BALLARD was recontacted on 9/15/66 by SAs BLAZE J. TOMASONI and CHARLES SILVERTHORN at which time the letter to Mr. KING and also the recordings and notes of the attorney were obtained.

A copy of the letter to Mr. KING is being enclosed for the Bureau for information.

Enclosed for the New York Office are the following:

1. Original letter from AUGUSTUS S. BALLARD to Mr. ROBERT L. KING, Assistant United States Attorney.

2. Copy of the above letter is also enclosed for the files of the New York Office.

3. Six packets containing Sound Scriber disks of the pre-sentence interviews with HARRY GOLD by Mr. HAMILTON and Mr. BALLARD.

4. Also enclosed are certain handwritten notes of the attorneys which may or may not be of assistance in this matter.

The disks which were reviewed on a Sound Scriber playback in 1954 by SA CHARLES SILVERTHORN are described as follows which description is taken from Phlet dated 3/18/54 in the case entitled, "HARRY GOLD, Espionage - R."

Packet #1 contains disks X1 to X32 as set out in Phlet 3/18/54. With the exception of disk X-1 which concerns GOLD's research work at Philadelphia General Hospital and a brief discussion of GOLD's bank accounts, this series of records concerns GOLD's chronological account of his activity in Soviet Espionage. It was believed the Bureau has all the information concerning GOLD's Espionage as reflected in this series of records. These records were made in June 1950.

Packet #2 contains disks X-A to X-H (4 disks)& log. This series of records were made on 8/9/50 and were a continuation of the X records referred to in item one. Specifically, the records concerned additional recollections GOLD had since June 1950. A review of this series of records revealed that all of the information mentioned was furnished to the Bureau.

Packet #3 consists of Y-1 to Y-4 inclusive (2 disks). In these records, GOLD, upon the instructions of his attorney, furnished an explanation of the motives behind his activity in Soviet Espionage. In the first Y-1 record, HAMILTON states "these records have to do with motives described in the X records." It is believed that the Bureau is already aware of the information discussed in this series of records.

Packet #4 consists of disks D-1 to D-3 (2 disks with handwritten log). In these two disks, HAMILTON dictated part of the defense statement he intended to use in court on behalf of HARRY GOLD.

Packet #5 consists of disks # 3 through 19. Disk 1 of this series was a statement by HAMILTON explaining how he was appointed as GOLD's counsel. The remainder of this series of disks concerns the personal life of subject as related by GOLD. GOLD does not discuss his espionage activity in this series of disks.

Packet #6 consists of three miscellaneous disks and 8 disks marked "SP." This packet was not made available to Agents for review in 1954 because it probably mainly concerns the speech that JOHN D. M. HAMILTON practiced before going into court in defense of HARRY GOLD. BALLARD mentions this as a P.S. in his letter to Mr. KING. Since no playback is available in BALLARD's office at this time it was not possible to determine whether these are actually the disks containing Mr. HAMILTON's speech. If they are Mr. BALLARD would rather not have them given to the court.

The New York Office should advise Mr. KING that Mr. BALLARD will be in New York City next Wednesday, 9/21/66 at approximately 10:30 A.M. and if Mr. KING desires, Mr. BALLARD will stop by his office for consultation on this matter.

LEADS

THE NEW YORK OFFICE

Will furnish the original letter of Mr. BALLARD and the items described above to Mr. ROBERT L. KING, Assistant United States

Ph file 65-4372

Attorney.

If Mr. KING desires to consult with Mr. BALLARD, New York should advise this office prior to 9/21 in order that Mr. BALLARD can be informed that he is to meet with Mr. KING, Wednesday, 9/21/66 when next BALLARD will be in New York City on business.

* * * * * *

With regard to the 22-page written statement of GOLD's, a copy of which was furnished by GOLD's attorney to SCHNEIR, NY was advised telephonically on 9/14/66 that this is probably a statement furnished to New York by Philadelphia in Phlet 2/26/54 under the HARRY GOLD file.

LAW OFFICES
PEPPER, HAMILTON & SCHEETZ
FIDELITY-PHILADELPHIA TRUST BUILDING
123 SOUTH BROAD STREET
PHILADELPHIA, PA. 19109

September 15, 1966

Mr. Robert L. King
Assistant United States Attorney
United States Attorney's Office
Southern District of New York
United States Court House
Foley Square
New York, New York 10007

RE: Morton Sobell vs. United States of America
66 Civil
1328

Dear Mr. King:

In 1961 Walter and Miriam Schneir came to Mr. John D.M. Hamilton and myself, Court appointed counsel for Harry Gold, and requested permission to listen to recordings which Mr. Hamilton and I had made of our conversations with Mr. Gold prior to his sentencing in Philadelphia in 1950. Mr. and Mrs. Schneir stated that they were working on a definitive book on atomic espionage and that they felt that "a full and fair portrait of Harry Gold will only be possible" if the requested material was made available to them.

Mr. and Mrs. Schneir indicated to us that they had already done extensive research, but that they felt that listening to the tapes would give them the essential feel for their subject that makes a book come alive and that they hoped "more public awareness of Gold's case may make his release more likely and, certainly, the more biographic information we have about Gold the more sympathetically we can portray him."

Summarizing the representations which the Schneirs had made to us respecting their motives, Mr. Hamilton and I left to Harry Gold the decision as to whether the Soundscriber discs which had been made of our prison interviews should be turned over to the Schneirs so they might listen to them. Mr. Gold advised us to make the discs available to the Schneirs and arrangements were made for the authors to listen to the discs in a Philadelphia hotel as they were played on a Soundscriber machine which we loaned to them.

101-2483-1663

ENCLOSURE

The result of the Schneirs' efforts was the book published by Doubleday entitled, "Invitation To An Inquest" in which Harry Gold is portrayed in a manner that is scarcely sympathetic. On the assumption that the general thrust and content of "Invitation To An Inquest" is familiar to you, I will not enumerate the scurrilous references to our client which are spread across its pages.

You have informed me that without authorization from us and (to the best of my recollection) without our knowledge the Schneirs not only listened to the Soundscriber discs but surreptitiously made tape recordings thereof which are presently in the hands of the counsel for Morton Sobell who have requested the Court to listen to the tapes in its consideration of the above captioned proceedings. You have further informed me that the Court has taken this feature of the case under advisement.

I wish to state unequivocally the position of Harry Gold as well as Mr. Hamilton and myself that the limited permission given to the Schneirs to listen to the discs in preparing their manuscript has been flagrantly violated and that there was no intention at any time to waive the privileged character of this material to such an extent that it would become admissible in judicial proceedings involving Morton Sobell. If, however, the Court should disagree with this position, we are not at all satisfied that the tapes which the Schneirs made are true and correct and full reproductions of the original discs and we would prefer that the Court listen to the original discs rather than the tape recordings made thereof.

Accordingly, we are handing this letter and what we believe to be all of the Soundscriber discs of our pre-sentencing interviews with Harry Gold and certain hand-written notes made by Mr. Hamilton and myself at that time to Mr. Silverthorn of the Federal Bureau of Investigation with the express understanding that this material from our files is to be used only in accordance with orders of the Court in the above proceedings and is thereafter to be returned to the undersigned. The discs are contained in six Soundscriber Disc Filers and there are a total of forty-four discs delivered herewith.

Very truly yours,

Augustus S. Ballard

Augustus S. Ballard

Receipt of original letter and material referred to therein is hereby acknowledged.

Charles Silverthorn
Special Agent, Federal Bureau of Investigati

P.S. Eight discs, marked SP 1 through 14 probably do not relate to prison interviews and should, therefore, be returned.

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

FBI

Date: 9/19/66

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

Via AIRTEL _____ (Priority)

TO: DIRECTOR, FBI (101-2483)

FROM: SAC, NEW YORK (100-37158)

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

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 12/10/86 BY 3642 Just-Doe

Re Philadelphia airtel, dated 9/15/66.

The original of the letter from Attorney AUGUSTUS S. BALLARD to AUSA ROBERT L. KING, SDNY, together with Sound Scriber disks of pre-sentence interviews of HARRY GOLD with his attorneys, were personally delivered to AUSA KING by SA PHILIP F. DONEGAN on 9/16/66.

On 9/19/66, AUSA KING advised that over the weekend he had listened to a portion of the above mentioned recorded interviews. He stated that from the portion he has reviewed, he cannot see where this information would be unfavorable to the government or where it would be especially helpful to the defense of the subject. He mentioned that the 6/3/45 meeting of GOLD with GREENGLASS in Albuquerque is described in some detail by GOLD, although GOLD did not mention the jello box cover or the verbal recognition signal utilized.

4 Bureau (RM)
(1 - 65-57449) (HARRY GOLD)
3 - Philadelphia (65-4372)
(1 - 65-4307) (HARRY GOLD)
1 - New York (65-15324) (HARRY GOLD)
1 - New York

EX-103
REC-62 101-2483-1664
SEP 20 1966

PFD:pas
(11)

SOVIET SECTION

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

62 SEP 26 1966

UNRECORDED COPY FILED IN 65-57449

KING stated that he conferred by telephone today with defense counsel MARSHALL PERLIN at which time he advised PERLIN of the contents of the letter from Attorney AUGUSTUS S. BALLARD. KING advised PERLIN that since there is a question of whether or not the privileged character of GOLD's interviews with his attorneys had been waived, he believes that he and PERLIN should confer with USDJ WEINFELD on this point.

PERLIN indicated that this would be satisfactory with him. KING stated he is presently attempting to arrange such a conference with Judge WEINFELD.

Regarding the intended visit of Mr. BALLARD to New York City on 9/21/66, AUSA KING advised that he would like to personally confer with Mr. BALLARD regarding this matter. He also stated that he would probably call Mr. BALLARD on 9/20/66.

However, for the information of Philadelphia, AUSA ROBERT L. KING, can be reached through the office of the United States Attorney, SDNY, Room 417, U.S. Court House, Foley Square, New York City. His private telephone number is 264-6425.

KING advised confidentially that he believes Judge WEINFELD might be distrubed when he learns not only how the recordings of GOLD were obtained, but how the present defense motion misrepresents these recordings.

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

FBI

Date: 9/20/66

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

Via AIRTEL (Priority)

TO: DIRECTOR, FBI (101-2483)

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

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

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 12/10/86 BY 3042 fwt-dle

ReNYairtel, 9/19/66.

AUSA ROBERT L. KING advised 9/20/66, that on this date he and defense attorney MARSHALL PERLIN conferred with USDJ EDWARD WEINFELD, SDNY, regarding the recorded pre-trial conversations of HARRY GOLD with his attorneys.

KING stated he made available to Judge WEINFELD the letter to him from GOLD's attorneys, dated 9/15/66, and expressed the indignation expressed by them for the manner in which defense attorneys for subject obtained the above recordings.

Judge WEINFELD indicated there could be no matter of privilege regarding these recordings since they had been previously made available to the FBI. The judge upbraided PERLIN, however, for not indicating in open court how the recordings in his possession had been obtained. PERLIN replied that he had been furnished this material by WALTER SCHNEIR and was not familiar with the circumstances surrounding which they had been obtained.

EX-103

REC 54 101-2483-1665

4 - BUREAU (RM) 1 0rtd
(1 - 65-57449)(HARRY GOLD)
2 - PHILADELPHIA (Info)(RM)
(1 - 65-4307)(HARRY GOLD)
1 - NY65-15324 (HARRY GOLD)
1 - NY 100-37158

cc: Mick

PFD:mfd (7331)
(10)

19 SEP 21 1966

SOVIET SECTION

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

PERLIN stated he is presently in the process of having the tapes in his possession transcribed. Upon completion, a copy will be provided to the USA for comparison with the original recordings, before being furnished to the court.

Judge WEINFELD stated that upon completion of this he would review and consider both the transcription and portions of the original recordings.

For information of Philadelphia, KING advised that he would personally contact AUGUSTUS S. BALLARD today regarding BALLARD's visit to NYC on 9/21/66.

Above is furnished for info of Bureau.

4-3 (Rev. 1-19-65)

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

DECODED COPY

☐ AIRGRAM ☐ CABLEGRAM ☐ RADIO ☒ TELETYPE

6:05 PM MST URGENT 9-17-66 TMO

TO DIRECTOR

FROM ALBUQUERQUE 180100

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 5-1-87 BY 3042 PWT/als

MORTON SOBELL, ESPIONAGE - RUSSIA.

RE BUREAU TEL SEPTEMBER 16 LAST.

LUCILLE BEALL AND LINDA HUGHES, BOTH CASHIER - CLERKS FOR HILTON HOTEL, ALBUQUERQUE, NM, IN JUNE, 1945, INDIVIDUALLY ADVISED IT WAS POLICY OF HOTEL HILTON, ALBUQUERQUE, IN 1945 THAT HOTEL EMPLOYEE PREPARING GUEST REGISTRATION CARDS USE HIS OR HER OWN INITIALS AND NOT SHIFT ROOM CLERK INITIALS IN PREPARING THESE CARDS. BOTH STATED THAT DURING PERTINENT MONTHS OF JUNE AND SEPTEMBER, 1945, ONLY ONE SHIFT ROOM CLERK ON DUTY PER SHIFT; HOWEVER, SHOULD THIS EMPLOYEE BE BUSY THE CASHIER - CLERK ON DUTY WOULD REGISTER A GUEST.

REC 53 101-24483-1666

AM COPY TO NEW YORK.

12 SEP 23 1966

EX-102

RECEIVED 9:17 PM AKJ

cc - Mr. Lee

FBI

If the intelligence contained in the above message is to be disseminated outside the Bureau, it is suggested that it be suitably paraphrased in order to protect the Bureau's cryptographic systems.

