The prosecutor then asked:

"Q. How would that incriminate you, if you are innocent?"

Over her counsel's objection the trial court pressed the question and she responded:

"A. - and as long as I had any idea that there might be some chance for me to be incriminated, I had the right to use that privilege."

The court then commented (R. 1376):

"At any rate, you don't feel that way about that question today, do you? You have answered when you talked to your brother, Dave, right here in this Courtroom, haven't you?"

After referring to an alleged contradiction created by her assertion of the privilege before the grand jury and a response in the trial court, the court put the following question to Mrs. Rosenberg (R. 1377):

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

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

The Court: All right, proceed."

Then the prosecutor asked (R. 1378):

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

Pressing this question again, the prosecutor declared (R. 1378):

> "Of course, you didn't know, so you weren't taking any chances in implicating yourself or your husband?"

At this stage, counsel for Mrs. Rosenberg moved for a mistrial (R. 1378). The motion was denied (R. 1379). The prosecutor then returned to the attack (R. 1379):

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

In the face of an objection by the defense to this whole line of inquiry, the prosecutor stated, still in the presence of the jury (R. 1381):

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

Before the grand jury Mrs. Rosenberg was asked whether she recollected a furlough visit of her brother to New York (R. 1381). She asserted the privilege as to that question (R. 1381). On direct examination she had answered the question (R. 1312, 1315). The court then brought out that she had changed her position. The following ensued:

> By the Court:
>
> "Q. You did answer that question here in Court, didn't you? You did remember the furlough visit?
>
> A. Yes.

Q. So that you had no objection here upon any grounds, whether it is incrimination or anything else, to answering that question [R. 1381, 1382]?

A. That's right.

Q. However, before the grand jury, you did assert your privilege, did you not?

A. Yes.

Q. He wants to know what the reason for it was at that time?

A. The only reason was that my brother was under arrest.

Q. You mean you didn't feel it would incriminate you?

A. Well, if I answered that I didn't want to answer the question on the grounds that it might incriminate me, I must have had a reason to think it might incriminate me."

The prosecution then through the following questions sought to establish that Ethel Rosenberg was fearful that her answers might involve her personally in a criminal prosecution (R. 1383):

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

Whereupon the court questioned her again (R. 1383):

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

The prosecution then returned to the same theme and asked the following series of questions (R. 1383):

"Q. Do you remember this question and this answer: 'Did you invite your brother David and his wife to your home for dinner? I mean during the period while he was on furlough in January of 1945? A. I decline to answer on the ground that this might incriminate me.' Do you remember giving that testimony?

A. Yes, I remember.

Q. Was it true at the time you gave it? Yes or no?

A. It is not a question of it being true."

The court commented in such a manner as to destroy Mrs. Rosenberg's credibility, stating (R. 1384):

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

Thereupon the court instructed the witness to answer the previous question, whether she had honestly asserted the privilege (R. 1385).

The prosecutor then gave deadly reality to the purpose of the joint interrogation by asking (R. 1386):

"What you are saying is that you were under no compulsion to confess your guilt in respect to this conspiracy?"

The questioning pursued the theme that her invocation of the privilege before the grand jury constituted, according to the court and prosecution, a contradiction of

her testimony. After pointing up the "contradiction" the prosecutor in each instance would pose the question, "Was it truthful?" (R. 1388-1394)

The prosecutor asked (R. 1394):

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

After quoting from the grand jury minutes wherein she had declined to answer a question concerning knowledge of the alleged Soviet courier Yakovlev, the following questions were asked and answers given (R. 1394):

"Q. And yet you had never met Yakovlev in your life?

A. That is right.

Q. Would you care to explain how you might be incriminated on the basis of that question and answer?"

Then the omnibus question was asked (R. 1395, 1396):

"Q. Is it not a fact that after consultation with your lawyer, in the course of your two appearances before the grand jury you refused to answer any questions asserting your privilege against self-incrimination insofar as you were asked questions relating to the employment, the activities of your brother David at Los Alamos in 1944 and 1945, insofar as concerned his wife, insofar as concerned Harry Gold and insofar as concerned Yakovlev, and insofar as concerned your association and your husband's association in connection with these people whom I have mentioned relating to the theft from Los Alamos of material relating to the development and production of the atomic bomb and the objective of delivery to the Soviet Union?"

