3. As a motion under 28 U.S.C. § 2255 is not an appeal from a criminal conviction, bail is not authorized by 18 U.S.C. § 3148 and, even when jurisdiction attaches, may be granted only in "unusual circumstances".

Even if the court obtained jurisdiction over the person of the petitioner, bail pending the determination of the motion is not justified. A motion under 28 U.S.C. § 2255 is an independent civil proceeding, see, e.g., Hefflin v. United States, 358 U.S. 415, 418 (1959), not an appeal from a criminal conviction. The rules governing bail pending appeal, Rule 46(a)(2), 18 U.S.C. § 3148, are consequently wholly inapplicable. Edwards v. United States, 286 F. 2d 704 (9th Cir. 1961); Reiff v. United States, 288 F. 2d 887 (9th Cir. 1961), Bruce v. United States, 256 F. Supp. 28 (D.D.C. 1966); In re Curtis' Petition; 227 F. Supp. 438 (E.D.Mo. 1964).

Even when the jurisdictional hurdle is surmounted, therefore, a prisoner serving a sentence under a judgment of conviction may, pending determination of a motion under 28 U.S.C. § 2255, be admitted to bail only under "unusual circumstances." Edwards v. United States, supra; Reiff v. United States, supra; Bruce v. United States,

supra; In re Curtis' Petition, supra. In the latter case, for example, the court concluded:

> "...[The] proceeding before this district court is a civil action in habeas corpus and is not, as such, an appeal from a criminal conviction. We are not here concerned with bail pending trial or bail pending appeal from a conviction. Habeas corpus is not governed by rules of criminal procedure. There are no unusual circumstances shown here to set aside the usual rule that bail cannot be granted to a prisoner during appeal from a denial of post-conviction remedy, such as habeas corpus or coram nobis...." 227 F. Supp. at 441.

The four cases cited above are the only cases considering what circumstances would justify bail for a convicted prisoner seeking relief by habeas corpus; all followed the "unusual circumstances" rule, and none found such circumstances to exist.

Johnston v. Marsh, supra, is the only contested case in which a convicted prisoner has been bailed pending determination of a motion under 28 U.S.C. § 2255 or 28 U.S.C. § 2254 (state custody). As that case arose on an application for prohibition and mandamus, the court reviewed only the court's jurisdiction to decide bail, not the criteria for

the decision. The case clearly conforms to the "unusual circumstances" rule, however, for the court emphasized that the prisoner was "under conditions of confinement rapidly progressing towards total blindness," 227 F. 2d at 529.*

The strict limits on bail pending collateral attack on a criminal conviction seem clearly based on a presumption as to the outcome. Instead of the presumption of innocence on the defendant's side, there is the presumption of lawfulness on the side of the judgment under which he is incarcerated. In this case, for example, the burden is on the petitioner to prove some specific element of the fraud that he has so constantly attributed to all associated with the trial of the case. The contrast

*In other cases bail has been granted without apparent opposition by the respondent. See United States ex rel. Stevens v. McCloskey, 239 F. Supp 419, 420 n.1 (S.D.N.Y. 1965) (the writ had issued and bail was evidently necessary to "prevent expiration of petitioner's sentence pending decision"); Levin v. Katzenbach 363 F. 2d 287 (D.C. Cir. 1966); Curtis v. Boeger, 331 F. 2d 675 (6th Cir. 1964); United States v. Rundle, 219 F. Supp. 549 (E.D. Pa. 1963). Only in the McCloskey case did the court state the circumstances which in its opinion justified bail--circumstances clearly not present in the instant case.

between the ease with which a prisoner can allege such frauds and the difficulties he would encounter in proving them is ample justification for limiting bail for convicted prisoners pending a motion under 28 U.S.C. § 2255 to the most unusual circumstances.

The other basis for the rule is doubtless the ability of prisoners to file motions uner 28 U.S.C. § 2255 without limit as to quantity or frequency. As a consequence, the possibility of bail except in the most unusual circumstances would sharply increase the incentive to file such motions, and result in constant interruptions of sentences that would disrupt both the rehabilitative and deterrent functions of the prison system.

As set forth in the accompanying affidavit, this case presents circumstances which are unusual only in the degree to which they militate against petitioner's admission to bail.

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CONCLUSION

The relief sought by petitioner should be denied in all respects.

Respectfully submitted,

ROBERT M. MORGENTHAU,
United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.

STEPHEN F. WILLIAMS,
Assistant United States Attorney,

Of Counsel.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

MORTON SODELL,

Petitioner, -Appellant

66 Civ. 1328

- against -

NOTICE OF MOTION

UNITED STATES OF AMERICA,

Respondent. -Appellee

----------x

S I R S:

PLEASE TAKE NOTICE, that upon the affidavit of MARSHALL PERLIN, sworn to the 13th day of March, 1967 and the exhibits thereto attached, and upon the files and records of this proceedings, portions of which will be submitted to this Court upon the return of the motion, the petitioner will move this Court at a Motion Term thereof to be held on the 20th day of March, 1967 at 10:30 o'clock in the forenoon at the United States Courthouse, Foley Square, New York, New York, or as soon thereafter as counsel can be heard, for an order admitting the petitioner to bail pending the determination of his appeal from the denial of relief, pursuant to Section 2255 of Title 28 U.S.C. under such just and reasonable circumstances as to this Court may seem necessary and proper in the premises.

Dated: New York, New York
March 13, 1967.

Yours, etc.,

MARSHALL PERLIN
36 West 44th Street
New York, New York

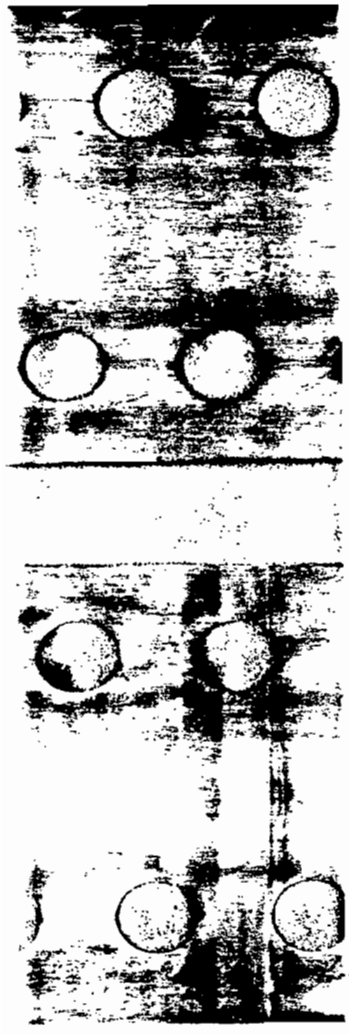
TO:
ROBERT M. MORGENTHAU, ESQ.
United States Attorney
United States Courthouse
Foley Square
New York, New York

ARTHUR KINOY
WILLIAM M. KUNSTLER
511 Fifth Avenue
New York, New York

VERN COUNTRYMAN
3 Suzanne Road
Lexington, Massachusetts

BENJAMIN O. DREYFUS
341 Market Street
San Francisco, California

MALCOLM SHARP
University of New Mexico
Law School
Albuquerque, New Mexico



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

MORTON SOBELL,

Petitioner-Appellant,

-against-

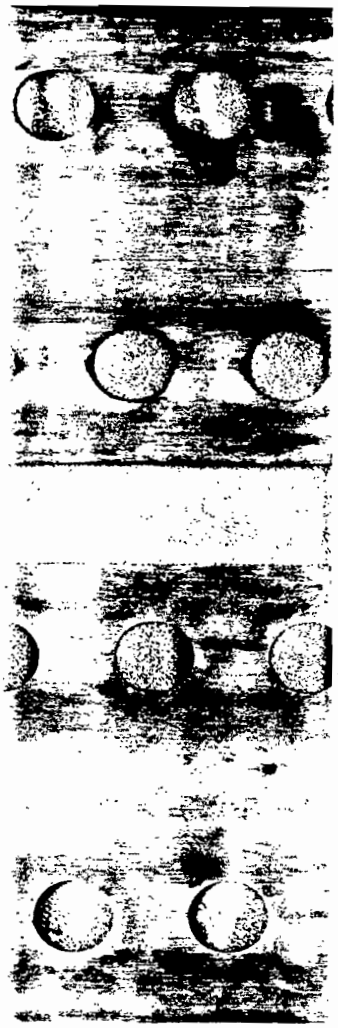
UNITED STATES OF AMERICA,

Respondent-Appellee.

----------x

Index No. 66 Civ.1328

AFFIDAVIT



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

MARSHALL PERLIN, being duly sworn, deposes and says:

1. He is one of the attorneys for MORTON SOBELL, (the petitioner-appellant, hereinafter referred to as petitioner) and submits this affidavit in support of petitioner's application for admission to bail under reasonable terms and conditions pending the disposition of his appeal to the United States Court of Appeals for this Circuit from the order and decision of Hon. Edward Weinfeld, Judge of the United States District Court for the Southern District of New York, denying petitioner's application for relief, without an evidentiary hearing. The application below was made pursuant to §2255 of Title 28 U.S.C. and was accompanied by a collateral application for pre-trial statements made by three prosecution witnesses (David and Ruth Greenglass and Harry Gold) and an alleged co-conspirator (Klaus Fuchs). The aforesaid order was made and entered on the 14th day of February, 1967 and amended by the court sua sponte on February 16, 1967. (The opinion will be submitted to the Court at the return of this motion.) A notice of appeal from the order of the Court was filed on March 7, 1967.

2. On February 8, 1967, prior to the decision of the lower court, the petitioner by order to show cause moved for an order admitting him to bail pending the disposition of his application for relief, which had been argued on September 12, 1966, returnable February 14, 1967. On the return date counsel for the petitioner was advised by the Court that the application for relief had been decided. In view of that fact, the petitioner requested, and was granted, an adjournment and obtained a second order to show cause returnable February 27, 1967 seeking the admission of the petitioner to bail pending appeal. Argument was had on February 27 and the application for bail was denied on March 2, 1967 by order filed that day by Judge Weinfeld. The petitioner appealed from the denial of bail on March 7, 1967. (The opinion of the court denying bail will be submitted to the Court on the return of this motion.)

3. 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 the petitioner was entitled, as well as other harassing tactics. The appellate process both in this Court and in the United States Supreme Court as well as the evidentiary hearing, which we verily believe will ultimately be granted, will consume such time that the petitioner may well have completed his service of sentence, thus rendering the proceedings moot. As set forth in the affidavits attached hereto which were submitted to the lower court, petitioner's release date may be de-

termined to be some time between June 1968 and January 1969.

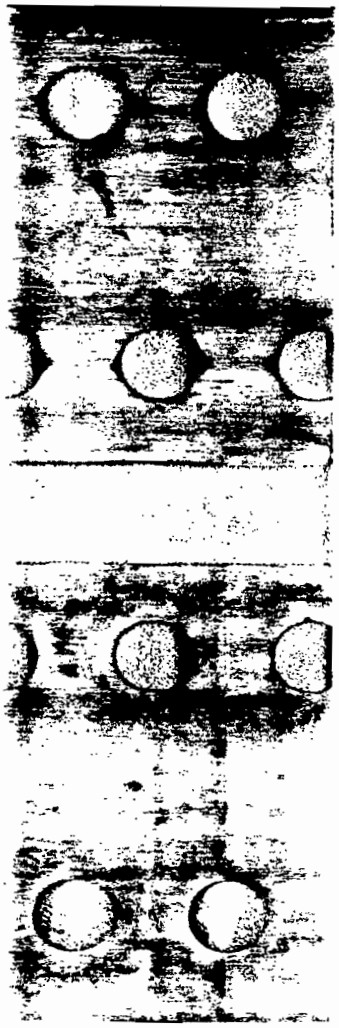
4. Some time in the late summer or early fall of 1965 the attorneys for the petitioner obtained certain evidence for the first time which served to establish that the government in the prosecution of the petitioner and his co-defendants had knowingly used a forged and after-contrived registration card, and false and perjured testimony to establish a crucial portion of its case against the petitioner and his co-defendants, an alleged June 3, 1945 meeting between David Greenglass and Harry Gold, both prosecution witnesses and alleged co-conspirators. It also served to establish that the government caused and induced the perjured testimony to be given, and four (4) months after the trial caused the original of the forged registration card to be released from its custody so as to permit its destruction.

5. After obtaining this latter information, the government, prior to the filing of the petition, persistently refused, in spite of numerous requests to disclose the time, place, manner and persons involved in acquiring or disposing of the original of the charged forged Exhibit 16 - the "June 3, 1945 registration card".

6. In March of 1966 petitioner moved to unimpound and unseal an exhibit (Government Exhibit 8) and testimony by Greenglass purported to describe a cross-section of the Nagasaki type atomic bomb, its nature, composition, operation and function, and the secrets and principles thereof, which, to petitioner's knowledge and that of his attorneys, had remained sealed and impounded since

the time of the trial in March of 1951.

7. By order dated April 14, 1966 of Hon. Edmund L. Palmieri, the aforesaid material, part of the files and records of the case, was unimpounded and unsealed under certain terms and conditions. The actual unsealing of the material took place on April 29, 1966. A copy of the same was made available to petitioner's counsel who there learned for the first time that the material had been unsealed and examined by the government before the trial judge in 1959.