Left to Mr. Walter Yeagley 9/21/66 assistant attorney General JPZ:dal

Mr. J. Walter Yeagley
Assistant Attorney General

September 21, 1966

REC 53
Director, FBI
1 - Mr. Lee

101-2483-1666

MORTON SOBELL
ESPIONAGE - RUSSIA

EX-102

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 6/1/87 BY 3042 PWT/CLS

Reference is made to our letter dated September 14, 1966.

On September 17, 1966, Lucille Beall and Linda Hughes both advised that they had been cashier-clerks for the Hilton Hotel, Albuquerque, New Mexico, in June, 1945. They stated the policy of the hotel in 1945 was that the employee who prepared the guest registration card would use his or her own initials and not the initials of the room clerk in charge of the shift. Both advised that during the months of June and September, 1945, only one room clerk was on duty per shift, but if this employee was busy, the cashier-clerk on duty would register a guest.

The above is furnished in response to the telephonic request made by Departmental Attorney Paul Vincent to Special Agent William A. Branigan of this Bureau on September 16, 1966.

101-2483

JPL:sal
(4)

NOTE: In connection with the current motion of the subject to set aside his conviction, we are attempting to obtain complete information concerning the registration card prepared for Harry Gold at the Hilton Hotel on June 3, 1945. The defense is claiming this card was a forgery prepared by the Bureau. The initials on the registration cards for June 3 and September 19, 1945, were made by the same person; however, they appear to be different.

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MAILED 11
SEP 21 1966
FBI/COMM-FBI

67 SEP 28 1966

MAIL ROOM ☐ TELETYPE UNIT ☐

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

FBI

Date: 9/14/66

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

Via AIRTEL _____ (Priority)

TO: DIRECTOR, FBI (101-2483)
(ATT: FBI LABORATORY)

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

~~515677~~

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

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

ReNYairtel, 9/13/66.

Enclosed herewith for the Bureau are 1 copy each of the following documents, mentioned in referenced airtel, which were furnished by AUSA ROBERT L. KING, SDNY, on 9/13/66:

Affidavit of MARSHALL PERLIN, dated 9/11/66, attaching a copy of the report of handwriting and document expert ELIZABETH MC CARTHY, Boston, Mass.

Affidavit of MALCOLM SHARP, Professor of Law, University of New Mexico, dated 9/11/66.

Affidavit of HAROLD CLAYTON UREY, La Jolla, Calif., dated 9/9/66.

4 - BUREAU (Encl. 5)(RM) ENCLOSURE
(1 - FBI Laboratory)(Encl. 3)
2 - ALBUQUERQUE (Encl. 2)(AM RM)
2 - MIAMI (Encl. 2)(AM RM)
2 - BOSTON (RM)
1 - NY 100-37158

REC-52

101-2483-1667

PFD:mfd (#331)
(13)

16 SEP 15 1966

SEVENTH

SOVIET SECTION

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

Affidavit of WALTER SCHNEIR dated 9/9/66.

A 70 page "Memorandum in Support of Petition" filed by attorneys for subject.

Also enclosed for the FBI Laboratory is a Photostat of Hilton Hotel registration card 65841, dated 6/3/45, in the name of HARRY GOLD (govt. trial exhibit #16) and a Photostat of Hilton Hotel Registration card 78783, dated 9/19/45, which are submitted for the FBI Laboratory. Also submitted with these cards for the benefit of the Laboratory is an extra copy of the above-mentioned affidavit of MARSHALL PERLIN, dated 9/11/66, containing a copy of the report of handwriting expert ELIZABETH MC CARTHY, who examined the enclosed Photostats on 9/7/66.

AUSA KING advised that at the hearing which was held in USDC, SDNY, on 9/12/66, concerning subject's motion to have his conviction set aside, the defense claimed that govt. trial exhibit #16, which was a Photostat of the Hilton Hotel registration card for HARRY GOLD, dated 6/3/45, was a forged document, manufactured by the FBI in order to falsely prove that HARRY GOLD was in Albuquerque, New Mexico, on 6/3/45. In an effort to prove this theory, the defense submitted to the court the above-mentioned report of ELIZABETH MC CARTHY. The court has reserved decision on subject's motion.

AUSA KING advised that because of the above, he is of the opinion that the court might order a further evidenciary hearing limited to the authenticity of the above 6/3/45 registration card. KING has therefore requested, upon advice of the Department, that the above-mentioned 6/3/45 registration card be forwarded to the FBI Laboratory together with the card for 9/19/45. It is noted that the card of 9/19/45 was not utilized as evidence in the trial of subject, but was retained by the USA, SDNY, along with govt. exhibit 16, and was made available to the defense for handwriting examination in the office of the USA on 9/7/66.

U

NY 100-37158

Request of the FBI Laboratory

In regard to the above, AUSA KING has requested that the FBI Laboratory examine the two enclosed cards (the originals of which have been destroyed) for any conclusions or statements they may be able to make which would aid him in refuting the report made by ELIZABETH MC CARTHY in behalf of the defense. KING stated he would desire, if possible, for the Laboratory to comment on the possibility of anyone being able from examination of a Photostat to ascertain if there had been erasures on the original document. Also, if this is not considered possible by document experts, would the Laboratory be in a position to furnish an expert, if needed in future, who could state this fact.

KING also requested whether or not it would be possible for the Laboratory to comment, for the benefit of the USA only, on their impression of the MC CARTHY report. KING advised that in connection with the MC CARTHY report, it is realized that the known specimens of the handwriting of Mrs. LARRY A. HOCKINSON (who was hotel clerk AK who apparently prepared the cards) is in the possession of subject's defense attorneys. KING stated he does not desire to request this material at this time from defense attorneys as to do so would concede that the government thought a factual issue existed, which might guarantee an evidenciary hearing for SOBELL on this issue.

LEADS OTHER OFFICES

With regard to the above-mentioned HARRY GOLD hotel registration cards, AUSA KING has requested information as to whether, during previous investigation, the following questions were ever asked of former Hilton Hotel clerk ANNA KINDERKNECHT (now apparently Mrs. LARRY A. HOCKINSON):

1. Was she ever asked if the writing (date, room #, Rate, and clerk's initials) on the bottom line of cards dated 6/3/45 and 9/19/45 was her writing?

2. In the event she cannot recall these specific cards, does she have recollection of any occasions when the numerals on the last line of the card might have been written by someone else, yet she might have initialed the card as the clerk?

3. Has she ever been shown copies of both cards and asked whether or not she believes the initials "AK" on each card were written by her?

KING stated that in the event the above information does not already appear in FBI Files, he desires that she be interviewed at this time to answer these questions.

LEAD

ALBUQUERQUE

At Albuquerque, New Mexico

Enclosed herewith for the information and assistance of that office is a Photostat of each of the above-mentioned Hilton Hotel registration cards which were furnished by AUSA KING on 9/13/66.

Albuquerque is requested to review its file to determine if the above information desired by AUSA KING is contained in the file. If the information is not available, it is requested that the former ANNA KINDERKNECHT be interviewed and the enclosed Photostat displayed to her.

It is noted that since information furnished by subject's defense attorneys reflects that ANNA KINDERKNECHT is now Mrs. LARRY A. HOCKINSON, and was last known to be residing in Miami, Florida, if it is necessary that she be interviewed, Albuquerque is requested to so advise the Miami Office.

MIAMI

At Miami, Florida

A copy of this communication together with a Photostat of hotel registration cards for 6/3/45 and 9/19/45 is being furnished for information and assistance of that office. Miami should refer to the lead for Albuquerque, and should hold in abeyance interview of Mrs. HOCKINSON until requested by Albuquerque.

BOSTON

At Boston, Mass.

AUSA KING has requested to know whether the FBI has any derogatory or subversive information regarding the above-mentioned handwriting and document expert, ELIZABETH MC CARTHY, 40 Court Street, Boston. An affidavit by defense attorneys states she has regularly examined documents in behalf of the Boston PD and the Mass. State Police.

Files of the NYO contain several references to MC CARTHY, but no extensive information regarding her.

Boston is requested to review its files for any pertinent derogatory or subversive information regarding ELIZABETH MC CARTHY, preferably any public source material which could be made available for the assistance of the USA.

If Boston is in possession of such information which would reflect on the background or activities of MC CARTHY, it is requested that a synopsis of such be furnished in form of LHM for the benefit of the USA. If a LHM is prepared, a copy should also be furnished to the Bureau for the Department.

It is requested that FBI Laboratory and auxiliary offices handle these requests with utmost expeditiousness.

9/21/66

1 - Mr. Lee

Airtel

To: SAC, New York (100-37158)

From: Director, FBI (105-2483) — 1667

MORTON SOBELL
ESP - R

REC- 52 (ST-103) 1

Reurairtel 9/19/66 and Bureau airtel 9/20/66.

Resubmit all attachments of your airtel of 9/14/66 except the photostats of the hotel registration cards.

JPL:sal
(4)

NOTE: New York in its airtel 9/14/66 submitted affidavits of Marshall Perlin, Malcolm Sharp, Harold Urey, and Walter Scheir as well as a 70-page "Memorandum in Support of Petition" filed by subject's attorneys along with photostats of registration cards of Harry Gold at Hilton Hotel, Albuquerque, and requested Lab examine ~~or~~ the photostats. By teletype 9/15/66 New York requested Lab to hold examination in abeyance. By airtel 9/20/66 the Lab returned all attachments to New York without examination by Division Five.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 5-1-87 BY 3042/PLT/ds

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Tele. Room
Holmes
Gandy

MAILED 12
SEP 2 1966
COMM-FBI

MAIL ROOM ☑ TELETYPE UNIT ☐

1 - Mr. Griffith
1 - Mr. Cadigan
1 - Mr. J. P. Lee
Room 822 9th & D

9/20/66

airtel

To: SAC, New York (100-37158)

From: Director, FBI (101-2483) -1667

Re: Morton Sobell REC-52
ESP - R

MB

CO: New York

Reurairtel 9/14/66 and your teletype 9/15/66.

Since retel 9/15/66 indicates investigation regarding the "6345 registration card of Harry Gold" should be held in abeyance pending some indication from USDC as to whether an evidentiary hearing might be requested on the authenticity of this hotel card, no examination was made and the evidence submitted with your airtel 9/14/66 is returned herewith. If future examination is requested, this material should be returned to the Laboratory.

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 5-1-87 BY 302 RWT/CB

JCC:GK (6)

MAILED 3
SEP 20 1966
COMM-FBI

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822(9+D)

4-3 (Rev. 1-27-66)

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Gandy

☐ AIRGRAM ☐ CABLEGRAM ☐ RADIO ☒ TELETYPE

10:49 AM URGENT 9-21-66 RON

TO DIRECTOR

FROM ALBUQUERQUE 211630

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 5-1-87 BY 3012 PWP/ks

MORTON SOBELL, ESPIONAGE-RUSSIA.

RE NEW YORK AIRTEL SEPTEMBER 14, BUREAU TEL SEPTEMBER 16, AND ALBUQUERQUE TEL SEPTEMBER 17 LAST.

PERTINENT ALBUQUERQUE FILES REVIEWED AND NO RECORD LOCATED OF ANSWERS TO PROPOSED QUESTIONS OF ANNA HOCKINSON, NEE KINDERKNECHT, RE HARRY GOLD REGISTRATION CARDS, HILTON HOTEL, JUNE AND SEPTEMBER 1945; AGNES HULEN, ROOM REGISTRATION CLERK, AND WANDA MC MULLAN, AUDITING OFFICE, HILTON HOTEL, ALBUQUERQUE, IN JUNE 1945, INDIVIDUALLY ADVISED SEPTEMBER 20, 1966, THAT HOTEL EMPLOYEES PREPARING GUEST REGISTRATION CARDS USE THEIR OWN INITIALS IN PREPARING THESE CARDS. BOTH STATED THAT DURING MONTHS JUNE AND SEPTEMBER 1945, THERE WAS ONLY ONE SHIFT ROOM CLERK ON DUTY PER SHIFT; HOWEVER, SHOULD THIS EMPLOYEE BE BUSY THE CASHIER-CLERK ON DUTY, TELEPHONE OPERATOR ON DUTY OR ANY OTHER AVAILABLE HOTEL EMPLOYEE WOULD REGISTER A GUEST BUT WOULD USE HIS OR HER OWN INITIALS.

AM COPIES TO NEW YORK AND MIAMI. RM.

101-2483-1668

RECEIVED: 1:59 PM JER

REC 32

12 SEP 28 1966

cc Lee

If the intelligence contained in the above message is to be disseminated outside the Bureau, it is suggested that it be suitably paraphrased in order to protect the Bureau's cryptographic systems.

Ref Mr. D. Walter Gregory 9/26/66

Mr. J. Walter Yeagley
Assistant Attorney General

September 26, 1966

Director, FBI

1 - Mr. Lee

MORTON SOBELL
ESPIONAGE - RUSSIA

Reference is made to our letter dated September 21, 1966.

A review of the files of our Albuquerque Office does not show that Mrs. Larry A. Hockinson, nee Anna Kinderknecht, was questioned at any time in the past concerning the writing on the Harry Gold registration cards of the Hilton Hotel, Albuquerque, New Mexico, for June 3 and September 19, 1945. She was never asked if she had prepared both these cards or if she felt that anyone else could have written the other items on the cards and she initialed the cards. No current interview of her has been conducted.

Agnes Mulen, room-registration clerk, and Wanda McMullan of the auditing office of the Hilton Hotel in June, 1945, individually advised when interviewed on September 20, 1966, that hotel employees preparing guest registration cards use their own initials in preparing the cards. Both stated that during the months of June and September, 1945, there was only one room clerk on duty per shift; however, if this employee was busy, any other available hotel employee would register a guest but would use his or her own initials.

