[redacted] (c) (S) b1

The above information was not included in the details of this report because the nature of the information tends to identify the very valuable informant as the source thereof.

INFORMANTS:

Identity of Source	File # Where Located
NY T - 1	[redacted]

b2 b7D

LEADS:

NEW YORK

At New York, New York

Will maintain this case in pending inactive status until subject's appeal has been argued in the United States Circuit Court of Appeals, Second Circuit, and keeping the Bureau advised of all developments regarding this appeal.

FD-305 (Rev. 1-25-60)

NY 100-37[redacted]

1. [X] Subject's name is included in the Security Index.
2. [X] The data appearing on the Security Index card are current.
3. [ ] Changes on the Security Index card are necessary and Form FD-122 has been submitted to the Bureau.
4. [X] A suitable photograph [X] is [ ] is not available.
5. [X] Careful consideration has been given to each source concealed and T symbols were utilized only [redacted] instances where the identities of the sources must be concealed.
6. [ ] Subject is employed in a key facility and _____ is charged with security responsibility. Interested agencies are _____.
7. [X] This report is classified "Confidential" because (state reason)

it contains information furnished by [redacted] a confidential informant of continuing value, the disclosure of which would tend to disclose the informant's identity and, thereby, adversely affect the national interests of this country.

b2
b7D

8. [ ] Subject previously interviewed (dates) _____.
   [ ] Subject was not reinterviewed because (state reason)

9. [X] This case no longer meets the Security Index criteria and a letter has been directed to the Bureau recommending cancellation of the Security Index card.
10. [X] This case has been re-evaluated in the light of the Security Index criteria and it continues to fall within such criteria because (state reason)

because subject is incarcerated at the U.S. Penitentiary, Atlanta, Georgia, following his conviction on 3/29/51, in the USDC, SDNY, NYC, for Conspiring to Commit Espionage on Behalf of the Soviet Union. The Committee to Secure Justice for Morton Sobell is actively engaged in efforts to have him released.

11. [X] Subject's SI card [ ] is [X] is not tabbed Detcom.
    [X] Subject's activities [ ] do [X] do not warrant Detcom tabbing.

- C* -

COVER PAGE

FD-204 (Rev. 8-8-59)

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

~~CONFIDENTIAL~~

Copy to:

Report of: CARLYLE W. MILLER Office: New York, New York
Date: 12/11/62
Field Office File No.: 100-37158 Bureau File No.: 101-2483
Title: MORTON SOBELL et al

Character: ESPIONAGE - R

DECLASSIFIED BY 3040PWT/MW
ON 4/29/87

Synopsis: Subject incarcerated at U.S. Penitentiary, Atlanta, Georgia, where he is serving thirty year sentence following his conviction on 3/29/51 in the USDC, SDNY, NYC, for Conspiring to Commit Espionage on Behalf of the Soviet Union. Subject's wife, HELEN SOBELL, is a member of the National Staff of the Committee to Secure Justice for Morton Sobell, which is characterized in the appendix hereto. On 1/3/62, a notice of motion on subject's behalf was served on the USA, SDNY, NYC, returnable 1/15/62, moving to set aside subject's sentence as illegal. This motion was argued in the USDC, SDNY, NYC, on 2/14/62, before USDJ JOHN F. X. MC GOHEY, who on 4/5/62, denied this motion. Subject's attorneys filed notice of appeal from this decision, 4/12/62. Oral argument of appeal scheduled by Circuit Court of Appeals, Second Circuit, for 12/7/62.

(W)

- P * -

DETAILS:

Subject's Incarceration at the United States Penitentiary, Atlanta, Georgia

Warden D. M. HERITAGE and Assistant Warden VIRGIL BRELEND, United States Penitentiary, Atlanta, Georgia,

~~CONFIDENTIAL~~
Group 1
Excluded from automatic downgrading and declassification

advised on various dates during 1962 that MORTON SOBELL continued to be incarcerated at that penitentiary. (u)

It is noted that MORTON SOBELL was convicted on March 29, 1951, in the United States District Court, Southern District of New York, New York, New York, for Conspiring to Commit Espionage on Behalf of the Soviet Union. On April 5, 1951, he was sentenced to a term of thirty years imprisonment. (u)

Committee to Secure Justice for Morton Sobell (CSJMS)

A characterization of the CSJMS is set forth in the appendix hereto.

NY T - 1 advised on various dates during 1962 that the subject's wife, HELEN SOBELL, continued to participate in the activities of the CSJMS, and that she was a National Staff member of that organization. (u)

Motion on Behalf of Morton Sobell to Set Aside His Sentence as Illegal

Assistant United States Attorney EDWARD R. CUNNIFFE, Southern District of New York, New York City, advised SA EDWARD F. MC CARTHY, on January 4, 1962, that on January 3, 1962, a notice of motion on behalf of MORTON SOBELL was served on the United States Attorney, Southern District of New York. The motion of SOBELL, filed by attorneys DONNER, PERLIN, and PIEL, 342 Madison Avenue, New York City, moved to set aside the sentence of SOBELL as illegal, and was returnable in the United States District Court, Southern District of New York, on Janury 15, 1962. The motion was made under Section 2255 of Title 28, United States Code. (u)

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

Assistant United States Attorney EDWARD R. CUNNIFFE advised SA EDWARD F. MC CARTHY on February 14, 1962, that the subject's motion was argued that date in the United States District Court, Southern District of New York, New York City, before United States District Judge JOHN F. X. MC GOHEY, who reserved decision. MARSHALL, PERLIN and SANFORD KATZ argued motion on behalf of SOBELL, and United States Attorney ROBERT M. MORGENTHAU, Southern District of New York, argued for the government. (u)

The April 6, 1962 issue of the "New York Times", a New York City daily newspaper, contained an article on page 7, entitled "Sobell Loses Sixth Plea - Federal Judge Notes Long History of Appeals", which states in part: (u)

"The Sixth appeal in Federal Court by MORTON SOBELL, serving thirty years for Conspiring to Commit Wartime Espionage, was denied yesterday by Judge JOHN F.X. MC GOHEY..... (u)

"Judge MC GOHEY, quoting from a legal source, said that 'the rule is clear that one who joins an existing conspiracy takes it as it is; and is therefore, held accountable for the prior conduct of the co-conspirators'. ETHEL and JULIUS ROSENBERG, convicted with SOBELL in 1951, were executed as atomic spies. (u)

Assistant United States Attorney EDWARD R. CUNNIFFE, Southern District of New York, advised SA EDWARD F. MC CARTHY on April 12, 1962 that on that date the subject's attorneys filed notice of appeal from Judge MC GOHEY's decision of April 5, 1962, denying subject's motion to set aside his conviction, and for a correction of his sentence. (u)

Assistant United States Attorney ROBERT J. GENIESSE, Southern District of New York, advised SA EDWARD F. MC CARTHY during November, 1962, that oral argument of subject's appeal was scheduled by the United States Circuit Court of Appeals, Second Circuit, for December 7, 1962.

~~CONFIDENTIAL~~

1.

APPENDIX

COMMITTEE TO SECURE JUSTICE
FOR MORTON SOBELL

"Following the execution of atomic spies ETHEL and JULIUS ROSENBERG in June, 1953, the 'Communist campaign assumed a different emphasis. Its major effort centered upon MORTON SOBELL,' the ROSENBERGS' codefendant. The National Committee to Secure Justice in the Rosenberg Case - a Communist front which had been conducting the campaign in the United States - was reconstituted as the National Rosenberg-Sobell Committee at a conference in Chicago in October, 1953, and 'then as the National Committee to Secure Justice for Morton Sobell in the Rosenberg Case' . . . ."

("Guide to Subversive Organizations and Publications" dated December 1, 1961, issued by the House Committee on Un-American Activities, page 116.)

In September, 1954, the name "National Committee to Secure Justice for Morton Sobell" appeared on literature issued by the Committee. In March, 1955, the current name, "Committee to Secure Justice for Morton Sobell," first appeared on literature issued by the Committee.

The Address Telephone Directory for the Borough of Manhattan, New York City, as published by the New York Telephone Company, on April 9, 1962, lists the "Committee to Secure Justice for Morton Sobell" (CSJMS) as being located at 940 Broadway, New York, New York.

~~CONFIDENTIAL~~

FD-323 (3-28-60)

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

In Reply, Please Refer to File No.

New York, New York
December 11, 1962

Bufile 101-2483
New York file 100-37158

Title

Morton Sobell

Character

Espionage - R

Reference

is made to report of Special Agent Carlyle W. Miller, dated and captioned as above, at New York.

All sources (except any listed below) used in referenced communication have furnished reliable information in the past.

OPTIONAL FORM NO. 10

UNITED STATES GOVERNMENT

Memorandum

TO : MR. SULLIVAN

FROM : MR. BRANIGAN

SUBJECT: MORTON SOBELL
ESPIONAGE - RUSSIA

1 - Mr. Belmont
1 - Mr. Mohr

DATE: 12-26-62

1 - Mr. DeLoach
1 - Mr. Sullivan
1 - Mr. Branigan
1 - Mr. Lee

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Caspe
Callahan
Conrad
DeLoach
Evans
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Rosen
Sullivan
Tavel
Trotter
Tele. Room
Holmes
Gandy

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 4/28/80 BY 3040 PWT/lmw

12-21-62 memorandum of Mr. DeLoach to Mr. Mohr advises of phone call from Judge Irving Kaufman to Mr. DeLoach on the same date in which Kaufman refers to Sobell's appeal for the sixth time to the Circuit Court of Appeals and that one of the judges hearing this appeal is Thurgood Marshall (formerly attorney for the National Association for the Advancement of Colored People - NAACP).

Kaufman refers to Sobell's claim that the Grunewald case (decided in 1957) holding it improper for the prosecutor to question the defendant relative to taking the Fifth Amendment before the Grand Jury, requires reversal of Sobell's conviction. It is noted that at Sobell's trial Ethel Rosenberg had been asked questions concerning her taking the Fifth Amendment before a Federal Grand Jury.

Kaufman states the Grunewald decision is not good law and believes it does not apply to this case. However, he refers to a "Sunday Worker" headline "U. S. Attorney Concedes That Conviction of Sobell May Be Illegal," which is a result of Judge Marshall asking the Assistant US Attorney who opposed the appeal "If Sobell had been tried last spring...wouldn't it be necessary for the Court to reverse the decision, particularly in view of the Grunewald decision?" The Assistant US Attorney replied "probably."

REC-54 100-2483-1507

Kaufman stated that this was typical of answers given by inexperienced attorneys representing the Department and he believed that this stupid answer would also be featured in "The Nation," "New Republic," and "The National Guardian." Kaufman stated he raised "hell" with Marshall whom he characterized as "naive" and "inexperienced." It was Kaufman's opinion that this might result in the obtaining of Sobell's freedom and he thought the Bureau might desire to acquaint the Attorney General with this unfortunate situation.

DEC 31 1962

JAN 2 1963

APL:hrt
(7)

100-2483

67 JAN 3 - 1963

MEMORANDUM FOR MR. SULLIVAN
RE: MORTON SOBELL
101-2483

OBSERVATIONS:

The above legal point of Sobell was rejected by Judge McGohey in the District Court on 4-5-62. In his opinion McGohey stated that Sobell "has already tried and failed to have the Supreme Court review his conviction in the light of the Grunewald decision." It would appear, therefore, a reversal of Sobell's conviction is remote. In any event, it is not believed any purpose would be served in advising the Attorney General concerning the remarks of Kaufman as to the inexperience of the Assistant US Attorney and his characterization of Judge Marshall.

RECOMMENDATION:

It is recommended that the Attorney General not be advised of Judge Kaufman's remarks and observations as set forth above.

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. Mohr

DATE: December 21, 1962

FROM : C. D. DeLoach

SUBJECT: MORTON SOBELL
ESPIONAGE - R
CASE APPEAL

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 4-28-87 BY 5040 PWT/tmw

Judge Irving Kaufman called from New York at 11:00 a. m., 12-21-62. He stated that captioned individual had appealed his case for the 6th time to the Court of Appeals. The last hearing was approximately one week ago. The court, at this time consisted of Judges Swann, Friendly and the new Judge, Thurgood Marshall (formerly Attorney for the NAACP).

Judge Kaufman made reference to the Supreme Court decision in the Gruenwald case in 1957 where the court held it was improper for the prosecutor to question the defendant regarding the fact that the defendant took the Fifth Amendment upon appearing before the Grand Jury. Judge Kaufman indicated that in this particular case Mrs. Ethel Rosenberg, when she was on the stand in 1951, was asked questions concerning her taking the Fifth Amendment before a Federal Grand Jury. Sobell's new appeal that was held approximately one week ago was based on the latter fact.

Judge Kaufman stated that the Gruenwald decision is not good law and in his opinion certainly does not apply to this case.

Judge Kaufman made further reference to the fact that Sunday's "Worker" had a headline "U. S. Attorney Concedes that Conviction of Sobell May Be Illegal." He stated this came about as a result of Judge Marshall's asking a question of Assistant U. S. Attorney Genniese during the above-mentioned hearing approximately one week ago. Marshall's question was, "If Sobell had been tried last Spring (1962) and we had him before us today wouldn't it be necessary for the court to reverse the decision, particularly in view of the Gruenwald decision?"

Genniese replied "probably." Judge Kaufman stated this was typical of the answers given by inexperienced trial attorneys who handle such cases for the Department of Justice. He indicated he had raised "hell" with Thurgood Marshall inasmuch as he considered Marshall to be somewhat naive and certainly inexperienced on the bench. Judge Kaufman also indicated that in his opinion the stupid answer on the part of AUSA Genniese would also be featured in "The Nation," "New Republic," and "The National Guardian."

53 JAN 3 1963

REC-54 101-2483-1508

JAN 2 1963

1 - Mr. Belmont
1 - Mr. Sullivan
1 - Mr. Jones

CONTINUED NEXT PAGE

CDD:sak (5)

12-26-62 apl/hr

ESE

Judge Kaufman was of the opinion that this might very well be the straw that breaks the camel's back and as a result obtain Sobell's freedom. He stated the Bureau might desire to acquaint the Attorney General with this unfortunate situation.

ACTION:

It is suggested this memorandum be forwarded to the Domestic Intelligence Division for appropriate consideration.

SAC, Baltimore 12-31-62

Director, FBI (105-100427)

DAVID ANDREWS
SECURITY MATTER - C

The captioned subject visited Bureau Headquarters on 12-27-62, and advised he resides at 848 Woodbourne Avenue, Baltimore 12, Maryland. He said he is presently serving as a student chaplain at Morgan State College in Baltimore. Andrews asked a number of questions concerning the Bureau's activities in connection with the prosecution of Morton Sobell. He claimed that the actions of the Bureau were questionable in relation to the manner in which the testimony of Max Elichter was obtained and he doubted whether or not Sobell's apprehension by the Bureau upon his deportation from Mexico was legal. He questioned whether or not the FBI's exhibit on communism was in line with its jurisdiction. Andrews was advised in no uncertain terms regarding the Bureau's involvement in these matters.

Following his visit it was learned that he had picketed the Attorney General's office and the Department of Justice Building on the same date.

The foregoing is provided for your information.

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

1 - Mr. DeLoach (sent with cover memo)
1 - Mr. Sullivan (sent with cover memo)
1 - 101-2483 (sent with cover memo)
1 - 100-387835 (sent with cover memo)

NOTE: See Jones to DeLoach memo dated 12-28-62, captioned "David Andrews Security Matter - C."