8. On May 9, 1966 a petition pursuant to §2255 relating to the June 3, 1945 meeting and other aspects of the trial, but not to the unimpounded material (such petition having been in preparation from a date earlier than April 29) was filed, returnable May 13, 1966. At the request of the government the matter was adjourned to June 27, 1966 and as a result of subsequent applications, to July 25, 1966.

9. In the interim, petitioner's attorneys consulted with certain scientific experts, in conformance with the order of Judge Palmieri, and on July 25, 1966 by order to show cause an affidavit (with the order of Judge Palmieri and the formerly impounded material attached) asked for leave to file an amended petition. The amended petition related to the previously impounded Greenglass testimony and Government Exhibit 8. Judge Edelstein granted the petitioner's motion for leave to amend.

10. On July 26, 1966 the government moved on the grounds of national security to reseal and reimpound the previously unim-

pounded material and to seal the petitioner's order to show cause with attached papers seeking leave to amend. Judge Edelstein impounded and resealed the aforesaid material for a period of two days and referred the matter to Judge Palmieri. The petitioner cross-moved to unseal. The government then proposed an order which in effect would have required that the 2255 application be heard in camera at the government's option, all on the grounds of national security. Judge Palmieri directed that the parties submit memoranda as to the government's right to an in camera proceeding at the same time directing the government to present evidence to support its claim of national security and secrecy. On the return day of all of the aforesaid motions, August 3, 1966, the government was forced to acknowledge that the material was not classified or secret and that it would not adversely affect the national security - and for the first time in these proceedings attempted to disclaim its former representations and characterizations of the impounded evidence and its significance.

11. On the filing of the amended petition with supporting affidavits of scientists, the government once again sought to seal the petition pending ostensible review and examination by the Atomic Energy Commission. The court afforded the government 45 minutes for such examination and the government thereupon abandoned its attempt to perpetuate the myth of the vital importance and significance of the formerly impounded evidence which the government falsely attributed to it in the course of the trial. The government now contends, and the lower court essentially found, that the evidence was of peripheral value - even though it resulted in the execution

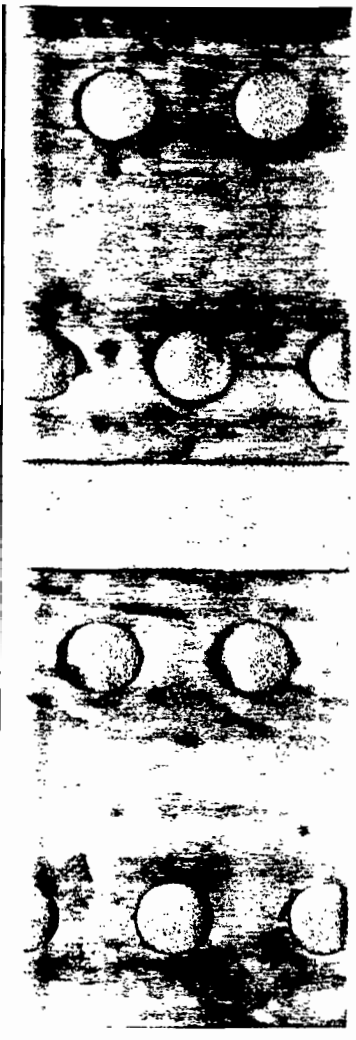
of the Rosenbergs and a 30 year sentence for petitioner.

12. The motion came on to be heard before Judge Weinfeld on September 12, 1966. The government in the course of argument maintained that certain allegations in the petition as to statements made by Gold, as well as vital omissions in his statements to his attorney (which conflicted basically with his trial testimony) were hearsay based on hearsay. To dispose of that issue the tape recordings were made available to the court and a transcript thereof running approximately 500 pages was submitted on October 17, 1966.

13. It was not until February 14, 1967 that Judge Weinfeld rendered his opinion, 79 pages in length. In the course of his opinion it was stated that he had examined all the files and records of the case including all post-conviction proceedings, collateral and otherwise, in the District Court, the Court of Appeals and the United States Supreme Court.

14. It can thus be seen that the entire files and records of the case, as well as the voluminous papers in the present application, will have to be docketed with this Court and it will take much time and effort. Equally, the length of the Judge's opinion and the various aspects of the case that he referred to will, in turn, require an extensive period of time to be spent in the preparation of the brief on appeal. Similarly, by reason of the scope of the petition, as well as the area covered by the opinion, this Court will be confronted with many substantial questions, innumerable documents, transcripts, the voluminous trial record itself,

and the prior post-trial proceedings. Since it took the lower court almost five months to consider this matter, it can reasonably be stated that the appellate process will consume a substantial period of time, and it can well be assumed that whoever prevails there will be a petition for writ of certiorari to the United States Supreme Court.

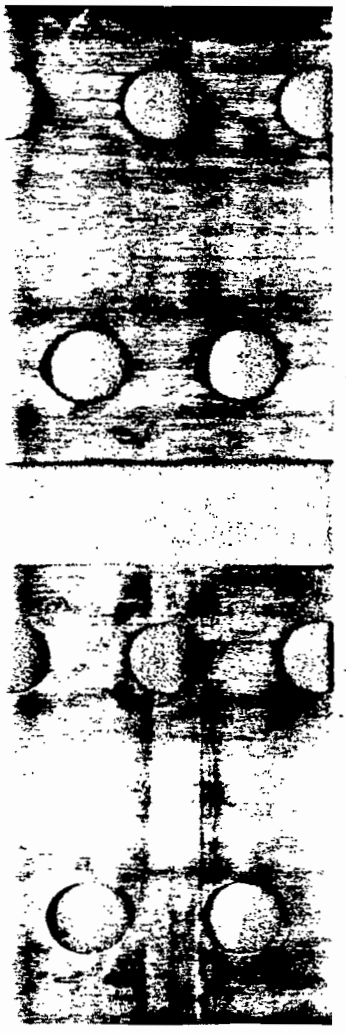


15. The lower court, in denying bail to the petitioner, after long consideration of the 2255 application stated that the issues "are comparatively simple", thus underscoring one of the most fundamental errors committed by it in rendering its opinion and denying relief. In posing the "issues", it in effect gave a simplistic version of the petition and failed to deal with the actual theory thrust and grounds of the petition, as well as the specific facts both in and dehors the record. The lower court having a distorted concept of the petition fell into the error of extracting some facts or statements out of context and ignoring allegations, factually supported by the papers, and surely misread the scientists' factual statements in their affidavits. The lower court's opinion was basically a response to a petition that was not before it, and written as if an evidentiary hearing had been held, permitting it to make findings of fact. In view of all these errors the court failed to apply the well-grounded principles of habeas corpus and which establish petitioner's right to an evidentiary hearing.

16. The petitioner incorporates, and will submit at the time of argument of this motion, the petition, supporting papers and other pleadings below as an exhibit in support of this application

for admission to bail.

17. It is respectfully submitted that this Court has the power by common law, constitution and statute to admit the petitioner to bail. This issue was not reached by the lower court. There are special and unique circumstances which warrant the admission of the petitioner to bail, particularly in view of the fact that he has almost completed the service of his lengthy sentence and it is reasonable and likely to assume that before these proceedings are finally disposed of he will have completed his service of sentence and thereby be deprived of the effective and necessary benefits of the Writ. There are, in addition, many substantial questions posed, not only by the petition but by the opinion of the lower court so as to warrant admitting the petitioner to bail pending appeal.



18. The basic issue before the lower court was whether petitioner was entitled to an evidentiary hearing to substantiate his claims as set forth in the petition and supporting affidavits upon the many facts there set forth, much dehors the record, and upon grounds never previously posed and considered. None of the allegations and facts set forth have been denied by the government and must be accepted as true in determining petitioner's right to a hearing.

19. One branch of the petition, that relating to the June 3, 1945 meeting and government Exhibit 16, both the lower court and the government acknowledge have never previously been presented or litigated. As to this branch of the petition, the

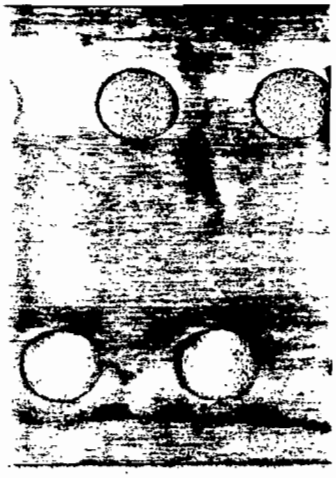
lower court's opinion is directed primarily not to the quantum of proof but by a summary disposition of the admitted issues of fact and the claim of lack of diligence on the part of the petitioner in discovering the charged fraud. The diligent attempt of the lower court to substitute a resolution of the admitted issues of fact in camera in place of an evidentiary hearing is directly in conflict with the holdings of the Federal Courts. The lower court importedly criticizes the petitioner on the one hand in not presenting all of his witnesses or evidence by affidavit or other documentary material, and on the other hand concludes that such further proof would not be forthcoming at an evidentiary hearing, or might not establish petitioner's claim. Yet the court fails to set forth such grounds for its "findings". The lower court compounds the error by holding in effect that the petitioner must prove and sustain his allegations by the pleadings alone.

20. The court then assumed the role of granting an appellate review of its "evidentiary hearing" while in fact none was held. This was clearly beyond its authority.

21. The very fact finding process pursued by the lower court in the absence of a hearing, and the nature and length of the lower court's opinion with its many resolutions of issues of fact; its drawing or rejecting inferences, establishes that the petition and its supporting papers were not in any way a "sham and frivolous" attack upon the judgment of conviction.

22. The lower court in reviewing the atomic branch of the petition not only recast it in a form not presented, but ignored

the basic thrust. The issue was not whether certain material was legally classified as secret, but whether the material presented by Greenglass was so distorted by the government through an alleged expert government employee, representations by the prosecution and other devices, that it fraudulently and prejudicially created a false impression in the minds of the jury as to the meaning and importance of the Greenglass material, and by this means induce them not only to accept the existence of a conspiracy but its success as well. The lower court, in its opinion, disregarded the conduct of the prosecution, the impact of the presence of the representatives of the Atomic Energy Commission, the notice to the jury, that leading scientists would be called, and based its disposition of the present application solely upon the ground that the Greenglass material could be considered legally classified and secret - even of peripheral value. That is not the issue that was placed before the court.



23. In determining the petitioner's right to a hearing the lower court applied standards applicable to a motion for a new trial based upon newly discovered evidence rather than grounds affording relief pursuant to habeas corpus. Putting aside the question of whether the government had committed fraud, had made misrepresentations or denied petitioner a fair trial, the lower court held that since, in its opinion, the wrongful conduct of the government could have been earlier discovered, petitioner was not entitled to relief.

24. Underlying the lower court's opinion is the holding that if the government had within its possession evidence or infor-

mation which might cast doubt upon the prosecution's case or its witnesses which might have some possible effect upon the jury it had no obligation to disclose unless a specific request for such evidence was made by the defendants in the course of the trial. The lower court also found that there was no obligation on the part of the government to correct false or misleading testimony given by its witnesses even though such testimony might have misled the jury, the defense and the court as well.

25. In this connection the court also found that if a petitioner was deprived of a fair trial but failed to act with sufficient expedition to obtain evidence and present it to the court in a habeas corpus proceeding, a conviction, though wrongfully obtained by the prosecution, was immune from collateral attack.

26. In the light of the proceedings and the manner of the lower court's disposition, it is respectfully submitted there are many substantial questions involved. They far exceed in substantiality the level required to admit a prisoner to bail.

27. It is not the contention of the petitioner that every application for habeas corpus automatically creates the right to be admitted to bail. Yet in the present instance there are sufficient, special, unique and substantial circumstances which would warrant petitioner's admission to bail pending the ultimate determination of this appeal. There is no prejudice to the government in admitting the petitioner to bail. Failure to do so may result in petitioner being deprived of his day in court and an

ultimate disposition of the present petition on the merits after an evidentiary hearing.

WHEREFORE, it is respectfully submitted that the relief sought in the motion for admission to bail be granted under just and reasonable circumstances as to this Court seems necessary and proper in the premises.

Marshall Perlin.

Sworn to before me this
13th day of March, 1967.

MILTON H. FRIEDMAN
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-0415101
Qualified in New York County
Term Expires March 30, 1968

FD-263 (Rev. 9-17-65)

FEDERAL BUREAU OF INVESTIGATION

REPORTING OFFICE	OFFICE OF ORIGIN	DATE	INVESTIGATIVE PERIOD
NEW YORK	NEW YORK	4/21/67	4/10/67

TITLE OF CASE

MORTON SOBELL aka

REPORT MADE BY: PHILIP F. DONEGAN — TYPED BY: jas

CHARACTER OF CASE

ESPIONAGE - R

REFERENCE:

New York airtel to Director, 3/22/67.

- P -

ADMINISTRATIVE

Subject's case is presently pending before the US Court of Appeals for the Second Circuit. The Bureau Will be kept advised of all proceedings in this regard.

INFORMANTS

Identity of Source	File Where Located
NY T-1 [redacted]	[redacted]
NY T-2 [redacted]	[redacted]

b2
b7D

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 5-4-87 BY 3042 PAT/ak

Case has been: Pending over one year ☐ Yes ☐ No; Pending prosecution over six months ☐ Yes ☐ No

APPROVED [signature] SPECIAL AGENT IN CHARGE

COPIES MADE:

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

DO NOT WRITE IN SPACES BELOW

101-2483-1694 REC 36

EX-116

10 APR 26 1967

Dissemination Record of Attached Report

Agency	USSS	RAO		
Request Recd.				
Date Fwd.	5-2-67	5-2-67		
How Fwd.	ltr/slip	ltr/slip		
By	JPL/da	JPL/da		

Notations

SOVIET SECTION

57 MAY 3 1967

LEADS

NEW YORK

AT NEW YORK, NEW YORK. Will follow and keep the Bureau advised of any pertinent developments regarding efforts by the subject to have his sentence vacated.