The above additional information is furnished in response to the telephonic request made by Departmental Attorney Paul Vincent to Special Agent William A. Branigan of this Bureau on September 16, 1966.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 5-1-87 BY 3012 RWT/ALS

REC 32 101-2483 - 1668

MAILED 19
SEP 26 1966
COMM-FBI

JPL:sal
(4)

NOTE: In connection with the current motion of the subject to set aside his conviction, we are attempting to obtain complete information about the registration cards prepared for Harry Gold at the Hilton Hotel on June 3, 1945. The defense is claiming the Bureau forged this card and claim that the initials on the registration cards for June 3 and September 19, 1945, were not made by the same person. The initials on these cards appear to be different. The Department does not want to have Mrs. Hockinson interviewed

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

61 OCT 4 1966

MAIL ROOM ☐ TELETYPE UNIT ☐

NOTE CONTINUED PAGE TWO.

Mr. J. Walter Yeagley

NOTE CONTINUED:

at this time since the defense has indicated that she can be called as a witness to testify concerning her initials on the cards.

Laboratory Transmittal Form
7-72

b7C

FBI LABORATORY

FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D. C.

To: SAC, New York (100-37158) Date: October 5, 1966

Re: MORTON SOBELL
ESP - R

CO: New York

J. Edgar Hoover
John Edgar Hoover, Director

FBI File No. 101-2483
Lab. No. D-516704 AX MO

Examination requested by: New York

Reference: Airtel 9/28/66

Examination requested: Document

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 5-1-87 BY 3042 AUT/CLS

Remarks:

For your investigative assistance in this matter, it is noted that in order to make an adequate examination of the handwriting on the last line of Exhibits 1 and 2, it will be necessary to submit comparable dictated known writings obtained from the hotel employees. Normal handwriting samples and some written with a backhand slant would be of value for comparison purposes. Obtaining such known handwriting samples should be undertaken when deemed advisable by your office. In this connection, it might be well to inquire of the hotel employees whether anyone employee would have occasion to use the initials "aK" as room clerk if those initials were not their own. For example, would an assistant room clerk use the initials of the room clerk if she were filling in at the desk for the room clerk.

For possible assistance, photographs made from the origina registration cards are being transmitted to your office herewith.

MAILED 19
OCT 6 1966
COMM-FBI

ENCLOSURE ATTACHED

REC-6 101-2483

19 OCT 6 1966

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

Enclosures (4) (Photographs of Exhibits 1 and 2, 2 Lab report)

JCC:GH (4)

54 OCT 12 1966

ADMINISTRATIVE PAGE

MAIL ROOM TELETYPE UNIT

822(9+1

7-1b

REPORT
of the

FBI LABORATORY

FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D. C.

To: FBI, New York (100-[illegible]158) Date: October 1, 1966
FBI File No. 101-[illegible]483 - 1669
Re: MORTON SOBELL Lab. No. D-516704 JK HO
MP - 2

Specimens received

Exhibit 1 Photocopy of Hilton Hotel registration card #65841, dated 8/3/45, in the name "Harry Gold"

Exhibit 2 Photocopy of Hilton Hotel registration card #78783, dated 9/19/45, in the name "Harry Gold"

ALSO SUBMITTED: Photocopy of affidavit of MARSHALL PERLIN, dated 9/11/66

Result of examination:

It is not possible to state whether the last lines of handwriting on Exhibits 1 and 2 were made by the same person or by different persons because there is not a sufficient number of comparable letters and letter combinations present to permit an adequate handwriting comparison. It is noted that the last line of handwriting on Exhibit 2 was executed in a rather formal style of writing whereas the last line of handwriting on Exhibit 1 shows a more careless or rapid style of writing.

It may be possible to detect erasures, alterations or eradications on an original document from examination of a photostat of the document if the alterations, erasures or eradications were very poorly done causing dark smudges or if fragments of the original writing were still visible and would therefore be reproduced in the photostat.

The initials of the clerk on Exhibit 1 appear to be "aK." To read these initials as "aH" or "ah" would require an unusual manner of writing the "H" or "h"

The Laboratory has good clear photographs of the original registration cards represented by Exhibit 1 and 2 that were used in reviewing the report of Mrs. McCarthy contained in the affidavit listed above as "ALSO SUBMITTED." Many of the characteristics referred to by her do not appear in the Laboratory photographs.

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

(continued on next page)

JCC: [illegible] (4)

MAIL ROOM ☐ TELETYPE UNIT ☐

For the most part, the things she makes reference to are the normal markings of a document that has been handled extensively plus the markings that do not appear in the Laboratory photographs. Such markings on the photostats are probably due to dirty photostat equipment or to processing defects.

Set forth below are comments pertaining to the various "findings" listed in Mrs. McCarthy's report. The same reference numbers are used;

Item 1a appears to be a piece of lint or fiber, not showing in the Laboratory photograph. This is also true of 1b and 1d.

Item 1c appears in the Laboratory photograph and looks like dirt or a piece of foreign substance embedded in the paper. This is also true of item 1g.

Item 1e appears to be a slight smudge on the original card.

Item 1f appears to be a pen drag or ink smear on the original card.

Item 1h is not in the Laboratory photograph and may be dirt on the photostat equipment.

Item 2a appears to be water spots or areas of incomplete development and is not on the Laboratory photograph.

Item 2b appears to be a rubber stamp drag mark and is on the Laboratory photograph.

Item 2c is on the Laboratory photograph and appears to be an ink smear or ink transfer.

Item 2d is not on the Laboratory photograph and appears to be a processing smear.

None of the characteristics described by Mrs. McCarthy that appear in the Laboratory photographs could be interpreted as erasures, alterations or eradications. It should be pointed out that an alteration or eradication, if done well enough, might not show in a good photograph and certainly would not show in a photostat.

(continued on next page)

The body and last line of Exhibit 2 are written in ink. The body of Exhibit 1 was written in ink and the last line was written in pencil. Normally it is possible to compare a photostat of pencil writing with original known writing in ink.

The submitted evidence will be temporarily retained in the laboratory pending further advice from your office concerning the disposition of this evidence.

7-2

FEDERAL BUREAU OF INVESTIGATION
UNITED STATES DEPARTMENT OF JUSTICE

Recorded 9/30/66
DAS

NO LAB FILE

Laboratory Work Sheet

Re: MORTON SOBELL
ESP - R
OO:NY

File # 101-2483 - 1669
Lab. # D-516704 AX

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 5.1.87 BY 3042/AWT/CLS

Examination requested by: New York (100-37158) A. 9/28/66

Examination requested: Document

Date received: 9/29,30/66

Result of Examination:

Examination by: b7C [redacted]

① It is not possible to state whether hw on last lines of Ex 1 & 2 were made by the same person or different persons because there is not a suff. no. of comp letters & letter combos present to make an adequate hw comparison. It is noted Ex 2 (last line) was executed in a rather formal style of writing whereas last line Ex 1 shows a more careless & rapid style of writing. [In order to make an adeq. exam it was is suggested that dict hw be obtained from hotel employees in wording Ex 1 & 2 (last lines). Normal samples & some written with backhand slant would be of value for comparison purposes. Obtaining such hw should be undertaken when deemed feasible by your office.

② See Shaney's wksheet

③ The initials of the clerk on Ex #1 appear to be "a K". To read these initials as "a H" or "a h" would require an unusual manner of writing a "H" or "h" [In this connection inquire hotel practice of someone other than room clerk "a K" initialing in here name]

Specimens submitted for examination

④ See Shaney's wksheet

Exhibit 1 Photocopy of Hilton Hotel registration card #65841, dated 6/3/45, in the name "Harry Gold"

Exhibit 2 Photocopy of Hilton Hotel registratioh card #78783, dated 9/19/45, in the name "Harry Gold"

Also Submitted : Photocopy of affidavit of MARSHALL PERLIN, dated 9/11/66

⑤ Body & last line Ex 2 in ink. Body Ex 1 in ink, last line in pencil.

⑥ Normally it is possible to compare a photostat of pencil writing with original known writings in pen & ink

⑦ Ex 1 & 2 ret'd temporarily [also clear fotos made from orig cards are available for any future hw exams requested. "Also sub" retained]

Lab rpt 10/5/66 JC:GH

send foto

Ex #1 6-3-45 1001 1.50 day rate ak
identif 8pNI

① Last line
No conclusion due to
lack comp writings
obtainable both normal
style + backhand.
in pencil + ink

Ex 2 9-19-45 521 2.00 ak

②
As initiated above lack
comparable wording
precludes any opinion as
to whether last line both
exhibits by one or two persons.

③ Shaneyfelt

④ Initials of clerk on Ex 1 appear to be "ak". To read as "aH" or "ah"
would require an unusual manner of writing "H" or "h"

⑤ Shaneyfelt

⑥ Body of Ex 1 ~~written~~ ~~appears~~ in ink. last line pencil.
" " Ex 2 written " " " also last line also ~~blind~~ ink) note flow loads at various places
Normally it is possible to compare a photostat of pencil writing with original pen
& ink writings.

2-2

FEDERAL BUREAU OF INVESTIGATION
UNITED STATES DEPARTMENT OF JUSTICE

Recorded 9/30/66
DAS

NO LAB FILE

Laboratory Work Sheet

Re: MORTON SOBELL
ESP - R
CO:NY

File # 101-2483 -1669
Lab. # D-516704 AX HC

Examination requested by: New York (100-37158) A. 9/28/66

Examination requested: Document

Date received: [redacted]

Result of Examination:

Examination by: [redacted]

Re item: 3 - It may be possible to detect erasures, alterations or eradications on an original document from examination of a photostat of the document if the alterations etc were very ~~carelessly~~ poorly done causing dark smudges or if fragments of the original writing were still visible and would therefore be reproduced in the photostat.

Specimens submitted for examination

Exhibit 1 Photocopy of Hilton Hotel registration card #65861, dated 6/3/45, in the name "Harry Gold"

Exhibit 2 Photocopy of Hilton Hotel registration card #78783, dated 9/19/45, in the name "Harry Gold"

Also Submitted : Photocopy of affidavit of MARSHALL PERLIN, dated 9/11/66

Re item 5: - The Lab has good clear photographs of the original reg. cards Ex #1 and Ex #2 which were used in reviewing the ~~Testimony~~ report of

Many
Mrs McCarthy. ~~The majority~~ of the characteristics referred to by her do not appear in the laboratory photographs. For the most part the things she makes reference to are the normal markings of a document that has been handled extensively plus the same markings that ~~would~~ do not appear in the laboratory photographs that are probably due to dirty photostat equipment or processing defects. Item 1a appears to be a piece of kind of fiber not showing in the lab photo. This is also true of 1b and 1d. Item 1c appears ~~to be~~ in the lab photo and looks like dirt or a piece of foreign substance embedded in the paper. This is also true of item 1g. Item 1e appears to be a slight smudge on the original card. Item 1f appears to be a pen drag or ink smear on the original card. Item 1h is not in the lab photos and may be photostat equipment

Item 2a appears to be water spots or or areas of incomplete development and are not on the lab photos. Item 2b appears to be a rubber stamp drag marks and is on the lab photo. Item 2c is on the lab photo and appears to be an ink smear or ink transfer. Item 2d is not on the lab photos and appears to be a processing smear.

None of the characteristics described by Mrs McCarthy that appear in the laboratory photographs could be interpreted as erasures, alterations or eradications. It should be pointed out that an alteration or ~~eradication~~ eradication if done well enough might not show in a good photograph and certainly would not show in a photostat.

9-30-66

Recorded [illegible]
[illegible]

FEDERAL BUREAU OF INVESTIGATION
UNITED STATES DEPARTMENT OF JUSTICE

[illegible] LAB FILE

Laboratory Work Sheet

Re: [illegible] SOBELL
[illegible] - R
OO:NY

File # 101-2483 101-2483-1669
Lab. # D-516708 AX

New York (100-[illegible]) A. [illegible]

Examination requested by:

Examination requested: Document

Date received: [redacted]

Result of Examination:

Examination by:

Rtnd to NY airtel 4/14/67 w/enc
(Request of NY tel call 4/13/67)

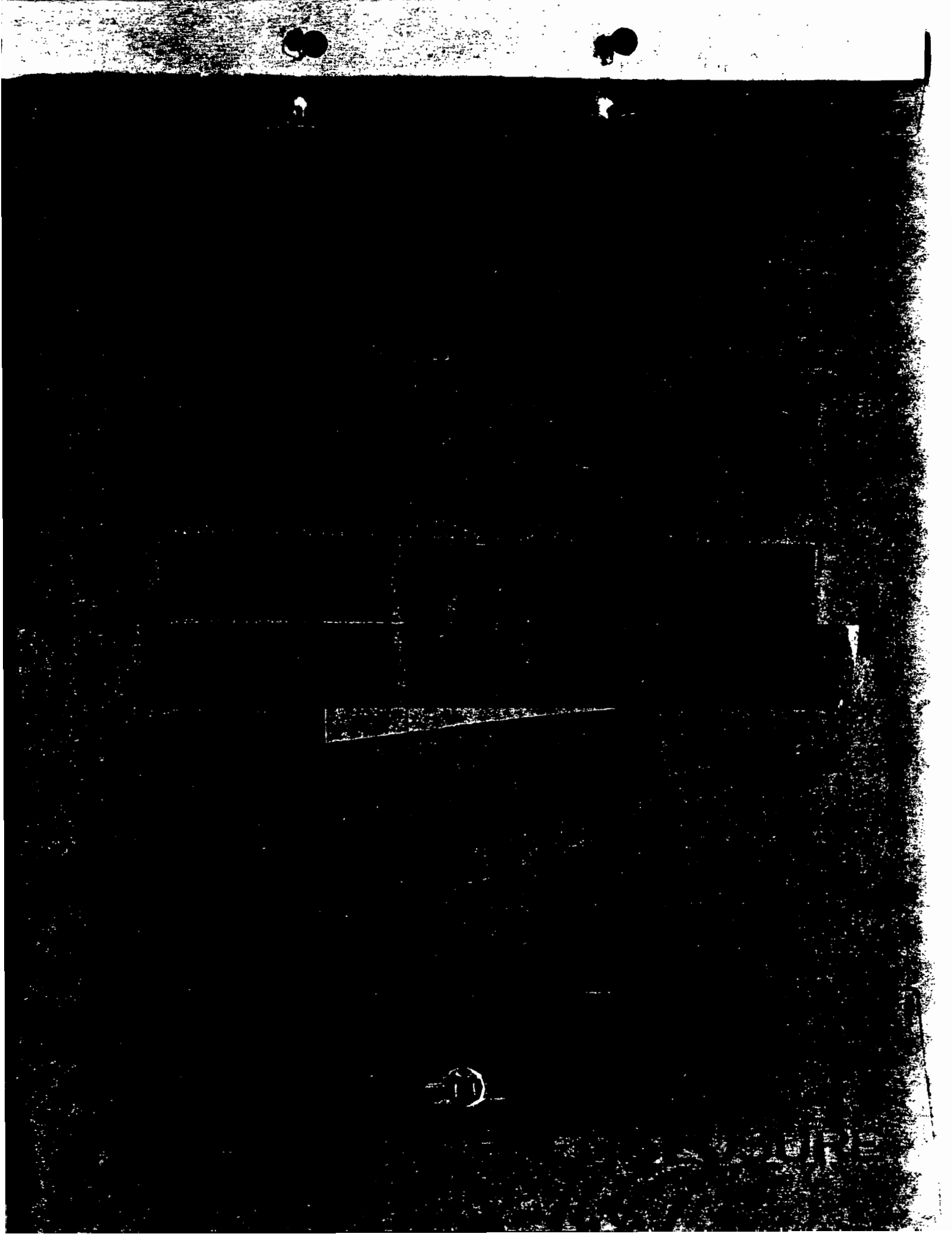
Specimens submitted for examination

Exhibit 1 Photocopy of Hilton Hotel registration card #[illegible], dated [illegible]/45, in the name "Harry Gold"