JWO'B:ear (8)

62 JAN 10 1963

ORIGINAL FILED IN 105-100427

Mr. DeLoach 12-28-62

M. A. Jones

DAVID ANDREWS
SECURITY MATTER - C Morton Sobell

At 5 p. m. on 12-27-62, the captioned individual appeared at Bureau Headquarters and spoke to SA John W. O'Beirne of the Crime Research Section.

He advised he is a Methodist minister, resides at 848 Woodbourne Avenue, Baltimore 12, Maryland, and is a student chaplain at Morgan State College, Baltimore, Maryland.

Andrews said he wanted to ask some questions concerning the FBI's participation in the prosecution of Morton Sobell in the Rosenberg case. Andrews asked whether or not the FBI used coercion to obtain testimony from Max Elichter to implicate Sobell. He wanted to know how Sobell was deported from Mexico and thereafter arrested by the FBI since Mexican authorities have granted that Sobell was not "deported." Andrews by implication indicated that Elichter's testimony was forced from him since the FBI was under the pressure of "McCarthyism" and the Korean war and it was politically expedient to obtain Sobell's conviction.

Andrews was immediately and forcefully informed that any implication to the effect that the FBI operated illegally was an outright deliberate lie and typical of communist tactics. He was also informed that the FBI is strictly a fact gathering agency and that all of its actions were subject to close scrutiny by the court which prosecuted Sobell. Andrews also raised a point concerning the communism exhibit on the FBI tour saying that it was strange there is no comparable exhibit concerning fascism, racism or militarism on display. It was pointed out to Andrews that the FBI's exhibit was installed in direct response to a number of appeals made of the FBI for information concerning communism. He was also advised that the FBI and Mr. Hoover are rightfully regarded as America's experts on the subject since they are charged with the responsibility of preserving internal security. He was enlightened concerning the decision of the courts which have declared the Communist Party as a subversive orgazination with a world-wide mission to impose its tyrannical ideology upon every nation of the earth. He was asked whether or not he had made as careful

Enclosure

1 - Mr. DeLoach - Enclosure
1 - Mr. Sullivan - Enclosure
(1) - 101-2483 - Enclosure
1 - 100-387835 - Enclosure
JWO'B:ear
(7)

101-2483-
NOT RECORDED
141 JAN 4 1963

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

100-387835-10 Enclosure

a study of communism as he had of the Morton Sobell case. He said he had read "Dr. Sharpe's" book and other literature regarding Sobell but admitted that he did not have a thorough knowledge of communism. He was referred to Mr. Hoover's publications which are available in all libraries which he would find most profitable to read.

Upon his departure it was learned that Andrews had demonstrated during the same day by picketing the Attorney General's office on the 5th floor and at the 9th street entrance of the Department of Justice Building. He had been ejected by building guards and resumed his picketing outside the building. Andrews is a peaceable type person and does not appear to resort to violence in either action or language.

Bufiles reflect Andrews was arrested three times during December, 1961, for kneeling in prayer on the White House sidewalk. He was picketing with the Committee to Secure Justice for Morton Sobell and charges against him were dropped upon his promise to leave Washington. This matter was discussed with a supervisor in the Domestic Intelligence Division.

RECOMMENDATION:

That the attached letter to Baltimore regarding Andrews' visit to the Bureau be approved and forwarded.

0-19 (Rev. 10-15-62)

Tolson
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Holmes
Gandy

Omissions Noted In Sobell Article

Letter to the Editor

TOM Kelly's story last month on Morton Sobell's parole appeal suffers from the difficulty of dealing with a voluminous record in the brief columns available. This may account for the omission of vital, significant factors.

Few can study the entire record, so it would seem desirable that the conclusions of the legal studies be brought to public attention. Each of the articles which noted study of the case, in five leading law journals, indicated that Sobell did not receive justice. There was general agreement that his 30-year sentence was inordinate. No law review study has dissented.

Mr. Kelly noted the flimsiness of the case against Sobell, based entirely on the vague and uncorroborated testimony of a confessed perjuror. However, he erred in saying that Sobell and his family had travelled from New York to Mexico under assumed names, after the Rosenbergs were arrested.

I do not blame Mr. Kelly for this error, for it is precisely what the FBI had implied. This might add color to the case against Sobell, but it is simply untrue. The Sobells obtained their tickets from New York to Mexico City in their own names, obtaining their required tourist documents from the Mexican Consulate in New York. They left on a long-awaited vacation to Mexico in June, 1950. The Rosenbergs were arrested in July and August, 1950.

Finally, while Mr. Kelly mentioned some Sobell supporters whom he discredits, including a book by John Wexley, he failed to mention the authoritative book written by the distinguished legal scholar, Prof. Malcolm Sharp of the U. of Chicago Law School, titled "Was Justice Done?" Also, the highly respected names of Sobell supporters in the U. S. Senate and the House of Representatives, on the major law school faculties, civil libertarians and educators and hundreds of responsible clergy leaders and organizations, including the Council of Churches of the National Capital Area.

AARON KATZ

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 4/27/80 BY 3049 PAT/MMO

55 JAN 10 1963

The Washington Post and Times Herald
✓ The Washington Daily News
The Evening Star
New York Herald Tribune
New York Journal-American
New York Mirror
New York Daily News
New York Post
The New York Times
The Worker
The New Leader
The Wall Street Journal
The National Observer
Date

EX-120

REC- 22

100-2483-1509

NOT RECORDED
184 JAN 8 1963

The Attorney General TOP SECRET January 14, 1963

Director, FBI CONFIDENTIAL JAIT

MORTON SOBELL
ESPIONAGE - RUSSIA Classified by 3040 PWTP

1 - Mr. Belmont
1 - Mr. Evans
1 - Mr. Sullivan
1 - Mr. Baumgardner
1 - Mr. Branigan
1 - Mr. Shaw

Declassify on: OADR 4/29/87 lmw

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE.

The above-captioned individual was convicted on March 29, 1951, along with Julius and Ethel Rosenberg, of conspiracy to commit espionage on behalf of the Soviet Union. He was sentenced on April 5, 1951, to serve 30 years for his participation in this espionage conspiracy and is currently serving this sentence. (U)

APPROPRIATE ACTIONS AND FIELD OFFICES ADVISED BY LETTING SLIP(S) OF 1-22-63

[redacted] (S)

b1

The above is for your information. Any additional information received with respect to this matter will be promptly brought to your attention. (U)

Because of the sensitive nature of our source, who has furnished reliable information in the past, we have classified this communication "Top Secret."

MAILED 2 JAN 14 1963 COMM-FBI

EX-120 REC-42 101-2483-1510

101-2483

1 - The Deputy Attorney General 19 JAN 14 1963

NOTE: Classified "Top Secret" because unauthorized disclosure of this information could result in grave damage to the Nation. (S) Source is [redacted] See memo Baumgardner to Sullivan 1/11/63 (C) [redacted] Internal Security - Communist."

1 - [redacted]

WGS:kmo (11)

RECEIVED-DIRECTOR

6 3 JAN 14 1963 TOP SECRET

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

MAIL ROOM TELETYPE UNIT

CONFIDENTIAL

Classified by 23525 DMH/RAL 4/29/87
Exempt from GDS, Category 3
Date of Declassification Indefinite

CONFIDENTIAL

The Attorney General

January 21, 1963

Director, FBI

1 - Mr. Belmont
1 - Mr. Evans
1 - Mr. Sullivan
1 - Mr. Baumgardner
1 - Mr. Lee
1 - Mr. Krupinsky
1 - Mr. Smith

COMMITTEE TO SECURE JUSTICE
FOR MORTON SOBELL
INTERNAL SECURITY - C

I have previously advised you concerning the continuing activity of the Committee to Secure Justice for Morton Sobell. The following information furnished by a confidential source, who has furnished reliable information in the past, concerns the latest activity of the Committee.

The Committee to Secure Justice for Morton Sobell, 940 Broadway, New York City, was recently engaged in the circulation of letters from the Committee calling for a board of inquiry into the Morton Sobell case.

Aaron Katz, east coast organizer for the Committee, has claimed that Sobell was not granted a parole "because of only three votes of the Parole Board." He believes that Sobell's chances will be better next May (1963) before this Board because a "friend is getting a job on the Parole Board." Katz also feels Sobell will have a better chance in view of the statement by United States Appeals Court Judge Thurgood Marshall. Judge Marshall, according to Katz, indicated that if Ethel Rosenberg appeared before the Court at the present time, she would be granted a new trial. According to the source, Katz was referring to a court decision declaring that references to the use of the Fifth Amendment before a grand jury by a defendant, when brought out in court, are prejudicial to that defendant.

APPROPRIATE AGENCIES AND FIELD OFFICES ADVISED BY SLIP(S) DATE 1-23-63 Reclassification

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 4/28/87 BY 3040PWT/mw 4/28/87

DECLASSIFIED BY

(1) - 101-2483 (Morton Sobell)

SEE NOTE ON YELLOW PAGES TWO AND THREE

WLS:erc
(14)

CONFIDENTIAL

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GROUP 1
Excluded from automatic downgrading and declassification

101-2483
NOT RECORDED
126 JAN 22 1963

37 JAN 28 1963

100-387835-2940

CONFIDENTIAL

The Attorney General

The Committee, according to Katz, will connect itself to the (Ethel and Julius) Rosenberg case in all future action. This is a complete reversal in policy on the part of the Committee.

Katz claims that, if and when Morton Sobell is released, the Committee will not go out of existence but will reorganize and conduct a campaign to vindicate the Rosenbergs.

1 - The Deputy Attorney General

1 - Mr. J. Walter Yeagley
Assistant Attorney General

1 - Mr. Richard A. Chappell
Chairman, Board of Parole

NOTE ON YELLOW:

The information contained in this letter was furnished in the memorandum enclosure to New York airtel 1/15/63 captioned "Committee to Secure Justice for Morton Sobell, IS - C, ISA - 1950." 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.

57D
62

In previous correspondence with the Attorney General and O'Donnell concerning the Committee to Secure Justice for Morton Sobell, the Committee, Morton Sobell, Helen Sobell, and Ethel and Julius Rosenberg have been CONFIDENTIAL.

NOTE CONTINUED PAGE 3

The Attorney General

NOTE ON YELLOW CONTINUED:

characterized. This information has been disseminated to the military intelligence agencies.

This information is being furnished by separate communication to the Honorable P. Kenneth O'Donnell, Special Assistant to the President.

CONFIDENTIAL

~~SECRET~~

January 21, 1963

BY COURIER SERVICE

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

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

Dear Mr. O'Donnell:

I have previously advised you concerning the continuing activity of the Committee to Secure Justice for Morton Sobell. The following information furnished by a confidential source, who has furnished reliable information in the past, concerns the latest activity of the Committee.

The Committee to Secure Justice for Morton Sobell, 940 Broadway, New York City, was recently engaged in the circulation of letters from the Committee calling for a board of inquiry into the Morton Sobell case.

Aaron Katz, east coast organizer for the Committee, has claimed that Sobell was not granted a parole "because of only three votes of the Parole Board." He believes that Sobell's chances will be better next May (1963) before this Board because a "friend is getting a job on the Parole Board." Katz also feels Sobell will have a better chance in view of the statement by United States Appeals Court Judge Thurgood Marshall. Judge Marshall, according to Katz, indicated that

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 4/05/82 BY ... DECLASSIFIED BY ... ON 10/... 82-1840CV

original filed in 100-387835-2947

1 - 101-2483 (Morton Sobell)

CONFIDENTIAL

SEE NOTE ON YELLOW PAGES 2 AND 3

WLS:ere
(11)

~~SECRET~~

Group 1
Excluded from automatic downgrading and declassification

DUPLICATE YELLOW
101-2483
NOT RECORDED
46 JAN 22 1963

55 JAN 25 1963

CONFIDENTIAL

SECRET

Honorable P. Kenneth O'Donnell

if Ethel Rosenberg appeared before the Court at the present time, she would be granted a new trial. According to the source, Katz was referring to a court decision declaring that references to the use of the Fifth Amendment before a grand jury by a defendant, when brought out in court, are prejudicial to that defendant.

The Committee, according to Katz, will connect itself to the (Ethel and Julius) Rosenberg case in all future action. This is a complete reversal in policy on the part of the Committee.

Katz claims that, if and when Morton Sobell is released, the Committee will not go out of existence but will reorganize and conduct a campaign to vindicate the Rosenbergs.

This information is being furnished to the Attorney General.

Sincerely yours,

NOTE ON YELLOW:

The information contained in this letter was furnished in the memorandum enclosure to New York airtel 1/15/63 captioned "Committee to Secure Justice for Morton Sobell, IS - C, ISA - 1950." 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. b7D

NOTE CONTINUED PAGE 3

SECRET CONFIDENTIAL

~~CONFIDENTIAL~~

Honorable P. Kenneth O'Donnell

~~SECRET~~

NOTE ON YELLOW CONTINUED:

In previous correspondence with the Attorney General and O'Donnell concerning the Committee to Secure Justice for Morton Sobell, the Committee, Morton Sobell, Helen Sobell, and Ethel and Julius Rosenberg have been characterized. This information has been disseminated to the military intelligence agencies.

~~SECRET~~

~~CONFIDENTIAL~~

CONFIDENTIAL

The Attorney General

January 23, 1963

Director, FBI

SECRET

1 - Belmont
1 - Evans
1 - Sullivan
1 - Baumgardner
1 - Wannall
1 - Branigan
1 - Lee

MORTON SOBELL
ESPIONAGE - RUSSIA

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE.

The above-captioned individual was convicted in March, 1951, along with Julius and Ethel Rosenberg, of conspiracy to commit espionage on behalf of the Soviets. He was sentenced in April, 1951, to serve thirty years in prison. He is currently serving this sentence.

There is attached for your information one copy of a memorandum dated January 18, 1963, which reports that

(S) b1

This is furnished to you for your information. Any additional information received concerning this matter will be promptly brought to your attention.

Enclosure

Classified by 3040 PWT/mw
Declassify on: OADR 4/29/87

101-2483

1 - The Deputy Attorney General (Enclosure)

JPL:jes
(11)

NOTE: This is classified "Confidential" since it reveals

(S) b1 SECRET

REC-71 101-2483-154

MAILED 2
JAN 23 1963
COMM-FBI

CONFIDENTIAL

GROUP 1
Excluded from automatic downgrading and declassification

SECRET

JAN 24 1963

MAIL ROOM TELETYPE UNIT

FBI

JAN 23 11 25 AM '63

REC'D-READING ROOM

DATE

Domestic Intelligence Division

~~SECRET~~

INFORMATIVE NOTE

Date 1-21-63

[redacted] Sobell was convicted with Julius and Ethel Rosenberg. (S)
Information will be furnished to the Attorney General.

b1

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE.

Classified by 3045 PWT/lmw
Declassify on: OADR 4/29/88

WAB:mhd

ERC

~~SECRET~~

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

FBI

Date: 1/18/63

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

Via AIRTEL
(Priority or Method of Mailing)

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

TO : DIRECTOR, FBI (101-2483)

FROM : SAC, NEW YORK (100-37158)

SUBJECT : MORTON SOBELL
ESP- R

(OO:NEW YORK)

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE.

Enclosed are five copies of a letterhead memorandum setting forth information [redacted] The information as it appears in the letterhead memorandum, has been paraphrased; however, a copy of the information as it was originally received has been filed in the exhibit section of the NYO file. (S)

The confidential source [redacted] who furnished information to SA FRANCIS J. O'BRIEN on 10/30/61. (U)

The letterhead memorandum is classified "Confidential" inasmuch as it reveals [redacted] (S)

APPROPRIATE AGENCIES AND FIELD OFFICES ADVISED BY ROUTING SLIP(S) OF Class DATE 5-22-78

Classified by 3042PWT/lmw
Declassify on: OADR 4/29/87

5 ENCLOSURE

3 - Bureau (101-2483) (Encs. 5) (RM)
2 - New York (100-37158)
(1 - New York 100-55873) (WALDO FRANK)

CWM:aam
(6)

ST-117

REC 43 101-2483-1512

6 JAN 24 1963

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

SECRET

7 JAN 30 1963

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

In Reply, Please Refer to File No.