FD-305 (Rev. 3-17-64)

NY 100-37158

1. [X] Subject's name is included in the Security Index.
2. [X] The data appearing on the Security Index card are current.
3. [ ] Changes on the Security Index card are necessary and Form FD-122 has been submitted to the Bureau.
4. [X] A suitable photograph [X] is [ ] is not available.
5. [ ] Subject is employed in a key facility and _____ is charged with security responsibility. Interested agencies are _____.
6. [X] This report is classified ~~Confidential~~ because (state reason) **it contains information furnished by informants of continuing value, the disclosure of which wouldadversely affect the national defense interests.**

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

8. [ ] This case no longer meets the Security Index criteria and a letter has been directed to the Bureau recommending cancellation of the Security Index card.
9. [X] This case has been re-evaluated in the light of the Security Index criteria and it continues to fall within such criteria because (state reason)
   Subject is incarcerated at US Penitentiary, Lewisburg, Pa., following his conviction on 3/29/51 in USDC, SDNY, for conspiring to commit espionage on behalf of the Soviet Union. The Committee to Free Morton Sobell is actively engaged in efforts to have him released.

10. [X] Subject's SI card [ ] is [X] is not tabbed Detcom.
    [ ] Subject's activities warrant Detcom tabbing because (state reasons)

FD-204 (Rev. 3-3-59)

CONFIDENTIAL

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

CONFIDENTIAL

Copy to:

Report of: PHILIP F. DONEGAN Office: New York, New York
Date: 4/21/67

Field Office File #: 100-37158 Bureau File #: 101-2483

Title: MORTON SOBELL

DECLASSIFIED BY 3042 PWT CLS
ON 5-4-87

Character: ESPIONAGE - RUSSIA

Synopsis: Subject is incarcerated at the US Penitentiary, Lewisburg, Pennsylvania, and is in good health. Attorneys for subject filed motion in USDC, SDNY, 6/14/66, under Title 18, Section 2255, USC, to vacate his sentence. Motion was amended and refiled 8/22/66. In hearing on subject's motion in USDC on 9/12/66, court reserved decision. On 2/14/67, USDC denied subject's motion. Attorneys for subject are appealing decision of USDC to Circuit Court of Appeals for Second Circuit. Subject's wife continues to direct activities of committee to free MORTON SOBELL in raising funds and gathering support for subject.

- P -

Classified by 4913
Exempt from GDS, Category 2
Date of Declassification Indefinite 2-11-98

DETAILS:

I. Place of Incarceration

MORTON SOBELL was convicted in United States District Court, Southern District of New York, on March 29, 1951, for conspiring to commit espionage on behalf of the Soviet Union. He was sentenced on the same date to 30 years in the custody of the Attorney General.

APPROPRIATE AGENCIES AND FIELD OFFICES ADVISED BY ROUTING SLIP(S) OF 4/15/67 DATE

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE

CONFIDENTIAL

CONFIDENTIAL

GROUP 1
Excluded from automatic downgrading and declassification

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

SOBELL is presently incarcerated at the United States Penitentiary, Lewisburg, Pennsylvania.

II. Condition of Health

On December 1, 1966, W. H. WELLER, Chief Medical Officer, United States Public Health Service, United States Penitentiary, Lewisburg, Pennsylvania, advised that SOBELL has required no medical treatment within recent months, and there has been no noticeable change in his mental or physical health.

III. Legal Action

On June 14, 1966, attorneys for subject filed a motion in United States District Court, Southern District of New York (SDNY), under Section 2255, Title 18, United States Code, to vacate the sentence of MORTON SOBELL. In this motion it was claimed that MORTON SOBELL was illegally convicted of conspiracy to transmit national defense information to the Soviet Union because the government had knowingly used perjured testimony and forged documents to secure his conviction, and has suppressed evidence that would have proved his innocence.

A date of July 25, 1966, was set for hearing on the above motion. However, on that date subject's attorneys requested a delay in order that they might amend subject's motion. They stated that as a result of experts having examined a previously sealed trial exhibit, the sketches and testimony of DAVID GREENGLASS, new evidence had been obtained which would affect the motion of subject.

Attorneys for subject were granted a delay and an amended motion under Section 2255 was filed in United States District Court on August 22, 1966. A hearing on this amended motion was held in United States District Court, Southern District of New York, on September 12, 1966, at which time the court reserved decision.

CONFIDENTIAL

On February 14, 1967, United States District Judge EDWARD WEINFELD, Southern District of New York, rendered a 79 page opinion in which he denied subject's motion in all respects. This states in part:

"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."

Assistant United States Attorney STEPHEN F. WILLIAMS, Southern District of New York, advised that on March 7, 1967, attorneys for subject had filed a Notice of Motion with the United States Court of Appeals for the Second Circuit. This was notice to the Court of Appeals of subject's intention to appeal the February 14, 1967 decision of the United States District Court regarding the previously mentioned motion to vacate his sentence. It was indicated that subject's attorneys now have 40 days in which to docket their records, and an additional 30 days in which to file a brief outlining the basis of the appeal.

Assistant United States Attorney WILLIAMS also advised that attorneys for subject filed a request for release of subject on bail pending a decision on his appeal. This request was denied by the Court of Appeals on March 20, 1967.

IV. Committee to Free MORTON SOBELL

The Committee to Free MORTON SOBELL is characterized in the Appendix Section of this report.

NY T-1 and NY T-2 have advised that during the past year, the subject's wife, HELEN SOBELL, has continued to direct the activities of the Committee to Free MORTON SOBELL. She serves as a National Staff member of this organization.

The above informants have advised that during the past year the Committee to Free MORTON SOBELL has engaged in extensive fundraising activities and has attempted through other activities to solicit support for MORTON SOBELL. Informants have advised that HELEN SOBELL has kept the membership advised of the status of the current legal proceedings aimed at securing the release of her husband from prison.

On March 17, 1967, NY T-2 advised that the Committee to Free MORTON SOBELL has rented the auditorium at Hunter College, New York City, for the purpose of holding a rally to honor the fiftieth birthday of MORTON SOBELL on April 11, 1967. This was scheduled as a public affair with an admission charge of $1.00 per person. Informant stated that the three scheduled speakers for this affair were Dr. HENRY LINSCHITZ, Dr. PHILIP MORRISON, and Dr. HAROLD C. UREY, all atomic scientists who had recently submitted affidavits in behalf of SOBELL in connection with his recent court proceedings. Informant advised that the Committee expected that approximately 2,000 persons would attend this affair.

CONFIDENTIAL

APPENDIX

1.

COMMITTEE TO FREE MORTON SOBELL

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

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

In September, 1954, the name "National Committee to Secure Justice for Morton Sobell" appeared on literature issued by the Committee. In March, 1955, the name, "Committee to Secure Justice for Morton Sobell", first appeared on literature issued by the Committee. In August, 1966, the name "Committee To Free Morton Sobell" first appeared on literature issued by the Committee.

The Address Telephone Directory for the Borough of Manhattan, New York City, published by the New York Telephone Company on August 18, 1966, lists the above Committee's address as 150 Fifth Avenue, New York, New York.

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

FBI

Date: 4/25/67

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 to Director, dated 3/22/67.

On 4/24/67, AUSA STEPHEN F. WILLIAMS, SDNY, advised that attorneys for subject completed a Docket of their records with the US Court of Appeals for the Second Circuit on 4/20/67. Accordingly, subject's attorneys must now file a brief outlining the nature of their appeal with the Court of Appeals by 5/19/67. WILLIAMS advised that after subject's appeal is filed, the Government will have an additional 20 days in which to file an answer.

The above is furnished for the information of the Bureau.

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 5-4-87 BY 3042 PWJ/clb

EX-103

REC 11 101-2483-1695

APR 26 1967

(3) - Bureau (RM)
1 - New York

PFD:nbc
(6)

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

UNITED STATES GOVERNMENT

Memorandum

TO : DIRECTOR, FBI (101-2483) DATE: 5/29/67

FROM : SAC, PHILADELPHIA (65-4372) (P*)

SUBJECT: MORTON SOBELL
ESP - R

Re Philadelphia letter to Bureau 12/9/66.

On 5/23/67, Dr. W.H. WELLER, Chief Medical Officer, U.S. Public Health Service, U.S. Penitentiary, Lewisburg, Pa., advised there has been no change in the mental or physical health of SOBELL since previous contact.

LEAD

PHILADELPHIA
AT LEWISBURG, PA.

Will periodically recontact Chief Medical Officer, U.S. Public Health Service, U.S. Penitentiary, Lewisburg, Pa.; for information regarding any change in mental or physical health of subject and advise Bureau of results.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 5-4-87 BY 3042/PWJT/CLS

2- Bureau (101-2483) (RM)
2- New York (100-37158) (RM)
2- Philadelphia (65-4372)
PMM/hn
(6)

EX-103

REC 3

101-2483-1696

MAY 29 1967

SOVIET SECTION

RESEARCH SECTION

56 JUN 5 1967

5010-106

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

F B I

Date: 6/6/67

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 RWT/CLS

ReNYairtel to Director, 4/25/67.

AUSA STEPHEN F. WILLIAMS, SDNY, advised that attorneys for subject obtained a delay until 5/26/67 for the filing of their brief with the US Court of Appeals for the Second Circuit.

Enclosed herewith for the information of the Bureau is one copy of the above mentioned brief on appeal, which was provided by AUSA WILLIAMS on 6/2/67.

Mr. WILLIAMS has advised that the Government's answer to the above mentioned brief of the subject must be filed on 6/13/67.

The Bureau will be advised of future developments in this matter.

REC 49

3 - Bureau (Encl. 1) (RM)
1 - New York
1 ENCLOSURE
"ENCL. BEHIND FILE"

PFD:mvl
(6)

100-37158-1697

4 JUN 7 1967

Approved: _____ Sent _____ M

Special Agent in Charge

62 JUN 16 1967

SOVIET INFILTRATION

Mr Williams

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 31259

Morton Sobell,

Petitioner-Appellant,

VS

The Unites States of America,

Respondent-Appellee.

BRIEF FOR APPELLANT

MARSHALL PERLIN
36 West 44th Street
New York City

WILLIAM M. KUNSTLER

ARTHUR KINOY

MALCOLM SHARP

BENJAMIN O. DREYFUS

VERN COUNTRYMAN

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

Proof of May 25th, 1967

United States Court of Appeals

For the Second Circuit

Docket No. 31259

MORTON SOBELL,

Petitioner-Appellant,

vs

THE UNITED STATES OF AMERICA,

Respondent-Appellee.

BRIEF FOR APPELLANT

Jurisdictional Statement

This is an appeal from an order of the U. S. District Court for the Southern District of New York denying appellant's motion for a hearing pursuant to Title 28 U.S.C. Section 2255. The opinion which constituted the order appealed from was entered on February 14, 1967 and thereafter revised on February 16, 1967. It has not yet been officially reported (A. 426-506).*

The order appealed from also denied other applications for collateral pre-hearing relief. Jurisdiction of this Court is conferred by Title 28 U.S.C., Section 1291.

---

* We designate with the letter "A" references to the current Appendix on appeal. The printed record of the original trial is referred to as "R".

The parties have by stipulation agreed, pursuant to Rule 11 of this Court, that in addition to the papers transmitted to the Court, either party may include any papers or exhibits as are set forth or referred to in the docket entries in the current application 66 Civ. 1328 and the prior proceedings and various exhibits or copies thereof may be handed up to the Court at the appropriate time.

Statement of the Case

On May 9, 1966, by order to show cause, appellant, pursuant to Title 28 U.S.C., Section 2255, moved for a hearing and upon the hearing for an order vacating and setting aside the judgment of conviction of the appellant on the ground that it was unjustly and illegally procured in violation of the Constitution and the laws of the United States, that he was denied due process of law by various means hereinafter set forth, by reason of which the sentencing court was without jurisdiction to impose the sentence, the said judgment being subject to collateral attack.

Appellant and his co-defendants Julius and Ethel Rosenberg were tried and convicted before a judge and jury under an indictment charging in a single count that they had conspired to transmit to the Soviet Union information purporting to relate to the national defense of the United States and to the advantage of a foreign nation all in violation of Title 50 U.S.C. Section 34 (R. 2) (since recodified and amended.) Sentence was imposed on April 5, 1951. A sentence of 30 years was imposed upon appellant (R. 29). His co-defendants, Julius and Ethel Rosenberg, were sentenced to death (R. 27-29).* On February 25, 1952 appellant's conviction was affirmed in this Court, Judge Frank dissenting, 195 F.2d 583. Appellant's petition for a writ of certiorari to the United States Supreme Court was denied, 344 U.S. 838.

Since their original conviction and appeal appellant and his co-defendants have instituted several collateral post-trial proceedings. In none of these were the issues raised upon the grounds and all of the facts set forth for the first time in this motion. At no time after conviction was appellant or his co-defendants ever granted an evidentiary hearing on any of their applications. In sev-

* The executions were carried out Friday, June 19, 1953.

eral instances the merits of appellant's contentions as well as of his co-defendants were implicitly recognized but held to be untimely and unavailable in a post-trial proceeding. At no time has the Supreme Court of the United States ever reviewed the fairness of the trial and this is reflected in explicit statements of Justices of the Supreme Court.