Exhibit 2 Photocopy of Hilton Hotel registration card #[illegible], dated [illegible]/45, in the name "Harry Gold"

Also Submitted : Photocopy of affidavit of MARSHALL PERLIN, dated [illegible]

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 5/87 BY 3042 RWT/cls



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MORTON SOBELL, Petitioner, -against- UNITED STATES OF AMERICA, Respondent.	66 Civ. 1328 AFFIDAVIT

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MARSHALL PERLIN, being duly sworn, deposes and says:

That he is one of the attorneys for the petitioner Morton Sobell and submits this affidavit in support of the Amended Petition before this Court.

Attached hereto is a report of Elizabeth McCarthy, an attorney, a handwriting and document expert of long experience and excellent standing, making certain findings and rendering opinions as to Government Exhibit 16, a photostat copy of an alleged hotel registration card of the Hilton Hotel, Albuquerque, New Mexico, bearing card No. 65841, dated on its face June 3rd, 1945, and having a time date stamp of June 4th on its reverse side; and a photostat of an alleged registration card of the Hilton Hotel, not introduced into evidence, card No. 78783, dated September 19, 1945; both cards bearing the name "Harry Gold."

Mrs. McCarthy has regularly examined questioned documents in behalf of the Boston police, the Massachusetts

State Police and various parties in both criminal and civil proceedings and has testified in connection therewith.

The report substantiates the allegations in the petition that Government Exhibit 16 is a photostat of a forged document.

Deponent has in his possession the tape recordings of pre-trial statements made by Harry Gold to his attorneys as well as the various other documents itemized in the affidavit of Walter and Miriam Schneir, sworn to the 19th day of August, 1966, and is prepared to submit those portions thereof as are relevant to the instant petition.

Marshall Perlin

Sworn to before me this
11th day of September, 1966.

Elizabeth McCarthy

HANDWRITING AND DOCUMENT EXPERT

40 COURT STREET
BOSTON 8, MASSACHUSETTS

TELEPHONES:
LAFAYETTE 3-2959
CAPITOL 7-8330

September 9, 1966

To:
Marshall Perlin, Esquire
36 West 44th Street
New York, New York 10036

R E P O R T

This reports on my detailed microscopic examination at the office of the United States Attorney in the United States District Courthouse, Foley Square, New York on September 7, 1966 of photostatic copies of two hotel registration cards of Hilton Hotel, Albuquerque, New Mexico, which are as follows:

1. Government's Exhibit 16, card No. 65841, dated 6/3/45, having a time date stamp of June 4 on its

reverse side, for Room 1001, bearing the handwriting:

"Harry Gold
6723 Kindred St., Phila. 24, Pa.
Terry & Siebert"

2. Card No. 78783 dated 9-19-45, for Room 521, bearing in handwriting below:

"Harry Gold
5132 Bouden st. Philadelphia 24
A. (?) A. Laboratories, New York City"

F I N D I N G S

I

I find erasures in a number of places and evidence of writing other than the present writing, which has been eradicated, on both of these cards. These are the following:

(1) Government Exhibit 16, Card No. 65841

(a) An erasure and the top of a letter can be seen over the second r in Harry.

(b) Over and around the name of the street "Kindred" are markings which appear to be erased writing characters, and there is a very apparent small down-stroke at the baseline of writing where the small e ends and the connecting stroke swings over to the d.

(c) Over the next word on the same line "St" there are dots which appear to be parts of removed letters.

(d) On the third printed line above the printed word "OFFICE" is a very evident? erased hieroglyphic which looks like a combination of capitals;- a group of initials--possibly beginning with an M, N or W and ending with a long curved down-stroke.

(e) An erasure smudge and underwriting appears under the "til" of the word until on the third last printed line, and the writing at this point is irregular. This often happens when the paper fibers and calendering are disturbed by an erasure and the area is subsequently overwritten.

(f) There are extra dots before the period after the letter p of p.M.

(g) There are signs of erased writing over the period which follows the letter M of p.M.

(h) Above the printed line at the lower right corner dots which may be parts of erased letters are found.

(2) Card No. 78783

(a) Below the printed word Hotel is a distinct smudge.

(b) Above the words Bouden (or Borden) st. to the right of the rubber stamp there is evidence of an erasure, and there are erased outlines which extend down below this line of writing into the space above the letters bor of Laboratories on the succeeding line.

(c) There is an extra stroke and what appears to be an apparent smudge under the t of Laboratories.

(d) There is an indentation or a groove after the number of the room (521) in the second printed block. This might be a long figure like a 7 or 9.

II

This reports on my comparison of writing of Mrs. Larry A. Hockinson, who was Anna Kinderknecht, on various standards submitted by you, with writing, initials and figures on the two Hilton Hotel registration cards. In this connection I have had writing of Mrs. Hockinson on:

Photostat of marriage certificate No. 36773 Book 62, Page 36773 for records of County of Bernalillo, State of New Mexico, dated September 23, 1952;

Registered mail receipt No. 223927 dated 4/18/61;

Letter to Mrs. Walter Schneir of April 20, 1961 and envelope addressed to her postmarked at Miami, Florida on April 21, 1961, 6:30 p.m.

Manila 6½ x 9½ envelope postmarked in Miami May 1, 3:30 p.m., year illegible, addressed to Mrs. Walter Schneir;

Letter addressed to Mr. and Mrs. Walter Schneir dated October 7, 1965 and envelope addressed to them postmarked at Miami, Florida 1A, October 7 1965.

OPINION:

A. It is my opinion that Mrs. Larry A. Hockinson wrote none of the following figures and writing on Card No. 65841, Government's Exhibit 16:

"6-3-45 1001 1^{50} day rate ak
until 8 p.M."

B. It is my further opinion that Mrs. Larry A. Hockinson wrote the following line of figures and initials on Card No. 78783:

"9-19-45 521 $5.^{00}$ ak"

III

I have previously reported on certain aspects of these two Hilton Hotel registration cards, namely, on June 21, 1961. My examinations then were made from much

dimmer, more poorly focused photostats than were the government photostats of these cards which I have had an opportunity to examine this week on September 7. This dimness may have been caused by the fact that the previous photostats were photostats of photostats whereas the present ones were made from the originals. Some of the phenomena I have mentioned above in these photostatic copies, of course, would be much more apparent if I could examine the original cards.

Respectfully submitted

Elizabeth McCarthy

Handwriting and Document Expert

em/cc

-36 (Rev. 5-22-64)

FBI

Date: 9/22/66

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

Via AIRTEL (Priority)

TO: DIRECTOR, FBI (101-2483)

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

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

ReBuairtel, 9/21/66.

Enclosed herewith for the Bureau are the 5 attachments described in NYairtel, 9/14/66, which were returned to NY by Buairtel, 9/20/66.

ENCLOSURE

[redacted] ATTACHED

"ENCL. BEHIND FILE"

(3) - BUREAU (Encl. 5)(RM)
1 - NY

[redacted]

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 5.1.87 BY 3042 RWJ/CLS

PFD:mfd (#331)
(6)

REC-58 101-2483-1470

EX-114

12 SEP 23 1966

SOVIET SECTION

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MORTON SOBELL, Petitioner,	:	
- v -	:	66 Civ. 1328
UNITED STATES OF AMERICA, Respondent.	:	

MEMORANDUM IN SUPPORT OF PETITION

MARSHALL PERLIN
WILLIAM M. KUNSTLER
ARTHUR KINOY
MALCOLM SHARP
BENJAMIN DREYFUS
VERN COUNTRYMAN

Attorneys for Petitioner

MARSHALL PERLIN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MORTON SOBELL, Petitioner,	:	
- v -	:	66 Civ. 1328
UNITED STATES OF AMERICA, Respondent.	:	

MEMORANDUM IN SUPPORT OF PETITION

The petitioner, along with his co-defendants, Julius and Ethel Rosenberg, was tried and convicted upon an indictment charging that they had conspired with others to transmit to the Soviet Union information purporting to relate to the national defense of the United States. Named as co-conspirators were Ruth and David Greenglass, Harry Gold, Anatoli A. Yakolev and divers other persons said to be unknown. In the course of the trial, one of the others "said to be unknown" was stated to be Klaus Fuchs. Following the conviction, petitioner was sentenced to thirty years imprisonment. His co-defendants, Julius and Ethel

Rosenberg, were sentenced to death, and executed on June 19, 1953.

THE AMENDED PETITION

The amended petition* alleges that the conviction of petitioner and his co-defendants was obtained by deliberately planned fraud perpetrated by the government. The petition asks that petitioner be afforded an evidentiary hearing to establish facts alleged, which warrant the granting of the ultimate relief sought.

The government has failed to controvert by any affidavit or pleading any of the allegations of the petition establishing the fraud. As the sole pleading before the court is the petition, its factual allegations must be taken as true for the purpose of the application.

For the convenience of the court, we shall set forth in summary fashion the grounds for relief alleged in the petition (see pet., par. 8).** The government:

(a) knowingly, by false statements and evidence and by other deceptive and fraudulent devices,

---

*Hereinafter referred to as "the petition."

**The above number refers to the numbered paragraph of the petition. The record references in the petition are to the printed transcript of the trial record rather than to the typewritten transcript. The references made in the government's brief are to the typewritten transcript.

falsely established in the minds of the trial court and jury that the Russians had obtained "the very bomb itself" (R. 183), referring to the atomic bomb; that Greenglass had passed "the atomic bomb secret" (R. 1551-1552) as a result of the alleged conspiracy, and by these means convinced the trial judge and jury that the defendants put "in the hands of the Russians the A-bomb years before our best scientists predicted..." (R. 1614);

(b) knowingly presented false, misleading and deceptive evidence supporting such false claim, in the form of Government Exhibit 8 and its description by Greenglass, and by presenting John A. Derry, an employee of the Atomic Energy Commission as an "expert" witness to confirm, "authenticate" and establish the "substantial accuracy" of the aforesaid false testimony as a description and cross-section of the atomic bomb dropped at Nagasaki in August, 1945, although the government knew that Derry did not possess the expertise it proclaimed for him and that such testimony of Derry was in fact false;

(c) knowingly and falsely represented and

imported to the court, to the jury and to the defendants and their counsel that Government Exhibit 8 and the testimony relating thereto had the imprimatur of authenticity and accuracy of the Atomic Energy Commission and the Joint Congressional Committee on Atomic Energy and that it represented the very "secret" and "principle" of the atomic bomb;

(d) for the purpose of establishing in the minds of the court, jury and defense that the representations and statements made or to be made by the government, and the testimony to be given by its witnesses, had been and would be approved and verified by world-renowned scientists associated with the development of the atomic bomb, the government represented and caused to be read to the jury on the voir dire a list of its witnesses, falsely and fraudulently including Dr. Harold C. Urey and Dr. J. Robert Oppenheimer, and thus falsely and fraudulently implying that they had expressed to the government their agreement with the prosecution's claims and willingness to testify against the defendants. Such deliberately

created false background coupled with the announced presence at the government counsel table of representatives of the Atomic Energy Commission and the Joint Congressional Committee on Atomic Energy clothed the testimony of Greenglass and Derry in the eyes of the court and jury, with a false and fictitious ~~court~~ clothe of full scientific authenticity, accuracy and approval;

(e) knowingly destroyed and caused and consciously permitted to be destroyed evidence which would have impeached and refuted knowingly false testimony given against the petitioner and his co-defendants;

(f) presented and vouched for the credibility of one of its main and indispensable witnesses, Harry Gold, a proved and admitted pathological liar and perjurer, and permitted him to give false and perjurious testimony on the trial, and knowingly suppressed evidence in its possession which would have established the false, perjured and contrived nature of such testimony, and further that said false, perjured and contrived testimony was prepared by Gold in collaboration

with the government, all of which was unknown to the defense at that time.

