known to petitioner or his present counsel until the successful application made in petitioner's behalf in late April 1966" is simply contrary to the record. Petitioner heard his counsel acquiesce in the motion to impound. He saw the exhibit. He heard the detailed descriptive testimony relating to it. He knew its importance. He heard the court's statement that it would be available to the defense at all times.(50) Nor was the impounded material a forgotten incident. Repeated references were made to it during the trial and in various post-conviction proceedings. Its significance was not lost upon petitioner since that exhibit, together with Exhibits 2, 6 and 7 were the subject of his 1952 section 2255 proceeding. Petitioner has been described by one of his lawyers as "a scientist and holder of a Master's degree. . . . clearthinking and articulate."(51) He

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(50) "The stenographer will read it back to you any time you want it," and ". . . I may say to the defense, for any subsequent proceeding it will be made available." Impounded testimony, p. 4.

(51) Affidavit of Howard N. Meyer in support of Sobell petition, (1952), p. 28.

assist in the preparation of his first petition, as he did in this one. Moreover, the printed record on direct appeal contains a reference to the availability of the impounded testimony.(53) Thus, in addition to petitioner and his trial counsel, who continued to represent him in association with other counsel in several post-conviction proceedings, three of petitioner's present staff of six lawyers, who have represented him as far back as 1956,(54) knew from the printed record that the impounded material was available.

II. THE CLAIMS WITH RESPECT TO EXHIBIT 16 AND TO THE GOLD-GREENGLASS MEETINGS ON JUNE 3, 1945

Harry Gold testified he had been a member of the Soviet espionage system from 1935 to shortly

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(52) Ibid.

(53) Before the impounded testimony was read to Derry, the court stated: "[T]here is to be no transcription made, and your stenographic minutes are to be considered impounded. Of course, if any counsel wants to have it read back for purposes of examination, it may be made available for that purpose." Record, p. 903.

(54) See United States v. Sobell, 142 F. Supp. 515, 517 (S.D.N.Y. 1956).

before his arrest by the Federal Bureau of Investigation in May 1950; that from March 1944 to late December 1946 his superior was Anatoli A. Yakovlev, whom he knew only as John. In May 1945 Yakovlev directed him to meet Klaus Fuchs on the first Saturday in June 1945 (June 2nd) at Santa Fe, New Mexico, and then to proceed to Albuquerque, New Mexico on an important mission. Yakovlev gave him the name of Greenglass with an address on High Street, Albuquerque; also the recognition signal "I come from Julius," a piece of a cardboard box cut irregularly, and $500 cash for Greenglass. The identification pattern, the Greenglasses had previously testified, had been arranged between them and the Rosenbergs in January 1945 in New York City, when Greenglass was on furlough. Gold testified that, as directed, he met Fuchs on June 2, 1945 at Santa Fe and received from him classified information; that he went on to Albuquerque and sought Greenglass at the High Street address, but was told by an old man that the Greenglasses were out for the evening and would be in early the next morning; that he "finally managed" to obtain lodging in the hallway

of a rooming house, and on Sunday morning registered at the Hotel Hilton under his own name; that he went to the High Street address that morning, met the Greenglasses, to whom he introduced himself as "Dave from Pittsburgh," exchanged identification signals, and gave them the envelope containing the $500 cash he had received from Yakovlev. Greenglass told Gold to return that afternoon, as the information was not ready. Upon his return he received from Greenglass an envelope which contained information on the atom bomb (Exhibits 6 and 7). Gold then returned to New York, arriving on June 5, 1945, and delivered to Yakovlev the material received from Greenglass and Fuchs.

The Greenglasses had previously testified to like effect with respect to the June 3 meetings with Gold. Mrs. Greenglass also testified that the next day, June 4, she deposited $400 in an Albuquerque bank.

Neither counsel for the Rosenbergs nor for petitioner cross-examined Gold. Two additional

witnesses testified. Thereupon, at a bench conference, the prosecutor stated he had a photostat of the registration card of Harry Gold at the Hotel Hilton on June 3; that "the original [was] on the way, together with a witness if required"[55]; and also he had testimony as to the bank records; that he wanted to offer a photostat of the registration card as a record regularly kept in the course of business. Defense counsel stated they had no objection. The matter was repeated before the jury, the prosecutor stating, ". . . [T]he government has available a number of witnesses from distant places to establish the authenticity of the records, hotel registration records, bank records."[56] Exhibit 16 was received in evidence under a stipulation that "it was made in the regular course of business by the party whose records it comes from."[57] Thereupon both the face and reverse sides

(55) Record, p. 867.

(56) Id. at 868.

(57) Id. at 869.

were read and exhibited to the jury. At the next trial session a photostat of a ledger sheet of the Albuquerque National Bank, together with a bank credit slip showing a deposit of $400 to the account of Ruth Greenglass, were received in evidence as Exhibit 17.

Up to the filing of the present petition, Gold's testimony of the June 3 events not only has not been challenged, but was accepted. Rosenbergs' counsel, in his summation to the jury stated: "I didn't ask him one question because there is no doubt in my mind that he impressed you as well as impressed everybody that he was telling the absolute truth, the absolute truth."(58)

Now, more than fifteen years after the trial, petitioner charges that there were no June 3 meetings between Gold and the Greenglasses at Albuquerque; that their testimony was perjurious; that upon information and belief the government knew

(58) Record, p. 1479.

their testimony was perjurious; that Gold was not registered at the Hotel Hilton on June 3, 1945; that Exhibit 16 showing Gold's registration at the hotel on June 3 is a forged, fraudulent and after-contrived document; that upon information and belief such false and perjured testimony and the forged and fraudulent exhibit "had been created and contrived by Gold and the government at the inducement and suggestion of the latter." There is not a word of direct evidence to support these serious charges made upon information and belief. Petitioner urges, however, that corrupt prosecution conduct may be inferred from Exhibit 16 itself; from the circumstances of its introduction into evidence; from the fact that allegedly the government, after trial, caused the destruction of the original (not in evidence) of Exhibit 16; and from pretrial statements of Gold which allegedly establish the falsity of his testimony and would have impeached his credibility, which were knowingly suppressed by the government.

The court has examined all the material relied upon by petitioner and finds that his charges

are not sustained, that the contended-for inferences are not warranted; further, that matter now claimed as newly or recently discovered has been known or available to him for many years, some of it as far back as the trial itself.

Exhibit 16

First: The claim that Exhibit 16 is forged rests in large measure upon the opinion of a handwriting expert with respect to certain figures and initials thereon compared with those on another Albuquerque Hilton Hotel registration card dated September 19, 1945. Each contains on its face a signature, Harry Gold, an address and the name of an employer. These appear to be in the same handwriting on each card and evidently no question is raised as to this portion.(59) Below, the following appears on Exhibit 16:

(59) Counsel upon the argument conceded that the Gold signatures on both cards were the same. SM 69.

Arrived	Room	Rate	Clerk	Baggage
6-3-45	1001	1.50 day rate until 8 p.m.	ak.	

The September 19 card contains the following under the corresponding legends:

9-19-45	521	5.00	ak.

Petitioner asserts that the initials "ak." reflect those of Anna Kinderknecht (now Mrs. Larry A. Hockinson), allegedly the room clerk at the Hilton Hotel in June and September 1945. The handwriting expert, based upon standard writings of Mrs. Hockinson, is of the opinion that she wrote the line of figures and initials appearing on the September 19 card, but that she did not write any of the figures or initials on the June 3 card, Exhibit 16.

The fact is that it hardly needed an expert to make this observation. Accepting the expert's opinion, it does not warrant the inference that the June 3 card was not a record kept in the regular course of the Hotel Hilton's business; neither does it warrant

the further inference that the card was fabricated and contrived by the government and Gold.

The card on its face has all the indicia of a registration card kept in the ordinary course of business by the Hotel Hilton; it is an Albuquerque Hilton card, bearing the appropriately printed title and number; the required descriptive information has been written upon it, and it bears the receipt and time stamp of that hotel. Taking as correct the expert's conclusion that the two cards are in different handwriting, it is by no means a reasonable inference that the June 3 card was not kept in the regular course of the business of the Hotel Hilton.(60) The circumstance that at a public and busy hotel(61) the

(60) An affidavit submitted in support of petitioner's application states that the hotel was visited during the course of an investigation "and a number of people who had been employed there in 1945 and/or 1950 were interviewed."

(61) Gold described Albuquerque on June 2-3, 1945 to his lawyer: ". . . The town was literally, as they say, jumping. There was absolutely no room to be had anywhere." Transcript of Tape Recordings, June 14, 1950, Reel 4, p. 53.

same initials appear on the two cards and they and the data as to rate, stay, departure and room number are in different handwriting does not, in one fell swoop, permit the inference that it was "forged"; that the government knew it was forged or contrived its forgery; that Gold did not register at the Hotel Hilton on June 3; that he committed perjury as to meetings that day with the Greenglasses; that David Greenglass and his wife committed perjury in so testifying; that the prosecutor perpetrated a fraud when he stated a witness was on his way with the original to testify that it was kept in the regular and usual course of business; that a grand fraud had been perpetrated by the Federal Bureau of Investigation, the United States Attorney and government witnesses to establish falsely that meetings occurred on June 3 between Gold and the Greenglasses at Albuquerque so as to give credence to Gold's testimony that the day before he had met and received from Klaus Fuchs classified material in order thereby to tax petitioner and his codefendants with the well-publicized activities of Fuchs in the Soviet spy system.

The entire theory of a grand conspiracy is the product of a fertile imagination. The unrestrained hurling of invective, page after page, in the petition does not obscure the lack of evidence. A constant drumfire of vituperation does not establish basic facts which are required before inferences may reasonably be drawn to support charges of fraud and perjury.

Additionally and significantly, the petition is silent as to the absence of any affidavit from Mrs. Hockinson. She is one person still available who can testify with respect to the June 3 card, whether it was kept in the regular course of the hotel's business, whether it is authentic, and the practice with respect to the preparation of registration cards by the hotel clerks. The absence of an affidavit or an explanation for its omission takes on added significance since not only has her whereabouts been known from 1961 to experienced investigators who have interested themselves on behalf of petitioner, but she has cooperated with them; she has submitted

samples of her handwriting to and been in touch with them. Her availability has also been known to petitioner's counsel.

Nor do additional matters to which petitioner adverts warrant the inference that government agents participated and fostered perjury on the part of Gold and Greenglass and manufactured the June 3 registration card. The original of Exhibit 16 was returned by the FBI shortly after the trial to the Hotel Hilton, which allegedly destroyed it in 1957 in accordance with its policy as permitted by the laws of New Mexico. The government is accused of perfidious conduct in not retaining it and is charged with deliberately sending it on to the hotel, knowing that it would be destroyed, with intent thereby to prevent handwriting examination. This contention, so typical of others recklessly made without factual support, falls of its own weight. The original registration card is not the exhibit in evidence. The photostat is Exhibit 16. This has been and still is available for, and indeed has been inspected by, petitioner and his handwriting expert who has

rendered an unequivocal opinion based thereon. Just why it should have been assumed that in 1967, ten years after it had been destroyed in normal routine practice, petitioner would charge the government with fraud based upon the return of the original to the hotel in 1951 is not apparent.

Equally without substance is the contention that the omission from Exhibit 16 of an FBI agent's initials, which appear on most of the other government exhibits, supports the claim that the document is a forgery. Exhibit 17, the bank record of the $400 deposit by Ruth Greenglass on June 4 is also without an agent's initials. Its authenticity has not been challenged.

Great stress is laid upon the fact that Exhibit 16 on its reverse side contains a time stamp, "June 4, 1945," as contrasted with the June 3 date on the face thereof, whereas the September 19 card contains the corresponding date on the reverse side. Both sides of Exhibit 16 were read to the jury. The difference in dates was evident. Just why an inference of corrupt conduct should now flow from this

circumstance is not clear -- any more than from the fact, noted by the handwriting expert, that erasures and smudges appear on both cards.

Petitioner suggests that counsel did not cross-examine Gold in reliance upon the prosecution's statement that the hotel registration card was authentic and that the original was on its way. Apart from the distortion of the prosecution's statement in requesting a stipulation as to the photostat, there is no showing that a witness was not on the way with the original to testify that it was a registration card kept in the regular course of business. But more important, petitioner's suggestions that his counsel did not cross-examine Gold because he was misled is demonstrably false. Gold was still under direct examination on March 15 when the court adjourned for the day. The following morning, when he resumed the witness chair, the prosecutor stated he had no further questions. Thereupon both petitioner's and the Rosenbergs' counsel announced "no cross-examination." Government Exhibit 16 had not yet been offered. First Dr. George Bernhard testified and he was followed

by William Danziger.(62) Not until after they testified was government Exhibit 16 offered and received in evidence.(63) Thus it could not have played the slightest part in the decision not to cross-examine Gold.

Second: Petitioner next claims that Gold committed and the government suborned perjury and suppressed evidence which allegedly establishes Gold's perjury and would have impeached his testimony as to the June 3 incidents. Petitioner relies in the main upon recorded discs of interviews between Gold and his court-assigned counsel; also an extensive statement dated October 11, 1950, after he had pleaded guilty, which Gold sent from prison to his lawyers.(64)

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(62) Id. at 848-867.

(63) Id. at 867-869.