The present motion was filed on May 9, 1966 addressed to an alleged meeting between two of the named co-conspirators on June 3, 1945 and a corroborating document to establish the same, a hotel registration card, used to establish transmission of information to the Sovet Union and linking appellant's co-defendants to that alleged event. Thereafter, on the basis of examination and review of evidence which purportedly contained an accurate and authentic drawing and description of the atomic bomb dropped on Nagasaki, evidence which had been sealed since the time of trial, an amended and supplementary petition relating thereto was filed on August 22, 1966. Argument was had on September 12, 1966 and the opinion and order was handed down by the court on February 14, 1967.

The Background and Setting of the Trial

In January of 1950 Klaus Fuchs, a British physicist, acknowledged that while serving at the highest levels of the Manhattan Project in New York and Los Alamos he had supplied information in 1944 and 1945 to the Soviet Union. It had been announced only months before that the Soviet Union had set off an atomic bomb. These two events not only caused fear in the minds of people, and the government as well, but further led to the illusion that the Soviet Union could not have developed the bomb at that time without having stolen the secrets of the bomb from this nation. It was believed that the one weapon that afforded this nation security had been stolen and thus the existence of our nation was immeasurably imperiled.

In May of 1950 Harry Gold confessed (and insisted) that he was the sole American courier between Fuchs and the Soviet Union. On June 15, 1950 David Greenglass was arrested and at some unspecified time thereafter allegedly confessed to having passed information relating to the atomic bomb. In July and August of 1950, after the commencement of the Korean War, appellant and his co-defendants were arrested. At the time of their arrest all the news media, primarily based upon reports emanating from various governmental officials, including the prosecutor, characterized the appellant and his co-defendants as the A-bomb spies, members of the Fuchs atom bomb conspiracy (fm. 34-69) * (A. 219-220).

The insistent theme of the government's case was that the charged conspirators had succeeded in stealing the secrets of the atomic bomb and transmitted this data to the Soviet Union and that as a result, the Soviet Union was given the know-how, thus enabling it to manufacture the atomic bomb, thereby imperiling this nation's security and world peace, provoking the Korean War, and altering the course of world history (A. 211-214, 216-218, 219-224, 228-246, 248-255).

The government now would prefer to recast the case, as did the lower court, and have us disregard its former contentions, and the attribution of importance given by it to the data allegedly passed by Greenglass through Rosenberg to the Soviet Union. Now it is said, since the passage was technically a violation of the Espionage Act of 1917, we need not consider the minimal or highly

* Fm. refers to the first 2255 motion. Page references are to the printed papers on appeal therein and the exhibits as identified therein. There was no dispute on the facts as to climate, but the court held it had not been timely raised and therefore waived. *U. S.* v. *Rosenberg,* 108 F. Supp. 798, aff'd. 200 F.2d 666; Cert. den. 345 U.S. 965. Nevertheless it does reflect the attitude and claims of the government. Therefore it is an element to be considered.

questionable value of the information and the government may disassociate itself from the evidence tendered in support of its claims and representations. It has been compelled to alter its position since the evidence upon which it originally premised its claims has now been made subject to scientific and public scrutiny, and found wanting.

The files and records of this case; the contentions of the government from the time of the arrest of the appellant and his co-defendants; the justification tendered for the execution of the Rosenbergs and the imposition of a thirty year sentence upon appellant; and the continued perpetuation of these falsified claims until the forced public disclosure of Government Exhibit 8 and the Greenglass testimony on August 3, 1966, equitably, legally and morally estop the government from rewriting or hiding from history. It cannot now recast the structure and architecture of this case retroactively to hide its past misdeeds from exposure by avoiding a hearing. The continued incarceration of the appellant compels otherwise.

Justice Frankfurter, after dissenting from the vacatur of the June 17, 1953 stay of Mr. Justice Douglas which resulted in the execution of the Rosenbergs on June 19, 1953 expanded upon his dissent in an opinion rendered June 22, 1953 and appropriately but tragically stated:

> "To be writing an opinion in a case affecting two lives after the curtain has been rung down upon them has the appearance of pathetic futility. But history also has its claims . . . only by sturdy self examination and self criticism can the necessary habits for detached and wise judgment be established and fortified so as to become effective when the judicial process is again subjected to stress and strain.
>
> ". . . But all systems of law, however wise, are administered through men and therefore may occasionally disclose the frailties of men. Perfection may not be demanded of law, but the capacity to

> counteract inevitable though rare, frailties is the mark of a civilized legal mechanism" (346 U.S. 273, 310).

Do we have the capacity to grant that which is demanded of the judicial organ of a civilized society? That is the basic issue before this Court.

History and justice have their claims and the time is now long past to counteract the frailties and errors of the institutions and the men party to this case and its tragic consequences.

The judicial device for granting such relief is the Great Writ. The appellant seeks at this moment most limited relief—the right to an evidentiary hearing. The factual allegations in his petition and supporting papers and documents are many times more than sufficient to warrant such relief. The court below erred in denying this application.

We cannot help but allude to the statement of Mr. Justice Brennan in *Fay* v. *Noia*, 372 U.S. 391, in discussing the availability of the Writ where extra-legal considerations are present. He stated:

> ". . . Behind them must be discerned the unceasing contest between personal liberty and government oppression. It is no accident that habeas corpus has time and again played a central role in national crises, wherein the claims of order and liberty clash most acutely, not only in England in the Seventeenth Century, but also in America from our very beginning, and today" (p. 400).

We cannot ignore the fact that this case, from the time of its inception to today, has figured prominently in many of the courtrooms and before many of the judges in this courthouse. We recognize the difficulties and the embarrassment which might result were a hearing to establish that appellant and his co-defendants had been denied a fair trial and that their conviction had been procured by impermissible conduct of the government. But such

considerations or the irrevocability of the death sentences must not be permitted, consciously or subconsciously, to enter into the determination of whether appellant is entitled to an evidentiary hearing. We protect our judicial and political institutions by permitting disclosure and determination by hearings—not by hiding out of fear of the consequences of truth. This Court must forbid the recasting of the files and records of this case, historical facts, the context in which it was tried and thereafter considered. The government must not be allowed to ignore the present petition and the facts contained therein. It must acknowledge or deny and then proceed to hearing.

Summary of the Atomic Branch of the Application

The basic thrust of the petition is that the government *in order to prove the existence of the conspiracy and thereby obtain a conviction,* knowingly used false and perjured testimony, made false statements and representations and grossly exaggerated claims and thus established in the minds of the jury, and the court as well, that the indictment charged and the proof established the crime of the century, dwarfing the spy trials in England, Canada, and elsewhere.

David Greenglass, a charged co-conspirator who had worked at the Los Alamos project as a machinist, testified that he had drawn a cross-section of the atomic bomb and prepared a 12-page description of its component parts and operation and allegedly delivered it to the Rosenbergs in September of 1945. To prove the conspiracy and indeed its success, the government falsely established that this information allegedly given by Greenglass was of transcendent importance, that it contained the most closely guarded secrets of the atom bomb and that the Greenglass testimony and Exhibit 8 was, in fact, an authentic and accurate description of the Nagasaki bomb. It further falsely claimed and established in the minds of the court and jury that this information was so authentic and ac-

curate, both as to the construction and operation of the bomb, that it enabled the Soviet Union to manufacture the weapon with such speed as to imperil this nation and change the course of world history.

We here summarize the means employed by the government to deceive the court and jury, and the defense as well, and which resulted in the unjust conviction of appellant and his co-defendants.

1. By a vast, imaginative publicity campaign the names of the appellant and his co-defendants were identified as virtual synonyms for atom-spies, traitors, villainy incarnate.

2. It was falsely represented at the outset of the trial that the government intended to call as witnesses such world-renowned scientists as Dr. Urey, Dr. Oppenheimer and others; although, in fact, the scientists were not called and had not even been asked to testify and had not indicated their willingness to do so. No atomic scientist or expert witness was called to support Exhibit 8 or its description, but the ruse deceived even the defendants' counsel into believing that the Greenglass testimony had top scientific imprimatur.

3. The prosecution caused representatives of the Atomic Energy Commission and the Joint Congressional Committee on Atomic Energy to be conspicuously seated at the prosecution table and identified in the presence of the jury. This fostered the notion in the minds of the jury that those august bodies not only supported the statements and representations of the prosecution, but had further verified and determined as authentic and accurate Exhibit 8 and the Greenglass description. In fact, the prosecutor falsely advised the jury that the material had been reviewed by the Commissioners themselves and that the material was of such importance to the national security and so top secret that it was only temporarily declassified for the purposes of the trial and would immediately thereafter be reclassified.

4. The prosecution falsely presented an employee of the A.E.C. as an expert and allowed him,

upon a false claim of knowledge and expertise, to declare authentic and accurate the sketch of the secret weapon as drawn and described by the chief prosecution witness. Yet the government knew that the claims of authenticity and accuracy were, in fact, false.

5. The prosecution, in its opening and closing statements to the jury, during the course of the trial and at the time of sentencing, knowingly made false statements and representations and claims.

Since Greenglass was by education, position and access to "secrets" such a weak link in the chain of fabricated evidence, the prosecution felt impelled to falsely clothe his "atom bomb" description with an aura of accuracy, authenticity and importance and by so doing enhance his status and credibility in the eyes of the jury. The prosecution's props alluded to, successfully elevated the melange of misinformation to the level that the judge and jury thought it was the mythical secret of the Nagasaki Bomb, and became stilts to increase the stature of Greenglass, and to give him the false appearance of a true source of vital espionage material.

The government's artful creation of Greenglass as the passer of the atomic bomb to the Soviet Union supported by the A.E.C. and the leading scientists in the field would cause the jury to accept the Greenglass testimony in its entirety and reject the Rosenbergs' testimony which denied the very existence of a conspiracy. Had the jury not been deceived by the false authentication of Greenglass's "scientific information" they might well have rejected the testimony of the formation of the conspiracy given by the real Greenglass, perceived as he really was.

It is conceivable that Greenglass, when presenting Exhibit 8 and the description on the trial, may have believed in his ignorance that his testimony was accurate, but in fact there is no question that his testimony was grossly erroneou not factually true, and it evidenced his complete lack of comprehension of the matter. The government knew of the inherent falsity of the drawing and descriptic The credibility of Greenglass in his "scientific" or "technical" testimony is not the issue; it is the government's fraud in knowingly offering false testimony as true (A.55) and Derry's fraud in falsely authenticating the caricature as a true depiction of the atom bomb. (R. 911-913).

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e... [illegible description and drawing] (R. 33).

Whatever the jury may have done in the absence of the government fraud, the present petition establishes that the fraud had been perpetrated by the government by the attributions given it to the Greenglass drawing and description, and this would require the setting aside of the judgment of conviction.

As established *prima facie* by the moving papers, and particularly the affidavits of the scientists, Exhibit 8 could at best be characterized as an ignorant caricature of the bomb—lacking vital components without which it could not work; it gave a false, misleading, garbled picture; it failed to show the construction, composition or functioning of the device; and would give the germ of an idea only to one who actually and intimately knew the facts. The description is even more erroneous in that it mislabels and misdescribes, and shows utter lack of comprehension and awareness of its inherent contradictions. It fails to have any of the attributes of value, authenticity and accuracy given to it by the government—quite to the contrary.

Yet, Derry, an A.E.C. employee, purported to establish the authenticity of the worthless paper, Exhibit 8, as a true depiction of "the bomb we dropped at Nagasaki", its construction, operation and components accurately described by Greenglass. As the exhibit was being admitted into evidence it was perceived by the jury through the magnifying glass of the impression produced by the A.E.C. representatives and the prosecutor's implication of top scientific approval.

We know, now that Exhibit 8 has been seen by scientists whose affidavits support the petition, that the errors and omissions in the paper and its description were so

egregious that the A.E.C. representatives in court and elsewhere were necessarily aware of them but failed to correct the testimony or to advise the court and the defendants of the infirmities of the government's case.

The government compounded the fraud by knowingly permitting one of its witnesses, Harry Gold, to give perjured testimony to the effect that the Soviet Union had stated that the information was "extremely excellent and very valuable" (R. 831; A. 268, 299).

The government took advantage of the fact that in 1951 no knowledgeable scientist who may have had relations with the A.E.C. would dare involve himself in behalf of the defense without imperiling his own security and clearance status and that any scientist would have been required to clear and disclose to the A.E.C. for scrutiny and approval the comments or information he would feel necessary to transmit to defense counsel.

Prior to the unsealing of the Greenglass material in 1966, no court other than the trial court had ever seen the material nor was such material ever evaluated by any scientist in behalf of appellant and his co-defendants. No court since the trial has ever evaluated the material to determine its true value or significance as a matter of scientific fact.

Proceedings Prior to the Filing of the Amended Petition

The petition filed on May 9, 1966 in support of the motion was primarily directed to Government Exhibit 16, a photostat of a purported hotel registration card and the testimony relating to a claimed Gold-Greenglass meeting on June 3, 1945 (A. 29-30). This testimony on the part of Gold and the Greenglasses was used to link the Rosenbergs with that meeting and the alleged transmission of classified material to the Soviet Union.

