I also object on the secondary evidence rule.

The Court: Overruled.

Mr. E. H. Bloch: I am sorry, the best evidence rule.

The Witness: Well, it had something to do with some statement that had been presented regarding membership in the party, the Communist Party or party activities, and I don't recall the complete substance of it.

The Court: Was there any comment by him after he read it to you?

The Witness: Yes. That is what is to come up.

The Court: Are you coming to that now?

(326)

The Witness: Yes.

Q. At that time do you remember——

Mr. Phillips: The witness is inaudible again, your Honor.

Mr. Saypol: After the close of the recess I mentioned it. I am sure everybody heard it. I asked some of the spectators in the rear of the room. They said at times they can hear the witness better than I.

Mr. Phillips: I don't think it is a problem here whether the spectators hear it.

The Court: I don't need any argument on this really, gentlemen.

Mr. Phillips: I don't think it is proper for Mr. Saypol to discuss these things with spectators.

The Court: Oh, listen, you are going to be here a long time. Just relax. Go ahead.

Q. About that time was the conversation carried on with you alone or with your wife? A. Well, there wasn't a continuation of the conversation. He just called me aside and made this remark to me.

Q. Now, did he say anything to you about the basis for the charges against him, the actual basis and what he thought had been the basis? A. Yes.

Mr. E. H. Bloch: I object to that as completely incompetent and immaterial.

(327)

The Court: Overruled.

Q. What did he say to you? A. He said he had been worried for quite some time for weeks about this case, because he thought it had to do with this espionage activity, but he was quite relieved to find out it only had to do with the party activity. So he was relieved.

Q. Did he say anything about you? A. I don't recall anything.

Q. Did he invite you to come to see him again? A. Yes.

Q. When did you see him next? Do you recall a telephone conversation with him one Saturday morning? A. Oh, yes.

Mr. E. H. Block: Again I must object to the question as leading and suggestive.

The Court: Overruled.

Mr. E. H. Block: I respectfully except.

A. He called me again in September of 1945.

Q. Did he tell you where he was? A. Yes. He was at the station, at Union Station in Washington. He had come into the city and said he wanted to speak to me.

Q. Did you see him? A. Yes. He came over to the house.

Q. How long was he with you that morning, do you remember? A. A short time. About fifteen or twenty (328) minutes.

Q. What did he say? A. Well, the war was over and he was saying that even though the war was over there was a continuing need for new military information for Russia, and again was trying to get my views about it, whether I would want to contribute in the future.

Q. You mean continue in giving help?

Mr. E. H. Block: I object to any phrase of Mr. Saypol with respect to what the witness has said.

(Last answer read at the request of the Court.)

The Court: I think that is sufficient. Have you completed your answer?

The Witness: Yes.

The Court: What did you say to him?

The Witness: I said I would see and if I had anything and I wanted to give it to him, I would let him know.

Q. Was there any discussion between you regarding the type of work you were engaged in at that time in the

Bureau of Ordnance in the Navy Department? A. Yes. He was asking whether—what I was doing. This was quite some time later after the past visit, and he was inquiring about it.

Q. What did you tell him, what you were working on at the time? What did you tell him? A. Well, I told (329) him that I was working on some sonar or anti-submarine fire control devices.

Q. Will you tell us what that was? Describe it a little more. A. Well, a fire control device being used for firing missiles against a target. These were particular ones which computed for missiles to be fired against submarines.

Q. In connection with your work I think you have told us you had occasion to visit different war plants throughout the country? A. Yes.

Q. That is for the Navy Department? A. Yes.

Q. Were there occasions when you visited the General Electric plant in Schenectady, New York? A. Yes.

Q. Was any such work in progress there? A. Yes.

Q. Did there come a time when Sobell was employed in that plant? A. Yes.

Q. Were there occasions on your visit to Schenectady that you saw Sobell? A. Yes.

Q. Do you recall an occasion in 1946 on one of these trips when you stayed overnight with Sobell at his home? A. Yes.

The Court: What year is this?

Mr. Saypol: 1946.