New York, New York
January 18, 1963

~~CONFIDENTIAL~~ ~~SECRET~~

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

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE.

Re: Morton Sobell

A confidential source who has furnished reliable information in the past, advised during January, 1963, that

[redacted] (S) b1

It is noted that Morton Sobell was convicted on March 29, 1951, in the United States District Court, Southern District of New York, New York City, for conspiring to commit espionage on behalf of the Soviet Union. On April 5, 1951, he was sentenced to a term of thirty years imprisonment and is currently serving his sentence at the Federal Penitentiray, Atlanta, Georgia.

[redacted] b7C, b7D

~~CONFIDENTIAL~~ ~~SECRET~~

Classified by 3042PWT/lmw
Declassify on: OADR 4/29/88

Group I
Excluded from automatic downgrading and declassification

10/14/75

ENCLOSURE

101-2483-15152

~~SECRET~~

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

FBI

Date: 2/8/63

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

Via AIRTEL RM (Priority or Method of Mailing)

WCS/88

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

TO : DIRECTOR, FBI (101-2483)

FROM : SAC, NEW YORK (100-37158)

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

AUSA ROBERT GENIESSE, SDNY, NYC, advised 2/7/63 that the U.S. Court of Appeals, Second Circuit, had on the previous day denied subject's appeal. AUSA GENIESSE stated he did not yet have a copy of the court's decision but would furnish one to the NYO when it becomes available.

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 4/28/87 BY 3042 PWT/lmw

REC-54
101-2483-1513

3 - Bureau (101-2483)(RM)
1 - New York (100-37158)

CWM:HC (332)
(6)

EX-116

13 FEB 21 1963

C. C. Wick

FEB 8 11 22 AM '63

58 FEB 15 1963

FBI NEW YORK N.Y.
RECD

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

OF 10

UNITED STATES GOVERNMENT
MEMORANDUM

Date: 2/15/63

TO: DIRECTOR, FBI (101-2483)

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

SUBJECT: MORTON SOBELL, aka.
ESP - R
(OO: NEW YORK)

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 7-31-84 BY 1678 REP/ls
4/28/87 3045 PWT tmw

On 1/7/63. Associate Warden VIRGIL BRELAND, U. S. Penitentiary, Atlanta, Ga., made available to SA ALDEN F. MILLER greeting cards received at the Penitentiary addressed to the above subject. Inasmuch as these correspondents of subject were not on the approved mailing list of inmate SOBELL, all cards were confiscated and made available to the Atlanta Office. Mr. BRELAND does not desire that any of these cards be returned to him. These cards are furnished to the respective offices where these correspondents live and there are sufficient copies of this letter designated for each office so that they may be made a part of the individual case file, if any such file does exist relating to the correspondent or names mentioned in the correspondence.

2 - Bureau (RM)
3 - Albany (Enc. 1) (RM)
8 - Baltimore (Enc. 2) (RM)
5 - Boston (Enc. 2) (RM)
25- Chicago (Enc.13) (RM)
2 - Cleveland (Enc. 1) (RM)
2 - Detroit (Enc. 1) (RM)
2 - Knoxville (Enc. 1) (RM)
21- Los Angeles (Enc.10) (RM)
2 - Louisville (Enc. 1) (RM)
4 - Milwaukee (Enc. 2) (RM)
5 - Minneapolis (Enc. 2) (RM)
2 - Newark (Enc. 1) (RM)
3 - New Haven (Enc. 1) (RM)
36- New York (Enc. 21) (RM)
6 - Philadelphia (Enc. 3) (RM)
2 - Portland (Enc. 1) (RM)
13- San Francisco (Enc.5) (RM)
2 - Salt Lake City (Enc. 1)(RM)
3 - San Antonio (Enc. 2) (RM)
15- Seattle (Enc. 10) (RM)
3 - Atlanta
(1 - 65-1361)
(1 - 100-5720) (ISOBEL CERNEY)
(1 - 100-5713) (EDWIN CERNEY)

EX-120
REC-30
REC-21
101-2483-1514
18 FEB 18 1963
EX-108

I. D. Ha...
W. H...
J. H. Gl...
W. P. S...
E. J. K...
B. C. Ra...

ESP-SUBC

AFM:sbb
(166)

F73

5 8 MAR 14 1963

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

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

It is to be noted that according to the records of Atlanta Penitentiary, MORTON SOBELL was convicted in Federal Court, New York City, charged with having committed Espionage on behalf of Russia, and was sentenced to a thirty-year sentence.

AT 65-1361

The greeting cards are set forth hereinafter as follows:

ALBANY

1. From Mr. and Mrs. THOMAS CERASOLI, P.O. Box 271, Barre, Vermont, postmarked Dec. 24, 1962, at Barre, Vt.

BALTIMORE

1. From SUSAN, NANCY, GEORGE, RUTH and SAM ABBOTT, return address - S. A. ABBOTT, 7308 Birch Ave., Takoma Park 12, Maryland, postmarked Washington 37, D. C., Dec. 19, 1962.

2. From SARAH and DAVID HAMMOND, return address - 8802 Glenville Rd., Silver Springs, Md., postmarked - Silver Spring, Md., Dec. 9, 1962.

BOSTON

1. From CHARLES and ELBA NELSON, return address - E. C. NELSON, Hillsboro, N. H., postmarked - Hillsboro, N. H., Dec. 20, 1962.

2. From MILLAE and RUDY HAASE, return address 346 Concord, Belmont, Mass., postmarked - Boston, Mass. Dec. 23, 1962.

CHICAGO

1. From Mr. and Mrs. C. L. STOECKER, return address - 706 S. Keeler Ave., Chicago 24, Ill., postmarked - Chicago, Ill., Dec. 16, 1962.

2. From CASS and M. SINBA, postmarked - Chicago, Ill., Dec. 29, 1962.

3. From NELLIE DeSCHAAF, return address - 9235 So. Marshfield Ave., Chicago 20, Ill., postmarked - Chicago, Ill., Dec. 16, 1962.

4. From NATALIE MYERS, postmarked - Chicago, Ill., Dec. 15, 1962.

AT 65-1361

5. From JOHN, return address - JOHN D. REINKE, 643 W. 44th Street, Chicago 9, Ill., postmarked - Chicago, Ill., Dec. 15, 1962.

6. From FLORENCE and DICK CRILEY, 709 S. Spaulding St., Chicago 24, Illinois, postmarked - Chicago, Ill., Dec. 17, 1962.

7. From Hugh McGilvery, 1766 N. Clark St., Chicago 14, Illinois, postmarked - Chicago, Ill., Dec. 21, 1962.

8. From CHARLES and ERMA SOTIS, 5159 W. Medill, Chicago 39, Ill., postmarked Chicago, Ill., Dec. 19, 1962.

9. From WINIFRED McGILL, Exec. Dir., and SAMUEL OUTLAW, Pres., return address - All Worlds and All Peoples, THE International Club, Box 9098 -- Chicago 90, Illinois, postmarked - Chicago, Ill., Dec. 18, 1962.

10. From Mr. and Mrs. BEN GREEN, return address 3934 Crain, Skokie, Ill., Postmarked Skokie, Ill., Dec. 19, 1962.

11. From DICK and ANNA MORGAN, return address - 5329 S. Greenwood, Chicago 15, Ill., postmarked - Chicago, Ill., Dec. 20, 1962.

12. From SAM and ELLEN DAVIS, postmarked - Chicago, Ill., Dec. 20, 1962.

13. From MOLLIE, STEVEN and JAMES WEST, return address - 4672 West End Ave., Chicago 44, Illinois, postmarked Dec. 13, 1962, Chicago, Ill.

CLEVELAND

1. From HENRY A. CRAWFORD, 2228 E. 80th St., Cleveland 3, Ohio, postmarked - Cleveland, Ohio, Dec. 23, 1962.

DETROIT

1. From GOLDIE GREGUREK, 401 Beaver, Lansing 6, Mich., postmarked - Lansing, Mich., Dec. 21, 1962.

AT 65-1361

KNOXVILLE

1. Letter from DANIEL OWEN, 5821 Fairhill Lane, Knoxville 18, Tennessee, postmarked - Knoxville, Tenn., Dec. 21, 1962.

LOS ANGELES

1. From RUTH KIDDER (Valley Chapter of the American Humanist Association), return address - 14742 Archwood St., Van Nuys, Calif., postmarked - Van Nuys, Calif. Dec. 28, 1962.

2. From DAN and JOE SCHARLIN, return address - 3410 Grantville Avenue, Los Angeles 66, Calif., postmarked - Los Angeles, Calif., Dec. 27, 1962.

3. From the SMITH's, postmarked - Los Angeles, Calif., Dec. 24, 1962.

4. From CLARENCE and VERA HATHAWAY, postmarked - Los Angeles, Calif., Dec. 26, 1962.

5. From BETTY WILLETT, return address - 1011 Rosemont, Los Angeles 26, Calif., postmarked - Los Angeles, Calif., Dec. 23, 1962.

6. From HELEN and SOL WEINGART, postmarked - Santa Monica, Calif., Dec. 23, 1962.

7. From the JACOBSONS, postmarked Venice, Calif., Dec. 23, 1962.

8. From the SIEGELS, 1853 Lohengrin St., Los Angeles 47, Calif., postmarked - Los Angeles, Calif., Dec.24,1962.

9. From WIDGE NEWMAN, 4046 Denny, No. Hollywood, California, postmarked - Los Angeles, Calif., Dec. 24, 1962.

10. From RUTH E. DUFF, CELIA PTASHNE, WALTER MILLSAP, RICHARD B. KOLLAK, PAUL LEWKOWICZ, HERMAN S. GRONDAKE, and BERNIE STEVENS, postmarked - Los Angeles, Calif., Dec. 27, 1962.

AT 65-1361

LOUISVILLE

1. From Jim Williams, return address - James H. Williams, 1338 South 2nd Street, Louisville 8, Kentucky, postmarked - Louisville, Ky., Dec. 20, 1962.

MILWAUKEE

1. From JOE LIMA and family, postmarked - Superior, Wis., Dec. 22, 1962.

2. From FRED and MARY BLAIR, 3236 N. 15th St., Milwaukee 6, Wis., postmarked - Milwaukee, Wis., Dec. 21, 1962.

MINNEAPOLIS

1. From SUSAN and HARVEY ABRAMS, return address - HARVEY A. ABRAMS, 327 14th Ave., S. E., Mpls., 14, Minn., postmarked - Minneapolis, Minn., Dec. 21, 1962.

2. From JEAN and BILL BRUST and family, postmarked - Saint Paul, Minn., Dec. 18, 1962.

NEWARK

1. Poem by WALTER LOWENFELS, from WALTER LOWENFELS, Mays Landing, R. D. 2, New Jersey, postmarked - Mays Landing, N. J., Dec. 21, 1962.

NEW HAVEN

1. From RUTH ERICKSON and ELEANOR STEVENSON, postmarked - New Milford, Conn., Dec. 18, 1961.

NEW YORK

1. From MILDRED C. CORBIN, 240 Crown St., Brooklyn 25, N. Y., postmarked - Brooklyn, N. Y., Dec. 21, 1962.

2. From ABE and ANNA ZUKERMAN, postmarked - New York, N. Y., Dec. 18, 1962.

3. From FOY and HERBERT APTHEKER, 32 Ludlam Pl., Brooklyn 25, N. Y., postmarked - Brooklyn, N.Y., Dec. 22, 1962.

4. From BELLA HALEBSKY, postmarked - New York, N. Y., Dec. 13, 1962.

5. From FREDA NOBLE, return address - Miss Noble, 3100 Ocean Pkwy., Brooklyn, N. Y., postmarked - Brooklyn, N. Y., Dec. 15, 1962.

6. From EDITH SEGAL and SAMUEL KAMEN, return address - 295 St. Johns Place, Brooklyn 38, N. Y., postmarked - New York, N. Y., Dec. 20, 1962.

7. From The Magils, postmarked New York 1, N. Y., Dec. 20, 1962.

8. From MURIEL and BEN GOLDRING, (first part of return address torn off - Brooklyn 18, N. Y.) postmarked - Dec. 20, 1962, New York, N. Y.

9. From GRAMBS and JIM ARONSON, postmarked New York, N. Y., Dec. 24, 1962.

10. From LEMENT HARRIS, return address L. U. HARRIS, Apt. 1D, 116 Thompson St., N.Y. 13, postmarked - New York, N. Y., Dec. 25, 1962.

11. From ALBERT and CEIL PAULA, Bronx, N.Y., postmarked New York, N. Y., Dec. 19, 1962.

12. From The Editors, return address - The Catholic Worker, 175 Chrystie St. N. Y. 2., postmarked - New York, N. Y., Dec. 20, 1962.

13. From PAULINE G. SCHINDLER, 835 North Kings Road, Los Angeles 69, California, postmarked - New York, N. Y., Dec. 22, 1962. (If deemed advisable, route same to Los Angeles).

14. From STEVE PANKOVITS and family, 407 Audubon Ave., New York 33, N. Y., postmarked - New York, N. Y. Dec. 20, 1962.

15. From THE GERSONS, SOPHIE, GRANDMA HELEN, DEBBY, SI, BILL and PAULA, 8860 18th Ave., Brooklyn 14, N. Y., postmarked - New York, N. Y., Dec. 21, 1962.

AT 65-1361

16. From MOMS U. SCHAPPES, postmarked - New York, N. Y., Dec. 21, 1962.

17. From MARY LEA and OAKLEY C. JOHNSON, Apt. 15-D, 140 West 104th Street, New York 25, N. Y., postmarked - New York, N. Y., Dec. 19, 1962.

18. From TOM and ELLA MYERSCOUGH, postmarked - Brooklyn 6, N. Y., Dec. 28, 1962.

19. From (initials illegible) postmarked - Brooklyn, N. Y., Jan. 3, 1963.

20. Letter from BARRIE SILVER, New Residence Hall, New York University, University Heights, Bronx 53, New York, postmarked Jan. 3, 1963, New York, N.Y.

21. From CLARA BERTHA and JESUS COLON, 850 St. Marks Avenue, Brooklyn 13, New York, postmarked - Brooklyn, N. Y., Jan. 7, 1963.

PHILADELPHIA

1. From DAVID and SOPHIE DAVIS, postmarked - Philadelphia 36, Pa., Dec. 21, 1962.

2. From TOM and ELEANOR NABRIED, return address - THOMAS NABRIED, 1345 W. Susquehana Ave. Phila. 32, Pa., postmarked - (not shown).

3. From Mrs. FRANCES GABON or GABOW, 8612 Rugby St., Phila. 50, Pa., postmarked - Philadelphia, Pa., Dec. 21, 1962.

PORTLAND

1. From MARSHALL CROB, P. O. Box 372, North Bend, Oregon, postmarked - North Bend, Oreg. Dec. 24, 1962.

SAN FRANCISCO

1. From BARNEY, PEARL, CORESA, MICHAEL, THOMAS, and NATHAN BAILEY (with photo enclosed), return address - B. Bailey, 625A S. Stewart Street, Sonora, California, postmarked - Sonora, Calif., Dec. 13, 1962.

2. From Mr. and Mrs. BRUCE B. JONES, 303 Live Oak Dr., Mill Valley, Calif., postmarked - Mill Valley, Calif., Dec. 22, 1962.