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

By the Court (R. 1396):

"Q. But you did not exercise that privilege here in court with respect to that same subject matter?

A. No."

By Mr. Saypol (R. 1396, 1397):

"Q. That need you felt was necessary for assertion by you so that you would not incriminate yourself, is that right?

A. I said that I used the right against self-incrimination.

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

'Q. Is there anything else you want to tell us about this entire matter? A. No.

Q. Any statement you want to make to the jury? A. No.'

Q. Did that occur?

A. Yes.

Q. Did you make any statement?

A. No.

Q. Did you make any answer?

A. No.

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

A. Yes, he was under arrest.

Q. You knew at that time, too, that you were suspect, did you not?

A. I really didn't know if I knew it.

Q. Didn't you think it appropriate at that time to make a complete statement such as you have made here denying any possible connection or complicity in this matter?

A. I had gone to the grand jury to answer any questions they might put to me and that I did. It didn't occur to me that it was something I was supposed to do, to make any kind of statement.

Q. Without exception you have refused to answer these questions because of the privilege which you had been advised you enjoyed?

A. Not without exception.

Q. You mean you told the name of your lawyer -- "

On redirect, counsel for Mrs. Rosenberg asked her whether she believed herself guilty of espionage at the time of her assertion of her privilege before the grand jury or at the time of her testimony in the course of the trial (R. 1398). Her answer was "no".

The court thereupon asked (R. 1398):

"So there was no difference in your position then than there is today?"

In the face of an avowal of innocence made by Mrs. Rosenberg in response to that question, the court asserted (R. 1398):

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

The re-cross examination was again limited to her assertion of the privilege before the grand jury (R. 1400),

as was the second re-cross examination (R. 1401, 1402).

After the testimony of Mrs. Rosenberg, the defense rested (R. 1402).

The Use of This Line of Cross-Examination in the Government's Summation

The prosecution, attacking the credibility of the defense witnesses and insisting upon their guilt, opened its summation by declaring (R. 1509):

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

The Use of This Line of Cross-Examination in the Court's Charge

The court in its charge to the jury concluded by referring to the invocation of the privilege by Ethel Rosenberg, stating (R. 1566):

"The defendant Ethel Rosenberg was cross-examined concerning her refusal to answer certain questions when she appeared before the grand jury on the ground that the answers might tend to incriminate her. Her failure to answer such questions is not to be taken as establishing the answers to any questions she was asked before the grand jury, but may be considered by you in determining the credibility of her answers to those same questions at this trial."

Counsel for the defense excepted to the court's charge in this respect (R. 1567, 1568).

The Original Appeal

On direct appeal to the Court of Appeals from the judgment of conviction and in an unsuccessful petition for certiorari, petitioner did not specifically seek review of the right of the prosecution and court to exploit a witness' resort to the Fifth Amendment privilege to impeach credibility. This is understandable enough in the light of this Court's opinion in Raffel v. United States, 271 U.S. 494 and the Second Circuit's decision in United States v. Gottfried, 165 F. 2d 360, cert. denied 333 U.S. 860. However, petitioner along with the Rosenbergs did, in a general attack on the fairness of the trial, protest the reiterative stress in the questioning of Mrs. Rosenberg.*

---

* When, in 1957, petitioner moved to vacate the orders of this Court denying his petition for rehearing and for a writ of certiorari and for an order granting certiorari based on the Grunewald decision, the government, in opposing this motion,

Facts Relating to the Issue of "Time of War"

The Indictment

The superseding indictment under which the petitioner was tried and convicted stated in part (R. 2)

> "On or about June 6th, 1955, up to and including June 16, 1950, at the Southern District of New York, and elsewhere, Julius Rosenberg, Ethel Rosenberg, Anatoli A. Yakovlev, also known as 'John', David Greenglass and Morton Sobell, the defendants herein, did, the United States of America then and there being at war, conspire . . . to violate subsection (a) of Section 32, Title 50, United States Code . . . "

The Evidence

The only testimony relating to petitioner and the charged conspiracy prior to September 2, 1945, the date of cessation of actual hostilities, is as follows:

---

contended that petitioner did not raise the Grunewald question in his petition for a writ of certiorari (Memorandum for the United States in Opposition p. 4, n. 5).