On April 14 appellant had obtained an order from District Judge Palmieri authorizing the unimpounding and

unsealing, under certain terms and conditions, of Government Exhibit 8, a purported cross section of the atomic bomb dropped at Nagasaki and its description by David Greenglass which had been sealed since March, 1951 (A. 10-12, 31-44). On April 29, 1966 the aforesaid material was unsealed and made available to the appellant and his attorneys for the first time for the purpose of their consulting with scientists and other experts (A. 13-28).

The appellant's counsel consulted with scientists involved in the development of the bomb and concluded that the material mandated a new or amended petition relating to this material (A. 45-46). On July 25, 1966 the appellant sought and was granted leave to amend the petition. Attached in support of the application was the unsealing order of April 14, 1966, a copy of Exhibit 8 and the transcript of the Greenglass testimony (A. 63-71).

At that juncture the government again attempted to foul the air with a smog of secrecy and national peril in the hope of intimidating counsel and independent scientists, and staging another spy melodrama. The premise on which the government's effort was based was the fiction developed at the trial that Exhibit 8 was a representation of the atom bomb and was classified by the A.E.C.* Realizing that the now unimpounded Exhibit 8 (and the Greenglass description) was a fraud, the appellant vigorously resisted the government's secrecy and national security claims, and demanded an airing of the issues, too long concealed. The government advised that it was moving to reseal Exhibit 8 and the testimony (A. 72-73).

In its affidavit, reference was made to the trial, that the information was "classified top secret" (A. 75) and it was further stated, in Paragraph "10" thereof:

---

* The government obtained the "classification" by having Greenglass draw it and then submitting it to the A.E.C. in 1951 (R. 501, 505).

> "On the other hand, I am informed by correspondence from the Director of the Division of Classification of the United States Atomic Energy Commission that comparable information to that contained in the aforementioned two exhibits concerning the design of other atomic weapons is still classified and that any action the Court might take to preclude dissemination of the information contained in these exhibits beyond defense counsel would be desirable (A. 78).*

Over appellant's opposition an order to show cause was granted with a two day order sealing the exhibits (A. 87) and the matter was referred to Judge Palmieri (A. 81-87). The government had been in communication with Judge Palmieri prior to the return date and the judge was led by it to believe that there had been some grievous violation of his order, that "secrets" were being exposed, and that the material was still classified (A. 103-120). The government stated it must determine which scientists were to be permitted access to the material (A. 112-113).

Appellant at the same time applied for an order vacating and removing any and all restrictions that may have been placed upon the utilization of the formerly impounded evidence and permitting it to assume the normal character of a public record in all respects (A. 88-101). Appellant pointed out that by the terms of Judge Palmieri's order the material was to be made public upon being submitted to any court (A. 93).

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* The detailed public dissemination of information of tremendous value, the development of the bomb, revealing the Greenglass material as a complete farce, was surely known and could have easily been learned by the United States Attorney's office if it "desired" to know. See *Atomic Energy for Military Purposes* by Henry DeWolf Smyth issued, with a forward by General Groves, September 1, 1945; Volumes I and II of LAMS-2532 *Manhattan District History Project Y, The Los Alamos Project* issued pursuant to contract with the Atomic Energy Commission distributed December, 1961: *The New World, 1939-1946*, Volume I of a history of the Atomic Energy Commission, one of the authors being an official A.E.C. historian; *Day of Trinity* by Lansing Lamont (A. 96-97, 418-419).

On July 27, 1966 Judge Palmieri signed an order to show cause returnable July 29th at 12:00 noon at which time the government was also afforded an opportunity to present an order generally covering the manner of conducting the amended 2255 proceedings. On the government's insistence that the nation's security was imperiled, the affidavit of appellant's counsel in support of the order to show cause was temporarily sealed (A. 117).

On July 28, 1966 appellant was served with a proposed order by the government which provided not only for the continued sealing of Government Exhibit 8 and descriptive testimony but that the entire 2255 proceedings be held *in camera* save those portions as the government might unilaterally deem it appropriate to make public (A. 121-134).

The appellant opposed any *in camera* proceeding as constitutionally invalid (A. 136-148).

A reporter of the *New York Times* communicated directly with the Director of Division of Classification of the Atomic Energy Commission in Washington, C. L. Marshall, who stated that the Commission had declassified all of the material contained in Government Exhibit 8 and related testimony and that the material could be published without any undue risk to the national defense and security* (A. 135).

On the return of the various motions on July 29, 1966 the appellant objected to the *in camera proceeding* (A. 151-159). The government in response challenged the integrity of the *New York Times* report and refused to produce the A.E.C. correspondence unless directed by the court, and insisted the secrecy of the material must be preserved (A.

* Prior to the hearing on July 29, 1966 the government was noticed by telegram and orally to produce the alleged correspondence of the Director of Division of Classification of the United States Atomic Energy Commission upon which the government's position was premised (A. 159-160).

162-166). Yet the government acknowledged that the material had been declassified in 1951 and never reclassified (A. 164).

Judge Palmieri found that the government's claim was too vague and uncertain and directed that the government produce, by witnesses or affidavits, proof in support of its oral representations that the national security was imperiled by public disclosure of the grand "secrets" of the atomic bomb as described by David Greenglass in March, 1951 (A. 177-183). Hearing on the matter was set down for August 3, 1966 (A. 191).

On being put to the proof of its claims, the government was forced to advise the court on August 3, 1966 that the material was unclassified, and that exhibit 8 and Greenglass' testimony and counsel's affidavit could be unsealed and made a public record (A. 192-194).

The myth was exposed—the miasma of mystery and secrecy had been removed. But now the government was to reverse its position as stated in the trial, and admit that the Greenglass material had been of minor importance, lacking any authenticity and accuracy, and was to declare that its claimed falsification of the facts at the trial could not have misled the jury.

The Trial

After their indictment Julius and Ethel Rosenberg moved for an order permitting them to examine all sketches and experiments and other documents referred to in the indictment. The government, in opposition, alleged that such sketches and experiments were "classified by the Atomic Energy Commission, which means that they are top secret in that they deal with subject matter vital to the defense of the United States and *should not be made the subject of disclosure under any conditions*". (Emphasis supplied.) The motion was denied by Judge Weinfeld

on October 6, 1950, *U.S.* v. *Rosenberg*, 10 F.R.D. 521. Judge Weinfeld stated in his opinion:

> "A further ground of opposition is that the sketch of which the defendants seek a copy is 'classified' by the Atomic Energy Commission, which means top secret and an affidavit is submitted to this effect.
>
> "To grant this portion of the motion would require the Government at this time to make available to the defendants and disclose publicly part of the very information relating to the National Defense which it is alleged the defendants conspired to transmit to a foreign government to be used to the latter's advantage and contrary to the national welfare." (pp. 523-524)*

We now know that the government's allegation was false, merely a part of its campaign prior to trial to establish that the secrets of the nation's most vital weapon had been stolen.

Just prior to the commencement of the trial the government filed, pursuant to Title 18 U.S.C. Section 3432, a list of witnesses to be called by the government including Dr. J. Robert Oppenheimer, Dr. Harold C. Urey, and Dr. Kistiakowski. The newspapers prominently featured this news and noted that they were leading scientists who figured prominently in the development of the bomb.**

Upon the commencement of the voir dire of the prospective jurors, the court, referring to the list of witnesses, stated that they

> "will be called as witnesses for the government in this case" (R. 51; A. 227-229).***

The court advised that the charge related to the Los Alamos project and cautioned the jury concerning the govern-

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* A similar application was made by appellant and denied on the same grounds.

** See fn. 33-69 and Exhibits in support.

*** The jury panel indicated by questions posed, their knowledge of these scientists (R. 52).

ment claim "*that the security of the United States is involved here*" (R. 57). (emphasis supplied.)

The jurors were then asked whether they had read about the case in various newspapers, and the jurors answered in the affirmative (R. 63). The jurors acknowledged reading columnists having strong feelings against the defendants (R. 71). The court on several occasions, recognizing all of the jurors were fully acquainted with the case, asked whether they had "become so prejudiced" as to be unable to render a verdict on the evidence alone (R. 71, 156). The voir dire removes any question but that the jurors were fully aware that the case was one of atomic bomb espionage and theft.

One juror asked that he be excused because he knew casually a brother of Dr. J. Robert Oppenheimer (R. 137). Another juror was excused for cause since his daughter had worked in the Manhattan Project with Dr. Urey (R. 156). The jurors thus fully expected that Dr. Oppenheimer and Dr. Urey were to be called as prosecution witnesses in this case. The government thereby helped to create in the minds of the jurors an appereceptive basis for the false claims to come.

The government, in its opening to the jury, continued its conditioning technique. The prosecution stated that Greenglass was stationed at Los Alamos

> "where there was experimentation and construction of the most important weapon ever known to mankind . . . The Rosenbergs devised and put into operation with the aid of Soviet nationals and Soviet agents in this country an elaborate scheme which enabled them to steal through David Greenglass this one weapon that might well hold the key to the survival of this nation and means the peace of the world—the atomic bomb. . . . the evidence will show how, at the behest of the Rosenbergs, Greenglass stole and turned over to them and their co-conspirators, Harry

> Gold, at secret rendezvous, sketches, and descriptions of secrets concerning atomic energy and sketches of the very bomb itself" (R. 183; A. 220-222).

Small wonder that after the government's clamorous false proclamation of the dimension of the alleged crime and the pretense of respected auspices under which the prosecution was undertaken, the insubstantial testimony of Greenglass fell with conviction and credibility upon the ears of the overwhelmed jurors.

Greenglass testified that he worked at the Los Alamos Project in a machine shop and from time to time was required to machine metallic lens molds which would be used to shape a high explosive. These molds were machined to certain specifications of which he had no knowledge. Government Exhibit 2 is a crude sketch of a two-dimensional "flat type" lens mold to form shaped charges (not the type used in the atom bomb) (A. 323-324). He had no involvement whatsoever with the use of the lens mold nor was he aware in any respect of the nature of the various explosives that were in combination placed in such lens molds. This work was far removed physically from his shop and Greenglass had no access to it (R. 625-626).

Government Exhibits 6 and 7 were allegedly transmitted to Gold at the questioned meeting of June 3, 1945 in Albuquerque, New Mexico. Government Exhibit 6 was said by Greenglass to be "a high explosive [sic] lens mold . . . with high explosive in it with the detonators on and I showed the steel tube in the middle which would be exploded [sic] by this lens mold" (R. 462). Exhibit 7 was said to be a drawing of "the mold being used in an experiment [sic]" (R. 462). Greenglass was in no way involved in this work and this may in part explain his misdescription. Dr. Koski, subsequently called, did not verify or authenticate the Greenglass testimony describing Exhibits 6 and 7.

At this stage of his testimony Greenglass left the stand and Dr. Walter S. Koski was called to the stand. Dr. Koski, using the drawings as a point of *departure*, went on to explain some of the functions of the ultimate lenses used in the implosion of a plutonium bomb, a three dimensional shaped charge used to produce symmetrical converging detonation waves * (R. 482).

The prosecutor then stated to the court and jury that the testimony of Greenglass and Dr. Koski had been declassified by the Atomic Energy Commission solely for the purposes of the trial and it was thereafter to be reclassified (R. 479). The purpose and effect of that statement were to increase the courtroom tension and further to develop the belief that the jury was witnessing an exposure of top secrets obtained by the Soviet espionage ring.

Thereafter Greenglass returned to the stand and testified that while in jail he had, for the purposes of the trial, drawn a sketch and description "of the atom bomb itself" used at Nagasaki, and that it was a replica of a cross-section of that atomic bomb which he allegedly transmitted to Rosenberg in September of 1945, five and a half years earlier along with a "12-page description" ( ).

Prior to counsel's examination of the tendered exhibit, Mr. Bloch, representing the Rosenbergs, asked in the presence of the jury that it be impounded and remain a secret to the Court, the jury and counsel (R. 499). The exhibit was never seen by the appellant or his co-defendants (R. 1097) and the record does not reflect whether it was seen by appellant's counsel. When Greenglass was asked to describe the exhibit, counsel for appellant's co-defendants approached the bench and stated that he personally and privately felt the description should be kept secret (R. 500). Obviously, trial counsel, unaware of the nature of the documents which would be the subjects of Greenglass's and

* Little, if any, of the manufacture of the molds used for the shaped charges for the atom bomb was done at Los Alamos.

Gold's testimony, particulars of which had been denied them in the interests of national defense (p. , *supra*), and impressed with the battery of scientists which the government had falsely claimed it would call to endorse them, was as much deceived as the jury by the prosecutor's tactics.

In the course of a colloquy out of the presence of the jury, Mr. Saypol stated that Exhibit 8 and the description had been gone over carefully by all of the prosecution's staff and in consultation with the AEC, the Department of Justice and the Joint Congressional Committee on Atomic Energy and that it was left to his discretion as to how much of this material should be disclosed (R. 501). After extended discussions at the bench it was decided that the evidence would be given *in camera* with the press to be present but "enjoined to good taste" (R. 508).