AT 65-1361

3. From WARREN K. and JOSEPHINE BILLINGS, 919 4th Avenue, San Mateo, California, postmarked - San Francisco, Calif., Dec. 18, 1962.

4. From E. EAGLE, 1501 Fillmore St., San Francisco 15, Calif., postmarked - San Francisco, Calif., Dec. 12, 1962.

5. From V. SURIAN, Postmarked - San Francisco, Calif., Dec. 21, 1962.

SALT LAKE

1. From AMMON HENNACY, 72 Postoffice Pl., Salt Lake City 1, Utah, postmarked - Salt Lake City, Utah, Dec. 22, 1962.

SAN ANTONIO

1. Card and note from M. FRIBERG, postmarked - San Antonio, Texas, December 20, 1962.

2. From JOHN W. STANFORD, return address - 1118 W. Rosewood, San Antonio 1, Texas, postmarked - San Antonio, Texas, Dec. 24, 1962.

SEATTLE

1. From MARY GIBSON, return address - 820 Cherry, 111 Seattle 4, Wash., postmarked - Seattle, Wash., Dec. 19, 1962.

2. From HARRY J. CANTER, postmarked - Seattle, Wash., Dec. 17, 1962.

3. From EIMER C. KISTLER, return address - 4035 - 39th Avenue South, Seattle 18, Washington. postmarked - Seattle, Wash., Dec. 20, 1962.

4. From ERNEST and STELLA VOGEL, 1031 - 23 Ave. East. Seattle, Wash., postmarked - Seattle, Wash., Dec. 20, 1962.

5. From JOHN DASCHBACH, 112 N. 46, Seattle 3, Wn., postmarked - Seattle, Wash., Dec. 16, 1962.

6. From Mr. and Mrs. H. BENDER, postmarked - Seattle, Wash., Dec. 18, 1962.

AT 65-1361

7. From MELBA WINDOFFER, return address - 6971 23rd SW, Seattle, Wash., postmarked - Seattle, Wash., Dec. 10. 1962.

8. From LENUS and DORIS WESTMAN, 123 Bellevue East, Seattle 2, Wash., postmarked - Seattle, Wash., Dec. 17, 1962.

9. From MARION and GLENN KINNEY, 210 29th East, Seattle 2, Wash., postmarked - Seattle, Wash., Dec. 29, 1962.

10. From The Carafox Family, 3702 S. W. Tillman, Seattle 6, postmarked - Seattle, Wash., Dec. 15, 1962.

ATLANTA

1. From EDWIN and ISOBEL CERNEY, 2465 Alpine Road, Menlo Park, California, postmarked - Menlo Park, Calif., Dec. 18, 1962.

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

FBI

Date: 2/18/63

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)(C)

SUBJECT: MORTON SOBELL
ESP-R
(OO: NEW YORK)

ReNYairtel 2/8/63.

Enclosed herewith for the Bureau is a copy of the decision of the US Court of Appeals, Second Circuit, dated 2/6/63, affirming the conviction and sentence of MORTON SOBELL. The enclosed copy was furnished by AUSA ROBERT J. GENIESSE, SDNY, NYC, to SA EDWARD F. MC CARTHY on 2/15/63.

The subject is on the Security Index of the NYO, and an annual report was submitted 12/11/62. Inasmuch as no further investigation is necessary in this case at the present time, it is being placed in a closed status.

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 4/28/80 BY 3042 PWT/lmw

1 ENCLOSURE ATTACHED
1 ENCLOSURE

3-Bureau (101-2483)(Encl. 1)(RM)
1-New York (100-37158)

REC 19 101-2483-1516

EX-112

25 FEB 19 1963

CWM:jth
(5)

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

cc - Wick

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 4/06/87 BY 3042 PWT/IMW

ENCLOSURE

ENCLOSURE

101-2483-1315

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 151—October Term, 1962

(Argued December 7, 1962 Decided February 6, 1963)

Docket No. 27558

UNITED STATES OF AMERICA,

Appellee,

v.

MORTON SOBELL,

Appellant.

Before:

SWAN, FRIENDLY and MARSHALL, *Circuit Judges.*

Appeal from an order of the District Court for the Southern District of New York, John F. X. McGohey, J., 204 F. Supp. 225 (1962), denying a motion under 28 U. S. C. § 2255 to vacate a conviction and sentence and, with respect to one of the grounds asserted, to reduce the sentence pursuant to F. R. Crim. Proc. 35. Affirmed.

MARSHALL PERLIN and SANFORD M. KATZ (Donner, Perlin & Piel), New York, N. Y. (Frank J. Donner, Eleanor Jackson Piel, of Counsel), (Benjamin Dreyfus, San Francisco, Cal., on brief), *for appellant.*

ROBERT J. GENIESSE (Vincent L. Broderick, United States Attorney for the Southern District of New York, Arthur I. Rosett, Assistant United States Attorney, on brief), *for appellee.*

FRIENDLY, *Circuit Judge*:

On March 29, 1951, a jury in the Southern District of New York found Morton Sobell guilty, along with Julius and Ethel Rosenberg, under a single count indictment charging a conspiracy to violate 50 U. S. C. (1946 ed.) § 32(a), which made it a crime to "communicate, deliver, or transmit, to any foreign government * * * information relating to the national defense," or to aid or induce another to do so. Sobell was sentenced to thirty years imprisonment, under the proviso that whoever shall violate § 32(a) "in time of war shall be punished by death or by imprisonment for not more than thirty years,"[1] as contrasted with the twenty years imprisonment that constituted the maximum penalty at other times. This Court affirmed the judgment of conviction, *United States* v. *Rosenberg,* 195 F. 2d 583 (1952); Judge Frank, who wrote the opinion, dissented as to Sobell on the sole ground that the question whether he had become a party to a larger conspiracy "to transmit all kinds of secret information", or only to a smaller one to transmit "just certain kinds which he knew about", should have been separately submitted to the jury since many acts and declarations relating to the larger conspiracy which were received in evidence without restriction could properly be considered against him only

---

1 Section 32(a) of Title 50 was recodified in 1948 as § 794(a) and (b) of Title 18, 62 Stat. 737. In 1954 the distinction with respect to the penalty in time of war was abolished; violation at any time was made punishable "by death or by imprisonment for any term of years or for life." 68 Stat. 1219.

in the former event, 195 F. 2d at 600-602. Certiorari was denied, 344 U. S. 838 (1952).

Sobell's instant motion, the appeal from Judge McGohey's denial of which, 204 F. Supp. 225 (S. D. N. Y. 1962), is here before us, is his fifth attempt to obtain post-conviction relief under 28 U. S. C. § 2255 or the Rules of Criminal Procedure.[2] He advances two separate grounds, sometimes hereafter characterized as the *Grunewald* ground and the "in time of war" ground; he claims, subject to a qualification noted in the margin,[3] that these grounds, although appearing on the trial record itself, have not been heretofore raised either on appeal or on motions for post-conviction relief. Although the Government disputes this, we put the controversy to one side, as we do also the issue of law—on which the courts of appeals have divided—whether the provision of § 2255 that "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner" is applicable when the later motion seeks the same "relief" as an earlier one but on a different ground. See the review of the authorities by Judge Wilbur K. Miller dissenting in *Belton* v. *United States*, 259 F. 2d 811, 824-25 (D. C. Cir.

2 See *United States* v. *Rosenberg*, 108 F. Supp. 798 (S. D. N. Y.), aff'd 200 F. 2d 666 (2 Cir. 1952), cert. denied, 345 U. S. 965 (1953); *United States* v. *Sobell*, unreported in the District Court and here, No. 22885, cert. denied, 347 U. S. 904 (1954); *United States* v. *Sobell* (two motions), 142 F. Supp. 515 (S. D. N. Y. 1956), aff'd 244 F. 2d 520 (2 Cir.), cert. denied, 355 U. S. 873 (1957). See also note 3, *infra*.

3 The *Grunewald* ground was the basis for a motion in the Supreme Court, in 1957, to vacate the Court's 1952 denial of certiorari and for leave to file a new petition for certiorari raising the point decided by the Court in *Grunewald* v. *United States*, 358 U. S. 391, 415-24, 425-26 (1957); this was denied, 355 U. S. 860 (1957). Appellant contends, and we agree, that no weight should be given to this, both because of general expressions as to the lack of significance in the denial of certiorari, e.g., *House* v. *Mayo*, 324 U. S. 42, 48 (1945), and cases cited, and because of the peculiar likelihood that the denial in this instance may have been for untimeliness.

1958); *Smith* v. *United States*, 270 F. 2d 921 (D. C. Cir. 1959). We read Judge McGohey's opinion as having "entertained" Sobell's motion on the merits; we shall consider the appeal on that basis. See *Taylor* v. *United States*, 238 F. 2d 409, 411 (9 Cir. 1956), cert. denied, 353 U. S. 938 (1957).

I. The Grunewald Ground.

What we have called the *Grunewald* ground relates to the point decided in Part III of *Grunewald* v. *United States*, 353 U. S. 391, 415-424, 425-426 (1957), with respect to the defendant Halperin. When testifying at the trial on his own behalf, Halperin was cross-examined as to various matters on which he had been interrogated before a grand jury; he answered in a way consistent with innocence. The Government was allowed, over objection, to bring out that before the grand jury Halperin had pleaded the privilege against self-incrimination as to these very questions. The judge instructed that although the jury was "not to draw any inference whatsoever as to the guilt or innocence of the defendant in this case by reason of the fact that he chose to assert his unquestioned right to invoke the Fifth Amendment on that previous occasion", it might consider "his prior assertions of the Fifth Amendment only for the purpose of ascertaining the weight you choose to give his present testimony with respect to the same matters upon which he previously asserted his constitutional privilege." We affirmed, 233 F. 2d 556, 568 (2 Cir. 1956), relying on *Raffel* v. *United States*, 271 U. S. 494 (1926) and our own previous decision in *United States* v. *Gottfried*, 165 F. 2d 360, 367, cert. denied, 333 U. S. 860 (1948), which in turn had cited *United States* v. *Mortimer*, 118 F. 2d 266 (2 Cir.), cert. denied, 314 U. S. 616 (1941); *United States* v. *Groves*, 122 F. 2d 87 (2 Cir.), cert. denied, 314 U. S. 670

(1941), and *United States* v. *Klinger*, 136 F. 2d 677 (2 Cir.), cert. denied, 320 U. S. 746 (1943); Judge Frank dissented, 233 F. 2d 571-92. The Supreme Court unanimously reversed. The opinion of the Court, by Mr. Justice Harlan, held that "in the particular circumstances of this case the cross-examination should have been excluded because its probative value on the issue of Halperin's credibility was so negligible as to be far outweighed by its possible impermissible impact on the jury", to wit, as direct evidence of guilt. 353 U. S. at 420. Recognizing that "the question whether a prior statement is sufficiently inconsistent to be allowed to go to the jury on the question of credibility is usually within the discretion of the trial judge", the Court held that "where such evidentiary matter has grave constitutional overtones, as it does here", the Court would "draw upon our supervisory power over the administration of federal criminal justice in order to rule on the matter. *Cf. McNabb* v. *United States*, 318 U. S. 332." 353 U. S. at 423-424. Mr. Justice Black, for the Chief Justice, Mr. Justice Douglas, Mr. Justice Brennan and himself, did "not, like the Court", rest his "conclusion on the special circumstances of this case"; he could "think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it." 353 U. S. at 425.

The asserted bearing of *Grunewald* here is as follows: The Government's case against Sobell rested almost wholly on the testimony of Max Elitcher, who, in addition to testifying to some independent attempts at espionage by Sobell, linked him closely with Julius Rosenberg. The latter contradicted the testimony of Elitcher with respect to Sobell, as he also did the testimony of David and Ruth Greenglass and Harry Gold with respect to the disclosure of atomic secrets by him and his wife. Ethel Rosenberg corroborated many of her husband's denials of the testimony

of the Greenglasses and Gold. Her evidence did not bear directly on Sobell, but there was no particular reason why it should, since Elitcher had not implicated her in any of Sobell's activities. Sobell did not take the stand.

Mrs. Rosenberg testified on direct and cross-examination about many matters upon which she had claimed the privilege before the grand jury. Repeatedly the prosecutor questioned her as to the supposed inconsistency between the versions of innocence to which she testified at the trial and her previous claim that answering questions about these same matters would tend to incriminate her. When objections or motions for a mistrial were made, the judge overruled or denied them, as he was required to do by the decisions of this Court cited in our opinion in *Grunewald*. Both during the trial and in his charge the judge made it crystal-clear that Mrs. Rosenberg's "failure to answer such questions [before the grand jury] is not to be taken as establishing the answers to any questions she was asked before the Grand Jury, but may be considered by you in determining the credibility of her answers to those same questions at this trial"—a correct statement of the rule as then established in this circuit. The matters about which Mrs. Rosenberg was interrogated with respect to her prior claim of privilege included her admission at the trial that she had consulted a lawyer prior to appearing before the grand jury; her denial of having discussed the case with her brother, David Greenglass; her denial of having discussed David's atomic work with him or his wife, or with her husband; her memory of a furlough visit from David in January 1945; her denial of having seen Harry Gold until he appeared in the courtroom; and her denial of having ever met Anatoli Yakovlev.

As regards some of these items, there was greater inconsistency between Mrs. Rosenberg's claim of privilege

before the grand jury and her testimony at the trial than in Halperin's case. It is hard, for example, to see how her claim before the grand jury that answering the questions about Harry Gold and Yakovlev would tend to incriminate her can be reconciled with the answers—outright denials of knowing either man—that she gave to these questions at the trial; it can scarcely be said, as the Supreme Court said of Halperin, that "had [she] answered the questions put to [her] before the grand jury in the same way [she] subsequently answered them at trial, this nevertheless would have provided the Government with incriminating evidence from [her] own mouth." 353 U. S. at 421-22. Hence, as regards these questions, it is by no means certain that the test laid down by the majority of the Supreme Court in *Grunewald*, that of balancing probative value against danger of prejudice, would have led in this case to the same result. We need not decide whether, as Sobell contends, that result would nevertheless be required by other factors present in this case but absent in *Grunewald*, such as the prosecutor's interrogation as to whether the claims of privilege before the grand jury had been truthful, and as to the reasons why the privilege had been claimed. For the inquiry about the prior claim of privilege in regard to questions answered at the trial otherwise than by outright denials—for example, those concerning Mrs. Rosenberg's relations with the Greenglasses and her consultation with her lawyer—would fall under the analysis made by the majority in *Grunewald*.

Sobell contends that if the point had been made on Mrs. Rosenberg's appeal to this Court (where presumably it would not have prevailed at the time, despite Judge Frank's subsequent espousal of it in his *Grunewald* dissent), if the Supreme Court had granted certiorari, and if the Court had then decided as it did five years later in *Grunewald*, any new trial would have included Sobell, since

the Government's evidence was broadly inconsistent with a conclusion that he alone was guilty. It could be said against this that, vis-à-vis her co-defendants, Mrs. Rosenberg was simply a witness, and that the improper denial of a claim of privilege by a witness normally is not a ground for granting a new trial on the appeal of a party, "whose only grievance can be that the overriding of the outsider's rights has resulted in a fuller fact-disclosure than the party desires." McCormick, Evidence (1954), p. 153 and see cases cited in fn. 8; 8 Wigmore, Evidence (McNaughton rev. 1961) pp. 112-13, 416. But the claim in this case is not merely the compulsion of testimony that was privileged but otherwise unobjectionable; the jury was allowed—properly, as the law then stood in this circuit—to consider evidence which, under the rule later laid down in *Grunewald*, had a probative value "so negligible as to be far outweighed by its possible impermissible impact on the jury," 353 U. S. at 420. In any event, this Court has held, on a direct appeal, that improper use of a witness' claim of Fifth Amendment privilege before the grand jury to impeach him at the trial can constitute a ground for reversing the conviction of the party for whom he testified, and, further, has followed the principle that "where errors as to one defendant are so substantial and of such nature as to affect a co-defendant with whom he is tried jointly, appellate courts have reversed the convictions of both defendants * * *." *United States* v. *Tomaiolo*, 249 F. 2d 683, 690-92, 696 and cases cited (2 Cir. 1957). Assuming all this in Sobell's favor, we thus arrive at the crucial issue whether he is entitled to relief under 28 U. S. C. § 2255.