In this 2255 proceeding the government took the position in the District Court that the Grunewald question was not raised by petitioner on his original appeal (Memorandum of the United States in Opposition, p. 68). Nevertheless, the District Court concluded that the "precise point" was raised on the original appeal and in Sobell's petition for a writ of certiorari (App. 227, 228).

The government changed its position in the court below, contending that petitioner did raise the Grunewald issue on his original appeal and his petition for a writ of certiorari (Brief for the United States in Opposition, p. 20). However, the court below concluded that this issue had not been previously raised by Sobell either on his original appeal or in his petition for a writ of certiorari (3a, 14a).

There was testimony by Elitcher of a conversation with Julius Rosenberg in the absence of Sobell in June of 1944. At that conversation Elitcher said that Rosenberg had told him that Sobell was also helping in getting information to the Soviet Union (R. 235-237).

During the week preceding Labor Day 1944, Elitcher testified, he and his wife went on a camping expedition with Sobell and his wife, and further testified as follows concerning a conversation with Sobell (R. 239):

> "A. I told him [Sobell] * * * that Julius Rosenberg had visited me * * * at my home, and had asked me whether I would contribute military information to Russia, and in the course of that he said you, Sobell, were also helping in this. At this point he became very angry and said 'he should not have mentioned my name. He should not have told you that.' I tried to explain that Rosenberg knew that he had seen me. So he probably felt safe about it. He said - he was still angry and said, 'it makes no difference, he shouldn't have done it.'"

The only other testimony concerning petitioner related to 1946 and later (R. 245-248, 251-263).*

---

* The court below, in denying petitioner relief, stated (17a): "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."

The Charge

After characterizing the offense charged, the court then set forth in synoptic fashion the essential elements of the offense, once again omitting any reference or mention of "time of war". At no time did the court ask the jury to determine when the petitioner had joined the conspiracy. Thus, the jury was not permitted to assess whether, upon the facts in the record, the petitioner joined the conspiracy "in time of war".

On sentencing the defendants, the trial court made the following comments (R. 1613):

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

In sentencing petitioner, the trial court stated (R. 1620):

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

The Decision of the Court of Appeals

The court below, in an opinion by Judge Friendly, affirmed the trial court's order denying petitioner's motion under §2255. The court recognized at the outset that the areas covered by §2255 are vaguely bounded and that the circumstances under which relief is available are not clearly defined.

The court below acknowledged that the questioning of Ethel Rosenberg probably fell within the proscription of the Grunewald case. It further conceded that in a direct -- as opposed to a collateral -- review of Mrs. Rosenberg's conviction, the improper use of her claim of the Fifth Amendment privilege before the grand jury to impeach her at the trial would constitute a ground for reversal of petitioner's conviction. However, it held that relief was not available under §2255. The court, guided largely by Sunal v. Large, 332 U.S. 174, ruled that relief is available by collateral attack under the first clause of §2255 only when there has been (a) a significant denial of a constitutional right even where the failure to appeal was not justifiable or (b) a serious defect in the trial short of constitutional dimension, which was either not correctible at all on appeal or, if

correctible, was not appealed because of "exceptional circumstances".

The court held that prejudice resulting from the improper use of the claim of the Fifth Amendment was not ruled in the Grunewald case to be of constitutional dimensions and that even if Grunewald could be construed to be constitutionally grounded, such constitutional injury must be confined (because of the personal nature of the constitutional privilege) to the person whose claim of privilege was later used to impeach him.

The court, proceeding to the second ground of possible relief under the first clause of §2255 found no greater justification for petitioner's failure to appeal than in Sunal v. Large. The court found that the policy favoring finality of litigation was not subordinated to petitioner's claim to the right of a new trial under the circumstances present here, especially since a new trial might now result in the release of petitioner from further punishment. In contrast, the court concluded, had a direct appeal reversed the conviction a new trial would probably not have resulted in an acquittal.

The court below conceded 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 court recognized,

moreover, that some of the testimony of Elitcher linking Sobell to the conspiracy covered a period when the "war" could be said to have ended as a matter of law. The court ruled, further, that a jury could properly have been asked to determine whether petitioner had joined the conspiracy "in time of war" (as judicially determined) or at some later date.

The court ruled, however, that the silence of the jury as to the date, if any, when petitioner joined the conspiracy was of no constitutional significance since the court had not been requested to submit an instruction to the jury on this issue.