Q. What part of 1946 was that, do you remember? (330) A. It would be the early part of 1946.

Q. Was there a discussion brought up by Sobell regard-

ing the military work or classified work or anything like that that you were working on? A. Yes.

Q. What was the conversation between you? A. Well, we talked about our work, about what I was doing and what he was doing, and he inquired about some—as to whether there were pamphlets written.

Q. Well, just a moment, before you get to that. What kind of work did you tell him you were doing? A. Well, I was working—I was project engineer on a fire control system, and I was in charge of that development work.

Q. Then what did he say? After you discussed with him the details of the work you say there was something said about some pamphlets or a pamphlet? A. Well, he inquired as to whether there were any reports written about this system on which I was working.

Q. In other words, he inquired about written material as distinguished from the oral talk that took place between you? A. Yes.

Mr. Phillips: I object to Mr. Saypol's speech about that. He said in other words. The witness didn't say that. Mr. Saypol says it. It is leading, suggestive and improper.

(331)

The Court: That is the way you should have made the objection without your speech.

Mr. Phillips: I jumped up as soon as I could.

The Court: But you made a speech and you objected to Mr. Saypol's speech.

Mr. Phillips: Oh, all right.

The Court: Overruled.

Mr. Phillips: Exception.

Q. What did you tell him with regard to this written material? A. I said there were some reports written on various phases of the equipment.

Q. Did you say anything else about it? A. He asked if I could get any of these reports and I said they were isolated ones and had little importance.

Q. These reports that he was talking about and that you were talking about, were these likewise classified? A. Yes.

Q. That is, they were not available for public distribution? A. That is correct.

Q. They were military secrets?

Mr. E. H. Bloch: I object to the question.

Mr. Phillips: I object to him asking the witness to conclude that they were military secrets.

Q. Were they military secrets?

Mr. Phillips: He said they were classified and (332) not open to the public. That is as far as we know.

By the Court:

Q. As far as you know were they military secrets? A. Yes.

Mr. Phillips: I object to the form of that question, and I except.

The Court: Overruled. And in what fashion were they classified?

The Witness: Confidential.

By Mr. Saypol:

Q. Was there any further discussion about the written material? A. Yes. He asked me whether there was an ordnance pamphlet written about this material, an ordnance pamphlet being an overall description of the system.

Q. What did you tell him? A. I said no, there was not. There was one being written by G. E. and would be finished—it was due to be finished some time the end of the year.

Q. Did he ask you whether you would get one for him or get some for him?

Mr. Phillips: I object again to asking this witness, trying to put the words into his mouth.

The Court: Can't we get this story from the witness in continuous fashion without this punctuation by an additional question?

(333)

By the Court:

Q. Can't you tell us or don't you remember? Can you tell us what you said to him and what he said to you about it? A. Yes.

Q. Why don't you tell us the whole story?

Mr. Saypol: Well, if we didn't have these frequent interruptions I think we could get it. The interruptions tend to distract the witness and I have to pursue it seriatim.

Mr. Phillips: May I suggest that the interruptions are occasioned by Mr. Saypol's improper questions.

The Court: May I suggest that we have no further argument. Go ahead.

The Witness: Well, on this occasion he asked me whether there were any reports written about the equipment, and I said yes, there were some. He asked if I could get these reports for him. I said no—I said yes but that they were very unimportant, they were isolated. They dealt with specific problems. He then asked whether there was an ordnance pamphlet written and I said no there wasn't, but one was due to be completed at the end of the year approximately, scheduled for completion then, and he was interested in seeing or knowing about the completion of this report.

Q. Do you know what type of work he was doing at (334) the General Electric plant at that time? A. Yes.

Q. What was he working on? Tell us. A. Well, he was working mainly on Servo mechanisms relating to military work.

Q. Can you tell us anything more about that? Servo mechanisms? A. Well, they are devices which are part of the systems, which are used to control, to drive equipment, to take intelligence and to use it in any way that it is necessary for these computations that are made. Generally you might say it is equipment which takes intelligence information and reproduces it mechanically or electrically and perhaps in other forms so it can be used.