*Thereafter the proceedings continued in the presence of the jury** and the Court advised them of his concern about disclosure of the description of the atomic bomb, and stated:

> ". . . Mr. Cohn was about to take detailed proof on certain descriptive matters concerning the atom bomb which the witness contends was turned over to the defendant, Julius Rosenberg; *that while it might not be in the best interests of the country*, was yet a matter that is necessary in the trial of a case and under our democratic form of government." (R. 504). (emphasis supplied)

After Br. Bloch stated his position that this testimony should be revealed solely to the Court, jury and counsel, Mr. Saypol commented:

> "Yes. I feel free to address myself to the subject in the light of the fact that the situation as exists is not of my creation but that of one of counsel for the defendants. The character of the proof has

* The Court below was under the erroneous impression that these statements was made only out of the presence of the jury (A. 467).

been offered. *This witness and the preceding one has been the subject of very grave consideration by my colleagues, myself, by agencies of the government, including the Department of Justice, the Atomic Energy Commission and the Joint Congressional Committee on Atomic Energy . . . that matter is of such gravity that the Atomic Energy Commission held hearings,* at which I was represented, as did the Joint Congressional Committee and representatives of the Atomic Energy Commission have been attendants here at the trial, *as your Honor knows, have been in constant consultation with me and my staff on the subject.**

". . . I think I stated before that solely for the purposes of this trial, the Atomic Energy Commission had released—had authorized the release of this information so the Court and jury might have it." (R. 505) (emphasis supplied).

Greenglass then gave his "impounded" testimony, purporting to describe the component parts, operation, principles and secrets of the Nagasaki plutonium bomb. (See A.).

The Government some days later called as an expert witness an employee of the Atomic Energy Commission, John A. Derry. Prior to Derry's taking the stand, the prosecutor approached the bench and stated that the testimony was ". . . going to establish the *authenticity* of the information that Greenglass gave to Rosenberg and *the authenticity* of the cut-away sketch" (R. 902, A.)—and that even more precautions were necessary (R. 902). Once again the Court was cleared and prior to the commencement of the testimony the court advised the jury that "it might be in the interest of the country that we do not hear certain portions of testimony but our law requires it" (R. 903).

Thus the stage was set for Derry's testimony to be accepted by the jury as authentic, expert, conclusive.

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* The jury had previously been advised and once again was advised of the presence of representatives of the Atomic Energy Commission, and the Joint Congressional Committee.

Derry, an electrical engineer, testified that he was previously employed primarily in the area of rural electrification (R. 904) and then after entering the army was stationed until April of 1944 at Oak Ridge, Tennessee when he became liaison officer for General Groves. The defense asked that he describe the atom bomb prior to the reading of the Greenglass testimony. The Court stated, in overruling the objection:

> "The jury will have to decide anyway but they are entitled, on a subject as technical as this and a subject on which there is so little knowledge outside of the technical field, to have the help of an expert." (R. 909)

In response to the court's questions he unequivocally stated that he knew each and every detail of the construction of the bomb and what went into it; he understood at the time of the development of the bomb in 1945 as well as at the time of his testimony, the entire subject matter (R. 910).

Derry testified that the material and sketch demonstrated "with substantial accuracy the principle" and "operation of the 1945 atomic bomb"; "that a scientist could perceive what the actual construction of the bomb was" (R. 911); and "It is the bomb we dropped at Nagasaki, similar to it" (R. 912). He stated "Government Exhibit 8 reflects a sketch of the atomic bomb when it had already been perfected" (R. 913). Mr. Derry was excused from the stand.* The material was impounded and not

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* Once Mr. Black sought to probe into the completeness of the sketch and description, the prosecution, with the trial court's aid interjected and came to the protection of the witness and in effect advised that Derry answer with care (R. 915-916). In any event, regardless of the comments of the trial court at the moment, it was still of the mind, under the influence of the government deception, that Exhibit 8 contained the vital secrets of the construction of the bomb which had been given, to the grave peril of the United States and the tremendous aid to the Soviet Union (see closing of the government to the jury, statements made at sentencing by the prosecutor and the Court.

made a public record of the Court until August 4, 1966 (R. , A.).

In a remarkable display of guile and deception the prosecutor had promised that great scientists would support his case by their testimony, thus preparing the mind of the jury to believe Greenglass and had then presented a liaison officer as his scientific expert, vouching for his capacity to "establish the authenticity" of the Greenglass story. In the government's summation to the jury it stated:

> ". . . *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, A.) (emphasis supplied)

That was precisely what the case was about. That was what the jury was led to believe was charged and established.

The court then charged the jury and summarized the government's claim, stating:

> ". . . *In this case, the government claims that the venture was successful as to the atom bomb secret*". (R. 1551-1552; A.) (emphasis supplied).

At the time of sentencing, the prosecution, characterizing the nature of the alleged crime committed by the defendants, stated that it would be proper to conclude that their conduct had caused the Korean War and further represented:

> "The secrets they sought and secured were of immeasurable importance and significance. . . . In terms of human life, these defendants have affected the lives, and perhaps, the freedom, of whole generations of mankind." (R. 1602)

Obviously, the sentencing court, as did the jury, based upon the representations of the prosecutor and the imprimatur of accuracy and authenticity put upon the

material by the government through the presence of the A.E.C. and the testimony of its employee, came to the same conclusion. At the time of sentence the trial court stated that the defendants had caused the Korean War with casualties exceeding 50,000; had altered the course of history to the disadvantage of this country; passed to the Soviet Union this nation's most deadly and closely guarded secrets which constituted a diabolical conspiracy to destroy a God-fearing nation; and hence found there can be no reason for mercy, thus requiring the imposition of the sentence of death (R. 1614-1616; A.).

In the brief to the Court of Appeals from the judgment of conviction the government maintained that the sketch and description were of sufficient accuracy and importance to permit one unacquainted with the facts to actually build the bomb.*

The Scientists' Affidavits

The affidavits of the scientists submitted in support of the petition were directed toward the examination of the testimony of Derry who testified as to the authenticity, importance and accuracy of the Greenglass testimony and sketch; the attributions given it by the government in those and other respects both independently and in conjunction with the Derry testimony; and its impact upon the court.

Their affidavits state facts and findings. They establish the falsity of the Derry testimony and the falsity of the government's statements. They make no comment on the credibility of Greenglass. They do not opine whether

* "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)." (Govt. Br. p. 11).

the government's statements were made in ignorance or with knowledge of the facts.

Hence the next step is the examination of the exhibit and description as given by Greenglass.

Prior to the introduction of Government Exhibit 8 and its descriptive testimony, Greenglass had already testified concerning lens molds and implosion.** It was Government Exhibit 8 as described which the Government claimed to contain *the* key [sic], *the* principle [sic], our most closely guarded secret, our most vital weapon.

Dr. Morrison's special qualifications and knowledge of the subject are set forth in his affidavit—a co-holder of the atom bomb patent, engaged in its development for three years, involved in the assembly of the bomb itself in Alamogordo and Tinian. His responsibility in the nuclear assembly, the initiator, and his required understanding of the structure and working of the entire bomb particularly equip him to state the facts as well as evaluate the Derry testimony and the Government's claims. He notes that the Greenglass testimony gives "a false depiction of what is purported to be the cross-section of the atom bomb" and that Derry's statement that it represented "a substantially true or accurate description of the bomb" is false.

Even apart from the omission of at least two important spherical components and the initiator without all of which

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*Upon the clear evidence contained in these affidavits, either Derry's claim to expertise and knowledge of the entire subject matter was false or he knowingly falsely authenticated as accurate the Greenglass sketch and drawing.

** The world's scientific community knew of at least three possible ways of setting off a nuclear bomb—the gun method, implosion and autocatalytic reaction. Lenses and shaped charges were equally well known and developed in various countries of the world. Implosion by definition as it related to an atomic bomb would import a spherical conformation of whatever elements were used in the construction of a bomb.

the bomb could not operate, the drawing and misdescription give a "false depiction" of the bomb. It misleads rather than informs and is "both qualitatively and quantitatively incorrect". These statements are fact, not opinion, and are directly in conflict with the testimony of Derry, who falsely attested authenticity and accuracy.*

Dr. Morrison states categorically that Derry was without scientific background to permit him to have knowledge of the design or construction of the bomb and that Derry was not closely associated with the technical aspects of the project (A. 346).** This is directly in conflict with the false testimony given by Derry in response to the court's questions to establish him as a scientific expert (R. 910; A. 348) upon whom the court directed the jury to rely in its

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* See Webster's New International Dictionary.

"Authenticity. 1. Quality or state of being possessing authority, validity, or truth; as the authenticity of an anecdote. 2. Genuineness; the quality of being genuine or not corrupted from the original; as the authenticity of a signature.

"Authenticate. . . . 2. To prove authentic; to determine as real and true or as genuine; as to authenticate a portrait. Syn. See confirm."

In the synonyms of the word "authentic" the following may be found: "Reliable, pure. . . . The prevailing sense of authentic is authoritative, trustworthy, with the implication of accordance with fact; . . . The prevailing sense of genuine is native, real, true, often with the implication of descent from, or correspondence to, and original source of stock."

> Accuracy: State or quality of being accurate; freedom from mistake or error, secured by exercising care; as to reason with accuracy; hence exact conformity to truth or to a rule or model; precision; exactness; correctness; as the value of testimony depends upon its *accuracy*.
>
> Accurate: In exact or careful conformity to truth or to some standard of requirement, especially as the result of care; free from failure, error or defect; exact; as, an accurate calculator; accurate knowledge * ant. inaccurate, inexact, erroneous, blundering, loose, free, careless, slipshod.

** This was essentially acknowledged by Derry long after the trial (A. 421).

consideration of this highly "technical field" (R. 909, A. 251). The drawing which Derry claimed was sufficient to show the actual construction of the atomic bomb could best be characterized by Dr. Morrison, who has knowledge, as a caricature of the bomb (A. 347-348).

The representations of the Government to the court and jury attributed even greater accuracy and significance to the Greenglass testimony than did Derry. Thus, their representations were even more grossly false, whether made consciously or in ignorance.

The accuracy of the factual statements made by Dr. Morrison is fully attested to by that of Dr. Linschitz, Dr. Urey, Dr. Christy and Dr. Oppenheimer, and is not contested by the government (A. 314-338, 412-414, 422-425).*

Dr. Linschitz was directly involved with the development of the implosion system of high explosive lenses and played a major role in that respect in association with Dr. Kistiakowski and Dr. Neddermeyer. He, too, was fully acquainted with all other functional systems of the bomb and their development in view of their necessary interrelationship, and also participated in the assembly of the bomb in Tinian and New Mexico.

Prior to evaluating the statements and representations of the Government and the testimony of Derry (A. 316), Dr. Linschitz found the entire sketch and description "highly incomplete" and vague, "a garbled, ambiguous and highly incomplete description of the plutonium bomb" (A. 317-318). In addition to pointing out the vital omissions in the sketch and misdescriptions, he comments in more detail about the distortions, both in concept and description which Derry swore to be accurate and which the Government falsely represented gave all necessary informa-

* See affidavit of Marshall Perlin dated February in support of an application for bail before this Court (pp. 11, 12).

tion to permit the Soviet Union to construct the bomb. Turning to the lens description he characterizes it thus:

> "This is perhaps analagous to drawing a cross-section of a new rocket and in a certain rectangular space therein writing 'fuel and engine'. The bomb drawing (Exhibit A) shows no interfaces nor indeed any structure whatever in the region marked 'lens'. Thus, no information regarding lens construction is conveyed by this diagram." *

Dr. Linschitz then concludes that Exhibits 2, 6 and 7, as well as Exhibit 8 do not give enough information to enable anyone to build even a flat lens, let alone a 3-dimensional one.**

After pointing out that one of the primary "principles" involved was the internal and external construction of the plutonium core upon which all other aspects of the bomb's construction depended, Dr. Linschitz found that the total information contained in the Greenglass testimony relating to classified information is reduced to the classified words "lens", and "implosion" and the spherically disposed components (A. 324). The utter falsity of the Government's representations and claims is grounded in the mis-

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* A partial list of the "omissions" also applicable to Exhibits 2, 6 and 7 includes: The chemical nature of the explosive components, the design of the lens surfaces, the form of interfaces or the method of fabricating and testing the lenses used, the very presence of tamper to say nothing of its chemical constitution, the means of achieving simultaneous detonations of all the lenses, the design of the mechanical components, the presence of neutron shielding and neutron generating elements, the critical importance of plutonium and the all-important configuration of the plutonium core. This not only makes the drawing and description merely schematic but also leaves at issue the various essential principles upon which the bomb operates. These omissions hardly constitute "minute details" or an "error here or there" (A. 317-324).

** Greenglass didn't even attempt in any part of his testimony or descriptions to deal with or indicate that he had any knowledge of 3-dimensional lenses, the type actually used in the atom bomb.

conception first, that "there is a secret or key formula for the construction of an atomic bomb",* a misconception reflected in "important statements by the prosecution and presiding judge which only served to reinforce this dangerously false impression."

Dr. Christy worked at the Metallurgical Laboratory at the University of Chicago and participated in the design of the first nuclear chain reactor which developed the first self-sustaining chain reaction in December of 1942, and in the design of the Hanford reactors for the plutonium use in the Nagasaki bomb (A. 422), and was responsible for the implosion design used in the Nagasaki bomb. He found himself in general and detailed agreement with Dr. Morrison's affidavit, and stated, as Dr. Linschitz described in detail, that the time factor for the development of the bomb was dependent primarily upon the production of sufficient plutonium (A. 423). Within that time the Soviet scientists would have been afforded adequate time to independently develop the implosion method (A. 423-424).