The court further ruled that the failure to obtain from the jury a finding on the subject of the date of petitioner's joining the conspiracy did not warrant relief under §2255 because this omission did not seriously affect petitioner's trial nor did exceptional circumstances excuse his failure to raise the point at trial or on appeal.

The court further held that Rule 35 of the Federal Rules of Criminal Procedure afforded no basis for relief since that rule was confined to correcting a sentence illegal on its face.

REASONS FOR GRANTING THE WRIT

The Cross-Examination of Ethel Rosenberg

1. Petitioner's entire defense depended upon the testimony of his two co-defendants, Julius and Ethel Rosenberg. The conduct of the trial court and the prosecution in the cross-examination of Ethel Rosenberg was so grossly unfair and improper that it destroyed her testimony, and made a guilty verdict as to all defendants inevitable.

Mrs. Rosenberg had appeared before the grand jury a few days after the arrest of her husband and brother, both charged with conspiring to commit espionage. The nature of her examination before the grand jury related to her alleged involvement in the charged conspiracy and under the advice of counsel she asserted her constitutional privilege. Her fear of incrimination was confirmed by the fact that she was arrested immediately upon leaving the grand jury room.

More than half of the cross-examination of Ethel Rosenberg by both the court and prosecution, over 125 questions, was directed to her assertion of her Fifth Amendment privilege before the grand jury as to questions which she answered in the course of her testimony before the trial jury.

A reading of her cross-examination, portions of which are set forth in the Statement of Case, pp. 17-27 supra, demonstrates that her prior assertion of the privilege was used

(1) to impeach her testimony and attack her credibility, and (2) as independent evidence of her ultimate guilt. These dual objectives are made all too clear by the number and nature of the questions posed and by the comments made, in the presence of the trial jury, by both trial court and prosecution over the strenuous objection of defense counsel. At one point a motion for a mistrial was made, to no avail.

Both the court and prosecution projected the thesis into the courtroom that there was an inconsistency between a prior assertion of the privilege and a subsequent answer to the same question in a manner consistent with innocence. The jury was thus advised that an innocent person suspected of committing a crime would not honestly assert the privilege before a grand jury. Mrs. Rosenberg was thus pressed by the court to account for her assertion of the privilege and asked to explain why she now answered the questions in the light of her prior invocation of the privilege before the grand jury. The prosecutor's questions sought to establish that when she appeared before the grand jury knowing her guilt she was unaware of the extent of evidence the federal authorities had against her and accordingly invoked the privilege. The prosecution could not have painted this picture more clearly for the jury: Having heard the evidence presented against her in the course of the trial she was prepared to commit perjury in an attempt to hide her guilt which she had poorly concealed

before the grand jury by asserting the privilege.

The lower court summarized the cross-examination only partially and made no reference to the trial court's role.

The importance of the cross-examination of Ethel Rosenberg in the prosecution's total strategy is demonstrated by its use in the summation to the jury, to establish her guilt and that of petitioner (p. 26 supra).

2. The trial court charged the jury over exception that the prior assertion of the privilege could be used to attack the credibility of Ethel Rosenberg, but failed to instruct that such conduct did not constitute evidence of guilt.

The court below acknowledged that in light of Grunewald v. United States, 353 U.S. 391,* on direct appeal now, in all probability the conviction of petitioner and his co-defendants would be reversed. A comparison of the trial record in Grunewald with that in the instant case clearly establishes that the "grave constitutional overtones" noted in Grunewald here reach such intensity as to violate the constitutional norms of a fair trial.

---

* This case, as decided by this Court, is heretofore and will be hereinafter referred to only as Grunewald in this petition.

In contrast to where in Grunewald only eight questions were asked in the proscribed area, here the major theme of the cross-examination was projected through more than 125 such questions. Unlike Grunewald where the improper questioning was merely incidental to the cross-examination, here it was a deliberate conscious strategy which dominated the attack on the defense. Here, unlike Grunewald, the judge was a major participant and brought his authority to the support of this maneuver.

In the Grunewald charge to the jury the trial court limited the significance of these questions to the sole purpose of ascertaining the weight the jury should give the witness' testimony. There, the trial court specifically charged the jury that it could draw no inference of guilt or innocence of the defendant-witness or of his co-defendants.