(g) knowingly presented false evidence through the testimony of Greenglass and Gold describing an alleged meeting between them on June 3, 1945 in Albuquerque, New Mexico, and knowingly introduced a false and forged exhibit in the course of the trial to corroborate such false testimony;

(h) knowingly suppressed and continued to suppress evidence known to it, but not known to petitioner and his counsel during the course of the trial or prior post-trial collateral proceedings which would have impeached and refuted testimony and evidence given against petitioner and co-defendants.

The above described devices and methods to effectuate the fraud deceived counsel for petitioner and his co-defendants and caused them to rely upon the false statements and representations and the false claims made by the government in open court before the jury, and deceived them into believing that Government Exhibit 8, the testimony of Greenglass describing it, and of Derry authenticating it as an "expert," encompassed "the secret of the atom bomb," the cross-section of "the bomb itself," and that its public

disclosure would endanger the national security. Defense counsel were also deceived by the government's fraud to believe that there had been a June 3, 1945 meeting between Gold and Greenglass, accepting the government's false representation that a photostat adduced by it was a true copy of a hotel registration card made and kept in the regular course of business. Thus, as a result of the government's fraud, the authenticity of Government Exhibit 8 and its description, as well as their significance, were not challenged, and Derry's alleged expertise and opinion were accepted, and the Greenglass-Gold meeting was not disputed, although the government knew all of such evidence to be false.

As such purported "facts," falsely and fraudulently established, tended to corroborate the government's proof of the existence of the conspiracy charges in the indictment and were calculated to bolster the false testimony of Greenglass relating thereto, the jury and court were thereby induced to believe the entire testimony of Greenglass, as to the existence of such conspiracy, as well as that of Elitcher that both Rosenberg and petitioner participated therein. As a consequence, the testimony denying the conspiracy, and the assertions of innocence on the part of the petitioner and his co-defendants were rejected by the jury.

The Passage of the "Secret of the Bomb"

In the course of the trial, the alleged passage of secret information was focused upon the supposed meeting between Gold and Greenglass on June 3, 1943 in Albuquerque, New Mexico, and information allegedly given Rosenberg in September, 1945. The government not only knowingly permitted Greenglass and Gold to give perjured testimony to establish that such meeting had occurred, but also false corroborated it by a forged document, Government Exhibit 16, the alleged photostat of an "original" registration card of the Hotel Hilton said to have been signed by Gold on June 3, 1945. At the alleged June 3, 1945 meeting, Greenglass is said to have transmitted sketches of a metallic mold used to shape flat lenses, Government Exhibits 6 and 7.

The very "secret" of the atom bomb, the basic principle of the weapon itself, was said by the government to be contained in the sketch drawn by Greenglass (Government Exhibit 8) and in Greenglass' description which was allegedly given to the Rosenbergs in September of 1945.

Prior to reaching "the very secret of the bomb itself," the government called Greenglass to the stand and had him identify and describe Government Exhibits 2, 6 and 7, which are rather primitive drawings of a flat type lens

mold and a sketch of an experimental set-up for studying a cylindrical implosion . His testimony was then interrupted and Dr. Koski took the stand and testified concerning such exhibits. Dr. Koski did not testify in any respect with reference to Government Exhibit 8. Instead, Dr. Koski was excused, Greenglass was recalled, and only then was Exhibit 8 introduced. The government dared not ask Dr. Koski to "authenticate" Government Exhibit 8, since he would have had to point out its crude errors, omissions and mis-descriptions.

Greenglass then gave his description of the "secret" of the bomb after Dr. Koski had left. The government stated that the Greenglass material had been declassified solely for the purpose of the trial, and falsely added that it was to be reclassified after the trial.

The government permitted the false testimony of Greenglass to be given within the most contrived framework of express and implied fraudulent misrepresentations. Counsel for the defense was impelled to conclude that the false representations that the government would prove its claims regarding Exhibit 8 were true, and that they would be verified by the scientists named in the list of witnesses. In this context, thoroughly deceived, counsel for petitioner's co-defendants asked for the impounding of

Government Exhibit 8 and the Greenglass description of it even before it was offered.

After the passage of several days, the government called a representative of the Atomic Energy Commission, John A. Derry, and falsely held him out to be an expert--which the government knew he was not. The government elicited false testimony, which has never been corrected to this day, that Derry was an expert knowledgeable in all the technical details of the construction, composition and operation of the bomb. He was called, and the jury was so told, for the purpose of authenticating and establishing the accuracy of the Greenglass testimony, that the sketch was in essence the Nagasaki bomb and contained the basic componentsand principles of the operation of that bomb. (But see the affidavits of Dr. Morrison, Dr. Linschitz and Dr. Urey, and the affidavit of Walter Schneir.)

Derry testified that he knew every detail of the construction of the atomic weapon; that he knew what went into it, and that he knew it in 1945 and in 1951. Derry stated that from the sketch one could perceive the actual construction of the bomb and that it was similar to the bomb dropped at Nagasaki. (R. 910-911) The government elicited such testimony knowing it was false. The

witness was himself a representative of the government.

Derry's stature was further enhanced in the minds of the jury when the court stated that it was necessary that the jury:

> "on a subject as technical as this, and a subject on which there is so little knowledge outside of the technical field to have the help of an expert." (R. 909)

The affidavits of Dr. Morrison and Dr. Linschitz eloquently establish the indisputable facts set forth in the petition relating to the Derry-Greenglass testimony. The government has not controverted a single statement contained in these affidavits. (See also the affidavit of Dr. Urey.) These affidavits establish the falsity of the testimony of Derry and Greenglass. The affiants are eminent scientists with unique expertise,--qualities completely lacking in Derry but falsely claimed for him at the trial. There is no conflict of opinion here between experts, as the government would now have us believe. We have, rather, uncontradicted statements of scientific facts in support of the petition.

Without discussing the many principles that were involved in the construction of the atomic bomb, it can categorically be stated that the essential principles were omitted from Exhibit 8 and the Greenglass testimony, and that consequently Greenglass did not in fact transmit

information which would enable anyone to construct an atomic bomb. The essential principles which were omitted by Greenglass include the nature, composition and operation of the nuclear core, its control and containment to initiate a chain reaction of plutonium to achieve an explosion. The essential principle underlying the controlled chain reaction not only involves the "initiator" (beryllium and polonium) but also the very nature of the structure of the plutonium sphere, the size of its internal radius, whether it is hollow or solid, whether the change from sub- to super-criticality is a consequence of change of volume by increasing density or by a change of the very geometrical form of the plutonium. The Greenglass sketch and description are totally devoid of any reference to such essential principles and thus practically worthless.

All these facts must have been known to the government when it created the myth that the secret of the bomb was allegedly stolen by Greenglass. These are serious charges of fraud, supported by substantial allegations of fact which the government has not denied. They mandate a hearing.

The Gold-Greenglass Meeting of June 3, 1945 and Government Exhibit 16

In order to convince the jury of the importance of Greenglass and the material he allegedly passed, and to bolster the story of an alleged June 3, 1945 meeting between Greenglass and Gold, the government sought to insinuate some of the notoriety of Klaus Fuchs, a confessed spy, into this trial. It did so by having Gold describe himself as a common courier for both Greenglass and Fuchs. Coupling the name of Greenglass with that of Fuchs and furnishing Gold, a compliant witness, as the courier for both of them in June, 1945, added credibility to the government's false, contrived evidence of such meeting, and it underscored the enormity of the alleged conspiracy.

Paragraph 66 of the petition sets forth in full the relevant testimony of Gold relating to the contrived June 3rd meeting. Paragraph 67 sets forth the statements of the government vouching for the authenticity of the photostat of the alleged original of the Hotel Hilton registration card. It was upon this representation by the government of authenticity that the defense counsel relied in consenting to its introduction into evidence. (Government Exhibit 16) Interestingly enough, there was no

attempt to introduce Government Exhibit 16 while Gold was on the stand. The government waited some days before offering its "corroborative evidence." The government heavily relied upon the false and perjured testimony of Gold and Greenglass and Government Exhibit 16 relating to the June 3rd meeting. (See paragraphs 69, 70 and 71 of the petition.)

Fuchs never identified Gold as a courier, although Fuchs freely confessed his ~~perjury~~ espionage. Gold was a "self-confessed spy" who had many motivations for cooperating with the government (pet. pars. 72-75). Some documentary evidence had to be contrived to support Gold's confession.

The government claimed to have two "original" registration cards of Gold at the Hotel Hilton at Albuquerque: the original of the photostat introduced into evidence as Government Exhibit 16 dated June 3, 1945; and the other not introduced into evidence dated September 19, 1945. The September 19 card was dated in writing on the front "September 19," and the rear portion bore the same date impressed by a time stamp. The date of acquisition by the FBI was written on the rear thereof, May 23, 1950, along with the initials of several FBI agents.

The alleged original of the September 19th card

is said to have been kept by the Department of Justice until 1960, ten years after its acquisition, and thereafter returned to the Hotel Hilton and destroyed. The alleged original of the June 3rd card introduced into evidence bore a time stamp of June 4, 1945 and contained ~~in~~ no FBI initials or notation as to when it was acquired. The "original" of Government Exhibit 16, the June 3rd card, is said by the Government to have been returned to the Hotel Hilton on August 4, 1951, four months after the judgment of conviction and long prior to the original appeal. The government knew and in fact intended that the "original" June 3rd card when returned to the Hotel Hilton would be destroyed by the hotel. In any event, the "original" of the government exhibit, <u>if such original ever existed,</u> was destroyed shortly after the trial, while the document not used was preserved for ten years.

Why?

It is because the government knew that Government Exhibit 16 was a forged, fabricated document intentionally created to falsely corroborate a non-existent meeting.

In 1961 Walter and Miriam Schneir obtained photostats of the two photostatic copies of the registration cards from the United States Attorney's office for the

Southern District of New York. They also communicated with the hotel clerk who purportedly wrote on both of the registration cards and obtained material containing her handwriting. They thereupon gave the photostats of the photostats, along with some samples of the clerk's handwriting, to Mrs. Elizabeth McCarthy, a noted handwriting and document expert, also an attorney, of Boston, Massachusetts. The hotel clerk's name was, in 1945, Anna Kindernegcht.* In rendering an opinion in 1961, Mrs. McCarthy had "some very real doubts" that Mrs. Hockinson's handwriting was on the June 3, 1945 card." She indicated the difficulty in determining a conclusive opinion from the study of the photostats or photographs given her. She would much prefer to have had an opportunity to examine the originals.

After the filing of the petition, counsel for the petitioner re-examined on two occasions the photostats on file with the court and noted some strange markings or lack of markings and indications of alteration of the "document" of which Government Exhibit 16 was said to be a photostat. Counsel therefore requested Mrs. McCarthy to come to New York and to examine the photo-

*Since that time, Miss Kindernegcht married and is now known as Anna Hockinson.

stats which had never previously been seen by her. Mrs. McCarthy examined these documents on September 7, 1966 at the United States Courthouse in the presence of Robert L. King, an Assistant United States Attorney, Walter Schneir, and Marshall Perlin, one of the counsel for petitioner. The aid of a microscope and other instruments were used in the examination.

As a result of that examination, Mrs. McCarthy has issued a report over her signature which establishes in her expert opinion that the June 3, 1945 "card" was a forgery. She states:

> "It is my opinion that Mrs. Larry A. Hockinson wrote none of the following figures and writing on Card No. 65841, Government's Exhibit 16:
>
> '6-3-45 1001 150 ak
> day rate
> until 8 p.m.'
>
> "It is my further opinion that Mrs. Larry A. Hockinson wrote the following line of figures and initials on Card No. 78783"
>
> '9-19-45 521 5.00 ak'"

Mrs. McCarthy's findings noted that from her examination of Government Exhibit 16 that there were a number of erasures of writings and markings, particularly in the areas near the forged handwriting of the registration clerk.

The government, when it prepared its brief and its previously submitted affidavit, was fully aware of the allegations of the petition that the card was forged, contrived and retroactively created. It has studiously avoided the denial of this very specific factual allegation. If this be disputed, an evidentiary hearing is required.

In its brief, the government makes the rather incredible statement that if it were to contrive a forgery it would have done a better job. In the alternative the government argued that we should have found out about the forgery sooner and, because trial counsel and subsequent counsel did not discover proof of the fraud earlier, the fraudulent conviction should now be immunized from collateral attack. In effect, the government asserts that the petitioner should remain in jail even though his conviction was obtained as a result of fraud.

"The cruelest lies are often told in silence."

In 1961, long after the conviction, Walter and Miriam Schneir obtained pre-trial statements made by Gold to his attorney, as well as numerous other documents which establish not only that the testimony Gold gave in this trial relating to the alleged Gold-Greenglass meeting was false, but also that Gold's perjury was suborned and

and his testimony contrived by the government. Gold was in the custody of the government for approximately two weeks prior to his relating the "story" to his attorney. These pre-trial statements were in fact prepared by Gold and the government prior to his speaking to his attorney. He spoke from notes admittedly based upon his government consultation. The variances between the pre-trial statements given to his attorney and the testimony given at this trial were of no minor or minimal nature. They went to the very heart of the testimony given by Gold in the course of the trial in relation to the alleged June 3rd meeting with Greenglass and all the associated events. All of this was known to the government. The prior statements given by Gold to the government have never been seen. Those portions of his pre-trial statements that have been seen establish perjury on Gold's part, of which the government must have known.

Between the time of Gold's arrest and the time of the trial in March, 1951, fundamental and substantial alterations and additions were made in Gold's "story" to implicate petitioner's co-defendants in the conspiracy, causing the conviction of the petitioner, as well as his co-defendants. (See paragraphs 76 through 90.)

Lest there be confusion, petitioner will present upon the hearing of this petition and upon a new trial, the tapes and documents containing the Gold pre-trial statements to his attorney, as well as other documents and data which support the allegations of the petition. There are many witnesses to be called beyond Gold and Greenglass. There are many agents and representatives of the government who can and will be called to establish the facts, which the government fears and does not deny.