(64) The recorded discs, a complete transcription based upon taped recordings of these, and a transcription of excerpts therefrom were submitted. The October 11, 1950 statement, entitled "The Circumstances Surrounding My Work as a Soviet Agent - A Report" (hereafter cited October 11 Statement), is an amplification of a prior, July 20, 1950, statement. (The July 20 statement was not

The tape recordings and the October 11, 1950 letter to his lawyers were, of course, protected by the lawyer-client privilege, and afford no basis for charges of government suppression of evidence upon the trial assuming for the moment, as petitioner contends, they support his charges of perjury. However, with Gold's consent, the recordings and other statements to his lawyers were delivered to the FBI on October 21, 1953,

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footnote 64 cont'd

submitted.) The October 11 statement contains an account of Gold's motivation in becoming a Russian spy, biographical matter and details of his espionage activities, including references to the June 3, 1945 meetings with the Greenglasses at Albuquerque. In addition to these two items, petitioner relies upon: A 2-page listing by Harry Gold of interviews had with FBI agents during the period May 22, 1950 and July 19, 1950; An 8-page handwritten statement of Harry Gold entitled, "Chronology of Work for the Soviet Union," the first five pages being dated June 15, 1950, the last three pages being dated June 16, 1950; Letter from John D. M. Hamilton to H. M. Harzenstein of the Federal Bureau of Investigation at Philadelphia, turning over thirty-three discs and other matter; a portion of page 6 of a letter of John D. M. Hamilton, dated September 30, 1960, setting forth the hours spent by Gold with the FBI during 1950-1955; A Letter from James V. Bennett, Director of Bureau of Prisons, to John D. M. Hamilton, dated July 11, 1955.

two and a half years after the trial.[65] Petitioner urges the government is chargeable with prior knowledge of the contents of these statements, since he asserts similar statements were made to agents of the FBI, both before and after the appointment of counsel; moreover, he claims that once the government did obtain the lawyer-client statements late in 1953 they should have been made available to petitioner in connection with his post-conviction applications.

The circumstances surrounding those statements are of some importance. Agents of the FBI first interviewed Gold on May 15, 1950, and, as he told his counsel on June 1, from this interview Gold felt they had sufficient information "to convict him, of conspiracy at least, in connection with the Fuchs case."[66] On May 21 he submitted to voluntary custody,

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(65) Certiorari had been denied on October 13, 1952, Rosenberg v. United States, and rehearing denied on November 17, 1952, 344 U.S. 838 and 889.

(66) Transcript of Tape Recordings, June 1, 1950, Reel 1, p. 6.

and on the 22nd and 23rd confessed to espionage activities over an eleven-year period. But, as Gold later wrote, during these first days he sought to limit his confession to that which he thought the FBI already had knowledge of, his relationship with Klaus Fuchs, and to cover up the identities of others with whom he had espionage transactions.(67) In his effort not to inform on others, as he was later to acknowledge to his attorneys, he resorted to lies and evasions, but was aware that "even while endeavoring to cover up . . . I amazedly found myself irresistibly revealing more and more of the true facts."(68) The final decision to make a full and complete confession of his work as a courier in the Soviet spy system was greatly influenced by the fact that his father and brother, to whom he was deeply devoted and who were in disbelief that he was in any way implicated in any

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(67) October 11 Statement, published in 1956 as part of a Senate Internal Security Subcommittee Report, 84th Congress, 2d Session, p. 1083.

(68) Id. at 1084.

crime, were about to mortgage their home and go into debt for his defense.[69] Thereupon, on June 1, 1950, he accepted court-assigned counsel upon condition that he be permitted to tell the entire story to the FBI, and that counsel "must agree to let me plead guilty, because I was."[70]

On June 1 Gold met briefly with his court-appointed counsel. Upon Gold's insistence that he wished to plead guilty, his lawyer emphasized that any hope for leniency required that he not withhold important information from the FBI. Gold thereupon talked with an FBI agent out of counsel's hearing, and counsel's contemporaneous understanding was that Gold gave him "information about several other people . . . who had important places in the picture."[71] Gold's subsequent written statement of October 11, 1950

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(69) Ibid.

(70) Ibid. See also Transcript of Tape Recordings, June 1, 1950, Reel 1, p. 6.

(71) Transcript of Tape Recordings, June 1, 1950, Reel 1, p. 8.

to his lawyer states he, on this occasion, told the agents of the FBI of the events of June 3, 1945 at Albuquerque and the Greenglass' involvement.(72)

Thereafter Gold and his counsel had four recorded interviews in June 1950 and one in August at Holmsburg Prison. At the first, on June 6, Gold's counsel advised him that the purpose of the interviews was to obtain an entire picture so as to present all ameliorating circumstances to the court at the time of sentence. To this end counsel suggested that the interviews "be broken into three sections": first, and to counsel most important, Gold's "life, irrespective of this offense," including his family, education and work, "leaving out all these other matters"; second, the charges and the facts he had given the FBI; and third, his philosophy and motives.(73) The interviews, accordingly, followed this pattern.

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(72) October 11 Statement, op. cit. supra note 67, at 1085.

(73) Transcript of Tape Recordings, June 6, 1950, Reel 1, pp. 15 and 17.

The remainder of the June 6 interview and a portion of the next, June 8, were taken up with matters not here relevant. Midway through the June 8 interview Gold commenced telling "everything, at least in substance, that . . . [he had] told the FBI."(74) [Emphasis supplied.] In the chronological sequence of his espionage activities Gold mentioned the trip to Santa Fe and Albuquerque, New Mexico on June 2 and 3, but elaboration was postponed for the next interview, which took place on June 14, 1950. At this June 14 interview Gold told his attorneys about his trip, at the direction of "John," to Santa Fe and Albuquerque over the weekend of June 2-3, 1945, and of his call on the "GI" in Albuquerque. He recited his unsuccessful efforts on the night of June 2 to contact the Greenglasses; his meeting with them the next morning; a verbal name identification; the afternoon meeting; the receipt of atomic energy information; the delivery of the $500. In substance

(74) Transcript of Tape Recordings, June 8, 1950, Reel 2, Side 2, p. 16.

his statement to his lawyers at the June 14 interview closely parallels his trial testimony. However, certain details to which he testified upon the trial were omitted, and in one instance there is an alleged contradiction. He did not mention the Greenglass name or address,(75) but only referred to the GI and his wife. He did not mention a piece of a cardboard box as the identification signal.(76) He did not mention "Julius" as the recognition signal; he said, "Bob sent me or Benny sent me or John sent me or something like that."(77)

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(75) Although Gold did not then recall the Greenglass name, he was able to direct the FBI to the house where they met, to describe roughly the appearance of both Ruth and David, to recall David was a GI, that Ruth had only recently come to Albuquerque, and to identify David as the GI, photographically, although he had aged and put on considerable weight. Transcript of Tape Recordings, June 14, 1950, Reel 5, pp. 37-44. It appears that as a result of data, description and information given by Gold to the FBI, Greenglass was identified and arrested on June 15, 1945.

(76) The recordings indicated that he would have omitted mention also of the verbal recognition signal had his lawyer not expressly inquired. Id. at 40.

(77) Listening to the passage in context, which reads, ". . . [W]hile this is not the exact recognition sign, I believe that it involved the name of a man and was something on the order of Bob sent

He did not mention Rosenberg's name, address or telephone number.(78) He said he checked his bag at the railroad station.(79) He did not mention registration at the Hotel Hilton.(80) He said Yakovlev told him there wasn't much point in getting in touch with the GI, whereas upon the trial he testified that

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footnote 77 cont'd

me or Benny sent me or John sent me or something like that," it is clear that "Bob, Benny or John" were offered to explain the nature of the recognition sign and that a man's name was involved. Recorded Sound Disc No. X-23, Soundscriber Locator 5-6, June 14, 1950.

(78) Gold did, however, say that the GI told him he "expected to have a furlough about Christmas of 1945, and he gave me the name or -- and the address, or much more likely, just the name and the telephone number of, I think, his father-in-law or possibly an uncle of his who lived somewhere in the Bronx of New York." Transcript of Tape Recordings, June 14, 1950, Reel 5, p. 41.

(79) Gold, upon the trial, gave no testimony at all as to his baggage. The June 3 registration card has no entry under the legend "baggage."

(80) However, in his June 14 recital to his lawyer of efforts to identify the GI and where the June 3 meetings took place, among other matters he stated, "I have looked at dozens of reels of motion pictures, starting with the Hilton Hotel and going all the way past undoubtedly the street where this GI lived." [Emphasis supplied.] Transcript of Tape Recordings, Reel 5, p. 43.

Yakovlev said the information was very valuable.(81)

(81) It is not altogether clear from the record that in fact this is a contradiction. At trial, Gold testified that in June 1945, Yakovlev told him that the information received from Greenglass had been very valuable [Record, p. 831], but that in November 1945, when Gold expressed a desire to meet with Greenglass or Rosenberg, Yakovlev told him to mind his own business and "cut me very short." [Record, p. 839.] In the October 11 Statement, op. cit. supra note 67, at 1085, apparently referring to the November meeting, Gold stated that Yakovlev had "subsequently - and with intent to mislead - told me that the information received was of no value." Describing these events to his counsel [Transcript of Tape Recordings, June 14, 1950, Reel 5, p. 42], Gold said that the trip to New Mexico ended the episode. "I never made any attempt to see him [Greenglass] again. I turned the information over to John. John never mentioned anything about it [apparently referring to further meetings between Greenglass and Gold] and on the one occasion when I did mention this man [Greenglass] sometime in the late fall of 1945 [the November meeting], John had said that we can forget all about him, that there wasn't much point in getting in touch with him. And I got from the manner in which he made the remark that apparently the information received had not been of very much consequence at all and that they believed that the risk attendant upon seeing him did not make any such effort worthwhile." Thus it is not clear from the June 14 recording and the October 11 Statement whether Gold was relating to his lawyers what Yakovlev told him at the June meeting, or the subsequent one in November when Gold believed Yakovlev intended to mislead him. Even assuming that there is an inconsistency, it relates solely to the question

Primarily, on the basis of the foregoing,

Gold is accused of perjury and the government of suborning perjury and suppressing evidence. Considering the purpose and circumstances of the taped interviews, the omissions are of no special significance. And any delay in mentioning the June 3 Albuquerque incidents and the GI is accounted for by the chronological pattern of the interviews. Gold was recounting to his lawyer in compressed form, "at least in substance," the information he had related to the FBI over an extended period.(82) The lawyers' and the FBI inquiries were not on parallel courses. The nature of each inquiry was different. His counsel were seeking the substance of information furnished the FBI in order to present a plea in mitigation of the offense. The FBI

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footnote 81 cont'd

whether Gold, in his pretrial statements, had mentioned Yakovlev's characterization of the information as valuable, and lends no support to petitioner's allegations of perjury.

(82) By June 14, the third interview with his lawyers, Gold had been interviewed for approximately 90 hours by agents of the FBI. "A 2-page listing by Harry Gold of interviews had with FBI agents during the period May 22, 1950 and July 19, 1950."

was seeking minutiae of detail, leads and data to be investigated and verified. Further, when Gold finally decided to cooperate fully he was faced with the task of dredging his memory as to people, events and incidents spanning a decade of intrigue; the Greenglass incident itself occurred five years earlier. The recordings evince a clear purpose on the part of Gold and the FBI to avoid faulty accusations -- as Gold put it, ". . . bending over backwards in an effort not to do so." The check of his information and details involving others was time consuming.(83)

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(83) A typical example: With reference to his efforts to identify the GI involved in the June 3 incident (later identified as Greenglass), Gold told his lawyers one day before Greenglass' arrest:

"I have -- would like to state one more thing. I have gone over and I have drawn a map of the area as well as I know. I have looked at maps of Albuquerque. I have looked at dozens of reels of motion pictures, starting with the Hilton Hotel and going all the way past undoubtedly the street where this GI lived.

"I have described in detail the approach to the house. I have described the appearance of the house from the outside. I have described the appearance of the porch, the appearance of the steps leading up to the apartment, the appearance of the apartment. I have described the appearance of the old man whom I saw that evening, and I believe I have identified him. I have even succeeded in

A careful reading of the transcripts of the recordings and all other material, rather than supporting petitioner's charges, strongly corroborates Gold's trial testimony. The substance of Gold's statement to his lawyer on June 14, one day before Gold's

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footnote 83 cont'd

picking out what I believe to be the correct house, even though the house was subsequently altered after '45 and the porch no longer existed but had been turned into a living room.

"And I believe that we had succeeded in identifying the person who was this GI. Our difficulties concerned -- he has put on, if it is the man, he has put on over thirty pounds. His wife has, who was only a girl and a very recent bride, has undoubtedly had a child or two and has matured considerably in appearance. But there are still many circumstantial factors which would lead us to believe that the man we have finally selected is the one.

"However, I would like to emphasize one point, and that is that I have been very careful, and so have the people from the FBI, in attempting to put the finger on a man merely to be able to do so, and that we are, if anything, bending over backwards in an effort not to do so. For instance, I looked at the pictures of several men before I finally picked out from them the one old man who I believe lived in the home at that time." Transcript of Tape Recordings, June 14, 1950, Reel 5, pp. 43-44.