The conduct of the trial court and prosecution here was vastly more improper and prejudicial. The court in substance advised the jury that the prior assertion of the privilege had probative significance in establishing the falsity of the testimony and the guilt of the witness.*

---

* This fact makes it more difficult to support the statement in the opinion below denying petitioner relief wherein the court says (6a):

> "Both during the trial and in his charge the Judge made it crystal-clear that Mrs. Rosenberg's 'failure to answer such questions

(Continued on next page)

3. Petitioner did not take the stand, but relied upon his constitutional privilege. By his silence he was particularly prejudiced by the comments of the court and government with reference to the Fifth Amendment privilege. The jury could only conclude that petitioner remained silent because he had something to hide. Thus, his refusal to take the stand could well have been considered evidence of guilt.

4. The case against the Rosenbergs depended principally upon the Greenglasses. According to the testimony of the Greenglasses, the Rosenbergs had participated jointly in the conspiracy. The jury was advised by the trial court that it must accept the testimony of the Greenglasses to convict the Rosenbergs.

In this context, if the jury was led to believe by the cross-examination of Ethel Rosenberg that her testimony was false and that she was guilty, it would inevitably come to the same conclusion as to Julius Rosenberg's testimony and guilt.

Ethel Rosenberg's testimony not only supported her own innocence, but that of her husband. It denied any illegal

---

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'."

conduct on the part of either of them. If her testimony were believed, that of her husband would have been believed and, therefore, the testimony of the one witness against petitioner, Elitcher, would have necessarily been rejected by the jury. Thus the record establishes the complete dependence upon the Rosenbergs of petitioner's defense.

5. The prosecution's tactic was admirably suited to the times. We cannot ignore, in evaluating the prejudicial error committed in the course of the trial, the climate of opinion in which it took place. This was a period in our nation's history when hysteria about loyalty and security permeated American life. The privilege was equated with guilt. As stated by this Court in Ullmann v. United States, 350 U.S. 422, the public "too readily assume[d] that those who invoke it [the Fifth Amendment] are either guilty of crime or commit perjury in claiming the privilege." This prejudicial impact was even greater upon petitioner and his co-defendants in view of the government's claim of their prior Communist affiliation or sympathies.

6. The court below measured petitioner's right to relief by the following standards: (1) a significant denial of a constitutional right or (2) an error not of constitutional magnitude which was not correctible on appeal or where exceptional circumstances excused the failure to

appeal (12a).

The gravity of the injury suffered by petitioner which we have already discussed did not lose constitutional magnitude because, as the court below seemed to think, the injury derived from the invasion of constitutional right of a co-defendant. The impact of the error committed by the prosecution and the trial court in a conspiracy trial such as this, must be considered in the context of the concurring opinion of Mr. Justice Jackson in Krulewitch v. United States, 336 U.S. 440, 445, 454:

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

See also, United States v. Tomaiolo, 249 F. 2d 683 (C.A. 2); Anderson et al v. United States, 318 U.S. 350; McDonald v. United States, 335 U.S. 451, 456; United States v. Thomson, 113 F. 2d 643 (C.A. 7); Feder v. United States, 257 Fed. 294 (C.A. 2); Smith v. United States, 230 F. 2d 935 (C.A. 6); Nelson v. United States, 208 F. 2d 505 (C.A.D.C.); Duncan v. United States, 23 F. 2d 3 (C.A. 7).

Nor can petitioner's right to relief be made to turn on the kind of constitutional right which was invaded at the trial. To be sure, the Fifth Amendment privilege is a right personal to the witness, but in this case the Fifth Amendment

was used not merely to invade the constitutional right of the defendant-witness; it was exploited as an instrument to destroy the entire defense, thereby depriving all the defendants of a fair trial.

The trial judge and the prosecution acted in concert in the cross-examination of Ethel Rosenberg so as to establish her guilt and that of her co-defendants thereby destroying the entire defense. By such questioning the defendants were denied a fair trial and the conviction is subject to collateral attack.

The lower court did not rule upon the question of the fairness of petitioner's trial. It limited its comments to the impairment of Ethel Rosenberg's constitutional rights under the Fifth Amendment.

7. Quite apart from the other constitutional aspects of petitioner's injury it can hardly be disputed that his right to a fair trial was seriously impaired and that there were exceptional circumstances which excused petitioner's failure to raise the issue involved here on direct appeal. Both petitioner and his co-defendants in the original appeal from the judgment of conviction, challenged the fairness of the trial, relating it to errors committed both by the trial judge and the prosecution. The same issue was raised by petitioner in his petition for writ of certiorari after the affirmance of the conviction.