That statute permits a federal prisoner to move at any time to vacate or correct his sentence "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." The second ground is not claimed to be applicable, nor is the third as to the *Grunewald* point. Since we now know that a different ruling was required on the issue later decided in *Grunewald*, it is argued that Sobell comes under the first ground in that his sentence was "imposed in violation of the laws of the United States." But if we were to read the statute to mean that relief is to be granted in every such case, we would be saying that § 2255 extends to any material error in a federal criminal trial—a result manifestly not intended by the framers, as shown by the review of the legislative history in *United States* v. *Hayman*, 342 U. S. 205, 210-219 (1952), and a reading that has been repudiated by the Supreme Court, *Hill* v. *United States*, 368 U. S. 424 (1962), as it had earlier been by this Court, *United States* v. *Angelet*, 255 F. 2d 383 (2 Cir. 1958).[4] Moreover, different words are

[4] The language under discussion stems from the Habeas Corpus Act of 1867, 14 Stat. 385, providing that "the several courts of the United States * * * within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States * * *," as carried forward in Rev. Stat. § 752 ("is in custody in violation of the Constitution or of a law or treaty of the United States"). This is now codified in 28 U. S. C. § 2241(b)(3), with "law" changed to "laws", as it is in § 2255. It is not entirely clear whether "law" in the Act of 1867 referred to the entire corpus of federal legal rules outside the Constitution and treaties, or only to federal statutes. Particularly in view of the adoption of the Act during the reconstruction period and the then received view that "In the ordinary use of language, it will hardly be contended, that the decisions of courts constitute laws," *Swift* v. *Tyson*, 16 Pet. 1, 18 (1842), the latter reading would seem more reasonable. For reasons later outlined in the text, we are not here required to decide whether the 1948 enactments preserved this original meaning or embodied the "new way of looking at law," *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 101 (1945), taught by *Erie R.R. Co.* v. *Tompkins*, 304 U. S. 64 (1938). Under either construction there remains the basic question, which exists also as to the

used in the third paragraph of § 2255, dealing with the action to be taken on the motion: "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 him a new trial or correct the sentence as may appear appropriate." Here the broad reference of the initial paragraph to "violation of the * * * laws of the United States" seems to have disappeared, at least if we can assume that the phrase "that the sentence imposed was not authorized by law" in the third paragraph means the same as "that the sentence was in excess of the maximum authorized by law" in the first;[5] and even "a denial or infringement of the constitutional rights of the prisoner" does not call for relief unless it be "such * * * as to render the judgment vulnerable to collateral attack." Juxtaposition of the two paragraphs thus suggests a reading that although any substantial claim of violation of federal "law", see fn. 4, *supra*, will get a federal prisoner into court under § 2255 in the sense

4 (Continued)

reference to the Constitution, whether a prisoner who has had a fair opportunity to try out his claim before a proper tribunal is "in custody in violation of" federal law simply because the earlier tribunal committed what a later one would consider an error in decision. See Hart & Wechsler, The Federal Courts and the Federal System (1953), 1238-39; Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 447-48, 474-77 (1963).

5 Recognition of the availability of *habeas corpus* to test alleged illegality in the sentence as distinguished from the conviction long antedates the modern use of the writ with respect to the latter. *Ex parte Lange*, 18 Wall. (85 U. S.) 163 (1874); *Ex parte Wilson*, 114 U. S. 417 (1885); *In re Snow*, 120 U. S. 274 (1887); *Ex parte Nielsen*, 131 U. S. 176 (1889).

of giving the court the power and duty to consider his motion, he can stay there and obtain relief only if he shows that the sentencing court was without jurisdiction, that the sentence was beyond the authorized maximum, or that the sentence or judgment is subject to collateral attack, leaving the meaning of this last phrase to be worked out by the courts—with the observation that although constitutional rights [illegible] particularly high plane, not every "denial or [illegible] even of them makes the judgment "vulnerable [illegible] collateral attack." But see, taking the view that relief is available under § 2255 for any denial of a constitutional right, the dissent of three Justices in *Hodges* v. *United States*, 368 U. S. 139, 140 (1961). Under a more literal reading the judgment of conviction, as distinguished from the sentence, can be successfully challenged only for denial or infringement of rights protected by the Constitution itself.

If it be deemed futile to endeavor to draw much meaning from the rather murky language of § 2255 and we turn for help to the decisions thereunder, we find these telling us that, in determining whether relief under § 2255 ought be granted, we should look to the previous practice in habeas corpus with respect to federal prisoners; indeed, the Supreme Court has said that "the legislation was intended simply to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined." *Hill* v. *United States, supra*, 368 U. S. at 427. But this also does not get us far; the glass itself is a dark one. See *Bator, supra*, fn. 4, at 465-74, 493-95. *Sunal* v. *Large*, 332 U. S. 174 (1947), sheds as much light as anything. Applying the standards limned in that and other opinions of the Supreme Court as best we can, we shall assume *arguendo*—in all likelihood too

favorably for appellant, and without qualifications which may well be needed in other factual settings,[6]—that he should have relief under § 2255 if he has shown (1) a significant denial of a constitutional right, even though he could have raised the point on appeal and there was no sufficient reason for not doing so, 332 U. S. at 178-79 and fn. 8, 182; see also *United States* v. *Rosenberg*, 200 F. 2d 666, 671 (2 Cir. 1952), cert. denied, 345 U. S. 965 (1953); *United States* v. *Allocco*, 305 F. 2d 704, 707 fn. 8 (2 Cir. 1962); or (2) an error seriously affecting his trial, even though not of constitutional magnitude, if it was not correctible on appeal or there were "exceptional circumstances" excusing the failure to appeal, 332 U. S. at 180-

6 Among such qualifications are questions how far constitutional rights may be waived and what circumstances constitute such a waiver, see *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 275-81 (1942); whether even constitutional claims must not be brought in some way to the attention of the trial court or else will be deemed "waived", see *Howell* v. *United States*, 172 F. 2d 213, 215 (4 Cir.), cert. denied, 337 U. S. 906 (1949); *United States* v. *Walker*, 197 F. 2d 287, 288 (2 Cir.), cert. denied, 344 U. S. 877 (1952); whether alleged errors in the determination of facts affecting conceded constitutional rights stand on the same footing as an alleged refusal to recognize the rights or failure to make them effective when the facts were undisputed from the outset or are no longer in controversy, and whether the alleged deprivation must be shown to have had a material effect, see *Kyle* v. *United States*, 297 F. 2d 507, 511-15 (2 Cir. 1961). Qualification may also be needed for cases where the Supreme Court has overruled one of its own decisions which had held that a particular practice did not violate constitutional rights, an issue that will be sharply raised in cases under § 2254 brought by state prisoners as a result of the overruling of *Wolf* v. *Colorado*, 338 U. S. 25 (1949), in *Mapp* v. *Ohio*, 367 U. S. 643 (1961). See, e.g., *People* v. *Loria*, 10 N. Y 2d 368, 223 N Y. S. 2d 462 (1961). In such cases, even assuming the necessity of raising constitutional claims on appeal in the ordinary case, it must be conceded that appeal would have seemed futile; as against this, there is the undesirability of having to reconsider hundreds of cases, decided correctly under the law as precisely ruled at the time, in only a few of which will the contentions be made out on the facts. Compare the suggestion in *Sunal* v. *Large*, *supra*, 332 U. S. at 181, that one of the exceptional circumstances justifying the use of *habeas corpus* to raise a point that could have been but was not appealed is "where the law was changed after the time for appeal had expired." But see *Bator*, *supra*, note 4, 527 fn. 220.

81, 184; see also *Bowen* v. *Johnston*, 306 U. S. 19, 26-28 (1939); *Jordan* v. *United States*, 352 U. S. 904 (1956), reversing per curiam 233 F. 2d 362, 367-69 (D. C. Cir. 1956); *Hill* v. *United States, supra*, 368 U. S. at 428.

(1) Sobell does not bring himself within the first category on the *Grunewald* ground since this is not of constitutional dimensions as to him. On the view of the majority in *Grunewald*, the reversal was not for denial of a right guaranteed by the Fifth Amendment but because the trial judge had abused his discretion in determining that the probative effect of the evidence outweighed its potentially prejudicial impact. True, the potential prejudice lay in the probability of the jury's drawing an impermissible inference of guilt from the claim of privilege and the issue was thus thought to have "grave constitutional overtones", 353 U. S. at 423. But the majority's invocation of the Court's "supervisory power over the administration of federal criminal justice in order to rule on the matter," and its citation of *McNabb* v. *United States*, 318 U. S. 332 (1943), show that the Court did not think it was enforcing a constitutional claim. The opinion of the four concurring Justices can be read as saying only that there is no basis for drawing any inference from a claim of the privilege against self-incrimination, and hence that a reference to such a claim can never be relevant to impeach credibility, and thus also as enforcing only a rule of evidence. See *Stewart* v. *United States*, 366 U. S. 1, 7, fn. 14 (1961). On the other hand, a general proscription of drawing inferences from a claim of the privilege against self-incrimination sounds like constitutional doctrine, and has the same effect as an avowedly constitutional precept that any later reference to a claim under the Fifth Amendment is impermissible because it renders the claim of privilege too hazardous, a view suggested by other language in

the concurring opinion and by the citation of *Johnson* v. *United States*, 318 U. S. 189, 196-99 (1943). But even if the Supreme Court would now deem *Grunewald* to be constitutionally grounded, a sufficient answer here would be that any constitutional implications must be limited to the person whose claim of privilege was later used against him. "[T]he privilege is that of the witness himself, and not that of the party on trial," *McAlister* v. *Henkel*, 201 U. S. 90, 91 (1906); see *Sachs* v. *Canal Zone*, 176 F. 2d 292-96 (5 Cir.), cert. denied, 338 U. S. 858 (1949); 8 Wigmore, Evidence (McNaughton rev. 1961), pp. 414-15; McCormick, Evidence (1954), p. 152. Although perhaps Sobell also may have been entitled to object on the ground of relevancy, namely, that at least in some instances there may have been no real inconsistency between Mrs. Rosenberg's claim of privilege before the grand jury and her testimony of innocence at the trial, the overruling of such an objection, even if this should now appear erroneous in the light of *Grunewald*, would not assume "constitutional proportions", *Sunal* v. *Large*, *supra*, 332 U. S. at 182. Sobell, therefore, can succeed only by bringing himself within the second category outlined above.

(2) Admittedly there was no procedural obstacle to the raising on appeal of the question here presented. Neither do we find any greater showing of exceptional circumstances justifying the failure to raise the question than in *Sunal* v. *Large*, *supra*. The defendants in the two cases there decided had faced a consistent line of lower court decisions adverse to their position, including a case, *Rinko* v. *United States*, in which certiorari had been denied, 325 U. S. 851 (1945), before the conviction of one of them; here there had been a line of adverse decisions by this Court, with certiorari denied. There many of the lower court decisions had rested on a Supreme Court opinion, *Falbo* v. *United*

States, 320 U. S. 549 (1944), not reading precisely on point but erroneously thought to be decisive by the lower courts, as it later was by three Justices of the Supreme Court, *Estep* v. *United States*, 327 U. S. 114, 137-39, 145 (1946); here a similar role was played by *Raffel* v. *United States*, 271 U. S. 494 (1926). In fact, *Raffel* was distinguishable on the ground, whether satisfying or not, that it involved an inference from a defendant's failure to take the stand to challenge certain testimony at a previous trial, rather than from a claim of privilege before a grand jury, and that it "did not focus on the question whether the cross-examination there involved was in fact probative in impeaching the defendant's credibility," 353 U. S. at 420, and *Johnson* v. *United States*, *supra*, afforded indication that *Raffel* would be rather closely confined. The road to ask the Supreme Court to test the distinction was open; when it was taken in *Grunewald*, the Court decided for the petitioner, without overruling *Raffel* as the four concurring Justices were willing to do. As in *Sunal* v. *Large*, "The case, therefore, is not one where the law was changed after the time for appeal had expired. *Cf. Warring* v. *Colpoys*, 122 F. 2d 642. It is rather a situation where at the time of the convictions the definitive ruling on the question of law had not crystallized." 332 U. S. at 181.

We think it important to emphasize, as did the Supreme Court in *Sunal* v. *Large*, the policy considerations underlying what may seem to some a hoary and technical rule—"that the writ of *habeas corpus* will not be allowed to do service for an appeal," 332 U. S. at 178. The problem, as Mr. Justice Douglas there said, "has radiations far beyond the present cases." 332 U. S. at 181. There is an inevitable attraction in the position that a person convicted of a serious crime should receive a new trial whenever a later decision of the highest court indicates that, with the benefit

of hindsight, a different course should have been followed at his trial in any consequential respect. Yet for courts to yield broadly to that attraction not only would cause "litigation in these criminal cases [to] be interminable" 332 U. S. at 182, but, in the sole interest of those already convicted of crime, would drastically impair the ability of the Government to discharge the duty of protection which it owes to all its citizens. If the point on which Sobell now relies had been raised and sustained on appeal, that would on no account have led to a direction for acquittal. Even under all the elaborate safeguards with which this country properly surrounds those charged with crime, it would have led only to a new trial, in which it seems unlikely that the result as to any of the defendants would have differed. When a claim is raised upon direct appeal as this could have been, and is there sustained, a new trial can be had seasonably, when witnesses are still available and their recollections still fresh. In contrast, collateral attack can come at any time. Yet normally it is quite academic to talk of a new trial ten or fifteen years after the event; in most cases to direct one after such an interval is in practical result to order a release from further punishment, although the defendant does not even contend he is entitled to that relief from the courts. When a defendant who has been tried fairly in accordance with the law as it was understood at the time seeks judicial relief because of new light on a point of law affecting an aspect of his trial, his request must be balanced against the rightful claims of organized society as reflected in the penal laws. All this is the wisdom behind the doctrine that limits collateral attack on criminal judgment. See Fuld, J., in *People* v. *Howard*, — N. Y. 2d —, — N. Y. S. 2d — (1962).

II. The "In Time of War" Ground.

The indictment charged that "On or about June 6, 1944, up to and including June 16, 1950, * * * the defendants herein, did, the United States of America then and there being at war, conspire" to communicate national defense information to the Soviet Union in violation of 50 U. S. C. § 32(a). The overt acts cited, none of which in terms referred to Sobell, were laid between June 6, 1944 and January 14, 1945. Elitcher's testimony would have placed Sobell's entrance into the conspiracy no later than June, 1944. But whereas the evidence as to the disclosure of atomic secrets by the Rosenbergs, in which Sobell was not proved to have participated, related principally to the period prior to the surrender of Japan on September 2, 1945, the greater portion of the evidence against Sobell concerned 1946, 1947 and 1948.