The procedure followed to enable Gold to recall David Greenglass' name is described in the October 11 Statement, op. cit. supra note 67, at 1085.

arrest, is essentially the substance of his trial testimony; the major events, times, places and persons correspond. The pretrial statements, recorded or written, are as fully inculpatory of the Greenglasses as is Gold's trial testimony. The omissions and the claimed contradiction do not undermine the fabric of essential matters. The omissions, in the light of the limited purpose of his lawyers' inquiry were not material thereto. The omissions and the claimed inconsistency, themselves explained in the very statements submitted by petitioner,(84) do not even approach supporting the charge of perjury -- much less the charge of government participation therein.(85)

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(84) See nn. 75-81 supra. Petitioner refers to and indicates there were available to him an excerpt from a statement given by Gold to the FBI on May 22, 1950; a 26-page statement in Gold's handwriting dated July 20, 1950; a 76-page statement in Gold's handwriting dated October 23, 1950, and other documentary material. However, these were not submitted.

(85) Cf. Edwards v. New York, 1 L. Ed.2d 17, 21-22 (1956); Price v. Johnston, 334 U.S. 266, 290-91 (1948); United States v. Abbinanti, 338 F.2d 331, 332 (2d Cir. 1964); Burns v. United States, 321 F.2d 893, 896-97 (8th Cir.), cert. denied, 375 U.S. 959 (1963); Enzor v. United States, 296 F.2d 62, 63 (5th Cir. 1961), cert. denied, 369 U.S. 854 (1962).

Third: This is not to say, however, that contradictory statements or omissions could not have been used upon the trial in an effort to undermine Gold's testimony. But no request was made for such statements, and as already noted, cross-examination was waived.

Petitioner now asserts that he and his counsel were unaware until recently of the existence of prior statements,(86) suggesting that such knowledge would have led trial counsel to cross-examine. But again the record contradicts the assertion. Counsel knew of Gold's background and activities. He was not a surprise witness suddenly called to the stand. Counsel knew that Gold was a self-confessed spy; that he had been interviewed extensively by agents of the FBI; that he had been cooperative with the authorities; that

(86) Gold's October 11, 1950 Statement, op. cit. supra note 67, upon which petitioner relies in part, became a public document in December 1956, when it was issued by the Senate Subcommittee on Internal Security, before which Gold had testified. In December 1956 petitioner was represented by three of his present counsel.

he had testified before grand juries; that five months before the trial of this case he had testified as a prosecution witness at the Brothman trial (87) in this district; that in the latter case, in which he was named as a co-conspirator on a charge of conspiracy to obstruct justice involving the giving of false testimony before a grand jury, Gold admitted he had lied before the grand jury; that his disclosure of his espionage activities had engendered great publicity. (88) There was ample basis on these matters alone for defense counsel to have undertaken a searching cross-examination in an attack upon Gold's credibility. Yet no request was made for pretrial statements, grand jury minutes, his trial testimony at the Brothman case (a matter of public record), or any other impeaching material. Trial counsel knew how to get impeaching matter within the then existing requirements. (89)

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(87) United States v. Brothman, S.D.N.Y., C. 133-106 (1950). Trial Transcript, pp. 199, 643-45, 650, 681-82, 748, 836.

(88) Record, pp. 568-70, 836, 981 and 1019.

(89) Record, pp. 288, 373-74. See United States v. Krulewitch, 145 F.2d 76, 78-80 (2d Cir. 1944).

They succeeded in obtaining Elitcher's statements to the FBI and his grand jury testimony,[90] and sought to lay a foundation for Greenglass' prior statements.[91]

The decision not to cross-examine, joined in by petitioner's counsel, was not inadvertent; it was deliberate. The Rosenbergs' counsel in his summation told the jury: "[Gold] got his 30-year bit and he told the truth. That is why I didn't cross-examine him."[92] The thirty-year "bit" was the maximum prison term authorized under the then existing Espionage Act.[93] Thus, there was no basis for effective cross-examination upon a claim that Gold's testimony was motivated by considerations of sentence. Further, defense counsel appraised Gold as "a very,

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(90) Record, pp. 430-31.

(91) Record, pp. 587, 613.

(92) Record, p. 1479.

(93) In 1954 the distinction with respect to the penalty in time of war was eliminated; violation at any time was made punishable "by death or by imprisonment for any term of years or for life." 68 Stat. 1219 (1954).

very bright and intelligent person."(94) These factors and a reading of his testimony, which is indeed impressive, suggests the reason counsel decided not to question him; cross-examination could well have served only to expand and emphasize the force of his testimony. That the decision was carefully weighed appears from the same counsel's acknowledgment on the first section 2255 motion that it "was a calculated judgment on . . . [his] part which involved certain risks which . . . [he] accepted."(95) It is somewhat late in the day now to fault counsel for judgment on trial strategy.(96) Clearly this is an attempt by petitioner to make the Jencks Act retroactive to 1951. Petitioner at his trial had a full opportunity, in consonance with the existing procedure,

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(94) Transcript of Argument, November 28, December 1, 2, 1952, p. 105.

(95) Id. at 107.

(96) See United States v. Garguilo, 324 F.2d 795, 796-97 (2d Cir. 1963); United States v. Gonzalez, 321 F.2d 638 (2d Cir. 1963); Frand v. United States, 301 F.2d 102 (10th Cir. 1962); United States v. Duhart, 269 F.2d 113, 115 (2d Cir. 1959).

to obtain all pretrial material, but by deliberate choice waived it.

Strictures, sometimes direct and sometimes oblique, are levelled against the trial attorneys, who continued to represent petitioner and his codefendants in several of the post-conviction proceedings, although the force of criticism is sought to be attenuated by further allegations that counsel were "misled," "deceived," "trapped," "coerced" and "intimidated" by governmental fraudulent conduct. These lawyers are no longer here to defend their professional conduct. But their defense is contained in the files of the vigorously contested trial, appellate and collateral proceedings. The case, which has been "scrutinized with extraordinary care"(97) and has had "painstaking consideration"(98) by each of the Justices of the Supreme Court, afforded ample opportunity for judgment of the lawyers' competency and whether they measured up to the task at hand. They were adjudged "highly

(97) United States v. Rosenberg, 195 F.2d 583, 590 (2d Cir. 1952).

(98) Rosenberg v. United States, 346 U.S. 273, 293 (1953)

competent and experienced,"[99] "singularly astute and conscientious,"[100] and "lawyers who have ably and courageously fought the Rosenbergs' battle."[101] Nothing now asserted by petitioner or his present counsel warrants any change of judgment as to his (or the Rosenbergs') lawyers' professional competency in defending him.

In conclusion, the court, with respect to all charges, finds that petitioner was competently represented by counsel; that he has failed to sustain his charges; that the files and records of the case conclusively show that he is not entitled to relief, and that no act or conduct on the part of the government deprived him of a fundamentally fair trial.

The motion is denied in all respects.

Dated: New York, N. Y.
February 14, 1967

EDWARD WEINFELD
United States District Judge

---

(99) United States v. Rosenberg, 195 F.2d 583, 593 (2d Cir. 1952).

(100) Id. at 596, n. 9.

(101) Rosenberg v. United States, 346 U.S. 273, 292 (1953).

The remainder of the June 6 interview and a portion of the next, June 8, were taken up with matters not here relevant. Midway through the June 8 interview Gold commenced telling "everything, at least in substance, that . . . [he had] told the FBI."(74) [Emphasis supplied.] In the chronological sequence of his espionage activities Gold mentioned the trip to Santa Fe and Albuquerque, New Mexico on June 2 and 3, but elaboration was postponed for the next interview, which took place on June 14, 1950. At this June 14 interview Gold told his attorneys [illegible] trip, at the direction of "John," to Santa [illegible] Albuquerque over the weekend of June 2-3, 1945, [illegible] call on the "GI" in Albuquerque. He re- [illegible] successful efforts on the night of June [illegible] the Greenglasses; his meeting with them the next morning; a verbal name identification; the afternoon meeting; the receipt of atomic energy information; the delivery of the $500. In substance

(74) Transcript of Tape Recordings, June 8, 1950, Reel 2, Side 2, p. 16.

They succeeded in obtaining Elitcher's statements to the FBI and his grand jury testimony,[90] and sought to lay a foundation for Greenglass' prior statements.[91]

The decision not to cross-examine, joined in by petitioner's counsel, was not inadvertent; it was deliberate. The Rosenbergs' counsel in his summation told the jury: "[Gold] got his 30-year bit and he told the truth. That is why I didn't cross-examine him."[92] That the decision was carefully weighed appears from the same counsel's acknowledgment on the first section 2255 motion that it "was a calculated judgment on . . . [his] part which involved certain risks which . . . [he] accepted."[93] It is somewhat late in the day now to fault counsel for judgment on trial strategy.[94] Clearly this is an attempt by

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(90) Record, pp. 430-31.

(91) Record, pp. 587, 613.

(92) Record, p. 1479.

(93) Transcript of Argument, November 28, December 1, 2, 1952, p. 107.

(94) See United States v. Garguilo, 324 F.2d 795, 796-97 (2d Cir. 1963); United States v. Gonzalez, 321 F.2d

petitioner to make the Jencks Act retroactive to 1951. Petitioner at his trial had a full opportunity, in consonance with the existing procedure, to obtain all pretrial material, but by deliberate choice waived it. A reading of Gold's testimony, which was indeed persuasive, suggests the reason counsel decided not to question him; cross-examination could well have served only to expand and emphasize the force of his testimony.

Strictures, sometimes direct and sometimes oblique, are levelled against the trial attorneys, who continued to represent petitioner and his codefendants in several of the post-conviction proceedings, although the force of criticism is sought to be attenuated by further allegations that counsel were "misled," "deceived," "trapped," "coerced" and "intimidated" by governmental fraudulent conduct. These lawyers are no longer here to defend their professional conduct.

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footnote 94 cont'd

638 (2d Cir. 1963); Frand v. United States, 301 F.2d 102 (10th Cir. 1962); United States v. Duhart, 269 F.2d 113, 115 (2d Cir. 1959).

But their defense is contained in the files of the vigorously contested trial, appellate and collateral proceedings. The case, which has been "scrutinized with extraordinary care"(95) and has had "painstaking consideration"(96) by each of the Justices of the Supreme Court, afforded ample opportunity for judgment of the lawyers' competency and whether they measured up to the task at hand. They were adjudged "highly competent and experienced,"(97) "singularly astute and conscientious,"(98) and "lawyers who have ably and courageously fought the Rosenbergs' battle."(99) Nothing now asserted by petitioner or his present counsel warrants any change of judgment as to his (or the Rosenbergs') lawyers' professional competency

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(95) United States v. Rosenberg, 195 F.2d 583, 590 (2d Cir. 1952).

(96) Rosenberg v. United States, 346 U.S. 273, 293 (1953).

(97) United States v. Rosenberg, 195 F.2d 583, 593 (2d Cir. 1952).

(98) Id. at 596, n. 9.

(99) Rosenberg v. United States, 346 U.S. 273, 292 (1953).

in defending him.

In conclusion, the court, with respect to all charges, finds that petitioner was competently represented by counsel; that he has failed to sustain his charges; that the files and records of the case conclusively show that he is not entitled to relief, and that no act or conduct on the part of the government deprived him of a fundamentally fair trial.

The motion is denied in all respects.

Dated: New York, N. Y.
February 14, 1967

EDWARD WEINFELD
United States District Judge

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA GEN. REG. NO. 27
5010-106

UNITED STATES GOVERNMENT

Memorandum

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

TO : Mr. W. C. Sullivan

DATE: 2/23/67

FROM : W. A. Branigan

1 - Mr. DeLoach
1 - Mr. W. C. Sullivan
1 - Mr. Wick
1 - Mr. W. A. Branigan
1 - Mr. J. P. Lee

SUBJECT: MORTON SOBELL
ESPIONAGE - RUSSIA

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 5-4-87 BY 2462 Pur/ds

This memorandum sets out a review of the opinion of Judge Edward Weinfeld denying the subject's most recent motion to set aside his conviction on a charge of espionage conspiracy.

BACKGROUND:

Morton Sobell was convicted along with Julius and Ethel Rosenberg in 1951 of conspiracy to commit espionage on behalf of the Soviets. The Rosenbergs were executed and Sobell was sentenced to 30 years in prison. Since that time numerous efforts have been made to upset this conviction without success. On 5/13/66 Sobell filed his sixth motion in a district court, Southern District of New York, to set aside his conviction claiming the Government knowingly used forged documents and perjurious testimony and suppressed evidence which would have proved that he was innocent.

OPINION OF DISTRICT JUDGE WEINFELD:

On 2/14/67 Judge Edward Weinfeld of the Southern District of New York filed a 79-page opinion by which he denied Sobell's motion. The Judge recited the facts in the case and concluded that Sobell's motion could be reduced to two basic points. The points are (1) the prosecution created in the minds of the jury a belief that Exhibit 8 (sketch of atomic bomb and testimony of David Greenglass concerning it) contained the secret and principle of the Nagasaki atomic bomb and (2) the Government permitted Harry Gold and David Greenglass to give perjurious testimony concerning a meeting in Albuquerque, New Mexico, on June 3, 1945, and corroborated this testimony by forging a registration card of the Hotel Hilton, Albuquerque.