The sketch would have meaning only to one who was already fully familiar with the implosion bomb design and party to its construction such as Dr. Christy. The sketch contains the germ of the ideas involved but " . . . it would be inadequate to convey the actual design to one otherwise unfamiliar with it" and even then only if accompanied by a correct verbal description which Dr. Christy found completely lacking (A. 424-425).

Dr. Urey, Nobel laureate, was one of the original organizers and initiators of atomic bomb research in 1940 and thereafter played a vital role in the top councils of the Man-

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* Commenting on one of the crucial principles involved, Dr. Linschitz notes, the method of detonation of the plutonium core was completely dependent on the size of the cavity of the plutonium sphere which is not indicated whatever in the sketch or drawing. The whole nature of the bomb was in large part determined by just such a factor (A. 319-322).

hattan Project. He had extensive knowledge of all of the basic problems involved in preparing materials for the bomb and the project itself and fully supports the statements of Dr. Linschitz and Dr. Morrison, as well as the appraisal of the value of the information allegedly transmitted by Greenglass. It is interesting to note that Dr. Urey with his tremendous knowledge and experience in the development of the bomb qualifies his affidavit by stating that he "had no direct detailed knowledge or experience of the actual construction of the bomb itself" before rendering his valid judgment, based on his experience with the problem involved in the construction of the bomb (A. 414).

No response to the scientists' affidavits and no answer to the phase of the petition discussed *supra* has been filed by the Government. The facts presented by the appellant are undisputed. Smug and tightlipped, the Government wields its judgment of conviction as its only weapon. The appellant's right to relief must be adjudged solely on the basis of his own papers, for the Government has advanced no factual justification for its conduct.

The Lower Court's Opinion on the "Atom Bomb" Branch of the Application.

The lower court's failure to deal with the issues raised by the petition is reflected not only in the formulation of the issues said to be involved but in its summary of the trial which omits many extremely pertinent portions of the record, particularly the statements and representations made by the prosecution. This latter point is dealt with in the opinion solely by a characterizing conclusion that appellant has distorted their meanings.

The petition is based, not only on facts *dehors* the record, but upon the trial as it was actually held, the claims actually made, the evidence adduced and the meaning attributed to it—the magnitude of the crime claimed to have been committed. All these factors, which had an

overwhelming impact upon the jury, are essentially ignored in the opinion. The lower court has, in effect, reconstructed the case and directed its opinion to a truncated version of a trial that was never held, devoid of the very premise upon which the case was instituted, the conviction obtained and the sentence imposed.

Based upon this fundamental error the court found that no showing had been made entitling appellant to a hearing. Where factual issues were inescapably tendered by the petition and affidavits, the court disposed of them by *ex parte* findings of fact.

The lower court assumes that there is "a secret and principle of the atomic bomb dropped at Nagasaki" (A. 434); that the issue is whether Greenglass defaulted because he failed to give a sufficiently accurate description of the A Bomb to constitute a violation of the Espionage Act of 1917 (A. 451); that the scientists challenge Greenglass's credibility (A. 453); that they do not impugn Derry's expertise or testimony but differ in the realm of "opinion" and only a jury can determine whether Derry's statements were false even in the face of evidence dehors the record (A. 454-457); that the significance attributed to the material by the Government was of no moment, since a prior determination held that the data (then not available to the Court and accepted as accurate by the defense) could be classified or secret under the Espionage Act and that in any event appellant should have been more diligent in his post-trial application (A. 471-472).

In each respect the lower court was in error as a reading of the petition and evidentiary supporting papers make quite clear.

The government's false claims, that the Greenglass material and testimony showed the construction and composition of the bomb, and that it was adequate to show how to construct it, were ignored utterly by the court

below. Also ignored was the plain fact that the petition and supporting papers established that there is no such thing as "the secret" or "the principle" of the Nagasaki bomb (A. 263, 333, 334).

It is not that Greenglass is faulted for giving essentially valueless information. It is the fact that the government with full knowledge falsely stated that which was valueless to be the most closely guarded secret of the vital weapon, which had enabled the Soviet Union to construct the atomic bomb. Nor is it merely the burden of the petition that Derry's opinion as an expert was wrong, which it was, but rather that, as the government well knew, his claimed knowledge of the facts and expertise were false, and that Derry gave factually false testimony as well as false opinions of authenticity and accuracy.

The lower court notes that Greenglass was working in a machine shop "*concerned* with high explosives" and worked on apparatus "*in connection* with experimentation on atomic energy" (A. 436).

Both the trial record and the facts presented in this petition make it clear that Greenglass' "concern" and "connection" were limited to machining 2-dimensional metallic molds used in preliminary experimentation with which he was not associated. He had nothing whatever to do with the composition, make-up or detonation of any high explosive or any experimentation on atomic energy. He was completely unaware of the fact that the shaped charges used in experimentation or in the bomb were made of various combinations of high explosives. If he did work on any apparatus that went into the atomic bomb, the record is devoid of any evidence of what it was. Greenglass was not asked to describe it nor was it suggested that he had any awareness of what it was.

After giving an incomplete summary of the Derry testimony, the court then directs its attention to the affidavits

of the scientists submitted in support of appellant's motion.*

The court misreads the affidavits as *solely directed* to the testimony of Greenglass to determine whether *his description and drawing* were not completely accurate or of any value to the Soviet Union. The court concludes that even though Greenglass' information was of little or no value or misleading, it is of no consequence in that it was Greenglass' job to get classified information to the extent of his capacity and the validity of the conviction could not be attacked because he was a poor or ineffective spy** (A. 451).

The court goes on to say it was not within the competence of the scientists to judge the credibility of Greenglass, and since Greenglass did not hold himself out as an expert, the jury could not be misled by his testimony; and that moreover, the trial court, during the examination of Greenglass, as an aside had noted that the material might not have been "accurate in every minute detail" and that Greenglass may have been "miscalculating a figure or making an error here or there" (R. 613, A. 452-453). The trial judge's comment was not in disparagement of the witness, but was rather calculated to impress on the jury that inaccuracy or error in details was not to be considered a material weakness in Greenglass's testimony.

Obviously the lower court's comments are not responsive to the issue placed before it. Greenglass in isolation is one thing. Greenglass in the context of the Derry testimony, the aura of and imprimatur of Dr. Urey and Dr. Oppen-

* No reference is made in the court's opinion to the representation by the government that the material was only temporarily declassified and would be once again reclassified by the A.E.C.; nor is reference made to statements made both to the court and to the jury concerning the prosecution's consultation with the A.E.C. and the review of the material prior to its presentation at the trial.

** The court's summary of the scientists' affidavits gives a fragmented and incomplete picture of what they had to say.

heimer, the presence of the AEC, and the statements, representations and claims of the government and the attributions of authenticity and accuracy, is an entirely different picture. The lower court dwells on the former and in effect excises and gerrymanders the total record. By so doing the issues are not faced but avoided.

Directing its attention to the Derry testimony, the court once again misreads the appellant's contention to be that only Derry's opinion as an expert was false, disregarding the falsity of the Derry factual testimony, which was impugned by the scientists.

Yet, looking to the scientists' affidavits we find sworn statements by unchallenged experts categorically and factually stating that Derry was *not* an expert; he had no competence to establish the "authenticity" of Exhibit 8; he had no knowledge of the design or construction of the atomic bomb; he was not closely associated with the technical aspects of the project (A.); if he ever saw the bomb he would have been obliged to state that it did not look like Exhibit 8 (A. 346-348). What he calls a substantially accurate description of the bomb is in fact false (A. 342-346).* All of the scientists are in detailed agreement with these statements of fact.

The jury was given false testimony. Derry, an employee of the AEC, the government, was falsely accredited as an expert and the jury was misled to rely on factual as well as opinion evidence of Derry. But the lower court finds that if Derry did not knowingly testify falsely (even though the prosecutor and the A.E.C. knew it to be false) that was of no moment in that the conspiracy charge was not limited to atomic bomb information.

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*Even if he were knowledgeable—he as well as the prosecution wrongfully failed to correct or dissociate themselves from the gross errors of Greenglass.

Implicit in the court's conclusion is that as long as the conduct of Greenglass (attributed to appellant and his co-defendants by virtue of the alleged conspiracy) might fall within the general terms of the indictment, falsity, deception and fraud in procuring the conviction cannot be collaterally attacked. It is a further corollary of the opinion that the conviction could not possibly have been affected by Derry's false testimony and the false credentials given him by the government in evaluating the credibility of Greenglass. One would have to conclude from the opinion that Derry's testimony had not been tendered to substantiate the statements and claims of the government in proving the grand theft of the atom bomb. The lower court finds that appellant is estopped, since one of appellant's co-defendant's counsel had asked on the trial that Derry be properly qualified; that the issue was finally litigated and is immune from collateral attack. The government's role in falsifying the Derry testimony is ignored.

One of the scientists, Dr. Linschitz, alludes to the fact that subjectivity (personal knowledge) may be involved to the extent that one fully aware of the construction of the bomb, could in examining the sketch, determine what was wrong with it, what was missing, what was mislabeled, what was misconceived or distorted. On the basis of that comment the lower court concludes that the applicant was merely expressing an alternative opinion to that of Derry's and that any scientist not aware of the construction of the bomb could equally have filled in these gaps (A. 325). This is directly in conflict with the very point made by Dr. Christy in the conclusion of his affidavit. This, too, the court ignored (A. 424-425).

The failure of the Government to call Dr. Urey, Dr. Kistiakowski and Dr. Oppenheimer is held by the lower court to be of no moment since the prosecution did not specifically state to the jury what they would testify if called to the stand. Thus, the court finds it impermissible to infer that by advising the jury that these witnesses

would testify, it would suggest that they would testify in support of the prosecution's case. In any event, the court states, the defense could have compelled the appearance of these witnesses by order of the court or by subpoena! To pose that contention is to answer it.

The court reasons that although the enormity of the crime conjured up by the government resulted in a death sentence imposed upon the Rosenbergs it could have had no impact upon appellant, who is charged with being a member of the same conspiracy, on the basis that he was not given the death sentence, as he was not charged with being a transmitter or recipient of atomic information. But it was the hoax knowingly created by the government that convicted the appellant *and* his co-defendants in the first place.

Finally, appellant is faulted in that he should have been more diligent in discovering the fraud—either during trial or after, as he had seen Exhibit 8 on the trial (A. 471-473).*

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* In late November, 1952 appellant's co-defendants instituted a § 2255 motion. Appellant thereafter joined in its support. It was contended: that the government had knowingly used false testimony when it permitted Greenglass to testify that he had drawn Exhibits 2, 6, 7 and 8 without aid or coaching or resort to any text or scientific works (premises upon an assumption of the accuracy of the information allegedly delivered); and the sentencing court was without jurisdiction in that the information was in any event in the public domain and known to the world scientific community and thus the government's classification was arbitrary and capricious, its disclosure was not violative of the Espionage Act of 1917.

This perjury aspect of the application was denied on the grounds that the affidavits submitted were by persons who had never seen Exhibit 8 or the impounded testimony (neither did the Court) and they were merely expressing an opinion upon facts unknown to them as to the general credibility and competency of Greenglass. The court found that the government's classification as secret, the fact of its engagement in the development of the atomic bomb in time of war, was not arbitrary and capricious. The court further assumed, and the defendants did not challenge the contention, that Government Exhibit 8 as described "disclosed, demonstrated 'substantially and with substantial accuracy the principle involved in the operation of the 1945 bomb' and that it was classified as top secret".

Lack of diligence does not protect from collateral attack a conviction illegally obtained by government misconduct. However, the statement that Sobell saw the exhibit does not comport with the facts, and indeed the Rosenbergs did not see the exhibit either (R. 1097). What compelled the court to arrive at such an erroneous conclusion contrary to the files and records of the case is difficult to conceive.

June 3, 1945 and Government Exhibit 16

In addition to fabricating the alleged importance of the information obtained by Greenglass, the government sought to establish that the conspiracy had been successful and there had been actual transmission of information to the Soviet Union, and that appellant and the Rosenbergs were part of the Gold-Fuchs-Yakovlev spy ring. This in turn centered around an alleged meeting held between Gold and Greenglass in Albuquerque, New Mexico on June 3, 1945 where the connection was said to have been established (A. 273-274, 277-278). The government "corroborated" this meeting by documentary proof, Exhibit 16, a photostat of a purported Hotel Hilton registration card bearing the June 3rd date on its face. To establish this aspect of its case the government:

> A. Knowingly permitted and caused Harry Gold and the Greenglasses to give perjured testimony to the effect that there was a meeting on June 3, 1945 in Albuquerque, New Mexico, arranged by the Rosenbergs, when in fact there was none;
>
> B. Introduced into evidence Government Exhibit 16, a purported photostat of an alleged original of a June 3, 1945 registration card of the Hotel Hilton, Albuquerque, New Mexico, when in fact the alleged original and the photostat were to the government's knowledge forged, after-contrived documents, and Harry Gold did not stay or register at the Hotel Hilton on June 3, 1945;

C. To immunize the exposure of the fraud the government, which had possession of the alleged original, disposed of it in August, 1951, four months after the judgment of conviction, knowing that by reason of such action the "original" would be destroyed and thereafter not subject to scrutiny or use in any retrial or subsequent proceeding;

D. Knowingly suppressed and continued to suppress evidence known to it but not known to the appellant or his counsel which would have impeached and refuted testimony given against appellant and his co-defendants (A. 215-216).

The Trial Record Covering June 3, 1945.