At the trial the defendants did not dispute that if the Government's evidence was believed, they were subject to the punishment of death or thirty years imprisonment which the proviso to § 32(a) made applicable to a violation "in time of war." It was hardly conceivable that any such claim would be made by the Rosenbergs, since the portion of the conspiracy relating to disclosure of atomic secrets, which dwarfed the other charges against them, was largely consummated before the fighting stopped. For Sobell the situation was different; it was possible in theory, however unlikely in fact, that the jury could divide Elitcher's testimony against him and credit only the part relating to later years. But in his case also there was no dispute that if he had committed any offense he had done so "in time of war"; his counsel, in summation, emphasized that Sobell's life was at stake and that "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." Under these circumstances it was altogether natural that the judge, who had received no request on the subject, did not include in his charge any reference to the term "in time of war" and told the jury, without objection from anyone, that the case was one in which the penalties of the proviso were applicable. He did, however, submit the indictment to the jury and they found the defendants "guilty as charged."

Sobell would now find in this a defect entitling him to have his conviction vacated under § 2255 or, in the alternative, to have his sentence reduced under F. R. Crim. Proc. 35. The basis of the argument is that whether § 32(a) was violated "in time of war" was a matter for determination by the jury as a part of its verdict; we accept this as a premise to the extent of holding that a defendant being tried under § 32(a) was entitled, on proper request, to have the jury determine whether any violation of the statute on his part occurred "in time of war" as that term would be defined for the jury by the judge. The next steps in the argument are that the "time of war" ended with the cessation of fighting on August 14, 1945, or with the unconditional surrender of Japan on September 2, 1945, or in any event when the President proclaimed the termination of hostilities on December 31, 1946, 61 Stat. 1048, and that the jury should have been so instructed. Since it was not, and since it might have convicted Sobell on the basis of believing only the portion of Elitcher's testimony relating to acts subsequent to one or the other of those dates, the thirty-year sentence is said to be one "not authorized by law or otherwise open to collateral attack" under § 2255 or, in the alternative, "an illegal sentence" under F. R. Crim. Proc. 35. "Exceptional circumstances" are alleged to excuse the failure to raise the point at trial or on appeal, since, it is said, until the decision in *Lee* v. *Madigan*, 358 U. S. 228

(1959), it was universally assumed that "time of war" continued until a treaty of peace had been ratified or a peace proclamation issued. At least this seems the most effective statement of the argument. For it would require stronger language than anything in *Stilson* v. *United States*, 250 U. S. 583, 587-88 (1919) or *Schaefer* v. *United States*, 251 U. S. 466 (1920), relied on by appellant, to convince us that the jury ought to have been allowed to make its own determination of when the war ended, a question of law which, as we shall see, is not readily answered even by judges.

Before proceeding further we must consider a threshold point, not raised by the Government, as to the applicability of § 2255 to the "in time of war" ground. In *Heflin* v. *United States*, 358 U. S. 415 (1959), a majority of the Justices joined in a concurring opinion, by Mr. Justice Stewart, taking the position that § 2255 is available only to a prisoner claiming the "right to be released." Here it could be said that if we should sustain Sobell's contention, the Government, rather than undergo a new trial, might consent to a reduction of the sentence to the twenty years that would have been permissible even if Sobell's violation of § 32(a) had been in time of peace, and, if it did, Sobell would have no "right to be released" and § 2255 would not be available. We do not read the statute, even in the light of the concurring opinion in *Heflin*, as calling for that result. Mr. Justice Stewart and his colleagues were addressing themselves to a situation where a prisoner in custody under a concededly valid sentence sought to attack a consecutive sentence which had not begun to run. Here Sobell is claiming the "right to be released" from a single sentence which he alleges to be illegal; if his claim were made out and the Government continued to insist on the higher penalty, there would have to be a new trial. The jurisdictional test of the first sentence of the

first paragraph of § 2255 is thus satisfied, and the final clause of the third paragraph makes clear that the court is not limited to discharging the prisoner but may "resentence him or grant a new trial or correct the sentence." We therefore pass to the merits.

In denying the alternative motion for reduction of sentence under Rule 35, Judge McGohey relied in part upon a theory which, if sound, would cover the motion under § 2255 as well. His reasoning was that even if we should assume the earliest possible date for the end of the war, the jury must have found that the over-all conspiracy had begun before then, and Sobell took the conspiracy as he found it, *United States* v. *Sansone,* 231 F. 2d 887, 893 (2 Cir.), cert. denied, 351 U. S. 987 (1956), and would thus be subject to the higher penalty even if he did not join until after the "time of war" had ended. On appeal the Government has not sought to support the decision on this ground. A person joining a conspiracy does, indeed, take it as he finds it in many respects, including the important one, to which the *Sansone* opinion had reference, that acts or declarations of conspirators prior to his entry are admissible against him. But here the question is what Congress meant when it said, 50 U. S. C. (1946 ed.) § 34, that "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 object 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." This language can indeed be read to say that when "the act the accomplishment of which is the object of such conspiracy" was a disclosure of defense information beginning in time of war and continuing into time of peace, the heavier penalty may be visited even on a "party to

such conspiracy" who did not join it in wartime. Yet it is difficult to discern what purpose Congress would have thought such a rule would accomplish, and it seems more reasonable to read the section as making the penalty for a substantive offense "in time of war" applicable to conspiring at such a time. Moreover, established principles favor the more lenient construction where ambiguity exists. See, e.g., *Bell* v. *United States*, 349 U. S. 81, 83-84 (1955).

We likewise cannot accept the Government's attempt to dispose of the contention on the basis that "time of war" under § 32(a) continued until the Presidential proclamation of the termination of the state of war with Japan on April 28, 1952, 66 Stat. c. 31, which succeeded the joint resolution of Congress and the Presidential proclamation terminating the war with Germany on October 19, 1951, 65 Stat. 451, 66 Stat. c. 3. We do follow the Government insofar as we reject Sobell's contention that the "time of war" ended on September 2, 1945, or even earlier. *Lee* v. *Madigan, supra,* did not decide that; it held that June 10, 1949, was within a proviso of Article of War 92, 10 U. S. C. (1946 ed. Supp. IV) § 1564, prohibiting a military trial of a soldier for murder or rape committed within the United States "in time of peace." The Court said that terms such as war and peace "must be construed in light of the precise facts of each case and the impact of the particular statute involved," 353 U. S. at 230-31. Nothing suggests it would have reached the same result if the conspiracy to commit murder there at issue had occurred in, say, late September, 1945. We have been cited to and have found nothing to indicate that any authority on international law, either in 1917, when § 32(a) was enacted, 40 Stat. 218, or since, would have considered a war to end, for govern-

mental purposes,[7] as soon as the last shot was fired, even when the surrender was unconditional. See *Ludecke* v. *Watkins*, 335 U. S. 160, 166-70 (1948). Although a leading treatise has long recognized that "Belligerents may • • • abstain from further acts of war and glide into peaceful relations without expressly making peace through a special treaty," 2 Oppenheim, International Law (2d ed. 1906), § 261, at p. 275, "glide" connotes a gradual rather than a sudden stop. A war may end also by subjugation of the enemy, but an unconditional surrender is not that when the successful belligerent has manifested no intention to hold the realm of the defeated one permanently under its dominion, *id.* §§ 264, 265, pp. 277-78; see also Phillipson, Termination of War and Treaties of Peace (1916), chs. I and II. A Congress containing many of the same members who had passed the Espionage Act of 1917 enacted a Joint Resolution terminating World War I on March 3, 1921, and declaring 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 war • • • terminated on the date when this resolution becomes effective • • •." 41 Stat. 1359. On September 1, 1945, President Truman was assured by the Attorney General that the end of actual fighting had terminated no war legislation, 30 Ops. Atty. Gen. 421, 422 (1945); a week later he asked the Congress to refrain from taking action that would end the war until a full study of the problem could be made. Message of September 8, 1945, 91 Cong. Rec. 8380. Congress complied with his request; not until 1947 did it enact a joint reso-

7 Decisions relating to the interpretation of insurance policies, leases, and other contracts, are not very helpful; the considerations bearing on the intent of persons as to their private relations are usually quite different from those relating to the purpose of legislators as to governmental powers.

lution repealing certain wartime statutes, 61 Stat. 449 (1947). We cite the 1945-1947 experience not as bearing directly on the intent of the Congress of 1917, but rather to illustrate how practicalities work against a construction that would strip government of "wartime" powers instantaneously and without opportunity even to consider how far they might be needed in a transitional period partaking of some elements of both war and peace. Cf. *Woods* v. *Cloyd W. Miller Co.*, 333 U. S. 138 141-43 (1948). The considerations that motivated the 1917 Congress to authorize the more severe penalties for espionage "in time of war" would not be dissipated the very moment when shooting stopped, even after unconditional surrender—with vast citizen armies, navies and air forces still in the field, allied military missions having access to American defense installations in the United States and abroad, and the danger of flare-ups in the defeated countries that might require military action for their suppression.

On the other hand, we cannot believe the Congress of 1917 would have thought the statute it was enacting would have the result that the death penalty for disclosing defense information to a foreign power "in time of war" should apply not only to disclosures during the less than four years of actual shooting between December 7, 1941 and September 2, 1945, but for six and a half years more, during which our wartime enemies had become our friends. In determining what a statute means when it speaks of war or peace, the purpose of the particular provision must be analyzed; such is the teaching of *Lee* v. *Madigan*. Here the purpose was to place the ultimate discouragement on communicating defense information when the nation was fighting for its own life, and to exact the ultimate penalty from those who did. Although this purpose would not end on the firing of the last shot or even on the signing of the surrender,

it also would not continue indefinitely thereafter. The prospect of a prolonged interval after the end of the fighting, which bore all the indicia of peace with the former enemy save for a formal treaty, the signing of which was postponed by disagreement among the victorious allies, was not likely to have occurred to the Congress of 1917. *That* Congress lived in a tidier age, when wars had been generally followed by peace treaties signed with reasonable promptness after the end of fighting.[8] Allies had been known to fall out over the division of the spoils, so that the friend of one day became the foe of the next and vice versa —the second Balkan War, following two months after the treaty ending the first, was a then recent example—but in such cases either the first "war" continued, or there was a brief "peace" followed by a new "war", with changed partners. But the 1917 Congress must be taken also to have been familiar with the notion that a "time of war" could end through simple cessation of hostilities even though no formal peace treaty had been concluded—in Oppenheim's phrase, that the former belligerents could "glide into peaceful relations." A half century earlier Secretary Seward had written:

8 In the greatest previous war won by a coalition, peace with France was concluded by the first Treaty of Paris on May 30, 1814, seven weeks after Napoleon's abdication on April 11, 1814; the final settlement among the allies was reached at Vienna a year later, on June 9, 1815, despite the unseemly interruption of the Hundred Days; and a second Treaty of Paris was concluded on November 20, 1815. The Treaty ending the Crimean War, also waged by a victorious coalition, was signed on March 30, 1856, six and a half months after the fall of Sebastopol on September 11, 1855. In the case of our own country's war last preceding World War I, hostilities with Spain were suspended August 12, 1898, 30 Stat. 1780, and ratifications of the peace treaty were exchanged April 11, 1899, 30 Stat. 1754. In World War I itself there was no great delay in the conclusion of a peace treaty or in its ratification by most of the powers; the Treaty of Versailles was signed on June 28, 1919, six and a half months after the armistice of November 11, 1918, and by the end of October, 1919, it had been ratified by all the principal belligerents save the United States.

> "It is certain * * * the situation of peace may be restored by the long suspension of hostilities without a treaty of peace being made. History is full of such occurrences. What period of suspension of war is necessary to justify the presumption of the restoration of peace has never yet been settled, and must in every case be determined with reference to collateral facts and circumstances."[9]

See also Phillipson, *supra*, ch. I.

We find it unnecessary to make such a determination here more precisely than to say that, for the purposes of § 32(a), the "war" had ended before the summer and fall of 1948, to which some of Elitcher's testimony against Sobell related.[10] True, American troops were still on foreign soil, but they were there for the same reasons that kept them there after April 28, 1952, when, as the Government concedes, the war with Germany and Japan had terminated. We add for clarity, as must be obvious, that nothing in the Constitution forbade Congress' making the heavier penalties applicable even to espionage carried on in peacetime, as it now has done, see fn. 1, *supra*, or taking other action, appropriate under the war power, that stretches into times of peace. The only question we have sought to

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9 Dip. Cor. 1868, II, 32, 34, Moore, Dig. VII, 366, cited in 2 Hyde, International Law (1922), pages 820-821, fn. 2.

10 In the light of the purpose of the proviso to § 32(a), a good date might be the President's proclamation of the end of hostilities on December 31, 1946, 61 Stat. 1048, even though the proclamation asserted that "a state of war still exists," as may well have been true for other purposes. *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 332 U. S. 111, 116 (1947); *Woods* v. *Cloyd W. Miller Co.*, *supra*, 333 U. S. at 141-43; *Ludecke* v. *Watkins*, *supra*, 335 U. S. at 166-70; *cf. Hamilton* v. *Kentucky Distilleries and Warehouse Co.*, 251 U. S. 146, 164-68 (1919).

answer is what the 1917 Congress meant by the phrase "in time of war".[11]

It follows that Sobell could properly have asked that the jury determine whether, if he had joined a conspiracy, he had done this in 1944-45 or only at some later date when, in our view, the United States was no longer at war for the purposes of § 32(a). But nothing of the sort was suggested; everything said by Sobell's trial counsel assumed that the proviso applied to Sobell if the jury found him guilty, as it unquestionably did to the Rosenbergs. Whether this was because counsel was not sensitive to the point, or because he thought it unlikely that the jury would draw a line through Elitcher's testimony and considered it a preferable trial tactic to emphasize the grave penalties a conviction might entail, while being confident that Sobell's offense would not attract a death sentence, we do not know.

Applying § 2255 as interpreted in our discussion of the *Grunewald* ground, Sobell again fails to make out a case for relief thereunder. The lack of any instruction to the jury to make a special finding relative to the penalty, that had not been requested, deprived Sobell of no constitutional right. It is true that the jury trial guaranteed in the Sixth Amendment, like that in the Seventh, is a trial not simply by a jury but by a jury acting under the instructions of a judge, *United States* v. *Philadelphia & Reading R.R.*, 123 U. S. 113, 114 (1887). But the guarantee is also of a judge assisted by appropriate requests on the part of the defendant; that is one of the reasons why the Sixth Amendment assures him "the Assistance of Counsel for his defence." Rules 30 and 51 negate appellant's assumption that it is

11 Many World War I statutes contained definitions of their duration. See *Hamilton* v. *Kentucky Distilleries and Warehouse Co., supra,* 251 U. S. at 165-166 fn. 12. The omission of any such provision from § 32 (a) was presumably due to its having been intended as permanent legislation.

unnecessary for a defendant to make "known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor," see *Williams* v. *United States*, 238 F. 2d 215 (5 Cir. 1956), cert. denied, 352 U. S. 1024 (1957); *Herzog* v. *United States*, 235 F. 2d 664 (9 Cir.), cert. denied, 352 U. S. 844 (1956). It is true that under F. R. Crim. Proc. 52(b) an appellate court has power to notice "Plain errors or defects affecting substantial rights * * * although they were not brought to the attention of the court", but this provision does not transmute ordinary errors or defects into constitutional ones, or obliterate the distinction between direct appeal and collateral attack. Perhaps a case might arise where a charge tells a jury so little as to deprive a defendant, even though no request was made or objection taken, of rights guaranteed by the Sixth Amendment, and by the due process clause of the Fifth as well. But there is no denial of constitutional right because a judge has not submitted as an issue what everyone plausibly assumed not to be one. See *Kenion* v. *Gill*, 155 F. 2d 176 (D. C. Cir. 1946); *United States* v. *Jonikas*, 197 F. 2d 675 (7 Cir.), cert. denied, 344 U. S. 877 (1952). Neither is this a case where there was no evidence that would warrant imposition of the higher penalty under the statute as we now construe it, a situation that might give rise to a due process claim of a different sort, see *Thompson* v. *City of Louisville*, 362 U. S. 199 (1960).