The Impact of the Fraud Upon the Entire Case

The government, by its fraudulent conduct, had impressed upon the jury that Gold, a day after meeting Fuchs for espionage purposes, had registered at the Hotel Hilton on June 3, 1945, and that on that same day Gold and Greenglass had met and information was passed through Gold to the Soviet Union with respect to the atomic bomb. Thus there was independent, oral and documentary corroboration of the Greenglass testimony inevitably resulting in the jury associating him with Fuchs, who was already a self-confessed spy. This thereby substantiated Greenglass' testimony in two vital areas and thus caused the jury to believe the entire testimony of Greenglass without which none of the defendants would have been convicted. It enhanced the stature of Greenglass in the mind of the jury and it grossly exaggerated the importance of the alleged material said to have been passed. The court and jury, as well as the defense, were therefore led to believe that Greenglass had transmitted the secret of the atomic bomb, the very weapon itself, to the Soviet Union and that the statements and claims made by the government in its opening to the jury and repeated in its closing, were true.

Max Elitcher, the one witness who sought to implicate Sobell in the charged conspiracy, testified that the initiator of the conspiracy was Rosenberg and that Rosenberg

had induced Sobell to join the conspiracy and in turn Sobell and Rosenberg induced Elitcher to cooperate.

The Rosenbergs categorically denied the testimony of Greenglass and Elitcher. If the Rosenbergs' testimony had been believed, Elitcher's and Greenglass' testimony would have been rejected by the jury and Sobell could not have been convicted. The fraudulent authentication of Greenglass' testimony tended to deprive the Rosenberg denials of evidentiary weight in the minds of the jury. Hence the fraud complained of in this petition gave to the jury a spurious factual basis for the conviction of the petitioner.

Petitioner need not show, in view of the actual presence of fraud, what the jury would have done absent the fraud. But the scope of the fraud now exposed went to the very question of whether the conspiracy charged ever existed.

Moreover, the fraud had further impact upon this case in that it so deceived counsel for petitioner and the co-defendants as to deprive them of effective means of representing the defendants. They naturally assumed the truthfulness of representations and claims by the government which were, in effect, false and known to the government to be false. Hence they believed that they were to be confronted with competent scientific witnesses such as Drs. Urey and Oppenheimer, when, in fact, the government never intended to call, and could not call, any competent scientist

to be party to its contrived, fraudulent case. The atmosphere created by the government's representations prior to and during the trial made it impossible for counsel to attempt even to seek, let alone obtain, scientific aid from any scientist involved in the atom bomb project and knowledgeable in the field. Any atomic scientist was then legally subject to the control of the Atomic Energy Commission and subject to severe restraints. One having special knowledge of classified material regarding the atomic bomb would have to clear with A.E.C. prior to consultation with defense counsel. And A.E.C. was presumably allied with the prosecution! The very nature of the material involved, that relating to the nature and operation of the atomic bomb, was itself so highly technical, politically sensitive and legally classified as to almost immunize it from challenge by the defense. This the prosecution knew and hence felt free to perpetrate the fraud without challenge.

That the government was willing and anxious to extend and protract the fraud beyond the trial itself is manifest in its statement to the Court of Appeals on the appeal from the judgment of conviction wherein it stated:

> "The description of the material given by Greenglass to the Rosenbergs at this time was secret and demonstrated with substantial accuracy the principle involved in the 1945 atomic bomb (658, 1325, 1328-29). The sketch furnished by Greenglass was a cross-section of the bomb (1335, Exhibit 8). With the descriptive material and

sketch a scientist could proceed with the actual construction of the atomic bomb itself. (1330)"

Page 11 of the Government Brief. [Page references are to typed transcript folios rather than the printed record.]

The Unimpounding of the Atomic Secret

The fraud having been effectively consummated and continued over the years, both petitioner and counsel, who had never seen Government Exhibit 8, assumed that it had the vitally important secret of the bomb encompassed therein. The material remained impounded until April, 1966, (except that in 1959 it was reexamined by the government, unbeknownst to petitioner, and once again sealed). In March of 1966, a motion was made to unseal the material and to make it available to petitioner, counsel and scientific experts. The government consented to the unimpounding under certain terms and conditions -- that counsel and petitioner might see it and that scientists might see it only if their names were given to the government and they signed an agreement to abide by the terms of the order that no information regarding the exhibit would be made public until filed in a court of record in an appropriate proceeding.

It was not until April 29, 1966, that the actual unimpounding took place and a copy of the transcript and

exhibit was made available. */ After the filing of the original petition in this proceeding, Exhibit 8 was duly examined by Drs. Linschitz and Morrison, on notice to the government. Thereafter, on July 25, 1966, petitioner filed a motion to amend the original petition to add a count based on the unimpounded evidence and its misuse by the government. The government opposed leave to amend but Judge Edelstein granted the motion. Thereafter, on July 27, 1966, the government moved to seal the impounded evidence once again on the ground that its unsealing would expose a vital secret. Petitioner's counsel cross-moved to delete any restrictions as to the use of the formerly impounded material and submitted an affidavit in support thereof, including articles from Life and Time magazines, published in 1951 and material obtained from official reports publicly distributed by the Atomic Energy Commission in 1961. The government thereupon moved to impound that affidavit on the alleged ground that it, too, contained "secret information". The government's motion purportedly relied upon correspondence with the Atomic Energy Commission. The government further moved that all proceedings pursuant to §2255 relating to the atomic bomb material in the 1951 trial be held

*/ The original exhibit has not been revealed.

in camera. The government's position was that its applications were designed to defend national security.

A newspaper reporter communicated with Mr. Marshall, Chief Classification Officer of the Atomic Energy Commission and inquired whether the material in question was classified. He was advised that it was not. On the hearing of the motion the government was asked by petitioner's counsel to produce the alleged letter from the Atomic Energy Commission on which its motion was purportedly based and to exhibit it to counsel. The government refused to do so. It characterized the statement in the newspaper that the material was unrestricted as false. In fact, the government's statement was false, an untruth made necessary to continue the myth of the great "secret" of Exhibit 8.

Since Judge Palmieri insisted, in view of the fact that petitioner would not rely upon its representations, that the government would have to prove its case that the material was classified and affected the national security, the government was forced to reverse its position, withdraw its motion, and permit full public disclosure, for the first time in fifteen years, of the material upon which the hoax in the Rosenberg trial was based.

It is interesting to note that the government, in asking at first that the cloak of secrecy be perpetuated, then maintained that it did affect national security but that

the Atomic Energy Commission was without power to reclassify that which had already been declassified. That statement, if true, establishes clearly that the statement made by the government in the course of the trial that the material would be reclassified immediately after the trial, was false. See p. See p. 11, petition supra.

These preliminary proceedings are here related to the Court in view of the new position taken for the first time in sixteen years by the government in its brief, and significantly not by affidavit, that the Greenglass information really was not so terribly important after all. See brief p. 74-75.

Newly Discovered Material and Prior Applications for Post-Trial Relief

The magnitude of the deception of defense counsel is demonstrated by the very nature of the post-trial motion made in November of 1952, seeking to set aside the judgments of conviction. So far as pertinent here, the Rosenbergs maintained that since Government Exhibit 8, among others, was of such accuracy, importance and value and related to the very operation and principles of the atomic weapon itself, and since it encompassed all the information required by the Soviet Union to construct the bomb, they challenged the Greenglass testimony as being perjurious in that it was beyond his competency, his power of recall, to recreate so

learned and graphic a description of the atom bomb without scientific aid and coaching. We now know that Exhibit 8 had no such qualities.

In pressing this motion, then defense counsel did not even ask for the unimpounding of Exhibit 8 for scientific review because he was convinced of its total accuracy and importance. The government knew in that post-trial proceeding that the factual premise of the petition based squarely upon the government's representation of accuracy and significance, had no basis in fact because the government had committed a fraud. Another branch of that motion made in November of 1952 was that much of the theoretical material encompassed in Government Exhibit 8 as well as Government Exhibits 2, 6 and 7 was in the public domain and therefore it had been capriciously classified as secret by the Manhattan Project during time of war and hence its disclosure was not a violation of law.

The November, 1952, application made by petitioner's co-defendants with whom he joined relating to the alleged atomic information passed, was thus premised on a ~~false~~ false hypothesis assumed in reliance upon the government's false representations. On the other hand, the present application is premised upon newly discovered evidence and facts not previously available. This is essentially admitted in the government's brief, but it complains that we should have

discovered the facts, and hence its fraud, sooner and we are now barred from relief.

It should be noted first that there was no evidentiary hearing granted the petitioner or his co-defendants with respect to the November, 1952, application, even as to facts dehors the record. Secondly, the government had facts within its possession at that time which it failed to disclose, when it had an obligation to do so, which, if revealed, would have resulted in a hearing on the merits prior to the execution of the Rosenbergs. Indeed, after the denial of that motion, on the application for reduction of sentence, the government reasserted the fraudulent claim that Greenglass had given the atom bomb to the Soviet Union.

Habeas corpus is in the nature of an equitable proceeding. It ill behooves the government now to complain of another application which was made necessary because of the government's perpetuation of its own fraud and its failure to disclose the facts.

In June of 1953 petitioner's co-defendants, pursuant to Rule 33 of the Federal Rules of Criminal Procedure and §2255, sought relief on the ground of newly discovered evidence relating to a certain console table which had been mentioned on the trial. In addition they there maintained that Greenglass was an habitual liar and that in some statements made to his attorney, Mr. Rogge, he indicated that

some of his statements made to the government concerning the "jello card" were not accurate or that he had no recollection of such an event and that he had no recall of an arrangement for a meeting in Albuquerque, New Mexico. That motion was denied after oral argument without an evidentiary hearing. It is true the showing made at that time was not as extensive as that made in the instant proceeding. Petitioner did not then have the information now presented. It was within the power of the government, indeed it was the government's obligation, to advise the petitioner's co-defendants that Gold, too, as well as Greenglass, had made no reference to a "jello card" in his pre-trial statements to his attorney or to the government until some time after the arrest of Greenglass, and that many other additions had been made to his statement to fabricate the June 3rd meeting for the purposes of the trial. The government is again relying on its own fraud in pleading the prior application in seeking to avoid the evidentiary hearing which the allegations of the present petition warrant and make necessary.

It cannot be disputed that there are new grounds for the relief sought. At no time until the instant application was a motion made for the production of the Gold-Greenglass pre-trial statements and the confession of Fuchs. Never before was the impounded evidence available.

Reference is made to an application made in 1956

concerning the circumstances and characterization of the kidnapping of Morton Sobell from Mexico. It cannot be said, nor indeed is it even argued, that the grounds for relief are the same as those raised in this petition.

The motion made by Sobell pursuant to §2255 in 1962 related to questions of law only, questions not raised here. */

As set forth in the petition, much of the factual support for the present petition has been newly discovered and only recently made available to counsel, such as:

(a) The Gold pre-trial statements and documentary material obtained from his counsel.

(b) The forgery of the June 3rd card.

(c) The unimpounding of Government Exhibit 8 and the Greenglass description. **/

(d) The declassification of various material permitting effective consultation with scientists.

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*/ In the argument before the Court of Appeals the petitioner had maintained that the use of the Fifth Amendment by the prosecution in the cross-examination of Ethel Rosenberg was grossly improper and contrary to the holding of the Supreme Court in Grunewald v. United States, 353 U.S. 391. The government was forced to admit in response to questioning from the Court that in light of Grunewald, upon direct appeal the judgment of Ethel Rosenberg would of necessity be reversed -- a tragic but belated acknowledgment of error. The petitioner failed to convince the Court that the error had substantially prejudiced him.

**/ It must be stressed that the statements made at the trial that the material could be made available to counsel in any subsequent proceeding was itself impounded and not part of the public record of this case.

(e) The scientific data and facts encompassed in the affidavits of Drs. Morrison and Linschitz and the conclusions that can be drawn therefrom.

The difficulty in obtaining all of this material is made manifestly clear in the affidavits submitted by Walter and Miriam Schneir.

The above only tells part of the picture in that we do not here narrate the refusal of the government to disclose facts, its failure to meet its obligations to do so, its resistance to inquiry, its failure to respond to questions and communications and its desire to hide the tragic events resulting in the fraudulent conviction.

THE LAW APPLICABLE TO PROCEEDINGS UNDER 28 U.S.C. 2255

The legal effect of the allegations contained in the petition, particularly as they pertain to the right to an evidentiary hearing, must be considered in the light of the light of the decisive and unequivocal principles established by the courts. It is now beyond cavil that a motion under Sec. 2255 is "exactly commensurate" with that previously available to Federal prisoners by way of habeas corpus. Sanders v. United States, 373 U.S. 1, 14. For all practical purposes, the motion remedy and the writ are one and the same. United States v. Hayman, 342 U.S. 205; Hill v. United States, 368 U.S. 424; Sanders v. United States, supra; Smith v. United States, 270 F. 2d 921; Longsdorf, The Federal Habeas Corpus Acts, Original and Amended, 13 F.R.D. 407, 424 (1953).