Q. Do you know whether that was classified information? A. I believe it was, yes.

Q. When did you see Sobell again? A. Well, I saw him again later that year at his home in Schenectady.

Q. Was that in connection with one of your official trips? A. Yes.

Q. Did you have any conversation with him about these pamphlets? A. Well, we had a discussion about our work, talking about what we were doing. In addition he asked me about the status of this pamphlet which I had previously mentioned. I told him it was not completed, it was dragging along, it had not been finished yet.

(335)

Q. Was there any further discussion? A. Yes. There was a suggestion made to me to visit——

Q. By him? A. By him, to see Rosenberg. I had not seen him and the suggestion was made, and I said I would do so at some future opportunity.

Q. Did he state to you the purpose for which you should see him?

Mr. Phillips: Just a minute. That is open to the same objection I made before.

The Court: I will overrule it.

Mr. Phillips: Exception.

A. Well, he said, I don't know in what words, or implied that it had to do with this espionage business, but I don't recall the exact nature of the words.

Mr. Phillips: I move to strike out the answer as a conclusion of the witness. He spoke of something being implied.

The Court: Well, I want to say this right now so that we have no further difficulty on this business of conclusions. I suggest that you read the most recent holding by the Court of Appeals for this circuit in *United States* v. *Petrone*, decided November 20, 1950. I don't know what the official citation is. You will find that the latest pronouncement by the Court of Appeals on this business of conclusions. In effect they tell the district (335a) court not to adhere to the old form of law book teaching on the matter of taking of evidence, that a conclusion should necessarily be excluded; the important thing, the important function of the district court is to attempt to elicit the truth from the witness, and whatever form, in effect they say, the district court determines would best elicit the truth, with the exception of the old hearsay doctrine which is still adhered to, that is the form which the testimony should take.

(336)

Now, I will, in my good judgment, at times sustain objection to exclusions, and at other times I will overrule them, in my good judgment.

Mr. Phillips: The point of my objection is to the use of the words "the conversation implied something." That is certainly objectionable.

The Court: That means an impression that he got. That is what a conclusion is, a man gets an impression of something.

Mr. Phillips: And the latest ruling is that a witness's impressions may be stated in that form?

The Court: Under certain circumstances, for the purpose of eliciting the truth.

Am I stating the law correctly as you understand it, Mr. Saypol and Mr. Cohn?

Mr. Cohn: No doubt about it.

Mr. Saypol: Mr. Cohn tried the case; he argued the case.

Mr. Cohn: No doubt about it. The Court of Appeals specifically held that an impression of a witness is competent, and in fact suggested it was error on the part of the District Court——

The Court: So to exclude an impression.

Mr. Cohn: The specific question, very briefly, in that case was, an FBI agent was asked his impression (337) of whether or not a counterfeiter knew that counterfeit money was in his house and was under his control, and the Court of Appeals held it was error not to permit the FBI agent to give his impression of whether the defendant knew at the time.

The Court: That is correct.

Mr. Phillips: I don't think it is quite analogous for a man saying something was implied.

The Court: The doctrine which they enunciate there is that the District Court should not be rigid in repeating and adhering to the old law school type of teaching, that all conclusions are not admissible, and I happen to think the Court of Appeals is absolutely right, for whatever that is worth.

Mr. Phillips: May I submit that this——

The Court: I think that this is an easier form and a better form to elicit from a witness the truth, without going to a lot of unnecessary motions.

Mr. Saypol: After all, aren't we getting at the truth here, by trying to get impressions from the witness?

The Court: Proceed.

Mr. E. H. Bloch: I object to any statements at all.

The Court: I will sustain your objection to (338) Mr. Saypol's comments.

Disregard Mr. Saypol's comments.

Mr. Phillips: What is the ruling on my objection?

The Court: The ruling on your objection is that it is overruled.

Mr. Phillips: Exception.

Mr. Saypol: Now, we got lost in the middle again. Will you reread the last question and answer, please?

(Last question and answer read.)