There is likewise no basis for concluding that although the failure under these circumstances to obtain from the jury a special finding of the date when Sobell joined the conspiracy was not of constitutional magnitude, he may nevertheless have relief under § 2255 because this seriously affected his trial and "exceptional circumstances" excuse his failure to raise the point either at trial or an appeal. We

gravely doubt that the first branch of the argument is made out; it seems quite unlikely that the jury would have accepted only the part of Elitcher's testimony relating to later years. In any event the second is not. The contention is that until the 1959 decision in *Lee* v. *Madigan, supra,* it was settled law that "war" continued for all purposes until the ratification of a treaty of peace or official action by the President (or by Congress and the President) declaring its complete termination; hence, it is urged, appellant could not reasonably have been expected to raise the point before then, and thereby brings himself within what are asserted to be the implications of *Sunal* v. *Large, supra,* 332 U. S. at 181, see fn. 6 *supra.* It would seem a sufficient answer that neither the petitioner in *Lee* v. *Madigan* nor the six Justices who joined in that decision thought the law had been thus firmly settled. But there is more. We have already cited expressions, antedating Sobell's trial by many years, to the effect that "war" might terminate by a long cessation of hostilities. See also Note, Judicial Determination of the End of the War, 47 Colum. L. Rev. 255, 256 and fns. 4 and 5 (1947). In the very year of Sobell's trial an eminent authority on international law, noting that no treaty of peace with Germany or Japan had yet been signed, wrote that "For some purposes, therefore, it may be said that the state of war with Germany and Japan continued; yet in view of the political developments, this view smacks of such unreality that no dogmatic statement can be made as to some of its possible consequences." Hudson, Cases on International Law (3d ed. 1951), page 618. The Supreme Court itself had indicated in 1948 that it might some day be required to determine whether it could "find that a war though merely formally kept alive had in fact ended," although characterizing this as "a question too fraught with gravity even to be adequately formulated when not com-

pelled." *Ludecke* v. *Watkins, supra,* 335 U. S. at 169. A new counsel for Sobell seems to have been aware of the point when he argued for a reduction of sentence in 1953, although *Lee* v. *Madigan* was still six years away. As with the *Grunewald* ground, the situation was that "at the time of the conviction the definitive ruling on the question of law had not crystallized," *Sunal* v. *Large,* 332 U. S. at 181—not that an alleged rule whereby only formal action could bring "war" to an end for any purpose had become so hardened that it would have seemed hopeless to question it.

The foregoing is largely determinative of Sobell's alternative motion for reduction of sentence under F. R. Crim. Proc. 35. The interpretation of that rule and its interrelation with the later-enacted § 2255, particularly the portions of that section speaking of a "sentence * * * in excess of the maximum authorized by law" and a sentence "not authorized by law or otherwise open to collateral attack", have recently concerned the Supreme Court, *Heflin* v. *United States,* 358 U. S. 415, 418 (1959); *Hill* v. *United States,* 368 U. S. 424 (1962). The *Hill* decision stated that "the narrow function of Rule 35 is to permit correction of an illegal *sentence,* not to re-examine errors occurring at the trial or other proceedings prior to the imposition of sentence", 368 U. S. at 430; *Heflin* said that "relief under Rule 35 of the Federal Rules of Criminal Procedure is available (at least where matters dehors the record are not involved)" when "the sentence imposed was illegal on its face", 358 U. S. at 418.

The indictment charged, as we have said, that "On or about June 6, 1944, up to and including June 16, 1950 * * * the United States of America then and there being at war", Sobell and others conspired to violate § 32(a), and the jury found him "guilty as charged." The indictment and

the evidence were such that, on proper proceedings, sentence under the proviso might lawfully have been imposed. Sobell's complaints are that the indictment included too long a period in its definition of "war", and that, for want of an instruction never sought, we cannot tell whether the jury believed he had conspired during or only after the "war". But the former complaint could have been the subject of a motion addressed to the indictment under Rule 12(b), and the latter was an appropriate subject for a request for an instruction under Rule 30. The sentence is thus not "illegal on its face"; the asserted defect consists of alleged "errors occurring at the trial or other proceedings prior to the imposition of sentence." These lie beyond the ambit of Rule 35, *Cook* v. *United States*, 171 F. 2d 567, 570 (1 Cir. 1948), cert. denied, 336 U. S. 926 (1949); *Stegall* v. *United States*, 279 F. 2d 872 (6 Cir.), cert. denied, 364 U. S. 915 (1960). That Rule is confined to cases where the court can properly correct the sentence without any need for a new trial, yet the very nub of Sobell's argument is that the issue of the date of his entrance into the conspiracy was one on which a jury was required to but did not pass. It would be quite improper for this Court, by utilizing Rule 35 to reduce Sobell's sentence, to place the Government in the same position as if the issue had been submitted to the jury and found in his favor.

Affirmed.

FD-36 (12-13-56)

FBI

Date: 3/4/63

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)

SUBJECT: MORTON SOBELL
ESP-R
(OO:NEW YORK)

Enclosed herewith are six copies of a letterhead memorandum suitable for dissemination concerning efforts of the Committee to Secure Justice for Morton Sobell to publicize the film entitled, "Morton Sobell-A Plea for Justice".

One copy of this airtel and letterhead memorandum is being furnished to the Bureau for the CPUSA-COUNTERINTELLIGENCE file in view of previous Bureau interest in the production of the Sobell film.

The information set forth was furnished by [redacted] to SA FRANK J. ILLIG, JR. b7C b7D

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 4/28/83 BY 3040 PWT/lmw/101-2483

REC-17 EX-121

6 MAR 5 1963

ENCLOSURE

4-Bureau (101-2483) (Encls 6) (RM)
(1-100-3-104)
1-New York (100-107111) (CSJMS) (41)
1-New York (100-129802) (CPUSA-COUNTERINTELLIGENCE) (41)
1-New York (100-37158)

CWM:dmm
(7)

Approved: 3 MAR [illegible] Sent _____ M Per _____
Special Agent in Charge

4-Copy to Atty. Gen. by routing slip for information
Date 3-6-63
by [illegible]

100-3-104-34 memorandum enclosed is

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

In Reply, Please Refer to File No.

New York, New York

March 4, 1963

Re: Morton Sobell

[redacted] New York, New York, advised a Special Agent of the Federal Bureau of Investigation on March 1, 1963, that the Committee to Secure Justice for Morton Sobell (CSJMS), had contacted him to request assistance in having the film entitled, "Morton Sobell-A Plea for Justice", shown over Station [redacted] Washington, D.C. When furnished this information [redacted] stated that he had no intention of assisting the CSJMS in this matter. b7C b7D

A characterization of the CSJMS is attached hereto.

[redacted] also furnished a brochure which the CSJMS had sent him, in which the film was described as a "Dramatic Documentary Probing the Public Issue on America's Conscience." This broshure went on to state that the running time of the film is 29 minutes, 10 seconds; that it is now available in 16 mm sound; and that it is available either on a loan basis or for purchase at $75.00 per print. b7C b7D

This document contains neither recommendations nor conclusions of the Federal Bureau of Investigation. It is the property of the Federal Bureau of Investigation and is loaned to your agency; it and its contents are not to be distributed outside your agency.

1 XEROX

MAR 7 1963

1. APPENDIX

COMMITTEE TO SECURE JUSTICE
FOR MORTON SOBELL

"Following the execution of atomic spies ETHEL and JULIUS ROSENBERG in June, 1953, the 'Communist campaign assumed a different emphasis. Its major effort centered upon MORTON SOBELL,' the ROSENBERGS' codefendant. The National Committee to Secure Justice in the Rosenberg Case - a Communist front which had been conducting the campaign in the United States - was reconstituted as the National Rosenberg-Sobell Committee at a conference in Chicago in October, 1953, and 'then as the National Committee to Secure Justice for Morton Sobell in the Rosenberg Case' . . . ."

("Guide to Subversive Organizations and Publications" dated December 1, 1961, issued by the House Committee on Un-American Activities, page 116.)

In September, 1954, the name "National Committee to Secure Justice for Morton Sobell" appeared on literature issued by the Committee. In March, 1955, the current name, "Committee to Secure Justice for Morton Sobell," first appeared on literature issued by the Committee.

The Address Telephone Directory for the Borough of Manhattan, New York City, as published by the New York Telephone Company, on April 9, 1962, lists the "Committee to Secure Justice for Morton Sobell" (CSJMS) as being located at 940 Broadway, New York, New York.

[redacted]

Mr. DeLoach: February 26, 1963

RE: TAPE RECORDING OF THE "BARRY GRAY" SHOW
2-14-63, NEW YORK, NEW YORK, CONTAINING REMARKS
OF MRS. MORTON SOBELL, STEPHEN LOVE AND
ROY M. COHN

INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 4/08/87 BY 3042 PWT/mw

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

The tape of the above interview has been reviewed by SA John M. Reed, Crime Research Section. It lasts approximately fifty-five minutes and is a partial segment of the entire program, which, from comments of the announcer (Barry Gray), appears to be two hours in length.

Gray introduces the participants as Mrs. Morton Sobell, the wife of the convicted spy who is now serving a prison sentence in a Federal penitentiary after his conviction for conspiracy to commit espionage. The other participants are: Stephen Love, a Chicago attorney who was formerly a professor at Northwestern School of Law, is Chairman of the Committee on Grievances of the Chicago Bar Association and the Illinois State Bar Association, and is also Chairman of the Supreme Court Committee on Character and Fitness; Roy M. Cohn, an attorney who is a partner in the New York law firm of Saxe, Bacon and O'Shea, 20 Exchange Place, New York 5, New York, is Chairman of the Board of the Lionel Corporation, Director of the 5th Avenue Coach Lines in New York City, Professor of Law at New York Law School, and was one of the prosecutors for the Government in the Sobell and Rosenberg case.

The program begins with a rather detailed and involved statement by Mrs. Sobell who claimed that her husband was unjustly tried, unjustly sentenced and is now serving an unjust prison term. She claimed he was tried during the Korean War in an atmosphere of hysteria, and that his cause for release from prison and complete withdrawal of all charges has been taken up by many religious leaders and Congressmen. Cohn and Love then make opening statements with appropriate platitudes to each other. This atmosphere does not last too long and they are soon literally shouting at each other.

Cohn does a very effective job of "cutting up" Love, who is obviously not well-prepared to defend or make statements on the case, in spite of the fact that he claims to have read the 2,700 pages of testimony on three separate occasions. Love states that his purpose in appearing on the program is to try to convince Cohn of the innocence of Morton Sobell and for Cohn to use his influence with the Department of Justice and the Administration to "undo a grave injustice."

JMR:jmf Mr. Sullivan

ENCLOSURE

101-2483-5 1517

12 MAR 7 1963

CRIME RESEARCH

REC-53

811-X1

MAR 14 1963

MAR 7 1963

REC-0

Informal Memo, M. A. Jones to DeLoach

There is no mention of the FBI; however, there are many reference to the Supreme Court's refusal, on seven separate occasions, to review the merits of the case. Love frequently becomes quite flustered and is unable to make an adequate rebuttal to Cohn's statements. Specifically, on one point which Cohn frequently asks as to why Sobell never took the witness stand in his own defense, Love states that this was the fault of Sobell's attorney and that Sobell should have testified in his own defense. The interview ends with the possibility of a continuation of this discussion between Cohn and Love at some future time on this program

M. A. Jones

Enclosure

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

FBI

Date: 4/15/63

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

Via AIRTEL (Priority or Method of Mailing)

Mr. Tolson
Mr. Belmont
Mr. Mohr
Mr. Casper
Mr. Callahan
Mr. Conrad
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. Rosen
Mr. Sullivan
Mr. Tavel
Mr. Trotter
Tele. Room
Miss Holmes
Miss Gandy

TO: DIRECTOR, FBI (101-2483)

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

SUBJECT: MORTON SOBELL
ESP - R
(00: New York)

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 4/25/83 BY 304 Pat/lmw

AUSA ROBERT J. GENIESSE, SDNY, NYC, advised SA EDWARD F. MC CARTHY on 4/12/63, that on 3/4/63, Justice JOHN M. HARLAN of the Supreme Court gave subject's attorney an extension of time until 4/6/63, to file for certiorari to review Circuit Court of Appeals refusal to review determination in USDC.

GENIESSE advised that petition for certiorari to the U.S. Supreme Court was filed by subject's attorneys on or about 4/6/63, together with application to proceed in forma pauperis.

WFO is requested to check with Clerk's Office of U.S. Supreme Court to obtain copy of subject's petition for completion of Bureau files in this matter. It is also requested that this matter be followed to obtain Supreme Court determination of this matter.

3- Bureau (101-2483) (RM)
2- Washington Field (RM)
1- New York (100-37158)

REC-20 101-2483-1518

EX-117

APR 16 1963

CWM:JCG
(7)

APR 23 1963

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

Domes[illegible]e Division

INFORMATIVE NOTE

Date 4/16/63

Subject was convicted along with Julius and Ethel Rosenberg of conspiracy to commit espionage in 1951. He was sentenced to serve 30 years for his participation in this espionage conspiracy. The attached airtel pertains to the sixth motion made by the subject to set aside his conviction and sentence. The case has had the attention of the Supreme Court in some form on ten separate occasions in the past.

LHM

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 4/28/80 BY 3045 PWT/ mmw

FBI

Date: 4/17/63

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

Via AIRTEL (Priority or Method of Mailing)

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

TO: DIRECTOR, FBI (101-2483)
SAC, NEW YORK (100-37158)

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

MORTON SOBELL, aka
ESPIONAGE - R
(00:NY)

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 4/25/67 BY 3042 PWT/lmw

Enclosed herewith for the Bureau and New York is one copy each of a petition for writ of ecertiorari filed in the U. S. Supreme Court, October Term, 1962, in No. 1333, Miscellaneous, MORTON SOBELL, Petitioner, v. United States of America.

The docket in this case reflects that one copy of the petition was filed in the Supreme Court on 4/5/63, at which time the petitioner filed a motion for leave to proceed in forma pauperis. Also filed was a motion for leave to use the record in Nos. 111 and 112, ROSENBERG et al, and SOBELL v. U. S., October Term, 1952.

The petition states that the petitioner, MORTON SOBELL, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit affirming an order of the District Court for the Southern District of New York, denying the petitioner's motion

ENCLOSURE ENCL. BEHIND FILE

REC- 69 101-2483-1519

Encl. Behind File

APR 23 1963

3 - Bureau (Enc.1)
2 - New York (Enc.1) (RM
2 - WFO
(1-100-25474)(CSJMS)
OMS:lmh
(7)

AIRTEL 4-19-63

memo Belmont to Sullivan
Belmont to Sullivan

EX-116

C. C. Wick

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

51 APR 26 1963

to vacate his conviction and sentence pursuant to Title 28 USC 2255, and, in the alternative, to reduce his sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure.

Statement of the case appears on page 10 of the enclosure; error claimed by the petitioner is set out at page 49.

WFO will follow this case in the U. S. Supreme Court and advise of developments as they occur.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 1333 MISC.

MORTON SOBELL,

Petitioner,

v.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

ELEANOR JACKSON PIEL
Attorney for Petitioner
36 West 44th Street
New York 36, N. Y.

OF COUNSEL:

MARSHALL PERLIN
FRANK J. DONNER
SANFORD M. KATZ

I N D E X

C I T A T I O N S

CASES

CASES - Continued

STATUTES

MISCELLANEOUS

ADDENDUM

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No.