At the time of the appeal in 1951 and application to this Court in 1952, this Court's decision in Raffel v. United States, 271 U.S. 494, seemed to foreclose this issue. See also United States v. Gottfried, 165 F. 2d 360 (C.A. 2) cert. denied 333 U.S. 860.

The court below denied that there were any exceptional circumstances, on the grounds that petitioner and his then counsel should have realized that "the definite ruling on the question of law had not crystallized" (14a, 15a).

The court suggested that petitioner's reliance on Raffel, supra, was misplaced because that case involved the failure of a defendant to take the stand at a previous trial rather than the prior claim of privilege before a grand jury. This is a most tenuous distinction as the court below suggests (15a); cf. Stewart v. United States, 366 U.S. 1. Yet the court below itself relied upon Raffel, supra, when it decided the Grunewald case (233 F. 2d 556). Nor did petitioner on his direct appeal have the benefit, as did defendant's counsel in Grunewald, of this Court's opinions in Emspak v. United States, 349 U.S. 190; Ullman v. United States, 350 U.S. 422; Slochower v. Board of Higher Education of the City of New York, 351 U.S. 551.

Immediately after the decision of this Court in Grunewald, petitioner filed a motion in this Court to vacate

the Court's 1952 denial of certiorari and for leave to file a new petition for certiorari. The government in opposing petitioner's motion maintained that the specific issue had not been previously raised by him on appeal and, in any event, the correct procedure was by motion pursuant to §2255, if the error could be said to reach constitutional proportions. Thus, diligence on the part of petitioner in seeking judicial relief in light of the law as it then prevailed cannot be denied.

We cannot ignore the fact that petitioner's request for review by this Court in 1952 did challenge the fairness of the trial and, in general terms, the conduct of the trial court and prosecution. In spite of the fact that this was a capital case, this Court denied certiorari. As stated by Mr. Justice Black in Rosenberg v. United States, 346 U.S. 273, 301,

> "It is not amiss to point out that this Court has never reviewed this record and has never affirmed the fairness of the trial below. Without an affirmance of the fairness of the trial by the highest court of the land there may always be questions as to whether these executions were legally and rightfully carried out. I would still grant certiorari and let this Court approve or disapprove the fairness of the trial."

In this context, it is respectfully submitted that exceptional circumstances were present warranting relief now under §2255.

The "Time of War" Issue

8. The indictment under which petitioner was convicted 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 Title 50 U.S.C. §32(a). This section of the Espionage Act then provided as follows:

> "Whoever shall violate the provisions of sub-section (a) of this section in time of war shall be punished by death or by imprisonment for not more than thirty years."

The maximum sentence which could have been imposed at that time for such offense committed in peace time was twenty years.

The trial court at no time charged the jury on the issue of "time of war"; it did not define "time of war" in legal terms for the jury nor did it ask the jury to determine when petitioner joined the conspiracy or, if when he did so, it was in "time of war".*

---

* The only reference to "time of war" came when the court interrupted its charge, and requested the clerk to read the indictment to the jury. The indictment reads "on or about June 6, 1944, up to and including June 6, 1950, . . . the United States of America then and there being at war . . ."

9. In the absence of a finding on the part of the jury on this crucial issue -- whether or not petitioner joined the criminal conspiracy in "time of war" -- the court was without authority to sentence petitioner either to the ultimate penalty of death or to 30 years imprisonment, or at all. This omission deprived petitioner of the right to a jury trial on a vital element of the offense. Moreover, the jury could only have concluded that it was barred from considering this issue in view of the court's detailed instructions on every other element of the offense. The court then proceeded to sentence petitioner on the assumption that petitioner had, in fact, committed the crime in time of war and gave him the maximum prison sentence.

10. It is axiomatic that a trial court in a criminal case is required to specify, define and explain each and every essential element of the offense in its charge to the jury. Screws v. United States, 325 U.S. 91 (1945); Kreiner v. United States, 11 F. 2d 722 (C.A. 2); United States v. Levy, 153 F. 2d 995 (C.A. 3).

The court below conceded that

> "defendant being tried under §32(a) was entitled upon 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." (18a)

Underlying this rule is the fundamental principle

of our criminal jurisprudence that to convict in a criminal case a jury must find that each and every essential element of the offense has been proved beyond a reasonable doubt. Christoffel v. United States, 338 U.S. 84; Schwachter v. United States, 237 F. 2d 640, 644 (C.A. 6).