By Mr. Saypol:

Q. That took place in the early part of 1946 or in 1946 sometime? A. Yes.

Q. Thereafter did you see Rosenberg? A. Yes, I did.

Q. That was after the discussion with Sobell? A. Yes.

Q. In which Sobell suggested that you see him? A. Yes.

Q. Where did you see him, do you remember? A. Did you say where or when?

Q. Where. A. At the home of Rosenberg.

Q. What did you say to him and what did he say to you? A. Well, I called him and said—well, I (339) was in the city on some official business, I believe—I called him and told him I would like to see him, and he said to come over. When I went up there——

The Court: When was this, did you say?

The Witness: I am sorry?

The Court: When was this?

The Witness: Either the end of '46 and possibly '47, the date I don't know.

The Court: All right.

A. (Continuing) I told him about what I was——

Q. Let me interrupt you for one minute. At the outset of the conversation was anything said about the fact that you had talked to Sobell? A. Yes, I told him I had.

Mr. E. H. Bloch: Now, if the Court please, I think that there ought not to be any leading or suggestive questions on this.

The Court: I agree.

Mr. E. H. Bloch: I agree with the Court, he ought to be asked concerning the conversation.

The Court: That is right; and he should tell us the conversation, and then if he has left out something which you consider important, then I will permit you to jog his memory, but I do wish this witness would tell us his story.

(340)

Q. Will you then tell us, Mr. Elitcher, after your conversation with Sobell, about your visit with Mr. Rosenberg and what you said and what he said? A. When I came there I told him that I seen Sobell, but he had suggested seeing him. I told him about my new work—I was perhaps in a more receptive frame of mind for him—and he then interrupted and told me that they were having some difficulty, felt that there was a leak in this espionage, and because of that there were precautions being taken by him. He told me it would be best if I don't see him, if I don't visit him, that I don't come to see him until he lets me know or until someone informs me. Otherwise—I think that was the substance of the conversation.

Q. Do you remember whether anything was said about what should be done by you in regard to any of your outside activities? A. Yes. I was told by him that it would be best if I discontinued my union activities and party activities.

Q. You mean Communist Party activities? A. Yes.

Mr. E. H. Block: Now, I object to that. There is no suggestion, there is no such suggestion in the witness' testimony, and here again it is leading.

The Court: Overruled.

Mr. E. H. Block: I except.

(341)

The Court: I think that is a matter that will go to the credibility of the witness. I have got to take it.

Mr. E. H. Block: I understand, your Honor, but if you will remember this witness' testimony, he hasn't said one word about Rosenberg's Communist Party affiliations or activities. They were exclu-

sively those of Sobell. Now, for the first time, Mr. Saypol interjects "Communist Party activities." I don't know what this witness meant, but I would like to get his testimony.

The Court: Let us have no argument. I am sure that Mr. Saypol isn't interjecting anything that this witness hasn't told him on a previous occasion.

Mr. E. H. Block: I am convinced of that.

Mr. Saypol: I take it that when this witness refers to "party activities" he is not talking about a May party or a political party, other than the party to which he is testifying.

The Court: Will you disregard that, please. Continue, Mr. Saypol.

By Mr. Saypol:

Q. Do you know whether there came a time in 1947—

The Court: Well now, wait. I am a little confused now on this story. Do I understand that the story ends this meeting with Rosenberg, in the early part (342) of 1946, when he tells you that he doesn't want you to do anything in connection with him and that you will hear from him further?

The Witness: Yes, that was late '46.

The Court: Late '46.

Mr. Saypol: I think the witness said late '46 or early '47.

The Court: That is right, or beginning of 194[illegible] yes.

The Witness: And he added that it would be best if I discontinued any of my union and Com-

munist Party activities, that it would be much safer. I told him I couldn't, that that was what I was doing, that was my life down there and I could not withdraw. He insisted but there were no conclusions resulting from it, and I left.

By Mr. Saypol:

Q. Was anything said by either party in respect to remaining in communication with each other? A. No.

Q. About that time, where had Sobell been working? A. At G.E.

Q. Did his employment change then? A. Well, sometime in 1947 he took a position at the Reeves Instrument Corporation.

Q. That is here in New York City? A. Yes.

(343)

Q. Do you know what kind of work he did there? A. Well, there was—it was again work done for the Armed Services; I am sure it was classified. He was in charge of a project at the Reeves Instrument Corporation.