REC-19 101-2483-1687

Regarding the first point, Exhibit 8 is a sketch of a cross section of the atomic bomb which David Greenglass prepared at the time of the trial and it was put into evidence as a replica of a sketch which Greenglass gave to Julius Rosenberg. The Judge points out that in a previous motion for a new trial in 1952 this Exhibit was attacked on the theory that Greenglass due to his lack of education was unable to produce the sketch (page 16), the information in the sketch was not secret (pages 17,18), and the information in it was of no value to the Russians (pages 19, 20). In the current motion Greenglass is

MAR 1 1967

101-2483
JPL:sal (6)

CONTINUED - OVER

accused of producing an inaccurate sketch of no value. Judge Weinfeld notes that Greenglass testified he told Rosenberg he had a "pretty good description of the A bomb" and drew a sketch (page 25). The contents of the sketch and the testimony by Greenglass concerning it, whether correct or not, is not the test of credibility concerning what Greenglass gave to Rosenberg. The Judge notes that if every scientist in the world said that this sketch was wrong, it still does not draw into issue the truthfulness of the testimony of Greenglass (page 26). In discussing point number two, Judge Weinfeld states that Sobell now claims that Greenglass and Gold did not meet in Albuquerque on June 3, 1945, that their testimony was false, and that the Government knew that it was false. Further a forged registration card for Harry Gold at the Hotel Hilton for June 3, 1945, was created at the suggestion of the Government (pages 50,51). The Judge notes there is not one word of direct evidence to support these serious charges, and he points out all of the material relied upon by Sobell has been examined and the charges are not sustained and the inferences not warranted (pages 51,52).

Weinfeld reminded the counsel that a "constant drumfire of vituperation does not establish basic facts" which are required before inferences may be drawn to support charges of fraud and perjury (page 56).

The Judge also carefully examined the testimony of Gold given at the trial and the records of his conversations with his attorneys and concluded that a reading of all the material strongly corroborates the trial testimony of Harry Gold (page 72). He points out on page 71 that recordings of the conversations Gold had with his attorneys "evince a clear purpose on the part of Gold and the FBI to avoid faulty accusations. He concludes that the omissions and claimed inconsistencies in Gold's testimony do not even approach supporting a charge of perjury, much less a charge of Government participation in perjury (page 73).

In conclusion the Judge points out that Sobell was competently represented by counsel at the trial, that he failed to sustain his charges, and the files and records of the case conclusively show he is not entitled to relief and no act or conduct of the Government deprived him of a fair trial.

ACTION: For information.

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

FBI

Date: 2/27/67

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)

ReNYairtel 2/20/67.

On 2/27/67, AUSA STEPHEN F. WILLIAMS, SDNY, advised that on that date MARSHALL PERLIN, attorney for subject, appeared in USDC, SDNY, for the purpose of arranging bail for the subject. WILLIAMS advised that the decision was reserved.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 5-31-87 BY 3242/PUT/cls

REC 18 101-2483- 1688

EX-113

FEB 28 1967

3 - Bureau (RM)
1 - New York

CPW:eah
(6)

SOVIET SECTION

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

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA GEN. REG. NO. 27
5010-105

UNITED STATES GOVERNMENT

Memorandum

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

TO : Mr. W. C. Sullivan

DATE: 2/23/67

FROM : W. A. Branigan

1 - Mr. DeLoach
1 - Mr. W. C. Sullivan
1 - Mr. D. E. Moore
1 - Mr. W. A. Branigan
1 - Mr. J. P. Lee

SUBJECT: MORTON SOBELL
ESPIONAGE - RUSSIA

Classified by 1678 REP/ad
Declassify on: OADR 2-21-82
Comp # 56961

This memorandum recommends that if we receive inquiry from the State Department concerning the release by the British of the confession of Klaus Fuchs, admitted Soviet agent, that State Department be advised this is a question for the British to decide. (U)

On February 23, 1967, [redacted] representative, telephonically contacted Inspector D. E. Moore and advised that the attorneys for Morton Sobell, convicted Soviet agent, have been putting pressure on the British through members of the British Parliament to have the statements made by Klaus Fuchs released to the public. [redacted] said that we would probably receive a request from the Department of State for our comments concerning this. (U)

b7D
b7C

DECLASSIFIED BY 3042 PWT
3/2/82

Morton Sobell was convicted along with Julius and Ethel Rosenberg in 1951 of conspiracy to commit espionage. The Rosenbergs were executed and Sobell was sentenced to 30 years in prison. Sobell's most recent motion to obtain a new trial was denied on 2/14/67 by Judge Edward Weinfeld of the Southern District of New York who wrote a 79-page opinion. (U)

Sobell in this motion made an attack against Harry Gold who testified that he acted as a courier for the Soviets to pick up information from Klaus Fuchs, British atomic scientist, who was in the U.S. during World War II and also contacted David Greenglass, U.S. Army Sergeant who furnished information from his employment at Los Alamos. Fuchs was arrested by the British on February 2, 1950, and charged with violating the Official Secrets Act. He admitted his guilt and furnished information concerning his contacts with the Soviets in England and in the U.S. He did not know the identity

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE

65-58565

UNRECORDED COPY FILED IN

101-2483

REC-35 101-2483-1689

JPL:sal
(6)

EX-113

CONTINUED - OVER

MAR 3 1967

61 MAR 10 1967

Classified by 2335
Exempt from GDS, Category 1 2 3
Date of Declassification Indefinite

XEROX
MAR 3 1967

SOVIET SECTION

Memorandum W. A. Branigan to C. D. Sullivan SECRET
RE: MORTON SOBELL
101-2483

of his American contact but from identifying data he furnished we were able to identify Gold as that contact, and Fuchs later identified Gold's photograph as his contact. In all probability the Sobell defense lawyers want to compare the statements of Fuchs with the testimony of Gold and attempt to capitalize on any discrepancies they might find or if they find no discrepancies, they will then accuse the Americans and the British of cooperating to coordinate the statements for the purposes of the trial. (U)

OBSERVATIONS:

In 1950 the Atomic Energy Commission requested our opinion concerning the declassification and publishing of Fuchs' interviews, and we responded that this was a British document under British control, and we would be in no position to declassify it. It is believed that this position is still the correct position. (U)

ACTION:

It is recommended that in the event we receive an inquiry from the Department of State concerning the declassification of the Fuchs' statements that we respond that this is a matter for the British to decide since it is a British document under British control.

Right.

SECRET

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

FBI

Date: 3/3/67

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)

ReNYairtel 2/27/67.

AUSA STEPHEN F. WILLIAMS, SDNY, advised that on 3/2/67, US District Judge EDWARD WEINFELD, USDC, SDNY, ordered that subject's request for bail, which was filed on 2/27/67, was denied.

Above for information of the Bureau.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 5-4-87 BY 3042/PWT/ck

EX-102

REC 20 101-2483-1690

2 - Bureau (RM)
1 - New York

PFD:eah
(6)

365

77 MAR

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

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA GEN. REG. NO. 27

5010-106

UNITED STATES GOVERNMENT

Memorandum

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

1 - Mr. DeLoach
1 - Mr. Sullivan

TO : Mr. W. C. Sullivan

SECRET

DATE: March 10, 1967

FROM : Mr. W. A. Branigan

1 - Mr. D. Brennan
1 - Mr. Branigan
1 - Mr. Lee

CLASSIFIED BY: 3042 PWTC
DECLASSIFY ON: OADR

SUBJECT: MORTON SOBELL
ESPIONAGE - RUSSIA

Classified by 1615 RFP/lab
Declassify on: OADR 7-21-83
Jump #36,261

Purpose of this memorandum is to summarize comments of [redacted] of t[redacted] concerning efforts to have the statements of Klaus Fuchs, convicted atomic spy, declassified and made public. (U)

b7D
b7C

[redacted] (U)

b7D
b7C

[redacted] (U)

b7D
b7C

[redacted] (U)

EX-103

[redacted] a member of Parliament, thereafter wrote to the Home Secretary noting his prior association with [redacted]

101-2483
WAB/JPL:lag
(6)

Classified by 1355
Exempt from GDS, Category 1 | 3
Date of Declassification Indefinite

10 MAR 15 1967

CONTINUED - OVER

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

XXXXXX
XXXXXX
XXXXXX

FEDERAL BUREAU OF INVESTIGATION
FOIPA DELETED PAGE INFORMATION SHEET

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

☑ Deleted under exemption(s) b7C, b7D with no segregable material available for release to you.

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

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

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

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

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

_____

_____

☐ For your information: _____

_____

☑ The following number is to be used for reference regarding these pages:

101-2483-1691 Pg 2

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

XXXXXX
XXXXXX
XXXXXX

FBI/DOJ

Memorandum Branigan to Sullivan
Re: MORTON SOBELL

~~SECRET~~

ACTION:

This is submitted for information purposes. If we are consulted by State Department concerning the release of Fuchs' statement, we should take the position that his statements are British documents made to British authorities and this is solely a British matter and the decision to release the statement should be made by the British Government.

~~SECRET~~

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : DIRECTOR, FBI (101-2483) DATE: 3/23/67

FROM : SAC, ALBUQUERQUE (65-50) (RUC)

SUBJECT: MORTON SOBELL
ESP - R
OO: NY

Re New York airtel dated 9/28/66.

A review of the Albuquerque file reflects there is, at this time, no outstanding investigation for Albuquerque, and, accordingly, this office is placing this matter is an RUC'd status.

EX-112

REC-25 101-2483-1692

TO MAR 27 1967

SOVIET SECTION

(2) - Bureau (RM)
2 - New York (100-37158)(RM)
1 - Albuquerque
RJW/sa
(5)

51 MAR 29 1967

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

5010-106

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

FBI

Date: 3/22/67

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 5-4-87 BY 3042/PUT/cls

ser 1686 per 1685 ser 1690

Re NY airtels 2/16/67, 2/20/67, and 3/3/67.

On 3/21/67, AUSA STEPHEN F. WILLIAMS, SDNY, advised that as a result of subject's request for bail having been denied by USDC, SDNY, on 3/2/67, Attorneys for subject petitioned the US Court of Appeals for the Second Circuit to have subject released on bail pending the appeal of the decision of USDJ EDWARD WEINFELD which was rendered on 2/14/67. Subject's request for bail was denied by the Court of Appeals on 3/20/67.

AUSA WILLIAMS advised that Attorneys for subject in a Notice of Motion which was filed with the Circuit Court of Appeals on 3/7/67, indicated to the Circuit Court that the above mentioned decision of USDJ WEINFELD would be appealed. He advised that subject's Attorneys will have 40 days from the date of Notice of Appeal to docket their records and related papers withthe Court of Appeals and then will have an additional 30 days in which to file a brief with the Court of Appeals outlining the basis of appeal.

ENCLOSURE

101-2483-1693

3- Bureau (Encls.5)(RM)
1- New York

REC 26 ST-115

MAR 23 1967

PFD:ptp
(6)

"ENCL. BEHIND FILE"

SOVIET SECTION

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

69 APR 4 1967

FD-36 (2-64)

FBI

Date:

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

AIRTEL

Via _____ (Priority)

NY 100-37158

Enclosed herewith for the information of the Bureau is one copy of each of the following documents which were furnished by AUSA WILLIAMS:

1. Notice of Motion and affidavit of MARSHAL PERLIN, dated 3/13/67.

2. Affidavit of MARSHAL PERLIN, dated 2/27/67, which was submitted to USDC requesting bail for subject.

3. Memorandum of the Government in opposition to subject's motion for bail.

4. Affidavit of AUSA STEPHEN F. WILLIAMS dated 3/17/67.

5. Retyped page number 66 of the opinion of USDJ EDWARD WEINFELD, dated 2/14/67. (This document was furnished to the Bureau by airtel dated 2/16/67. The original of page 66 was not legible).

Serialized in
101-483-1686 Encl. Columbia file

- 2 -

8/89

Approved: _____ Sent _____ M Per _____

Special Agent in Charge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - x

MORTON SOBELL,

Petitioner,

-against- 66 Civ. 1328

UNITED STATES OF AMERICA, AFFIDAVIT

Respondent.

- - - - - - - - - - - - - - - - - - x

STATE OF NEW YORK)
(ss.:
COUNTY OF NEW YORK)

MARSHALL PERLIN, being duly sworn, deposes and says:

1. I am one of the attorneys for the petitioner. This affidavit is submitted in support of the petitioner's application for bail. The application for bail was originally made on papers prepared prior to the recent determination by HON. EDWARD WEINFELD, District Judge, of the petitioner's application for relief pursuant to 28 U.S.C. § 2255. Judge Weinfeld, by decision dated February 14, 1967, denied the Section 2255 application. The original application for bail would have come on to be heard on February 14, 1967, pursuant to order to show cause returnable that date, but it was adjourned when counsel were notified by the Court that the decision had just been filed.

2. The purpose of this affidavit is to update the application for bail so that it may be considered in the light of the decision and the present posture of the § 2255 application. The petitioner now applies for bail pending appeal to the United States Court of Appeals, Second Circuit, from the District Court order denying the petitioner a hearing and denying him relief. It is respectfully requested that this affidavit be read together with my affidavits of February 8, 1967 and February 18, 1967.

3. Bail is warranted in view of the time factors hereinafter elaborated and in the light of the substantial questions presented for appellate review. The failure of the District Court to grant a hearing, and its disregard in its opinion of crucial factual allegations and applicable legal principles, constitute, in the opinion of counsel, respectfully expressed, grievous errors and a continuation of one of the glaring injustices of modern times.