It is clear, following the principles established above, that the trial court's failure to charge the jury as to an essential element of the offense which made the crime a capital offense, invalidated the conviction. Therefore collateral attack is available to petitioner.

11. It is conceded that there were no requests to charge concerning the element of "time of war" offered the court at the trial.* This was an issue, however, which involved the nature and scope of the judicial authority to sentence. The administration thereof was peculiarly within the responsibility and stewardship of the trial court itself. It could not be delegated as a responsibility of petitioner; nor could the failure of petitioner to request a charge on this issue relieve the court of its responsibility. Cf. Screws v. United States, supra.

---

* As to the co-defendants Rosenberg the court below said: "It was hardly conceivable that any such claim [concerning 'time of war'] would be made by the Rosenbergs so far as this statute was concerned, 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." (17a)

12. The court below itself rejected the government's contention that "time of war" under §32(a) continued until the presidential proclamation of 1952 (21a). It invoked the teaching of Lee v. Madigan, 358 U.S. 228, and picked two dates which it deemed appropriate (25a):

> "We find it unnecessary to make such a determination here more precisely than to say that, for purposes of §32(a) the 'war' had ended before the summer and fall of 1948, . . . "

And again,

> "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 . . . "

In rejecting the government's contention below, the court below pointed out (23a):

> "On the other hand, we cannot believe that the Congress of 1917 would have thought the Statute it was enacting would have the result that the death penalty . . . should apply . . . for six and one half years more [after August 14, 1945], during which our wartime enemies had become our friends."

The court's recognition of the impropriety of the government's proposed termination date could only lead to the conclusion that the end of actual hostilities marked the termination of "time of war" for purposes of this provision of the Espionage Act. While the court below ostensibly applied the rule of lenity (21a), it chose two dates falling between the government's proposed date and the cessation of actual hostilities -- each plainly inconsistent with the

application of that rule. As the court below itself observed (23a):

> "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."

13. It seems clear that the most appropriate date for the termination of "time of war" was September 2, 1945, the date of Japan's surrender to the Allied Powers, but the entire testimony concerning Sobell prior to this date was not only equivocal but even if believed, could hardly be competent to establish his membership in the charged conspiracy. It consisted of two incidents testified to by Elitcher: The first, a conversation with Julius Rosenberg in the absence of petitioner in June of 1944; and a conversation with Sobell in September of 1944 wherein petitioner was said to have protested the use of his name in connection with any illegal activities.

The Rosenberg-Elitcher conversation could not be used to establish petitioner's membership in the conspiracy. Glasser v. United States, 315 U.S. 60, 74. The other conversation is susceptible to an interpretation of innocence, and in any event equivocal as to guilt. On this state of the record there was little or no evidence of petitioner's participation in the conspiracy "in time of war". Thus, had the issue been properly submitted to the jury they might have

found that petitioner had joined the conspiracy at some time other than in "time of war".

14. The court below was apparently of the view that had the jury been properly instructed, the outcome of the trial would not have been different. Speculating as to the outcome of the result cannot be a determinative factor where there has been a denial of due process. This view, of course, was predicated on the court's assumption that the war did not terminate in 1945. As we have seen, there was little or no evidence of petitioner's involvement in the conspiracy prior to 1945.

15. It is suggested by the court below that petitioner is barred from relief under §2255 because new counsel for petitioner in 1953 in arguing for reduction of sentence appeared to be aware of the "time of war" issue (29a). If relief under §2255 is available to petitioner the motion is timely whenever made; neither statute of limitations, nor res judicata, nor the doctrine of laches is applicable. See Heflin v. United States, 358 U.S. 415, 420.

The error claimed here went to the very jurisdiction of the court and deprived it of the power to sentence petitioner to thirty years in prison or death. Absent a jury finding on the subject, petitioner was tried and convicted without due process of law and the conviction should be set aside.

16. Assuming arguendo that petitioner is not entitled to relief under §2255, he is entitled to have his illegal sentence corrected under Rule 35 of the Federal Rules of Criminal Procedure.