Thus, in any consideration of petitioner's right to an evidentiary hearing, we must, as Mr. Justice Brennan so pertinently reminded in Fay v. Noia, 372 U.S. 391, "bear in mind the extraordinary prestige of the Great Writ habeas corpus ad subjiciendum, in Anglo-American jurisprudence: 'the most celebrated writ in the English law'. 3 Blackstone Commentaries, 1929". (at 399-400)

In no area has the "Great Writ" been of more significance than in the very type of case with which this court is now confronted --- namely, one involving an imprisonment of an individual growing directly out of an acute national crisis.* In Noia, Mr. Justice Brennan went directly to the heart of this truism when, after holding that the writ was the most important process known to constitutional law, he stated:

> "...these are not extravagant expressions. Behind them must be discerned the unceasing contest between personal liberty and government oppression. It is no accident that habeas corpus has time and again played a central role in national crises, wherein the claims of order and liberty clash most acutely, not only in England in the Seventeenth century, but also in America from our very beginning, and today. Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's im prisonment: If the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release." (at 400-402)

A. The Right to an Evidentiary Hearing.

The right to an evidentiary hearing in federal habeas corpus proceedings is so fundamental as to require

*/"All the significant statutory changes in the federal writ have been prompted by grave political crises". Fay v. Noia, supra, footnote 9, at 401.

little elaboration here. In Townsend v. Sain, 372 U.S.293, Chief Justice Warren, in pointing out that evidentiary hearings could properly relate to matters encompassed in the files and records of a case as well as those dehors the record, stated:

> "The rule could not be otherwise. The whole history of the writ--its unique development--refutes a construction of federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review. The function of habeas is different. It is to test by way of an original civil proceeding, independent of normal channels of review, the very gravest allegations...simply because detention so obtained is intolerable, the opportunity for redress which presupposes the opportunity to be heard, to argue and present evidence, must never be totally foreclosed...the language of Congress, the history of the writ, the decisions of this court, all make clear that the power of inquiry on federal habeas corpus is plenary. Therefore, where an applicant for a writ of habeas corpus alleges facts, which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew...where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing...either at the time of the trial or in a collateral proceeding." (at 311-312)

This compelling"right to be heard" (Fay v. Noia, supra, at 427) springs into being the moment a petitioner presents "evidence crucial to the adequate consideration of the constitutional claim..." (Townsend v. Sain, supra, at p. 317). With express application to motions under Sec. 2255, it is beyond dispute that the sentencing court has no power to reach a determination without an evidentiary

hearing unless the allegations are so clearly frivolous as to be deemed an abuse of the remedy or they can be conclusively determined from the files and records of the case. See Sanders v. United States, supra; Marchese v. United States, 304 F. 2d 154, vacated and remanded, 374 U.S. 101; Bone v. United States, 305 F. 2d, 722, vacated and remanded, 374 U.S. 503; United States ex rel Smith v. Baldi, 344 U.S. 561 (dissenting opinion); Haier v. United States, 334 F. 2d, 441; United States ex rel Rambert v. State of New York, 358 F. 2d, 715; Machibroda v. United States, 368 U.S. 487.

In Kyle v. United States, 297 F. 2d 507, a second 2255 application by a prisoner who had been convicted of conspiracy to violate the mail fraud laws, was denied by this court without an evidentiary hearing. Despite the fact that petitioner, before argument of his appeal, had served his sentence, a motion by the Government to dismiss the appeal as moot was denied. 288 F. 2d, 440. The basis of the second 2255 application was the alleged suppression or loss by the government of certain correspondence which petitioner claimed to have turned over to it. This claim had been asserted on petitioner's appeal and had constituted one ground of his first 2255 proceeding.

In reversing, the court, through Circuit Judge Friendly, stated that:

-4-

"...a hearing ought to have been granted...[T]rue, the hearing might show that the Government had merely been negligent, perhaps not even that, but it might also show considerably more. Hence it would be premature to consider whether if the testimony were to show only negligence in the handling of material evidence, petitioner would be entitled to relief under Sec. 2255 as Consolidated Laundries held a defendant to be on a motion for a new trial.* (at 511)

See also United States ex rel Almeida v. Baldi, 195 F. 2d 815, cert. den. 345 U.S. 904; United States ex rel Thompson v. Dye, 221 F. 2d 763.

B. The Grounds For Relief

Whether one is seeking relief by way of habeas corpus or 2255, the grounds, all applicable in the instant proceeding, are identical. For present purposes they are as follows:

1. The knowing use by the prosecution of testimony or documentary evidence known by it to be false, fraudulent, perjured or forged.

2. The wilful and deliberate suppression by the prosecution of evidence impeaching its case and favorable to the defendant.

3. False representations made by the prosecution to the court and jury.

4. The failure by the prosecution to correct testimony or documentary evidence which it or any agency of government knows or should know is false, fraudulent, perjured or forged.

For the court's convenience, the legal aspects of each of the above grounds for relief will be discussed separately below.

*/United States v. Consolidated Laundries Corp. 291 F.2d 563.

1. The knowing use by the prosecution of testimony or documentary evidence known by it to be false, fraudulent, perjured or forged.

There is not the remotest shadow of a doubt that proof of the prosecution's knowing use of false, fraudulent, perjured or forged testimony or documentary evidence entitles a petitioner to a vacation of his sentence. In a long, unbroken series of decisions from Mooney v. Holohan, 294 U.S. 103 to the present time, the Supreme Court has consistently affirmed and expanded the principle that the knowing use by the prosecution of false and perjured testimony and forged exhibits, subjects any such conviction and sentence to collateral attack requiring the vacating of the original sentence and judgment.

> "That requirement [due process of law], in safeguarding the liberty of a citizen against deprivation through the action of a state, embodies the fundamental conception of justice which lies at the base of our civil and political institutions. Hebert v. Louisiana, 272 U.S. 312, 316, 317***. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing, if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." (at 112)

See also Brown v. Mississippi, 297 U.S. 278; Hysler v. Florida, 315 U.S. 411; Pyle v. Kansas, 317 U.S. 213; Ex parte Hawk, 321 U.S. 114; White v. Reagan, 324 U.S. 760;

Hawk v. Olson, 326 U.S. 271; Burke v. Georgia, 338 U.S. 941; United States v. Hayman, supra; Price v. Johnston, 344 U.S. 266; Simpson v. Teets, 353 U.S. 926; Napue v. People of the State of Illinois, 360 U.S. 264.

The decisive importance of this principle to the preservation of an ordered system of law was categorically expounded by Mr. Justice Frankfurter in Hysler v. Florida, supra, when he stated:

> "The guides for decision are clear. If a state, whether by the active conduct or the connivance of the prosecution, obtains a conviction through the use of perjured testimony, it violates civilized standards for the trial of guilt or innocence and thereby deprives an accused of liberty without due process of law." (at 413)

In United States ex rel Rohrlich v. Wallack, 251 F. Supp. 1009, this court has, as late as last March, reiterated the right of petitioners who raise the issue of the knowing use of false testimony to a full hearing. Petitioner, a state prisoner, had brought three federal habeas corpus proceedings before the instant one on the ground that the prosecution had knowingly permitted a co-defendant to testify falsely that no promises had been made to him in return for testimony damaging to relator. As Judge Weinfeld stated:

"In view of the serious charge that the prosecution participated in depriving petitioner of his constitutional right to a fair trial, the state courts should be afforded the opportunity to consider and pass upon his claim on the basis of a full record..."

2. The wilful and deliberate suppression by the prosecution of evidence impeaching its case and favorable to the defendant.

As with the knowing use of false, fraudulent, perjured or forged testimony or evidence, the prosecution's suppression of evidence impeaching its case and favorable to petitioner equally renders a conviction and sentence void for want of due process of law. This charge, if sustained at a hearing, would, of course, subject a conviction and sentence to successful collateral attack. See Pyle v. Kansas, supra, where Mr. Justice Murphy held that allegations of:

"Deliberate suppression by those same authorities of evidence favorable to [a defendant]***sufficiently charged a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle [him] to release from his present custody." (at 216)

Only recently, in considering a state conviction for murder, the Supreme Court emphatically reaffirmed the principle that "the suppression by the prosecution of evidence favorable to an accused, upon request, violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the

prosecution." Brady v. State of Maryland, 373 U.S. 83, 104. In commenting on the rationale of this rule, Mr. Justice Douglas said that

> "A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty, helps shape a trial that bears heavily on a defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with the standards of justice, even though, as in the present case, his action is not 'the result of guile'". (at 87-88)

See also Mooney v. Holohan, and cases cited, supra; United States ex rel Almeida v. Baldi, supra; Powell v. Wiman, 287 F. 2d 275.

Only recently, this circuit categorized the failure of a state prosecutor to call two exculpatory witnesses to a robbery as "inconsistent with proper standards of fairness and constituted the judgment of conviction the denial of due process of law." United States v. Wilkins, 362 F. 2d 135, 140. In commenting on this principle, the court, by Circuit Judge Marshall, stated as follows:

> "Recently, and most relevantly, the Supreme Court held that, even though there was no falsehood in the testimony offered at a trial, 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment irrespective of the good or bad faith of the prosecution'. Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196, 10 L. Ed. 2d 215 (1963)." (At 137)

The court was quick to point out that Wilkins was different from Brady in that counsel in the latter case "never requested the disclosure of evidence from the prosecution..." (at 137). However, he held

> "...that such request is not a sine qua non to establish a duty on the prosecution's part. It is important that the Supreme Court's opinion in Brady agree with the Maryland court that the decision in United States ex rel Almeida v. Baldi, 195 F. 2d 815 (3 Cir. 1952) cert. denied, 345 U.S. 904, 73 S. Ct. 639, 97 L. Ed. 1341 (1952), and United States ex rel Thompson v. Dye, 221 F. 2d 763 (3 Cir.), cert denied, sub nomine, Pennsylvania v. United States ex rel Thomoson, 350 U.S. 875, 76 S.Ct. 120, 100 L. Ed. 773 (1955), state the correct constitutional rule regarding the oblication of a prosecutor to disclose exculpatory evidence." (At 137)

The court cited with approval Judge Hastie's concurring opinion in Thompson v. Dye, supra, in which he stated:

> "It seems likely that many situations will arise in which a prosecutor can fairly keep to himself his knowledge of available testimony which he views as mistaken or false. But there are other circumstances in which a prosecutor must, or certainly should, know that even testimony which he honestly disbelieves is of a type or from a source which in all probability would make it very persuasive to a fair-minded jury." (At 769)

In affirming an order sustaining the writ of habeas corpus, the unanimous court observed that its conclusion was "bolstered by many other cases arising in both federal and state courts, which have recognized a duty to disclose material exculpatory evidence as an ingredient of due process"

(At 138) In a carefully reasoned analysis, the court traces the history of non-disclosure by the prosecution from as early as 1941 (Curtis v. Rives, 123 F. 2d 936) through Application of Kapatos (208 F. Supp. 883) in 1962.

The latter case is of particular significance. The withheld testimony was that of a man who heard shots being fired on the street below, looked out and saw two men jump into a car proceeding along the street without lights, and would have tended to support the defendant's claim of innocence. Although this witness appeared before the grand jury, he was neither called to testify at the trial nor was the court or defense counsel informed of his prior testimony. Judge Palmieri, in sustaining a writ of habeas corpus, stated that:

> "The average accused usually does not have the manpower or resources available to the State in the investigation of the crime. Nor does he have access to all of the evidence much of which has usually been removed or obliterated by the time he learns he is to be tried for the crime. In view of this disparity between the investigating powers of the state and the defendant, I do not think it imposes too onerous a burden on the state to disclose the existence of a witness of the significance of Danise in the instant case. At the very least the trial judge should have been made aware of this evidence and a ruling should have been requested by the prosecutor with respect to his duty in the premises. His unilateral decision to keep the evidence undisclosed invited the risk of error." (at 888)

See also United States ex rel Montgomery v. Ragen, 86 F. Supp. 382 and Smallwood v. Warden, Maryland Penitentiary, 205 F. Supp. 325.

In commenting on Kapatos, the court stated that, like Wilkins, "it did not include any elements of proved bad faith or overreaching on the prosecution's part." (At 139) Earlier the court had disposed of one aspect of Woolomes v. Heinze, 198 F. 2d 577, cert.denied 344 U.S. 929, and Application of Landeros, 154 F. Supp. 183, the latter being cited by the government in its brief. These cases, it held, do not stand for the proposition that connivance or actual fraud by the prosecution are essential ingredients of a duty to disclose. "Formulation of the duties in terms of wilful or wrongful conduct would seem only to confuse here, and is not necessary under the governing law as we understand it." (At 139)

The court cited with approval People v. Fisher, 23 Misc. 2d, 391, where the Court of General Sessions, New York County, held that "the suppression or withholding of material evidence by the prosecution which is favorable to a person accused of crime is a violation of due process of law and renders a conviction void." In this connection, see also Fugati v. State, 169 Neb. 434, cert. denied, 363 U.S. 851 and, Note, The Duty of the Prosecutor to Disclose Exculpatory Evidence, 60 Colum. L. Rev. 858.

The court stressed that although the availability of witnesses to the defense through its own investigation was a relevant consideration, it was not ordinarily

determinative. In commenting on the two witnesses whose testimony was suppressed, it concluded as follows:

> "There can be no question that their testimony would have been material. We cannot speculate as to the effect this testimony would have had on the jury if it had an opportunity to hear it. The jury was denied that opportunity by virtue of the prosecution's failure to acquaint defense counsel and the trial judge with the names of the witnesses. In the circumstances of this case, that denial was inconsistent with proper standards of fairness, and constituted the judgment of conviction, a denial of due process of law." (At 140)

In Thompson v. Dye, supra, the prosecutor withheld exculpatory information received by him from one of two arresting officers, while calling the other who presented testimony damaging to defendant. Following this officer's appearance, the prosecutor announced that he "could call a few other police officers who would corroborate what has already been testified to." The defense thereupon made no effort to call the first arresting officer.

As Judge Hastie put it, "the wrong of non-disclosure of obviously significant testimony was compounded by a misleading affirmative statement as to the nature of the available but unused testimony." (at 769) Cf. United States v. Rutkin, 212 F. 2d 641 in which the Third Circuit ordered a hearing to be held on the ground, inter alia, that petitioner had alleged the suppression by the government of a pre-trial statement from a third person impeaching the

chief prosecution witness . "On this ground* also," the court said at 645, "the case must be returned to the district courit for a hearing..." See also Curran v. State of Delaware, 259 F. 2d, 707 and Barbee v. Warden, Maryland Penitentiary, 331 F. 2d 842.