4. It is petitioner's intention to appeal to the United States Supreme Court, if necessary, and to present convincing evidence in support of his petition at such hearing as may be afforded him. I have advised the petitioner, and I verily believe, that his petition is meritorious on the law and on the facts alleged;

that in my opinion he is entitled to a hearing; and that upon review there is a reasonable probability that the District Court order denying him a hearing will be reversed. Other counsel for the petitioner join in this statement of legal opinion.

5. I respectfully refer the Court to the history of petitioner's incarceration contained in paragraphs "1" through "5" of my affidavit of February 8, 1967. As we see from that chronology, petitioner's term will expire, after credit for earned "meritorious good time," in about three years and perhaps as early as some time in 1968.

6. The procedural course which this case faces may well extend beyond the projected period of incarceration of the petitioner, whether the shorter or the longer estimate be correct. Even if the forthcoming appeal to the Court of Appeals be expedited, the case would probably not reach the Supreme Court before the latter part of this year. Indeed, if the Court of Appeals should undertake as detailed and time-consuming a study of the record as did the District Court, a contingency not at all improbable, we would not be expected to reach the Supreme Court before 1968. It is to be presumed that the defeated party will appeal to the Supreme Court whether the Court of Appeals affirms or reverses. If either appellate court should order

a hearing, then one may reasonably anticipate that the hearing as well as probable ensuing appeals might consume the balance of the year 1968 and conceivably longer. Thus it is evident that a denial of bail might result in a continued incarceration of the petitioner until the end of his term, notwithstanding the fact that as a result of this proceeding it may eventually be held that his conviction was unlawful.

7. In the respondent's affidavit of February 14, 1967 reference is made to an affidavit sworn to September 23, 1953 and submitted by the petitioner on October 8, 1953 in the United States Court of Appeals. (See printed transcript of record Sobell v. United States of America, October term 1953 No. 497, pp. 6 through 11). It is submitted that the affidavit read in its totality would support the application for admission to bail rather than militate against it as the respondent contends. I incorporate in full and make a part hereof the entire affidavit of September 23, 1953. For the convenience of the court I quote a portion of that affidavit:

[fols. 13-14] "So I went back to Mexico City, and my wife and I talked it over once again. We realized that our ties to home were to strong, that we owed it to everyone to return and help to combat the repressive tendencies from which we had contemplated staying away and "sitting it out". I know now how right this last decision was, and how wrong I was to think I could isolate myself from others who had the same problem.

> "[redacted] my wife and I decided to come back to New York, take up our lives, and join in whatever way we could in resisting the attacks on the liberties of people that were being made in the United States. We made plans for our return. There is tangible, documentary proof of this, too, for we then secured vaccinations in Mexico City -- which we had not needed to get there, but which we did need to return to the United States.
>
> But then came the unheard-of attack which deprived us of the chance to return voluntarily. My apartment was invaded by armed men who represented themselves as Mexican police, but refused, when I requested it, to permit me to call the American Embassy. This fact, and the rest of this incident, was set forth in my uncontradicted affidavit in support of my trial counsel's motion to arrest judgment. The United States Attorney at my trial as much as admitted that the FBI had engineered the whole affair. I cannot understand to this day, how this lawless act, apparently calculated to prevent me from returning voluntarily -- for I was never informed of so much as even that I was wanted for questioning -- has remained unrebuked."

That petitioner and his family have deep roots and ties with people in New York City cannot be denied. The circumstances surrounding the conviction of the petitioner and his incarceration are such to establish that fact. It need not be stressed that we are here concerned with a case that has aroused the interest and concern of thousands upon thousands of people here in New York City alone who have expended enormous time and effort in behalf of the petitioner to achieve his freedom on the belief of his innocence as well as the strong feeling of the unjustness of his sentence. The petitioner's recognition of this strong interest and concern

on the part of these many people from all walks of life and his gratitude therefor cannot be questioned. The ties established between his family and these many people from the City and surrounding communities have strengthened and deepened during the unfortunate years of petitioner's incarceration. In this setting and the fact that the petitioner has almost completed the service of his extremely long sentence, to suggest that he is a bail risk is patently absurd.

8. I shall not here argue at length any of the substantial questions presented for review on appeal from the order of February 14, 1967, nor shall I here state all of the errors assigned to the District Court. I merely wish to state the existence of substantial questions from which it would follow that justice requires that the petitioner be admitted to bail pending appeal; and I do not propose in this affidavit to furnish the petitioner's arguments which must be presented fully to the United States Court of Appeals.

9. The District Court's first and fundamental error was its failure to comprehend the nature of the application. The Court has from time to time in its opinion gone off on different tangents. It reads the present petition at certain points as a restatement and an attempt to relitigate the same charges made in prior § 2255 applications (17-20)*. Elsewhere this petition is read as a contradiction

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* The numbers in parentheses refer to pages of the filed Opinion of the District Court.

of previous charges (21-22). Both assumptions or inferences of the District Court are erroneous. In fact, the prior § 2255 proceedings were based on a perfectly understandable belief on the part of the petitioner and his attorneys that the impounded Exhibit "8" and the oral testimony referring thereto were what the Government and its witnesses had represented and stated them to be; whereas, the present petition, as amended after May 1966, is based on the facts revealed after the unimpounding of Exhibit "8". To fault the petitioner because he had previously argued that his conviction was unjust and unlawful even if Exhibit "8" had been as represented at the trial, whereas he now knows that it was falsely and fraudulently presented by the Government, would be to reward fraud and prejudice on the part of the prosecution. This petition does not contradict or enlarge any prior application; it is a different petition based on the recently unimpounded testimony and documents and new scientific data and other evidence resulting from the unimpounding.

10. The 1952 motion was premised upon the belief that the information given by Greenglass was of great accuracy and importance and that it was beyond his competence to provide such information or to present such testimony on the trial without the aid of coaching of the Government, which he denied. That petition maintained that his denial of aid constituted perjury, United States v. Rosenberg, 108 F.Supp. 798, 800, Footnote 1. It was also contended there

that the court was without jurisdiction in that the material allegedly transferred had been arbitrarily and capriciously classified as secret and was in the public domain and hence not violative of the Espionage Statute. United States v. Rosenberg, supra. Surely that is not the theory legally or factually present in the present petition.

11. In its opposition to the 1952 petition, the Government argued that the affidavits submitted by the petitioner there were of no value in that the scientist-affiants had not seen Exhibit "8" or the Greenglass testimony. The Court was in accord. The present application, on the other hand, is supported by scientists who have examined copies of Exhibit "8" and the Greenglass testimony and who made key contributions to the development and design of the 1945 implosion bomb. One of them is actually a co-holder of the bomb patent. Another carried out the first experiments on explosive lenses at Los Alamos and played a major role in their development. A third made the basic design suggestions for the configuration of the plutonium core, and thereby overcame one of the main problems in achieving a successful implosion.

12. The opinion of the District Court distorts the petition insofar as it refers to Exhibit "8" and the testimony with reference thereto so as erroneously to

make it appear that the petitioner is complaining of a variance between the indictment and the proof or is applying for a new trial on the basis of newly discovered evidence. If indeed the conviction of the petitioner was procured by knowingly false evidence and testimony, such unjust conviction cannot stand even though petitioner or his attorneys, had they been more suspicious of the prosecutor, might have discovered the truth earlier. The rules applicable to an application for a new trial based on newly discovered evidence cannot clothe the Government with immunity for knowingly procuring a conviction by false, fraudulent and perjured testimony.

13. The District Court misreads or ignores the basic thrust of the petition. It assumes, on no discernible legal basis, that the petitioner would have been convicted even if the court and jury and the defense had known that Exhibit "8" was not in truth a "sketch of the very bomb itself" and a "cross-section of the atom bomb itself"; and if the Government had not made the misrepresentations set out in the petition. See Petition, Paragraphs "14", "23", "28", "31", "67" and "69". When the jury was deceived into the belief that the "atom bomb itself" had been delivered into the hands of the Russians, they were most assuredly able to determine therefrom that the conspiracy charged in the indictment had been formed and that the defendants were therefore guilty. Moreover, the Government's own description of

Exhibit "8" and the associated testimony of Derry is quite different from the belated disparagement of such evidence by the District Court, as can be gleaned from the Government brief to the Court of Appeals on the appeal from the conviction:

> "The descriptive 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 atom bomb itself (1330)."

That statement was in accord with the position taken by the prosecution in its representations to the jury on the trial. See the comment by the prosecution in summation in connection with the testimony of Greenglass and Derry:

> "I have said there is much about this that we have not disclosed or we do not know, but there is one part of the scheme that we do know about. You know about it because it was disclosed right before you. We know these conspirators stole the most important scientific secrets ever known to mankind from this country and delivered them to the Soviet Union." (R. 1519)

P-42-1

14. The District Court erred in generally ignoring and disregarding the acts and statements of the Government, and in exculpating the prosecution for that conduct which the Court did consider and which resulted in the deception alluded to above. For example, the District Court finds that the prosecutor's references to Oppenheimer, Urey and Kistiakowski in the list of proposed witnesses and during the voir dire were innocent and not intended to deceive. The fact which the District Court ignores is that the statements by the prosecutor were false and must have been known to him to have been false. Dr. Urey has already established that he had never been asked to testify. The late Dr. Robert Oppenheimer, who had himself been tragically subjected to scrutiny and surveillance, has written as follows to one of the attorneys who had been assisting petitioner's counsel in the atomic energy branch of the petition:

> "Thank you for your note of October 21st, in which you asked me whether I was ever requested to be a witness in the trial of Sobell or the Rosenbergs. No one ever asked me to appear and no one indicated to me what I might be asked were I to appear."*

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* Dr. Oppenheimer wrote two letters, one dated October 4, 1966 and one dated October 25, 1966. The letter of

The Government's obvious purpose in including those names on its list of witnesses and in surrounding the prosecutors with representatives of the Atomic Energy

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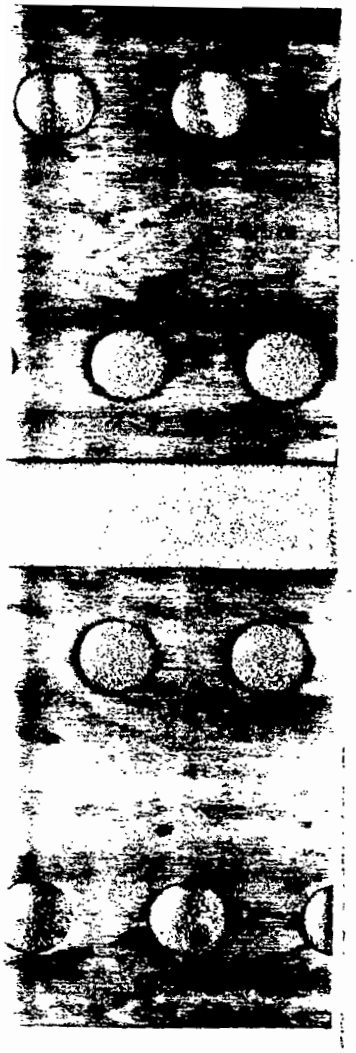
[Footnote Continued]

October 4th read as follows:

> "Thank you for your note of September 27th, and the petition on behalf of Sobell. From the beginning, it has seemed to me that I was not the right man to become engaged in that case, and I do know very little indeed about it.
>
> What Phillip Morrison writes is true enough, as one might expect. I am not at all in a position to evaluate its relevance to the fairness of the trial, or indeed its possible connection with Sobell and his alleged guilt; but as a statement of a physicist who knew what was going on, it is an acceptable and factual account.
>
> With good wishes."

The letter of October 25th read as follows:

> "Thank you for your note of October 21st, in which you asked me whether I was ever requested to be a witness in the trial of Sobell or the Rosenbergs. No one ever asked me to appear and no one indicated to me what I might be asked were I to appear.
>
> I learned that my name was listed because in a capital case the prosecution cannot call witnesses whose names have not been made available to the defense in advance. I do not know whether even this is true.
>
> With good wishes."

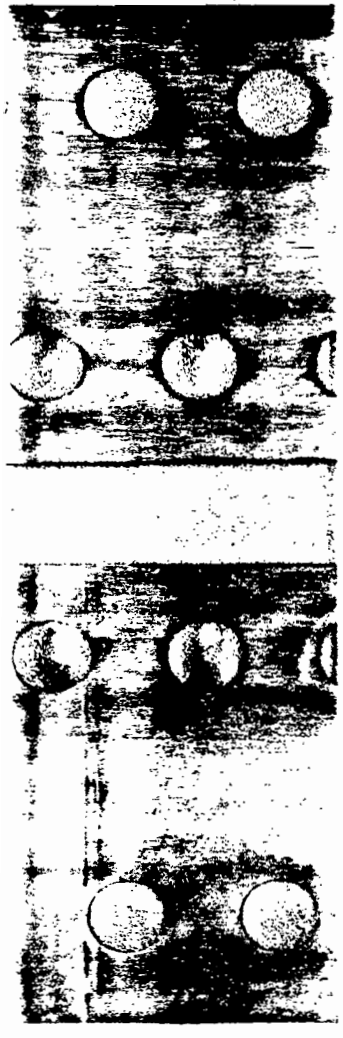


Commission and the Joint Congressional Committee on Atomic Energy was to intimidate the defendants into believing that the Government was about to support its case by showing the theft by Greenglass of genuine atomic bomb secrets, with the corroboration of government officials and distinguished scientists and that it would be idle to attempt to challenge the atomic bomb material when it was offered in evidence.