MORTON SOBELL,

Petitioner,

v.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

Petitioner, Morton Sobell, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit affirming an order of the District Court for the Southern District of New York, denying petitioner's motion to vacate his conviction and sentence pursuant to Title 28 U.S.C. §2255, and, in the alternative, to reduce his sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure.

OPINION BELOW

The opinion of the Court of Appeals is not reported

and appears in the record at 1a-30a.*

JURISDICTION

The judgment of the Court of Appeals was entered on February 6, 1963 (31a). On March 4, 1963, by order of Mr. Justice Harlan, the time for filing this petition for writ of certiorari was extended to and including April 6, 1963. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254(1).

GROUNDS FOR RELIEF

A. The Improper Cross-Examination of Petitioner's Co-Defendant and Witness Ethel Rosenberg.

Petitioner's defense rested upon the testimony of his charged co-conspirators, Julius and Ethel Rosenberg. In the cross-examination of Ethel Rosenberg, whose testimony corroborated and supported that of her husband, Julius Rosenberg, both the trial court and the prosecution repeatedly questioned her with reference to her prior invocation of the Fifth Amendment privilege before the grand jury as to those very same questions which she had answered in the course of the trial. The trial court and the prosecution sought to

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* References followed by "a" are to the proceedings in the United States Court of Appeals. References prefixed by "App." are to the petitioner's appendix in the United States Court of Appeals. References prefixed by "R." are to the Transcript of Record filed in this Court in Rosenberg v. United States and Sobell v. United States, Nos. 111 and 112, October Term, 1951.

establish by this questioning that her testimony was untrue and that the prior assertion of the privilege constituted evidence of her ultimate guilt. By so doing the value of her testimony and that of her husband was destroyed. In these circumstances the constitutionally impermissible cross-examination destroyed petitioner's defense and deprived him of a fair trial and due process of law.

B. The "In Time of War" Ground

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

"Time of War" as applied to the Espionage Act of 1917 refers solely to a period of actual hostilities. The nature of the evidence adduced against petitioner as to alleged wartime membership in the conspiracy was such as to raise a substantial question of fact which was required to be resolved by the jury. Absent this finding by the jury, the court was without power to impose a wartime sentence.

Therefore, assuming arguendo that the conviction was valid, petitioner is entitled to be resentenced under the peacetime provisions of the Espionage Act of 1917, pursuant to Rule 35 of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

I. Whether relief is available under Title 28 U.S.C. §2255 to a petitioner under the following circumstances:

A. There were three charged co-conspirator-defendants in this case; the defense of all three of them rested on the interrelated testimony of two of them, Julius and Ethel Rosenberg. Their testimony was corroborative of each other and established, if believed, the innocence of all three. Petitioner, the third charged conspirator, did not take the stand, but relied on the testimony of his co-defendants to establish his innocence. The direct testimony of Ethel Rosenberg was attacked in an intensive cross-examination, in excess of 125 questions, over half of her cross-examination conducted by court and prosecutor concerning her invocation of the privilege against self-incrimination before the grand jury. These questions were calculated to demonstrate:

(a) Her prior plea of the Fifth Amendment before the grand jury was inconsistent with her responses to the same questions at the trial and that her responses were therefore untruthful.

(b) The reason for her prior plea was her consciousness of guilt and her desire to avoid confessing it with a minimum of risk.

II. Whether relief is available under Title 28 U.S.C. §2255 to a petitioner under the above-described circumstances because:

A. The impermissible interrogation and comment on the constitutional privilege by court and prosecutor deprived petitioner of due process of law.

B. The impermissible interrogation and comment on the constitutional privilege by court and prosecutor, while error not of constitutional magnitude, is subject to collateral attack by virtue of exceptional circumstances in that petitioner did not seek review of the misconduct of court and prosecutor because:

(a) The Court's decision in Raffel v. United States, 271 U.S. 494 (1926) and the decision in the court below of United States v. Gottfried, 165 F. 2d 360, 367, cert. denied 333 U.S. 860 (1948) were legal barriers to review of such misconduct in procedure of the trial.

(b) Petitioner did seek review on appeal of the unfairness of the trial.

III. Whether relief under Title 28 U.S.C. §2255 is available to petitioner under the above described circumstances

where he relied on his own constitutional right of silence in the face of the destructive cross-examination of Ethel Rosenberg as to her own silence before the grand jury, thereby permitting the jury to draw an adverse inference as to petitioner's guilt and depriving him of a fair trial.

IV. Whether, in petitioner's trial under a statute which permitted a maximum sentence of 30 years imprisonment only if the offense were committed in time of war (otherwise the maximum sentence was 20 years imprisonment) and the court failed to define "time of war" or submit the issue of when petitioner joined the conspiracy to the jury, such failure on the part of the trial judge entitles petitioner to relief under Title 28 U.S.C. §2255.

V. Is "time of war" such an essential element of the crime as to deprive petitioner of due process of law by reason of the trial court's failure to mention, define or explain such essential element in its charge to the jury?

VI. If it was not of constitutional proportions was it nevertheless serious and excusable as to petitioner in view of this Court's later ruling in Lee v. Madigan, 358 U.S. 228 (1959) so as to warrant setting aside the judgment of conviction on collateral attack?

VII. Whether because of the trial court's failure to

charge the jury on an essential element of the crime which was the sine qua non of the 30 year sentence imposed, petitioner is now entitled to be returned to the sentencing court and be resentenced under Rule 35 of the Federal Rules of Criminal Procedure.

VIII. Whether, as a result of the failure to charge the jury on the subject of the "time of war" issue, the court was without power to impose sentence and therefore the sentence was illegal and hence correctible under Rule 35 of the Federal Rules of Criminal Procedure.

STATUTES INVOLVED

The constitutional and statutory provisions involved herein are the Fifth and Sixth Amendments to the Constitution; Title 28, U.S.C. §2255; Rule 35 of the Federal Rules of Criminal Procedure; the Espionage Act of 1917 §32 (a); and are hereinafter set forth:

Fifth Amendment

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Title 28, United States Code

"§ 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."

Federal Rules of Criminal Procedure

"Rule 35. 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."

The Espionage Act of 1917, § 32 (a) provided in relevant part:

"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 * * * ."

STATEMENT OF CASE

Prior Proceedings

On March 29, 1951, petitioner along with his co-defendants Julius and Ethel Rosenberg, after a trial by jury, was found guilty of conspiring to transmit information relating to the national defense of the United States in violation of 50 U.S.C., §32(a). On April 5, 1951, petitioner was sentenced to 30 years imprisonment under the wartime provisions of the statute and the death penalty was imposed upon his co-defendants. The Court of Appeals for the Second Circuit affirmed petitioner's conviction, Judge Frank dissenting, 195 F. 2d 583.

Petitioner is presently detained in the United States Penitentiary at Atlanta, Georgia, and has been in federal custody since August, 1950.

In 1957, after the decision of the Supreme Court in United States v. Grunewald, 353 U.S. 391, petitioner filed a motion to vacate the orders of the Supreme Court denying petitions for writs of certiorari and rehearing, and for leave to

file a belated petition based upon the decision of the Supreme Court in Grunewald. This was an out-of-time and out-of-term application, made approximately five years after the consideration of the original petition, and was opposed by the government primarily on the grounds that it was belatedly filed, and the issue there raised had not been raised in the original petition for certiorari or in a timely petition for rehearing. On October 28, 1957, the motion was denied, 355 U.S. 860.*

The Improper Cross-Examination of Petitioner's Co-Defendant and Witness, Ethel Rosenberg.

The Interdependent Aspect of the Government's Case

Julius Rosenberg was arrested on July 17, 1950. On August 7 and 11, 1950, Ethel Rosenberg, wife of Julius Rosenberg, was subpoenaed by the grand jury and after consultation with her counsel appeared and testified. At the time of her appearance both her husband and her brother, David Greenglass, were already in custody, charged with conspiring to commit

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

espionage. On August 11, 1950, following her second appearance before the grand jury, Ethel Rosenberg was arrested. Morton Sobell, petitioner, was arrested on August 18, 1950.

The major portion of the evidence related to the Rosenbergs. The principal witnesses against the Rosenbergs were Ruth and David Greenglass, sister-in-law and brother of Ethel Rosenberg, and Max Elitcher. As stated by the lower court, (5a):

> "The Government's case against Sobell rested almost wholly on the testimony of Max Elitcher, who in addition to testifying to some independent attempts at espionage by Sobell linked him closely with Julius Rosenberg. The latter contradicted the testimony of Elitcher with respect to Sobell, as he also did the testimony of David and Ruth Greenglass and Harry Gold with respect to the disclosure of atomic secrets by him and his wife."

While Elitcher's testimony was the only evidence introduced to implicate petitioner in the charged conspiracy, testimony was also presented for the purpose of establishing "consciousness of guilt" that Sobell and his family had gone to Mexico and during a portion of his stay there corresponded under assumed names. This evidence was further tendered by the prosecution on the grounds that part of the conspiracy was a plan to flee the country through Mexico in the event there was danger of apprehension. Testimony was presented that the Rosenbergs had made inquiry in connection with a trip to Mexico and that they had obtained passport photos in anticipation of leaving the country.

As stated by the court below, all of Elitcher's testimony against petitioner was inextricably bound and related to the alleged relationship between petitioner and Julius Rosenberg. Indeed, in summarizing the testimony of Elitcher as it related to petitioner, the government in the District Court demonstrated that it was dependent upon the joint involvement of Julius Rosenberg with petitioner (Government's Brief on Appeal, p. 11):

> "According to Elitcher, Sobell had suggested that Elitcher visit Rosenberg, implying that the visit would have to do with espionage. Elitcher did visit Rosenberg and told him that Sobell had suggested it.
>
> * * * * *
>
> "Elitcher also testified that in 1948, when he was contemplating leaving Naval Ordnance for a job in private industry, Sobell and Rosenberg tried to dissuade him from leaving because someone was needed at Naval Ordnance for espionage purposes.
>
> * * * * *
>
> "Elitcher also described an automobile trip with Sobell in 1948 into lower Manhattan for the purpose of delivering to Julius Rosenberg a 35 millimeter film can (R. 353-5). On that occasion Sobell described the information he was delivering to Rosenberg as 'too valuable to be destroyed and yet too dangerous to keep around.' (R. 354). On the way home Sobell stated that Elitcher did not have to worry about being under surveillance because Julius Rosenberg had said that he had once 'talked to' Elizabeth Bentley (who was then revealing to the authorities her prior espionage activities) on the telephone but was 'pretty sure' she did not know who he was (R. 354-6).
>
> "Elizabeth Bentley also testified to the effect that she had been involved in transmitting in-

> formation to Russian agents. Specifically, she mentioned accompanying a Russian agent named Golos to lower Manhattan in 1942 where the agent received an envelope from 'an engineer' in the vicinity of Knickerbocker Village (R. 1454-60). She then described receiving intermittent telephone calls from one 'Julius' up to late 1943 (R. 1463-4). 'Julius' lived in Knickerbocker Village (R. 1469). Julius Rosenberg was in fact an engineer and in 1942 had at that time lived in Knickerbocker Village (R. 1561-2). Bentley's role was to relay the telephone messages to Golos. She was in effect a 'go-between' (R. 1467-72)."

Petitioner's entire defense was based on the testimony of Julius and Ethel Rosenberg.

Julius Rosenberg, the first witness for the defense, denied point by point the government's testimony seeking to implicate him in the conspiracy. He not only denied the testimony of Ruth and David Greenglass, but he asserted his complete innocence as well as that of his wife and petitioner. He was interrogated both by his counsel and the prosecution specifically with reference to the testimony of Elitcher, his relationship with Elitcher and the specific testimony of Elitcher relating to Sobell and Julius Rosenberg. Julius Rosenberg's responses were uniformly directly in conflict with that of Elitcher.

Both on direct examination, examination by petitioner's counsel and in the course of cross-examination by the government, Julius Rosenberg was asked to and did testify concerning his relationship with petitioner and Elitcher. The testimony, if believed, would have established that neither the Rosenbergs

nor petitioner were involved in any conspiracy or illegal activity and further demonstrated the falsity of Elitcher's testimony.

The record is replete with testimony of the Greenglasses that Ethel Rosenberg and Julius Rosenberg were jointly involved in the alleged espionage ring; that they were involved with the Greenglasses in obtaining information about the atomic bomb; that Ethel Rosenberg had helped prepare typed material delivered to her husband. The government contended that there was dual complicity on the part of Ethel and Julius Rosenberg.

The Cross-Examination of Ethel Rosenberg

Upon the completion of the testimony of Julius Rosenberg, petitioner's co-defendant and second chief defense witness, Ethel Rosenberg, took the stand. In addition to presenting evidence to establish her innocence, she corroborated point by point the testimony of her husband. Since the testimony of Julius and Ethel Rosenberg was mutually consistent and interdependent, the acceptance of her testimony would have resulted in the rejection of Elitcher's testimony.

As stated by the trial court in its charge to the jury, the crucial issue was one of credibility. Who would be believed -- the prosecution witnesses, the Greenglasses and Elitcher, or the defendants, Julius and Ethel Rosenberg?

The main thrust of the prosecution's examination of Ethel Rosenberg was to elicit the fact that she had asserted her Fifth Amendment privilege before the grand jury to many questions which she answered in the course of the trial in support of her innocence. Indeed, more than one-half of her entire cross-examination, in excess of 125 questions, was directed solely to her assertion of the privilege before the grand jury and the adverse inferences which were to be drawn therefrom. This cross-examination was utilized as a means of impeaching her credibility and as independent evidence of her guilt. The trial jury was made to believe that if Ethel Rosenberg asserted the privilege there was a contradiction between her trial testimony affirming her innocence and the prior assertions.

The impact on the jury of this cross-examination was magnified by the trial court's promiscuous indulgence in interrogation of the witness along the same lines. The trial court in effect told the jury that there was an inconsistency between an innocent answer and a prior assertion of the privilege. The court went further; it made it clear to the jury that if she honestly asserted the privilege before the grand jury, she had something to hide and that the assertion was therefore evidence of her guilt.

Illustrative of the foregoing technique of both the court and prosecution are the following extracts from the record:

The prosecution, after bringing out the fact that Ethel Rosenberg asserted the privilege before the grand jury to a question which she answered at the trial consistently with innocence, asked the following question (R. 1373):

"Q. Was that the truth?"

Counsel for the defense objected on the ground that there was no inconsistency between the assertion of the privilege and her subsequent response to the same question. In reply and in the presence of the trial jury, the court made the following comment (R. 1373):

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

And further (R. 1373):

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

Mrs. Rosenberg responded (R. 1374):

> "A. Was what the truth? That I answered the question that way?
>
> Q. That you answered that to disclose whether you had consulted with your lawyers about this matter would incriminate you?"

The court, pursuing this line, went on to ask her (R. 1374, R. 1375):

> "Q. The fact of the matter is that you have no objection today to giving the answer to that?

A. That's right.

Q. And what was your answer today as to when you consulted your lawyer?

A. Sometime after my husband had seen him, the day, the evening of the day he was interrogated by the FBI.

Q. And today you feel there is nothing incriminating about that answer?

A. No.

Q. But at that time, before the grand jury, you did?

A. I must have had some reason for feeling that way.

Q. Now, what was the reason?
A. I couldn't say at this time.

The Court: In your own interest, I think you ought to think about it and see if you can give us some reason.

The Witness: I really couldn't say."

In response to a question by the prosecution, Ethel Rosenberg denied that she had discussed the case with her brother, David Greenglass. Thereupon, the prosecutor elicited the fact that she invoked her Fifth Amendment privilege to the same question before the grand jury. She was then asked whether the assertion of the privilege was honest (R. 1376):

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

A. It was true because my brother, David, was under arrest."