As we have elsewhere pointed out (see p.44-46, supra) there was no determination and in view of the trial court's failure to explain or charge the jury with respect to the element of "time of war", there could not have been any jury determination that petitioner joined the conspiracy "in time of war". Absent such a finding the trial court was without any authority to impose the wartime penalty of thirty years on petitioner.

The restrictive application given by the court below to the scope of review available under Rule 35 cannot be reconciled with this Court's approach in Heflin v. United States, 358 U.S. 415 and Prince v. United States, 352 U.S. 322. In both of these cases, this Court examined the sentences imposed in light of the trial record and the particular statutes involved, with particular scrutiny being given to their pertinent legislative history.

While the court below concluded that it did not believe that the Congress of 1917, when it enacted the Espionage Act, intended that the severer wartime penalty would be applicable to peace time (23a), and found that the legislative purpose "was to place the ultimate discouragement on communicating

defense information when the nation was fighting for its own life," (id.) it nevertheless concluded that for the purposes of §32(a) the "war" ended subsequent to the cessation of actual hostilities (25a). In this the court below was in error.

It is precisely because of the trial court's failure to charge with respect to this crucial element of the offense and the utter paucity of the evidence linking petitioner to the conspiracy "in time of war" that the sentence imposed was illegal.

Thus, neither the statute, in the light of its legislative history, nor the evidence, nor the charge to the jury, can rationalize or justify the sentence imposed.

17. At the time of its decision the court below did not have the benefit of this Court's decision in Fay v. Noia, _____ U.S. _____ No. 84, decided March 18, 1963. That court's excessive concern with considerations of finality -- with a possibility of the government's inability to prosecute the case to a successful conclusion by reason of the passage of time, with questions of waiver and speculations as to the prejudice to petitioner as the result of the errors complained of -- all ignore the true nature and scope of the writ as set forth in the Noia case. As Mr. Justice Brennan reminded us:

> "Today as always few indeed is the number of . . . prisoners who eventually win their

freedom by means of habeas corpus. Those few who are ultimately successful are persons whom society has grievously wronged and for whom belated liberation is little enough compensation. Surely no fair-minded person will contend that those who have been deprived of their liberty without due process of law ought nevertheless to languish in prison . . . For such anomalies, such affronts to the conscience of a civilized society, habeas corpus is predestined by its historical role in the struggle for personal liberty to be the ultimate remedy . . . "

CONCLUSION

For all the above reasons, the writ of certiorari should be granted, the decision below reversed and petitioner granted a new trial; or, in the alternative, the case remanded to the District Court for resentencing under Rule 35.

Respectfully submitted,

ELEANOR JACKSON PIEL
Attorney for Petitioner

OF COUNSEL:

MARSHALL PERLIN
FRANK J. DONNER
SANFORD M. KATZ

1/8/63

~~CONFIDENTIAL~~ ~~TOP SECRET~~

AIRTEL REGISTERED MAIL

TO : DIRECTOR, FBI [redacted] (C)

FROM : SAC, NEW YORK [redacted] (C)

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE.

SUBJECT: [redacted] (C)
(OO: CG)

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

[redacted]

On 1/7/63, [redacted] (C) furnished the following information to SA ALEXANDER C. BURLINSON: (U)

[redacted]

4 - Bureau [redacted] (RM)
(1 - 101-2483) (MORTON SOBELL)
1 - Chicago [redacted] (RM) (C)
1 - NY [redacted] (C)
1 - NY 100-37158 (MORTON SOBELL) (33)
1 - NY [redacted] (41) (C)

101-2483 (C)

ACB:gmg
(10)

~~TOP SECRET~~

NOT RECORDED
188 JAN 16 1963

Classified By 1555 WAR/DRR 10/20/95
Exempt [illegible] Category 1a3
Declassify [illegible]

54 JAN 22 1963

~~CONFIDENTIAL~~

FIELD OFFICES
VIEWED BY ROUTING
SLIP(S) OF 3-11-74 dc
DATE

4-750 (Rev. 4-17-85)

XXXXXX
XXXXXX
XXXXXX

FEDERAL BUREAU OF INVESTIGATION
FOIPA DELETED PAGE INFORMATION SHEET

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

☑ Deleted under exemption(s) b1 with no segregable material available for release to you.

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

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

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

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

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

☐ For your information: _____

☑ The following number is to be used for reference regarding these pages:
101-2483-NR after 1519

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

XXXXXX
XXXXXX
XXXXXX

FBI/DOJ