When Derry testified it could hardly have been known to the defendants that the Government had been unable to prevail upon any scientist to testify and that Derry, liaison for Gen. Groves, was its only "expert". The District Court's description of him as "an electrical engineer" (14) rather misses the point that the work Derry did at the project was not that of an electrical engineer. The Court also misses the point that the scientists whose affidavits were submitted in support of the petition have categorically branded Derry's testimony as false and have characterized Derry as one who did not have the expertise attributed to him by the prosecution and as falsely claimed by him in his testimony. The Court also, in considering the fraud of the Derry testimony, fails to note that whether the prosecutor did or did not know that Derry's testimony was false, the Government nevertheless is chargeable with its falsity

in that Derry himself was a Government employee. The District Court should not have presumed to determine these fact questions without a hearing.

14. In considering the affidavits of Dr. Morrison, Dr. Linschitz and Dr. Christy, the District Court has contented itself with isolated quotations therefrom and has ignored the totality of the affidavits which tend to establish the falsity of the very nucleus of the prosecution's scientific evidence.

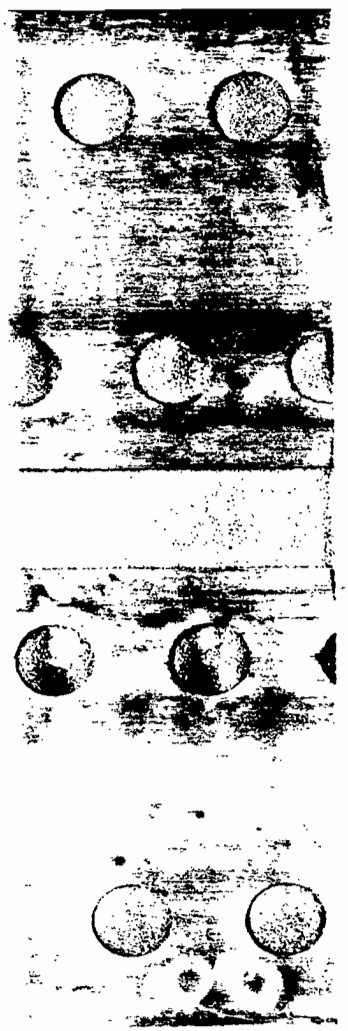


15. It is incontestable that those scientists are equipped with first-hand, detailed knowledge regarding the matters they discussed, and they are uniquely qualified to provide authoritative technological facts and opinions. Indeed, this is the first time since the commencement of the litigation sixteen years ago that a court has had the benefit of true scientific aid in the consideration of any phase of the case. These scientists analyzed the Greenglass material and then examined the Derry testimony and the statements of the prosecution and pointedly and specifically detailed the falsity of the Derry testimony and representations of the prosecution. They went on to substantiate and set forth the factual and scientific foundation for their statements.

16. The District Court has concentrated on a few conservative phrases taken out of context, the import of which is scarcely more than an acknowledgment that Exhibit "8" purports to portray some elementary insignificant fact about the atomic bomb. But the District Court has disregarded the substance of the affidavits. In view of the scientific complexity of the subject of the affidavits, the authoritative backgrounds of the scientists, and the relative incompetence of lawyers and judges to form independent scientific opinions on one of the most esoteric subjects of modern times, a hearing would of necessity be required to lay a basis for a finding of fact. It was error for the Court to make findings with respect to the Derry testimony and Exhibit "8" without a hearing.

17. The importance and value of the scientific data and comments contained in the affidavits furnished by the petitioner are highlighted by the practical impossibility of procuring such affidavits earlier in the litigation. It was impossible to obtain scientific witnesses at the time of the trial because of the political climate and the use thereof made by the prosecution. Once it was announced to the world that some of the leading scientists responsible for the development of the bomb, such as Dr. Urey, Dr. Oppenheimer and Dr. Kistiakowski were prepared to

testify for the prosecution, few if any of their fellow scientists would have dared to participate in the defense. If any such scientist had been found, he would have found it necessary to consult with the Atomic Energy Commission to determine what was and what was not classified and he would then have to be a party to the publicizing of scientific matter concerning the atomic bomb. It would not have been testimonially feasible to point out the deficiencies of Exhibit "8" without elaborating on the omitted or misstated truths about the bomb. Such conduct on the part of an atomic scientist in 1951 would undoubtedly have resulted in suspension of his security clearance and perhaps worse. It was error for the District Court to draw any inference adverse to the petitioner from his inability to procure eminent scientific witnesses before.

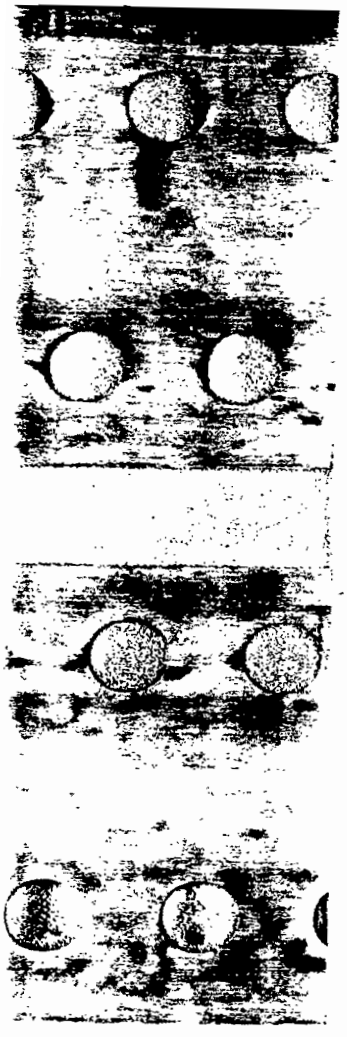


18. We turn now to that portion of the opinion dealing with the Hilton Hotel registration card (Government Exhibit 16). We respectfully submit that the District Court erred in determining without a hearing sharp issues of fact and in rejecting uncontested allegations of material facts.

19. The Government vouched for the credibility of the card when the prosecution offered it in evidence as a record kept by the Hotel Hilton in the regular course of business. The prosecution's reliance on the card as evidence of the June 3, 1945 Gold-Greenglass Albuquerque meeting is

shown by the statement in the Prosecutor's summation:

> "The veracity of David and Ruth Greenglass and of Harry Gold is established by documentary evidence and cannot be contradicted. You have in evidence before you the registration card from the Hotel Hilton in Albuquerque which shows that he [Gold] was registered there on June 3, 1945."



20. The Court's distinctions between direct and circumstantial evidence of forgery, and between documentary evidence and business records, are immaterial and misleading. The Court has drawn factual inferences and made factual determinations with respect to uncontested and damning charges without calling on the Government to meet them. The District Court demands far too much of a § 2255 petition, far beyond the legal requirements of a prima facie showing. He has rejected this branch of the petition virtually on the ground that it is not conclusive, while denying the petitioner a hearing upon which the charges could be established.

21. The petition prima facie established the following:

(a) The June 3, 1945 registration card contained the forged handwriting of Anna Kinderknecht (now Mrs. Hockinson).

(b) It contained unexplained erasures and overwriting at critical places.

(c) The date stamped on the back of the card was June 4, 1945, as contrasted with the date June 3, 1945 on the face.

(d) Unlike all other exhibits in possession of the Government, it bore no legend as to the date of its acquisition by the FBI and no FBI Agent's initials.*

(e) The card was not "discovered" by the Government until some undetermined time after the arrest of Gold, and at a place undetermined, although the September 19, 1945 Hilton Hotel registration card was in the possession of the Government in May 1950 when Gold was arrested.

(f) The card was inconsistent with Gold's pretrial taped statement in which he had said that he stayed in the Hilton Hotel in Albuquerque only once, in September 1945.

(g) The original of Exhibit 16 was allegedly returned by the Government to Hilton

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* The Court's point that the bank records also had no FBI Agent's initials is invalid, for the bank records were never in the Government's possession.

Hotel in 1951 when it was ripe for immediate destruction according to the hotel policy, which was to destroy registration cards six years after they were dated.

22. Despite the sharpness and documents of the petitioner's attack on Exhibit 16 and the Government's inability or failure to refute any of the charges, the District Court, applying a special brand of "summary judgment", purported to weigh the evidentiary value of the allegations of the petition and made a series of adverse factual determinations. Its response to the petition was substantially as follows:

(a) Although the handwriting on Exhibit 16 purported to be that of Anna Kinderknecht (although not in her handwriting and the Court acknowledges this fact) it concludes that it could not possibly be a forgery, in that there conceivably could be some other explanation.

(b) Even if the card was forged, it might nevertheless have been an entry kept in the regular course of business.

(c) The presumptive date of destruction of the original of Exhibit 16 (if there was any) was misstated as 1957 instead of the true date of 1951.

(d) Called attention to the failure of the petitioner to furnish Mrs. Hockinson's affidavit, ignoring the impossibility of procuring an affidavit without consent, contrasted with the ability to compel oral testimony at a hearing.

(e) Accepted on no evidentiary basis whatever, that all Hilton Hotel cards for June 3, 1945, had been misdated.

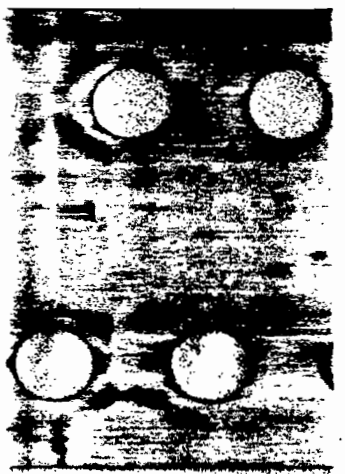
23. I submit that the petition and supporting papers, including the affidavit of Mrs. McCarthy mandated a hearing, and that the failure to grant a hearing was error.

24. Finally, we come to the error committed by the District Court in its rejection of the evidence of knowing use of false Gold testimony as shown by prior materially inconsistent statements known to the Government. The petitioner submitted various exhibits and transcripts relating to communications and conferences between Gold and his attorneys, and records of statements written by Gold. The falsity of Gold's trial testimony was shown not only by the respects in which it contradicted his prior statements but also in that on the trial he gave testimony against the defendants which did not appear in any form in

his prior statements. The Court notes critically that one of Gold's statements, that dated July 20, 1950, was not submitted, although that statement was also in the possession of the Government. But the July 20th statement, like all of the material submitted to the Court, and additional statements of Gold not included in the voluminous summation, omitted any reference to the alleged evidence connecting Gold and the Rosenbergs. See paragraphs "84" and "85" of the petition. Indeed, there is much material in such statements which would be available upon a hearing and would further impeach Gold's testimony. I submit that it was not incumbent upon the petitioner to submit all possible evidence to the Court on his application for an evidentiary hearing in view of the ample showing made by his moving papers.

25. A fair reading of the transcripts and statements submitted reveals that much of Gold's trial testimony was contrived after he had made a full statement of the "facts" on various occasions before the trial. In assigning error, I shall not here attempt an exhaustive list of the contradictions, inconsistencies and omissions which I respectfully believe should have called for an evidentiary hearing. However, by way of illustration, I call attention to one glaring example of false testimony as revealed by Gold's prior statements to his attorney and other writings.

26. The subject was the importance to the Russians of the material allegedly obtained by Gold from Greenglass. We have seen that in the creation and presentation of Exhibit "8", in the staging of alleged AEC and scientific support of the prosecution, in the build-up of Derry and in other actions, the prosecution assiduously fostered the notion that Greenglass had delivered to the Rosenbergs for transfer to Russia, a sketch of the cross-section of the atomic bomb. It was necessary for the prosecution to cause Gold to substantiate that fact by asserting that he had obtained from Greenglass and delivered to Yakovlev significant material.



27. Yet, on June 14, 1950, Gold had said to his attorney, as shown by the tape recording of that day:

> "...[Yakovlev] had said that we can forget all about him, [Greenglass] that there wasn't much point in getting in touch with him. And I got from the manner in which he made the remark that apparently the information received had not been of very much consequence at all and they believe that the risk attendant upon seeing him did not make any such effort worth while."

And on June 16, 1950, in a so-called "Chronology of Work for Soviet Union", Gold wrote:

> "... I turned the data over to [Yakovlev]. Earlier I have said that I believed the information to have been unimportant but I have since learned that it was highly valuable."

In Gold's statement of October 11, 1950, a draft of a statement he intended to make to the Court at the time of his sentence in the event that his attorneys' statement would be limited, he wrote:

> "As has been said before, until some time after my arrest, all memory of this incident had fled from me (probably this was because Yakovlev had subsequently - and with intent to mislead - tell me that the information received was of no value)."

28. Yet Gold testified that Yakovlev had stated: "that the information which I had received from Greenglass was extremely excellend and very valuable" (R. 631).

29. I submit that the petition and supporting documents made a strong prima facie showing that Gold's trial testimony was belied by his pretrial statements. It was error for the District Court to reject the showing made and deny petitioner an evidentiary hearing and it was equally error, in any event, to deny to the petitioner pretrial statements given to the Government by Gold and Greenglass as well as the Fuchs statement.

WHEREFORE, for the reasons as stated above, petitioner should be admitted to bail pending the ultimate determination of the appeal.

Marshall Perlin

Sworn to before me
this 27th day of
February, 1967.