Q. About that time did you see Sobell? A. Yes.

Q. Did you have a conversation with him? A. Yes, I met him more than once at Reeves.

Q. Do you recall the occasion when you had lunch with him? A. Yes.

Q. Where did that luncheon take place? A. At a sort of an eating place on Third Avenue, The Sugar Bowl.

The Court: When?

The Witness: In 1947.

The Court: When?

The Witness: End of 1947. I don't remember the month.

Q. Third Avenue and what street, do you remember? A. 99th—no, I am sorry—89th Street.

Q. Was there some conversation then about the type of work that he was on? A. Well, we did talk about what we were both doing; we always talked about that.

Q. What was it at the time, do you remember? A. That I was doing or that he?

Q. He was doing. A. Well, he was working on some plotting, what we call "a plotting board."

(344)

Q. What were you working on? A. I was still working on this same fire control system.

Q. Any particular phase of it? A. No, it is the same I was the project engineer in charge of the whole system.

Q. At this luncheon conversation, what was said? A. Well, there was this request for names or information about any engineering students that I might know, who were progressive, as I have testified before, and asked whether, if I knew of any such people, would I let him know. I told him I didn't know anybody. However, if somebody came along I would tell him about it.

Q. Was there anything said about the method of putting them in touch with anybody, whom they were to be put in touch with? A. No, there was no discussion of that.

Q. About that time, do you recall a conversation with Sobell relating to your wife? A. Yes.

Q. What was the conversation? A. Well, at about that time my wife and I were having some personal difficulties and I told it to him.

The Court: Where was this, at the Sugar Bowl?

The Witness: At the Sugar Bowl.

A. (Continuing) He said that he—or, he became concerned and asked whether she knew anything about this espionage business. I told him I thought that she might (345) know. However, I wasn't sure. He said, "Well, that isn't good"; and I said, "Well, it is just too bad. If she knows, she knows, and I just can't do anything about it."

Q. Then, did there come a time when you went to work for the Reeves Instrument Company, too? A. Yes.

Q. What was that? A. In October of 1948.

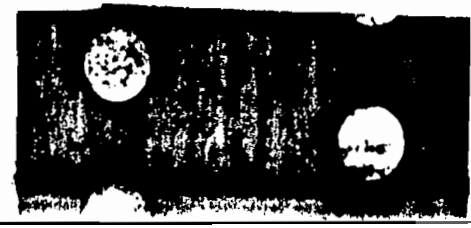
Q. Where did you take up your residence? A. At the address I mentioned previously, 164-18 72nd Avenue, Flushing.

Q. Did you and Sobell live near each other at that address? A. Yes.

Q. In other words, he lived in the same vicinity? A. Yes, we were back to back, actually.

Q. Do you have occasion to come to work together and go home together? A. Yes, we rode together in sort of a car pool, two of us, and we alternated driving.

Q. Now, do you recall a conversation with him on one of these occasions, returning home, regarding this subject? A. Yes. There was a similar request made about



people that I might know, except on this occasion ther was the statement——

Q. By whom? A. By Sobell, that because of some i creased security measures that had been taken, it woul be best to find engineering students, young students, wh (346) were not involved in any progressive activity, s that they would not be suspected, people who might eve tually be asked about providing military information. I said I didn't know of anybody—again I didn't know, an I said I had no knowledge.

Q. Now, just coming back for a moment, at the tim you first came to work for Reeves or immediately pr ceding that, did you have any conversation with Sobe about your plans? A. Yes. I had been informed—wel my plans for leaving the Bureau of Ordnance started som months before I left. I had been telling him about i telling him that I had been planning to make a chang However, I hadn't made up my mind. However, wha I finally did decide to leave, which was about in June 1948, again on the occasion of a visit to New York business, I called him and told him that I was planni to leave the Bureau; that I had definitely decided to so. He said, "Don't do anything before you see me. want to talk to you about it, and Rosenberg also wan to speak to you about it." He made an appointment f me to meet Rosenberg at 42nd Street and Third Av nue, which I did. This was about 6.30 in the evenin There was a meeting with Rosenberg——

The Court: Speak up.