3. False representations made by the prosecution to court and jury.

Charges that the prosecution made false representations to the court and jury in the course of the original proceedings against petitioner would most certainly render a conviction and sentence void for want of due process of law. Mooney v. Holohan, and cases cited supra.** Misrepresentations to a court by a prosecuting official offend against the very heart of a system of impartial administration of justice. As the Supreme Court has definitively pointed out in Berger v. United States, 295 U.S. 78:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case but that justice shall be done. As such he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed he should do so. But, while he may strike

*The first ground was "the knowing use of perjury by the government." (at 644)

**This ground existed long prior to Mooney v. Holohan.

hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."*

See also, Smith v. United States, 223 F. 2d 750; Mesarosh v. United States, 352 U.S. 1.

In Mesarosh, supra, the Solicitor General put it even more strongly:

"If I may say one word more in regard to that [the failure of the defense to move for a new trial], I feel that the obligation of the Government in a situation of this kind reaches far beyond the rights of these particular defendants, and it is its duty to this Court, and to the country, and it is our obligation in a situation of this kind, to try and see that justice is done. *** We may be criticized for being too late, but I think it is never too late, to try to do justice. Having come to the conclusion [that the validity of this testimony may be open to doubt], I think we should come before the courts, whichever one is proper, and try to get a correction of the wrong, if there is one." Fn. 7 (at 18)

Mr. Justice Douglas in Brady v. State of Maryland, supra, put it another way. "An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.'" (at 87)

*See R. 1510-1511, reflecting the prosecutor's awareness of his obligations in this respect.

4. The failure by the prosecution to correct testimony or documentary evidence which it knows or should know is false, fraudulent, perjured or forged.

In Brady v. State of Maryland, supra, Mr. Justice Douglas, in commenting on the statement of the Third Circuit in United States ex rel Almeida v. Baldi, supra, that suppression of evidence favorable to the accused was "itself sufficient to amount to a denial of due process" (at 104), stated as follows:

> "In Napue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217, we extended the test formulated in Mooney v. Holohan when we said: 'the same result obtains when the state, although not soliciting false evidence, allows it to go uncorrected when it appears.' And see Alcorta v. Texas, 355 U.S. 28, 78 S. Ct. 103, 2 L. Ed 2d 9; Wilde v. Wyoming, 362 U.S. 607, 80 S. Ct. 900, 4 L. Ed 2d 985. Cf. Durley v. Mayo, 351 U.S. 277, 285, 76 S. Ct. 806, 811, 100 L.Ed. 1178 (dissenting opinion)."

In Alcorta v. Texas, supra, the defendant was convicted of murder with malice for the fatal stabbing of his wife whom he claimed to have killed when he discovered her kissing one Castilleja late at night in a parked car. Unknown to the defense, Castilleja had previously informed the prosecutor that he had had sexual intercourse with the victim on many occasions. The prosecutor had thereupon advised him that he should not volunteer any information about his intimacy with the dead woman while he was on the

stand but that, if he were specifically asked about it, he was to answer truthfully.

In its per curiam reversal of the denial of the writ of habeas corpus, the Supreme Court stated as follows:

> "Under the general principles laid down by this Court in Mooney v. Holohan, ... and Pyle v. State of Kansas ...petitioner was not accorded due process of law. It cannot seriously be disputed that Castilleja's testimony, taken as a whole, gave the jury the false impression that his relationship with petitioner's wife was nothing more than that of casual friendship. This testimony was elicited by the prosecutor who knew of the illicit intercourse between Castilleja and petitioner's wife. Undoubtedly, Castilleja's testimony was seriously prejudicial to petitioner. It tended squarely to refute his claim that he had adequate cause for a surge of 'sudden passion' in which he killed his wife. If Castilleja's relationship with petitioner's wife had been truthfully portrayed to the jury, it would have, apart from impeaching his credibility, tended to corroborate petitioner's contention that he had found his wife embracing Castilleja. If petitioner's defense had been accepted by the jury, as it might well have been if Castilleja had not been allowed to testify falsely, to the knowledge of the prosecutor, his offense would have been reduced to 'murder without malice' precluding the death penalty now imposed upon him. (at 31 to 32)

C. The Prosecution's Objections to Granting Present Relief Have No Merit.

In order to eliminate the "backing and filling"* which it found so objectionable in federal habeas corpus, from the field of motions under section 2255, the Supreme Court, five weeks after its landmark opinion in Fay v. Noia,

*Fay v. Noia, supra, at 412

supra, decided Sanders v. United States, supra.* In that case, involving a third such motion, the court expressly laid down a series of criteria relating to the breadth, use and function of such motions. They are as follows:

a. The principle of res judicata is inapplicable to 2255 proceedings.

b. No controlling weight may be given to the denial of a prior 2255 application unless the same ground presented in a subsequent application was determined adversely to applicant on the merits.

c. Doubts as to whether two grounds of successive 2255 applications are different or the same should be reso;ved in favor of applicant.

d. Notwithstanding the number of prior applications for 2255 relief, the presentation of a new ground or one that has never before been litigated on the merits clearly entitles an applicant to an evidentiary hearing.

e. In seeking to avoid an evidentiary hearing the government has the burden of showing that there has been an abuse of the motion remedy by the applicant.

f. The court cannot, when facts are presented in a 2255 motion which are outside of the record, deny it on the ground that the files and record of the case conclusively show that an applicant was entitled to no relief.

g. The court has no power to deny a 2255 motion without an evidentiary hearing unless the allegations are so clearly trivial as to be deemed an abuse of the remedy or they can be conclusively determined from the files and record of the case.

As has already been indicated, the principle of res judicata has no applicability whatsoever to 2255 motions. Sanders v. United States, supra. However, even prior to Sanders, it had been uniformly held that "...newness in

*An examination of cases cited by the government in its brief indicates that the overwhelming majority are pre-Sanders.

habeas corpus proceedings has never been limited to new facts; it has always included different legal theory. Price v. Johnston, 334 U.S. 266, 68 S. Ct. 1049, 92 L. Ed. 1356." Smith v. United States, 270 F. 2d, 921, 925-926. See also Green v. United States, 158 F. Supp. 804, (DCD Mass. 1958); affirmed on other grounds 256 F. 2d 483; United States v. Newman, 126 F. Supp. 94; and United States v. Wantland, 199 F. 2d 237.

In Sanders, the Supreme Court reiterated this principle when it stated:

> "By ground we mean simply a sufficient legal basis for granting the relief sought by the applicant... In other words, identical grounds may often be proved by different factual applications. So also, identical grounds may be supported by different legal arguments...or be couched in different language...Should doubts arise in particular cases as to whether two grounds are different or the same, they should be resolved in favor of the applicant." (at 16)

The court also stressed the fact that all prior denials, in order to act as a bar to a new application, must have rested on an adjudication on the merits, thus presuming that grounds previously raised were either conclusively resolved by the files and records of the case or adversely decided upon an evidentiary hearing. But the court was quick to point out that even in the face of a prior evidentiary hearing:

"if factual issues are involved, the applicant is entitled to a new hearing upon showing that the evidentiary hearing at the prior application was not full and fair." (at 16)

However, if a new ground, or one previously raised but not decided on the merits, is advanced by the applicant "...the federal judge surely has the power and, if the ends of justice demand, the duty...to reach the merits." (at 18-19)

In Price v. Johnston, supra, which involved a fourth application for habeas corpus relief, the Court of Appeals for the Ninth Circuit denied a petition raising for the first time a charge of knowing use of false testimony, on the ground that there was no evidence that the knowledge of the fraud was previously unknown to the petitioner. In reversing, Mr. Justice Murphy stated:

"Moreover, the principle has developed that the writ of habeas corpus should be left sufficiently elastic so that a court may, in the exercise of its proper jurisdiction, deal effectively with any and all forms of illegal restraint. The rigidity which is appropriate to ordinary jurisdictional doctrine has not been applied to this writ." (at 283)

The court went on to add that it cannot be assumed that the petitioner had "acquired no new or additional information since the time of the trial or the first habeas corpus proceeding that might indicate fraudulent conduct on the part of the prosecuting attorney." (at 290)

"In the second place, even if it is found that petitioner did have prior knowledge of all the facts concerning the allegation in question, it does not necessarily follow that the fourth petition should

be dismissed without further opportunity to amend the pleading or without holding a hearing. If called upon, petitioner may be able to present adequate reason for not making the allegation earlier, reason which make it fair and just for the trial court to overlook the delay. The primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned. And if for some unjustifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial releif." (at 291)

In Juelich v. United States, 300 F. 2d 381, the trial court refused to entertain a second motion under Sec. 2255 on the ground that it was based on unsubstantiated allegations of physical incompetency made nearly seven years after the trial. In unanimously reversing the Fifth Circuit stated as follows:

"...it is clear that the motion in question here is not one for similar relief within the meaning of the Statute. Thus the judge would have no discretion to refuse to entertain the motion unless he found from the motion and the files and records of the case that it was conclusively shown that appellate was entitled to no relief...The fact that seven years had elapsed since the conviction ro that the only substantiation of the motion was the affidavit of the movant are no bars to consideration of the motion since the Statute specifically says that the motion may be made at any time, and says nothing about substantiation." (at 383)

In essence, the government claims, quite unabashedly, that the petition here is a "clearly frivolous" one. While what is or is not a "clearly frivolous" ground must be decided on a case-to-case basis. As the Supreme Court

stated in Machibroda v. United States, 368 U.S. 487,

> "there will always be marginal cases, and this case is not far from the line. But the specific and detailed factual assertions of the petitioner, while improbable, cannot at this juncture be said to be incredible If the allegations are true, the petitioner is clearly entitled to relief..." (at 495)

This circuit in United States ex rel Rambert v. State of New York, 358 F. 2d 715, in an appeal by a state prisoner from an order denying an application for a writ of habeas corpus without a hearing, held that "if facts are in dispute, the habeas corpus court must hold a hearing if applicant did not receive a full and fair evidentiary hearing in a state court either at the time of the trial or in a collateral proceeding...unless the claims are 'vague, conclusory or palpably incredible'...or 'patently frivolous or false'..." (at 716)

If petitioner raises factual issues dehors the record, a 2255 motion cannot be denied on the grounds that the files and records of the case conclusively show that he is entitled to no relief. Juelich v. United States, supra. In Machibroda v. United States, supra, a federal prisoner's motion based on an allegation that his plea of guilty at trial had been induced by promises made to him by the prosecutor was denied without a hearing, despite the fact that his supporting affidavit set out detailed factual allegations as to meetings with the prosecutor. The govern-

ment in opposing the motion filed, inter alia, an affidavit in opposition which, although conceding one meeting with petitioner, emphatically denied any promises or coercion. In reversing, the Court, by Mr. Justice Potter Stewart, stated:

> "This was not a case where the issues raised by the motion were conclusively determined either by the motion itself or by the 'files and records' in the trial court. The factual allegations contained in the petitioner's motion and affidavit, ... related primarily to purported occurrences outside the courtroom and upon which the record could therefore cast no real light. Nor were the circumstances alleged of a kind that the district judge could completely resolve by drawing upon his own personal knowledge or recollection.
>
> "We cannot agree with the government that a hearing in this case would be futile because of the apparent lack of any eye-witnesses to the occurrences alleged, other than the petitioner himself and the assistant United States attorney. The petitioner's motion and affidavit contain charges which are detailed and specific. It is not unreasonable to suppose that many of the material allegations can either be corroborated or disproved by the visitors' records of the county jail where the petitioner was confined, the mail records of the penitentiary to which he was sent and other such sources. 'Not by the pleadings and the affidavits but by the whole of the testimony must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge. The government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard."

In Stone v. United States, 358 F. 2d 503, a 2255 motion was filed by the petitioner based upon the ground that he was not mentally competent at the time of his plea and

sentencing. Subsequent to the filing of this motion, the district court entered an order denying it without an evidentiary hearing "on the ground that the record conclusively showed that appellant was entitled to no relief." (at 505) Petitioner then filed other 2255 motions each raising the same ground and each being denied in turn as a successive motion for similar relief under the statute. In reversing and remanding for a full evidentiary hearing, the court stated:

> "The petition presents a substantial factual issue... Since we have concluded that no legal bar prevents the resolution of this issue on its merits, we believe -- as the district court would doubtless have agreed had it shared our view of the law -- that the ends of justice would be served by reaching the merits of that issue." (at 508)

The court added that "...since the adequacy of appellant's allegation was not questioned, an evidentiary hearing was required." (at 507) See Trotter v. United States 359 F. 2d 419, in which this court reversed the district court's denial of a petition under Sec. 2255 on the ground that it "did not have before it any reply by the government to the allegations of the petitioner either denying them or dealing with them otherwise." (at 419)*

*Judge Blumenfeld, in a concurring opinion stated, "I would like to make it plain that a hearing is required if the government denies the petitioner's allegations..." (at 420)

As Sanders so clearly points out, the burden is upon the government to plead and prove abuse of process with clarity and particularity (at 11). But in any event, the court there held that a subsequent application under 2255 will be denied only where the ground presented was previously determined adversely to the applicant, the prior determination was on the merits, and the ends of justice would not be served by reaching the merits of a subsequent application. Moreover, all doubts as to whether the grounds asserted in a successive application are different or are the same as those raised in earlier motions "should be resolved in favor of the applicant." (at 16)

As the Sanders court expressly stated:

> "No matter how many prior applications for federal collateral relief a prisoner has made, the principle elaborated in sub part A, supra [successive motions on grounds previously heard and determined] cannot apply if a different ground is presented by the new application. So too it cannot apply if the same ground was earlier presented but not adjudicated on the merits. In either case, full consideration of the merits of the new application can be avoided only if there has been an abuse of the writ for motion remedy; and this the government has the burden of proving." (at 14)