66 Civ. 1328

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MORTON SOBELL,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT

MARSHALL PERLIN
FRIEDMAN & PERLIN
ATTORNEYS FOR Petitioner.
36 WEST 44TH STREET
BOROUGH OF MANHATTAN NEW YORK, N. Y. 10036
MO 1-1088

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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MORTON SOBELL, :

Petitioner, : AFFIDAVIT

-v- : 22 1120

UNITED STATES OF AMERICA, :

Respondent. :

- - - - - - - - - - - - - - - - - - - x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

STEPHEN F. WILLIAMS, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York, in charge of the above-captioned case, and, as such, I am familiar with the facts and proceedings therein.

2. By notice of motion returnable March 20, 1957, petitioner applies for an order admitting him to bail pending appeal from the Honorable Edward Weinfeld's denial of his sixth motion under 28 U.S.C. § 2255. This affidavit is submitted in opposition to this bail application.

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Background

3. Petitioner is presently serving a 30-year sentence under a judgment of conviction that has proven invulnerable under incessant direct and collateral attack ever since it was entered on April 5, 1951 (see pp. 4-5 of Judge Weinfeld's opinion for a listing of the judicial considerations of the five collateral attacks preceding the present one; see also "Memorandum of the United States of America in Opposition to Amended Section 2255 Petition of Morton Sobell," pp. 29-38, for a summary review of those attacks).

4. Petitioner's most recent application for relief was carefully scrutinized by Judge Weinfeld; like all five previous motions, it was found wanting. On February 14, 1967 Judge Weinfeld held that petitioner was not entitled to a hearing, as "the files and records of the case conclusively show that he is not entitled to relief" (Judge Weinfeld's opinion, p. 79).

5. On March 2, 1967 Judge Weinfeld denied petitioner's application for bail pending final disposition of petitioner's current application for relief.* In so doing, he wrote:

*Petitioner has also appealed from Judge Weinfeld's denial of bail. Whatever the disposition of the present bail application, it will render that appeal moot.

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"The presumptive validity of the judgment of conviction, affirmed upon direct appeal, is buttressed by the rejection of five prior collateral attacks, all of which also have been affirmed upon appeal. Despite the voluminous, repetitive and discursive allegations in the present section 2255 petition, the issues upon the petitioner's appeal from the denial of his latest attack upon the judgment of conviction are comparatively simple and can be presented with dispatch to the Court of Appeals. The appeal can be heard promptly under the existing rules and, if petitioner is so minded, he can apply for an order for a preference and so expedite his appeal."

Bail Precluded by Law

6. Rule 8 of the Rules of this Court adopts Rule 49 of the Revised Rules of the Supreme Court "so far as applicable". The first paragraph of the adopted Rule is dispositive of the present application:

1. Pending review of a decision refusing a writ of habeas corpus, or refusing a rule to show cause why the writ should not be granted, the custody of the prisoner shall not be disturbed, except by order of the court wherein the case is then pending, or of a judge or justice thereof, upon a showing that custodial considerations require his removal. In such cases, the order of the court or judge or justice will make appropriate provision for substitution so that the case will not become moot.

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7. Rule 49 further provides that "the initial order respecting the custody or enlargement of the prisoner pending review" - in this case Judge Weinfeld's refusal to grant bail - shall be disturbed "only when special reasons therefor are shown":

> 4. Except as elsewhere provided in this rule, the initial order respecting the custody or enlargement of the prisoner pending review, as also any recognizance taken, shall be deemed to cover not only the review in the court of appeals, but also the further possible review in this court; and only where special reasons therefor are shown to the court of appeals or to this court or to a judge or justice of either court will that order be disturbed, or any independent order made in that regard.

8. No case has been found admitting a convicted prisoner to bail pending appeal from denial of an application for a hearing under 28 U.S.C. § 2255. In circuits that have not adopted Supreme Court Rule 49, the courts considering the issue have concluded that only "unusual circumstances" would justify admission to bail in such a case, and have proceeded to find that such circumstances were not present (see "Memorandum of Law in Opposition to Petitioner's Motion for Admission to Bail," pp. 10 - 13). This evident reluctance is clearly based in part on grave doubt as to whether any court has jurisdiction to disturb the custody of a prisoner serving a sentence under a presumptively valid judgment, and as

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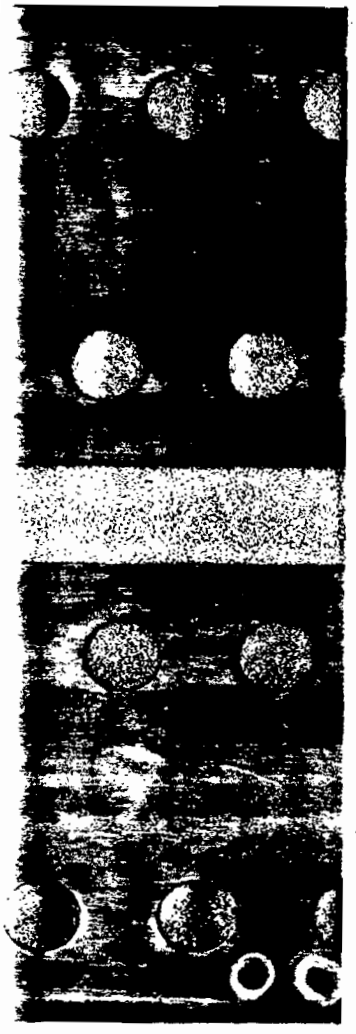
to whom the only pending matter is an application under 28 U.S.C. § 2255 that has been found inadequate on its face (see "Memorandum of Law in Opposition to Petitioner's Motion for Admission to Bail", pp. 5 - 9).



Bail Precluded by Circumstances of the Case

9. Petitioner claims that, as a result of delays which he attributes to the Government and Judge Weinfeld, disposition of the present petition will consume all or most of petitioner's remaining sentence:

> "In consideration of the present application for bail, an important factor is the element of time, the time consumed in preparation of the petition, its presentation to and disposition by the lower court, delays caused by the Government, its failure to disclose information to which petitioner was entitled, as well as other harassing tactics." (March 13, 1967 affidavit of Marshall Perlin, p. 2.)

In fact the record shows that all significant past delay results directly from petitioner's conduct; any future delay will doubtless spring from the same source.

Delay in filing the petition and related papers

10. Petitioner claims that it was not until "late summer or early fall of 1965" that his attorneys obtained the material on which the present motion bases its attacks on the Government's evidence of the June 3, 1945

meeting between Harry Gold and David Greenglass (March 13, 1967 affidavit of Marshall Perlin, p. 3). Even if this were true (the Government contends that all such material was available at the time petitioner initiated his third § 2255 motion in May 1956 (see July 11, 1966 affidavit of Robert L. King, passim)), at least seven months passed between these discoveries and the filing of petitioner's May 9, 1966 motion.

11. The Honorable Marvin E. Frankel thereupon established a schedule calling for petitioner's supporting brief to be filed on May 27, 1966, and the Government's answering papers on June 14, 1966 (Tr., May 13, 1966, p. 26-27). Instead of following this schedule, petitioner delayed the filing of his brief until June 13, 1966, forcing the Government to request and obtain until July 11, 1966 for the filing of its answering papers, which deadline the Government duly met (see Tr., August 15, 1966, p. 5). Two days later, petitioner filed a minor amendment of his May 9, 1966 petition, on the purported ground that the Government had "not interposed any response thereto". (See undated Notice, postmarked July 12, 1966, received July 13, 1966.)

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12. On July 25, 1966, the adjourned return date of the May 1966 motion, petitioner sought and obtained leave to file an amended petition. Petitioner explained the need for such leave on the ground that the unimpounding on April 14, 1966 of Government's Exhibit 8 and the related testimony of David Greenglass had led to "new evidence". (July 25, 1966 affidavit of Marshall Perlin, p. 2; Tr., July 25, 1966, passim). Judge Weinfeld's opinion concluded that "the contention that the [branch of the present motion based on the unimpounded materials] is based on newly discovered facts ... flies in the face of the record" (Opinion, p. 44), pointing to the fact that petitioner himself was present when the trial judge ruled the impounded material would be available to the defense "for any subsequent proceeding" (Impounded Testimony, p. 4), that the printed record itself contains an allusion to its continued availability (p. 903), and that it had been one of the subjects of petitioner's 1952 motion pursuant to 28 U.S.C. § 2255.

13. After two adjournments, one by consent of the Government (Tr., August 3, 1966, p. 50) and one over its objection (Tr., August 15, 1966, passim), the present petition, incorporating the attack on the Government's evidence of the June 3, 1945 meeting and on Exhibit 8 and all related testimony was filed on August 22, 1966. This

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was at least ten months after petitioner's admitted discovery of the basis for the assault on the evidence of the June 3, 1945 meeting.

14. On September 3, 1966, twelve days after the filing of the present petition, the Government filed its answering papers.

15. On the return date of the motion, September 12, 1966, petitioner filed a brief and four new affidavits, by Marshall Perlin, Malcolm Sharp, Harold C. Urey, and Walter Schneir.

16. On October 17, 1966 petitioner filed an additional affidavit, that of Robert F. Christy, as well as transcripts of discs recording certain pre-trial statements of a Government witness, Harry Gold; since June 1961 copies of these discs had been in the possession of Walter and Miriam Schneir, who at least as early as the summer of 1965 had shared their materials with defense counsel (see August 19, 1966 affidavit of Walter and Miriam Schneir, attached to August 22, 1966 petition, pp. 2, 4 and 6).

17. Since "late summer or early fall of 1965", therefore, over a year passed before petitioner placed his materials before the court in full. In the meantime petitioner had ignored one deadline (paragraph 11),

abandoned its May 1966 motion on the return date, and obtained three successive deadlines for the filing of an amended motion (paragraphs 12 and 13). The last of these petitioner finally met. Apart from petitioner's substitution of his August for his May petition, he made supplementary filings on three occasions, July 13, September 12 and October 17 (paragraphs 11, 15 and 16).

18. The bail application in the court below followed the same course. On the original return date he asked and obtained a week's adjournment to study Judge Weinfeld's opinion (Tr., February 14, 1967); on the adjourned return date he sought and obtained a second week's adjournment (Tr., February 20, 1967); finally, on February 27, 1967, he was ready to argue the motion, but filed an affidavit that attempted to shore up his case by inclusion of excerpts from counsel's correspondence with an atomic scientist who had died in the interim (February 27, 1967 affidavit of Marshall Perlin, pp. 11-12).

19. Three weeks passed between Judge Weinfeld's opinion on the merits and the filing of a notice of appeal on March 7, 1967.

Style of the Petition

20. Besides taking at least a year to present his material to the court, in seemingly endless driblets,

petitioner presented it in a style marked by repetition and vituperation, as if high volume and frequency could conceal the paucity of facts. As Judge Weinfeld wrote (pp. 7-8):

> "A preliminary observation is in order. The constant repetition through the petition's 100 paragraphs of allegations of fraud, perjury, concealment of evidence and like epithets, and the "upon information and belief" charges make it desirable to state what ordinarily would be assumed - that reiteration of unsupported charges and conclusory allegations is no substitute for factual allegations."

And later (p. 56):

> "The entire theory of a grand conspiracy is the product of a fertile imagination. The unrestrained hurling of invective, page after page, in the petition does not observe the lack of evidence. A constant drumfire of vituperation does not establish basic facts which are required before inferences may reasonably be drawn to support charges of fraud and perjury."

The necessity of distilling the essence of petitioner's claims from the flood of irrelevant and conclusory denunciations, doubtless delayed the court below.

Anticipated Time of Release

21. No matter what the course of petitioner's present appeal on the merits, disposition of the motion should not take more than a small fraction of petitioner's remaining prison sentence. The Bureau of Prisons

calculates that petitioner may be eligible for release, on the basis of maximum past and future statutory and meritorious good time (assuming accumulation of the latter at the same rate as in the past), in April 1970. This calculation gives petitioner credit for all time in custody from April 5, 1951, the date of his sentence, except the 479 days from July 20, 1951 to November 19, 1952, during which petitioner was at the Federal House of Detention pursuant to an election not to serve his sentence. Petitioner now claims he is entitled to credit for (1) the pre-sentence period of custody, from August 1950 to April 1951 (see February 8, 1967 affidavit of Marshall Perlin, p. 1)* and (2) the period of custody pursuant to his election not to serve, from July 1951 to November 1952 (see February 8, 1967 affidavit of Marshall Perlin, pp. 1-2**).

22. As the statute and rule in effect at the time provided that sentence should commence on the date the prisoner was committed to a place of detention to await transportation to the place where his sentence is

* The above-mentioned affidavit mistakenly assumes that the Bureau of Prisons has not given credit for the April-May 1951 period during which petitioner was in custody at the Federal House of Detention awaiting transportation to the place where he was to serve his sentence.

** The above-mentioned affidavit mistakenly places the inception of the election not to serve in August 1951, instead of July 20, 1951.

to be served, 18 U.S.C. § 3568*, April 5, 1951 in this case, and should exclude periods during which an election not to serve was in effect (or the defendant was released on bail), Rule 38(a)(2)**, United States v. Cortese, 244 F. 2d 872 (2d Cir. 1957), the July 1951 - November 1952 period in this case, it is clear that petitioner's sentence will run to April 1970, so that there is no possibility that delay pending disposition of the present motion will deny to him the practical benefits that its success would entail.