(347)

Mr. E. H. Bloch: May we have the time fix please, your Honor?

The Court: Yes.

The Witness: I think it was in June of 1948, when I decided to leave.

The Court: And is this when you had this conversation with Sobell?

The Witness: Yes.

Mr. Saypol: The conversation with Sobell, if the Court please, I think preceded the appointment that he made. The appointment came out of the conversation with Sobell.

The Court: Yes, I am talking about having this conversation and I am asking whether that was in June of 1948?

The Witness: Yes.

By Mr. Saypol:

Q. Now, did you ultimately meet Rosenberg as a result of Sobell's suggestion? A. Yes, I met him at this appointed place. Sobell also came along—I don't believe they came together—and we walked up Third Avenue and some of the side streets and discussed this matter.

Q. What did Rosenberg say to you? A. Rosenberg asked about my plans to leave.

(348)

The Court: When was this?

The Witness: Same time; this is the same day.

The Court: Oh, the same day.

Q. Yes? A. Asked about my plans. I told him I had decided to leave Washington. He said that that was too

bad; that he was sorry to hear it, because he wanted me to stay there, at the Bureau of Ordnance; he wanted me—he needed somebody to work at the Navy Department for this espionage purpose, and he wanted me to change my mind. He said that he also—he had some plans in his pocket for me to make a contact in Washington to meet somebody, to establish a contact. I told him that I would not, I would not do so, I would not change my plans to leave. My wife and I wanted to leave and we were going to leave. Sobell was along and I recall that he agreed with Rosenberg in his trying to convince me to stay down at the Bureau of Ordnance. However, I convinced him that I was not going to change my plans; I was going to leave Washington. So that ended that part of the conversation. Sobell left and Rosenberg and I had dinner together.

Q. Well, in the course of the conversation among the three of you, when they were trying to convince you that you ought to stay at the Bureau of Ordnance, at the Navy Department in Washington, do you recall any (349) language of Sobell's to you regarding his view of Rosenberg's pleas to you? A. Well, only that he said, "Well, Rosenberg is right, Julie is right; you should do that," just some similar remarks concerning it.

Q. Now, after Sobell left, what happened? A. Rosenberg and I had dinner together at Manny Wolf's, on Third Avenue, and——

Q. What was the conversation in the course of the dinner? A. Well, among other things, we continued to talk about this espionage, not relating to my leaving or not leaving. He spoke of—well, he asked whether I knew of places where important military work was done.

mentioned the Bell Telephone Laboratories to him. He was interested in my getting——

Q. Which Bell Laboratories? A. In Whippany, New Jersey. He was interested in my getting a position there and I said, "We'll see, maybe I can. I don't know." He also told me about the fact that money could be made available for my education, if I so desired, if I wanted to take courses which would improve my technical status. In the course of that conversation I also asked him about how he had started in this venture and he told me that he had a long time ago decided that this was what he wanted to do and he made it his point to get close to people, people in the Communist Party, he said—he didn't (350) specify any person or their positions—and kept getting close from one person to another, until he was able to approach someone, a Russian—again he didn't specify who or what he was—who would listen to his proposition concerning this matter of getting information to Russia.

Q. Did he say that he finally succeeded in getting to somebody? A. Yes, he did.

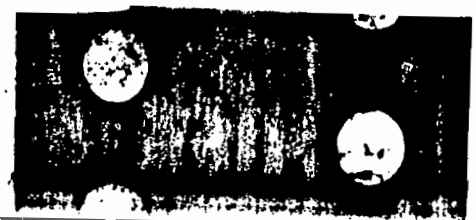
Mr. Saypol: Your Honor, I want to go into a fresh subject. Perhaps your Honor is disposed to take the noon recess.

The Court: All right.

Ladies and gentlemen of the jury, you are excused until 2.20 this afternoon.

The Court will recess until 2.20.

(Recess to 2.20 P.M.)



(351)

AFTERNOON SESSION

MAX ELITCHER, resumed the stand:

Direct examination continued by Mr. Saypol:

Q. At the time of the luncheon recess I recall you were testifying about the time you came up to New York from Washington and changed your employment. When was that? A. Well, the time I came up and decided to change my employment was in June of 1948.