Normal Reasons for Bail Absent

23. None of the usual reasons for admitting a prisoner to bail are present here. Far from being clothed with the presumption of innocence that gives a defendant the right to bail before trial, petitioner has been convicted. The crime of which he has been convicted, conspiracy to violate 50 U.S.C. § 32 (now 18 U.S.C. § 794), is a capital offense, so that even before conviction

*Section 6 of P.L. 89-465 explicitly provides that Section 4, amending 18 U.S.C. § 3568 to give credit for "days spent in custody in connection with the offense", applies only to sentences imposed on or after the effective date.

**The 1966 amendment eliminating the election to serve procedure, is not retroactive. See February 28, 1966 order of the Supreme Court, paragraph 2, 39 F.R.D. 69, 252, 271 (1966).

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petitioner was not entitled to bail, 18 U.S.C. § 3148. The record, far from containing the chance of error that gives a defendant some claim to bail pending appeal, has been carefully scrutinized for error; none has been found. The possibility that denial of bail will prejudice the petitioner is no greater than the chance of his ultimately succeeding in vacating his conviction. This seems slight at best. If a hearing were ordered, he would at last have to substantiate his wild allegations of fraud, perjury, forgery and prosecution complicity therein, as to which he has never made offers of specific, material proof. In view of his failure to make such offers of proof, the likelihood of his meeting the necessary burden seems remote.

24. Prior to his arrest, moreover, petitioner fled this country to avoid prosecution. The testimony at trial showed that petitioner, with his immediate family, fled to Mexico shortly after co-conspirators David Greenglass and Harry Gold were apprehended; that he falsely explained to a neighbor in Mexico City that he had left the United States because of fear that he would be inducted into the Army (1348-50, 1417-19*);

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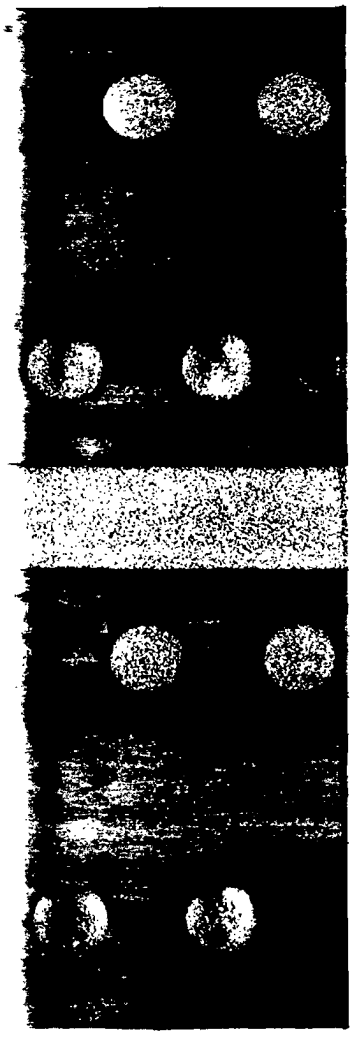
* The indicated references are to pages of the typed transcript of the trial.



that while in Mexico he visited two leading seaports, using no less than five false names; that his apprehension and return to the United States prevented him from perfecting his flight out of Mexico to points abroad (1358-72; 1525-26).*

25. Even petitioner's own story of his trip to Mexico belies the statement of his counsel that he and his family have "deep roots, friends and associations in this city." (February 8, 1957 affidavit of Marshall Perlin, p. 4). In a sworn affidavit attempting to explain the Mexican venture, petitioner stated, after referring to his completion of a research project and a course that he was teaching, and to his wife's and daughter's completion of their respective school terms, "None of us had any special ties keeping us in the city, so we decided to go to Mexico." (September 23, 1953 affidavit of Morton Sobell in opposition to motion of United States Attorney to affirm the June 8, 1953 decision denying his second motion under 28 U.S.C. § 2255, p. 3) (Emphasis added.).

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* The indicated references are to pages of the typed transcript of the trial.

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26. Moreover, petitioner's own story of his Mexican trip also reflects his readiness to leave the United States permanently: "... [We] just didn't know whether we would come back or not. I recall thinking that Mexico might offer us a real challenge and opportunity - a country that, in my technical, engineering field was really in its pioneer days." (September 23, 1953 affidavit of Morton Sobell, pp. 4-5). Accordingly, petitioner and his wife cashed in their return trip American Airlines tickets, and, on learning of the arrest of Julius Rosenberg, petitioner travelled about Mexico, "using false names, and inquiring about passage to Europe or South America for all of us." (September 23, 1953 affidavit of Morton Sobell, p. 5).

27. In the light of this record, it is easy to see why petitioner's claim of "deep roots" in New York City is supported only by the affidavit of his counsel on information and belief that are wholly without foundation.

28. In sum, nothing in this case justifies imposing upon the Government the risk of petitioner's again fleeing the United States.

WHEREFORE, the Government respectfully requests that petitioner's application for bail be denied in all respects.

STEPHEN F. WILLIAMS
Assistant United States Attorney

Sworn to before me this
17th day of March, 1967.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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MORTON SOBELL, :

Petitioner, :

MR 1160

-v- :

UNITED STATES OF AMERICA, :

Respondent. :

----------X

MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S MOTION FOR ADMISSION TO BAIL.

Preliminary Statement

Petitioner is presently serving a 30-year sentence under a judgment of conviction that has withstood incessant direct and collateral attack ever since it was entered on April 5, 1951. Now, by motion returnable March 20, 1967, he moves this Court for an order admitting him to bail pending appeal from the denial, by the Honorable Edward Weinfeld, of petitioner's sixth application pursuant to 28 U.S.C. § 2255 to vacate and set aside that sentence and judgment of conviction.

The Government opposes the present application for bail on the grounds that in the present posture of the case (1) the rules of this Court preclude bail; (2) the jurisdiction of this Court to grant bail is at best questionable; and (3) even if the Court had jurisdiction to release petitioner on bail, the unusual circumstances necessary to justify such action are not present.

Argument

1. Rule 8 of the Rules of this Court precludes bail.

On February 14, 1967 Judge Weinfeld denied petitioner's motion to set aside his judgment of conviction and his demands for a hearing and other relief, finding that "the files and records of the case conclusively show that he is not entitled to relief" (Opinion, p.79). Rule 49 of the Revised Rules of the Supreme Court, which is adopted "so far as applicable" by Rule 8 of the Rules of this Court, explicitly covers this situation:

> "1. Pending review of a decision refusing a writ of habeas corpus, or refusing a rule to show cause

> why the writ should not be granted, the custody of the prisoner shall not be disturbed, except by order of the court wherein the case is then pending, or of a judge or justice thereof, upon a showing that custodial considerations require his removal. In such cases, the order of the court or judge or justice will make appropriate provision for substitution so that the case will not become moot."

As 28 U.S.C. § 2255 represents a statutory codification of habeas corpus, United States v. Hayman, 342 U.S. 205 (1952), Judge Weinfeld's denial of the motion for vacation of the judgment and for a hearing represents a decision refusing a writ of habeas corpus.

Rule 49 provides, moreover, that the initial decision on the petitioner's custody should be disturbed "only where special reasons therefor are shown":

> "4. Except as elsewhere provided in this rule, the initial order respecting the custody or enlargement of the prisoner pending review, as also any recognizance taken, shall be deemed to cover not only the review in the court of appeals, but also the further possible review in this court; and only where special reasons therefor are shown to the court of appeals or to this court or to a judge or justice of either court will that order be disturbed, or any independent order made in that regard."

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Judge Weinfeld considered the issue and denied bail on March 2, 1967. Not reaching the issue of his power to grant bail, he ruled:

> "The presumptive validity of the judgment of conviction, affirmed upon direct appeal, is buttressed by the rejection of five prior collateral attacks, all of which also have been affirmed upon appeal. Despite the voluminous repetitive and discursive allegations in the present section 2255 petition, the issues upon the petitioner's appeal from the denial of his latest attack upon the judgment of conviction are comparatively simple and can be presented with dispatch to the Court of Appeals. The appeal can be heard promptly under the existing rules and, if petitioner is so minded, he can apply for an order for a preference and so expedite his appeal."

No reason has been shown, let alone a special one, for disturbing Judge Weinfeld's denial of bail.*

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*Petitioner has appealed from this denial of bail by notice of appeal filed March 7, 1967. The disposition of the present application should render that appeal moot.

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2. As Petitioner is in custody under a judgment of conviction that has been affirmed and as to which the Supreme Court has denied certiorari, this Court may have no authority to admit him to bail.

Petitioner was convicted on March 29, 1951, of conspiring to violate 50 U.S.C. § 32, after trial before the Honorable Irving R. Kaufman and a jury. On April 5, 1951, petitioner was sentenced to 30-years imprisonment. His conviction, and those of his co-defendants Julius and Ethel Rosenberg, were affirmed on appeal, 195 F. 2d 583 (2d Cir. 1952), cert. denied, 344 U.S. 838 (1952). Petitioner's subsequent petition for rehearing, motion for leave to file a second petition for rehearing and motion to vacate the orders denying certiorari and rehearing, have all been denied by the Supreme Court, 344 U.S. 889, 347 U.S. 1021, 355 U.S. 860. Petitioner is therefore in custody of the warden of the Federal Penitentiary at Lewisburg, Pennsylvania, under a presumptively lawful judgment, all avenues of direct review having been unsuccessfully exhausted.

The only matter presently outstanding before any court with respect to petitioner's judgment of conviction is his sixth application under 18 U.S.C. § 2255. As a consequence of that application, the district court obtained authority to require the respondent "to produce at the hearing the body of the person detained," 28 U.S.C. § 2243, or to provide the petitioner whatever relief is appropriate if he prevails on the merits, 28 U.S.C. § 2255. As Judge Weinfeld has found that the records of the case conclusively show that the petitioner is entitled to no relief, nothing in the statutes relating to writs of habeas corpus, 28 U.S.C. §§ 2241-2255, gives this Court or the district court authority to interfere with petitioner's custody, by granting him bail or otherwise.

No case has been found directly considering whether a court may bail a habeas corpus petitioner pending appeal from a lower court's refusal to issue the writ or to bring the petitioner into its custody. The leading case considering whether a court could

bail a convicted prisoner as to whom the writ had issued, strongly implied that the issuance of the writ was a prerequisite to the habeas corpus court's power to bail. Johnston v. Marsh, 227 F. 2d 528 (3rd Cir. 1955), dealt with a prisoner serving a sentence under a state judgment of conviction, who applied to a federal district court for a writ of habeas corpus, alleging lack of due process in his trial. The federal judge issued the writ, requiring the prison warden to bring the prisoner before the federal court, and, after a hearing on the prisoner's health, found that the prisoner, an advanced diabetic, was, "under conditions of confinement, rapidly progressing toward total blindness." 227 F. 2d at 529. He thereupon admitted the prisoner to bail pending disposition on the merits, making hospitalization a condition of the bail. The state prison warden sought writs of prohibition and mandamus against the federal judge. The court denied the writs, finding the source of the judge's authority

as follows:

"We think the basis of the judge's authority in this case is the fact that there is a prisoner before him [4] over whom he has jurisdiction and where his power to act judicially is expressly conferred by statute. [5] That being so, he had the authority which a court has with regard to such a case ... ."
227 F. 2d at 530.

"4. We are not required here to decide whether a court can properly grant bail without first securing custody of the prisoner. On August 12, 1955, Judge Marsh issued a writ of habeas corpus ordering prisoner brought before him and the prisoner was so brought. The Code, 62 Stat. 965 (1948), as amended, 23 U.S.C. § 2241(c)(5) (1952), gives the court the authority to issue writs 'necessary to bring [the prisoner] into court to testify ***,' without limitation as to the context of the testimony. When the prisoner came before the court, the judge, under common law doctrine, gained custody of him, the authority of the writ superseding that of the original commitment. In re Kaine, 1852, 14 How. 103, 133, 55 U.S. 103, 133, 14 L. Ed. 345 (dissent); Barth v. Clise 1870, 12 Wall. 400, 402, 79 U.S. 400, 402, 20 L. Ed. 393."

"5. 62 Stat. 964 (1948, as amended, 28 U.S.C. § 2241 (1952)."

Judge Hastie, concurring, stressed more emphatically the significance of the writ's having issued:

> "...When a court with jurisdiction of the subject matter receives a petition for habeas corpus which is not inadequate on its face, normal procedure is to issue a writ of habeas corpus, ordering the person who is detaining the petitioner to bring him before the court for hearing and decision whether he is unlawfully deprived of his liberty. The district court issued such an order here and in obedience thereto the state warden produced his prisoner.
>
> "At that junction the body of the petitioner came under the lawful control of the district court... . During [the pending of disposition] detention is by force of the writ of habeas corpus, and the antecedent detaining authority is superseded for the time being." 227 F. 2d at 532. (Emphasis added.)

As Judge Weinfeld has determined that the application of the petitioner herein is "inadequate on its face," and as no writ has issued to bring him before this Court or the district court, the detaining authority of the warden of the Federal Penitentiary at Lewisburg, Pennsylvania continues unabated.*

* The only other case considering the jurisdictional issue is Bruce v. United States, 256 F.Supp. 28 (D.D.C. 1966) which followed Johnston v. Marsh and found that the court had power to admit to bail pending appeal from denial of relief under 28 U.S.C. § 2255 after a hearing had been held. Finding no unusual circumstances, however, the court declined to set bail.