Q. Now, there came a time when you drove to New York with your family? A. That is correct.

Q. When was that? A. The end of July or the beginning of August. Just about the end of July.

Mr. E. H. Bloch: What year?

The Court: What year?

The Witness: Of 1948. I was coming up to look for a place to live and my family and I drove up to New York. We were going to stay at the home of the Sobells during the search for a home, a permanent home.

Q. Did you come to Sobell's home with your family? A. Yes, I did.

Q. Did you talk to him? Did you see him there? A. Yes, I did.

Q. Will you tell us about the conversation? A. Well—

The Court: This is the end of 1948?

(352)

The Witness: No, June—July of 1948. Well, on the way up——

Colloquy of Counsel

Q. Just a moment. Excuse me. I think the witness said the end of July or August.

The Witness: Yes.

Q. Go ahead. A. On the way up to New York, upon leaving Baltimore we had stopped to buy some dishes and we went off the main road and on coming back I noticed that I was being followed.

Mr. E. H. Block: I object to this as not binding on the defendant.

The Court: It will be connected with the defendant in a conversation of some kind?

Mr. Saypol: Yes. I think by this time it is pretty nearly connected.

The Court: You say it will be?

Mr. Saypol: Yes.

The Court: Objection overruled.

Mr. Saypol: I say by this time I think it is pretty nearly connected. He has testified to a conversation with Sobell.

The Court: Not yet. He hasn't told us yet. I assume he will.

The Witness: I continued to notice these cars until I got to New York, and I stopped off briefly (353) at my mother's house, which is on the way to Queens. I had told my wife as we entered New York——

Mr. Kuntz: We object to that.

The Court: Yes. Don't tell us what you told your wife.

The Witness: I then proceeded on to Sobell's. When I got there, we had one child and we put the

child to bed, I called Sobell aside and told him that I thought that I had been followed by one or two cars from Washington to New York. At this point he became very angry and said that I should not have come to the house under those circumstances. I told him that those were my plans. I had intended —I had planned to come to his house to stay; the fact that I was followed couldn't change it; whoever was following me would probably know about it; in any case it was our only destination. He was still angry and concerned. However, he didn't seem to believe that I had been followed. He told me I should leave the house, I should go to a place in the mountains perhaps, or some other place and stay. During this next interval I told him that it was not possible. I didn't know where to go; I just had no—nothing, I could see no other thing to do but to stay.

He finally agreed that I would stay. However, a short time later he came over to me and said he had some (354) valuable information in the house, some thing that he should have given to Julius Rosenberg some time ago and had not done so; it was too valuable to be destroyed and yet too dangerous to keep around. He said he wanted to deliver it to Rosenberg that night. I told him it was foolish under the circumstances, that it was dangerous, it was a silly thing to do. However, he insisted and said that he was tired. He asked me to go along. He said he was tired, and that he might not be able to make the trip back. I agreed to go after argument, and we left the house. Upon leaving I saw him take what identified then as a 35 millimeter film can.

No reference was made to it. He took it. When we got into the car he put it in the glove compartment. We drove—he drove over to Manhattan along the East Side Drive and he parked outside the Journal American Building. He left the car. He told me to park the car on the street around the corner, which I then noticed was Catherine Slip. He took this can out of the glove compartment and left and I drove up the street and down and parked facing the East River Drive on Catherine Street and waited for him there. He came back approximately a half hour later, or perhaps a little shorter, and as we drove off I turned to him and said, "Well, what does Julie think about this, my being followed?"

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He said, "It is all right; don't be concerned about it; it is O.K." He then said Rosenberg had told him that he once talked to Elizabeth Bentley on the phone but he was pretty sure she didn't know who he was and therefore everything was all right. We proceeded back to the house.

Q. Just a moment. At that time was the name Elizabeth Bentley under discussion? A. Well, it had been in the newspapers just prior to that time, and I knew——

The Court: Excuse me. Would Juror No. 2 like some water?

Juror No. 2: I would.

The Court: Would you give that juror some water, please.

All right, proceed.