Gold testified that in May of 1945 he met with his contact, Yakovlev, a Soviet national, in preparation for a meeting with Fuchs on June 2, 1945. He testified that at that time he was given an additional assignment to see Greenglass in Albuquerque, New Mexico, whose name and address were set forth on an onion skin paper, and he was told that the recognition signal was "I come from Julius" (R. 822, A. 278). This additional task, he said, "was very vital . . . extremely important business", and he was replacing a woman courier (R. 821). He testified that he was given as an additional recognition signal a cut piece of cardboard from a Jello box, and was told that the person from whom he would be receiving the information would have a matching portion (R. 822, A. 279). He stated that after meeting Fuchs in Santa Fe on June 2, 1945, he left for Albuquerque and visited the designated address in Albuquerque but that the Greenglasses were not at home (R. 822-823).

Several hours later (he went on), he found a place to stay in the hallway of a rooming house. Upon arising and getting dressed on Sunday, June 3, 1945, he went to the Hotel Hilton and registered at about 8:00 A.M. under his own name, and then went to the Greenglass residence arriving there approximately 8:30 A.M. (R. 825, A. 279). He

gave the recognition signal "I came from Julius" (R. 825). The cardboard pieces were brought out and matched. Gold identified himself as "Dave from Pittsburgh" and it was then noted that it was the same as Greenglass (R. 826). After a conversation, he left and returned at or about 3 o'clock in the afternoon when he was given an envelope by Greenglass (R. 827). Prior to departing he was advised that Greenglass expected his furlough around Christmas and if Gold wished to get in touch with him he could do so by calling his brother-in-law, Julius, whose telephone number he also gave to Gold (R. 827, A. 280).

He thereafter left Albuquerque by rail (R. 828) and kept his appointed meeting with Yakovlev in the evening of June 5, 1945 (R. 828, A. 280-281).

At no time while Gold was on the stand was he asked to identify any alleged registration card, photostat or original. No reference was made to his staying at the Hotel Hilton on September 19, 1945 although he specifically stated in the course of his testimony that he did meet with Fuchs in Santa Fe on September 19, 1945 (R. 835). A major portion of Gold's testimony related to Fuchs both prior to and after the alleged June 3rd tryst.

After Gold had left the stand and after two intervening witnesses the prosecutor approached the bench and stated:

> "I now have some testimony which it is possible that there will be a stipulation on: the fact of the registration of Harry Gold at the Hotel Hilton on June 3rd (R. 867, A. 280-281).

He stated he had the original of the card on the way together with a witness undesignated by name, and requested that since these witnesses were from distant places that Mr. Bloch stipulate as to the records rather than insist upon "strict technical proof". Mr. Block did so in reliance on the representation implicit in the prosecutor's words. It was stipulated that the photostat of the alleged

card be received in evidence as "a copy of the registration card as a record regularly kept in the course of business . . ." (R. 869).*

Gold was the only witness who did link the Rosenbergs, however obliquely, to the government's claim of actual arrangement for transmission of information to a foreign power. This linkage testimony—Fuchs-Gold-Greenglass-Rosenberg-Yakovlev, was heavily stressed by the prosecution in its summation to the jury and was particularly alluded to by the court in its charge (R. 1521-24, 1557, A. 283-286).

The theory and thrust of the government's case was that a single grand conspiracy to commit espionage existed. The focus of the entire trial was the alleged conspiracy to transmit classified atomic bomb data to the Soviet Union involving Fuchs, the Rosenbergs, the Greenglasses, Gold and Yakovlev—and appellant, by reason of Elitcher's connecting him with Rosenberg in the general nefarious scheme. The overwhelming portion of the trial and that portion which attained greatest public notice and promoted the greatest controversy was that of the Rosenbergs and alleged atomic theft. Thus, appellant was burdened by all this highly prejudicial testimony and caught in the whirlpool of the alleged notorious crime by the single conspiracy indictment and trial.

Fuchs, whether named in the indictment or not, had cast, to the limited extent his confession was made public, the framework within which the government was compelled to operate, and upon finding his alleged single courier, that

* It is interesting to note that while the government wished to avoid going to the "trouble" of bringing the hotel clerk, Anna Kinderknecht, who in fact was not asked to be a witness, to New York to attest to the card in open court, it nevertheless called hotel clerks from Mexico, the hotel clerks who actually filled out the registration cards where the appellant stayed in Vera Cruz and Tampico (R. 927-934). No request for a stipulation was made.

fact then could serve as the basis for enlarging the net to cover others whether innocent or not. The government had Fuchs' full confession in January of 1950 and was afforded quite a degree of latitude, as was Gold, in the development of the story because the facts of the Santa Fe meeting—whether one or more—were never disclosed* (A. 286-290).

Fuchs' description of his courier—if there was only one—was not that of Gold and he never "identified" Gold even after Gold had confessed his involvement in espionage activities (A. 288-289). The formal arrest was made only after the FBI obtained at the hotel the purported original of the Hotel Hilton registration card dated September 19 1945 bearing Gold's name. The photostat of the September 19th registration card would indicate that the original had the initials of several FBI agents inscribed on the back, along with the date of acquisition, May 23, 1950 (A. 361-362). There is no dispute that the FBI did send its agents to obtain all documents of record to establish Gold's presence in or about Santa Fe or Albuquerque in 1945 (A. 291).

The FBI searched the files of the Hotel Hilton to find proof of Gold's stay or stays at that hotel in 1945. The files and records at the Hotel Hilton are so kept that there is indexing both by name and by card number. Thus, if one registration card or invoice of Harry Gold was to be found at the Hotel Hilton, his other registration cards, if any, at least for that year would have been found in the very same place. But the FBI never found the "original" Government Exhibit 16, the alleged June 3rd card, at the Hotel Hilton, and that is not contested by the government. It acknowledges that Government Exhibit 16 was "*acquired*" at a different, and obviously at a later, time than the September

* The government has refused to make the Fuchs confession available on the claim the British authorities would not permit it. The British Home Office on the other hand just recently would not acknowledge this fact and advised counsel that its availability was up to the American authorities.

19th card and that the two cards were *"handled in a different manner"* (First Govt. Br., p. 53; A. 292). Exhibit 16 bears no date of acquisition or the initials of any government agent.

Every other exhibit obtained by the FBI introduced into evidence bore the initials of one or more FBI agents ( ). The sole alleged exception is a photostat of a ledger sheet of the Albuquerque National Bank together with a credit slip showing a deposit of $400 (Government Exhibit 17). Yet it must be noted that Government Exhibit 17 was a photostat of a permanent bank record still in the bank's possession, and the original bank record itself bear a FBI identification to this day that a copy was delivered to the government at a designated time.*

On September 7, 1966 Elizabeth McCarthy, an attorney and an acknowledged leading expert in questioned handwritings and documents, made a detailed microscopic examination of the photostatic copies of the alleged "originals" of the two registration cards of the Hilton Hotel. In addition she had in her possession various writings of Anna Kinderknecht (now Mrs. Larry A. Hockinson), the hotel clerk whose initials were purportedly inscribed on both cards (A. 389-390, 393-394).

Mrs. McCarthy found that the handwriting on the September 19th card was that of Mrs. Hockinson and that the handwriting on the June 3rd card was *not* the handwriting of Mrs. Hockinson (A. 394-395).

In rendering this expert opinion she also found factually that there were deletions, erasures and overwriting on various portions of the cards and particularly in the area of the initialed handwriting of Mrs. Hockinson on the June 3rd card (A. 390-393).

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* This is essentially acknowledged in the Government's brief to the amended petition (p. 83).

Government Exhibit 16 has on its face in the spurious handwriting the date June 3, 1945 with a time stamp on the rear of the card dated June 4, 1945, 12:36 P.M.* The September 19th card bears both on the front and rear portions the written date September 19, 1945 and the time stamp dated September 19, 1945 at 12:34 P.M.

The mystery of the acquisition of the June 3rd card is compounded by the mystery of the disposition of its alleged original. On April 5, 1951 appellant was sentenced to 30 years imprisonment and his co-defendants were sentenced to death. Yet on August 4, 1951, barely four months after the judgment and sentencing and while an appeal was pending, the government claims it returned the alleged original to the Hotel Hilton at Albuquerque fully aware of the fact that under New Mexico law and the custom of the hotel it was ripe for immediate destruction in that more than five years had transpired since the time of the alleged registration ** (A. 302-305).

Both in 1965 and 1966 counsel for the appellant directed innumerable inquiries to the Department of Justice concerning the cards, the time and circumstances of their acquisition and the persons involved, and any records reflecting the facts, all to no avail *** (A. 305-306).

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* Gold testified that he registered on June 3rd some time prior to 8:30 A.M.

** In one letter the government indicated that the June 3rd card may have been destroyed in 1957 presuming the five years would commence running from the time of the return of the card rather than the date of registration and in a subsequent letter stated without any factual foundation or any indication for the basis of the claim that it was destroyed in 1957.

It should also be noted that at the time of its alleged destruction in 1957, which appellant in no way accepts as a fact, appellant had then pending a 2255 application and the government was then said to be reviewing the entire case.

*** The government states it held the alleged original Sept. 19, 1945 card until 1960. No explanation of the difference in the manner of handling the two cards has been offered.

Some time in June of 1961 Walter and Miriam Schneir obtained access; with the consent of Harry Gold, to 14 hours pre-trial interviews between Gold and his attorneys, John D. M. Hamilton and Augustus S. Ballard, along with numerous other written material by Gold including correspondence between him and his attorneys. The items are more specifically set forth in the affidavit of Walter and Miriam Schneir dated August 19, 1966 (A. 351-355). Those interviews were had during the period June 1, 1950 to August 9, 1950.* A brief preliminary interview was had on June 1, 1950. The subsequent ones were held on June 6th, June 8th, June 14th and August 9th, 1950.

Gold allegedly confessed on May 22, 1950 after spending ten hours with the FBI. His first interview of substance with his attorney on June 6, 1950 was held after 69 hours of "interrogation" by the FBI (Exhibit A). (Officials of other agencies also interrogated him). The first time he ever mentioned the alleged June 3rd episode to his attorneys was on June 14, 1950 after 84 hours of discussions with the FBI again and after having been in custody 23 days.

In his interviews with his lawyers relating to the June 3rd affair he stated that he had stayed overnight at a rooming house after failing to obtain a hotel room and made no reference whatsoever to his registering or staying at the Hotel Hilton (Reel 4, p. 53).** Rather he stated that he had checked his bags at the railroad station and then sought to find the Greenglasses not mentioned by name (Reel 5, p. 38). He was explicit in clearly stating he had stayed at the Hotel Hilton on one occasion only and that was in September of 1945. He stated in part:

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* A transcript of those interviews was submitted to the lower court approximately one month after the argument. They total approximately 500 pages.

** The transcript of the interviews is designated by reel number and page, in some instances, side "1" or "2" of the reel.

> "I have made one omission with respect to Albuquerque, and this is the fact that I registered at the Hotel Hilton on the occasion of the second trip, [to see Fuchs] and have explained why it was necessary to on that one occasion stay at the Hilton",

He went on to state:

> "I would like to state that my stay at the Palmer House on the occasion of my second trip, my stay at the Hilton in Albuquerque had all been verified through information that I had given the investigating agents. This has enabled them to fix the dates." (Reel 4, pp. 72-73)

At no time did he indicate or suggest or refer to any stay at the Hilton in June of 1945.*

It is in this context that one evaluates Exhibit 16.

The government, in the course of the argument below, stated that it had a complete explanation for the discrepancy in dating on the front and rear of Government Exhibit 16, June 3rd in front and June 4th the time stamp (T.M. 116-117).** It was that all the cards of the Hotel Hilton of June 3rd, 1945 were misstamped June 4th. When asked for an affidavit or evidence in support of this position the government stated that since all the cards have now been destroyed, it would require testimony from a FBI agent and that would create an issue of fact and result in a hearing (T.M. 117-120). An obvious issue of fact was posed before the court and if resolved by the court, no reference to the matter can be found in the court's opinion.

The government does not deny, but rather contends that appellant should have known, that Gold was a pathological

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* Indeed, Gold's attorney, at the time of his statement to the court on December 7, 1950, prior to sentencing, adverted to the fact that Gold stayed at the Hotel Hilton on one occasion in September, 1945.

** T.M. refers to the transcript of argument held September 12, 1966.

liar, that he had fabricated such a web of lies that it was difficult for him to discern and distinguish fact from fiction and that he had perjured himself before a Grand Jury in 1947 and that this was known to the appellant and his co-defendants (A. 364-374, 376-378).

But appellant did not know of the government's knowledge that Gold had lied in this very case in giving his crucial testimony to establish linkage of Gold with Greenglass and the Rosenbergs and the alleged transmission of secrets of the atomic bomb to the Soviet Union.

A reading of the interviews and other written material obtained from his attorneys establishes clearly and unequivocally the following (see A. 296-298):

> A. Long prior to the substantive interviews with his attorneys which started on June 6, 1950 he had approximately 69 hours of interviews with the FBI alone excluding any with other agencies of the government and the prosecutors ( ). In the course of these interviews, interrogations and discussions he made elaborate notes and when he "narrated the story" to his attorneys from June 6th through August 9th it was based upon the notes resulting from his discussions with the government (Reel 1, side 1, p. 17, Reel 2, side 2, p. 16, Reel 3, pp. 28, 33, Reel 4, p. 56, Reel 5, pp. 30, 31, Reel 6, pp. 35, 55).
>
> B. In the course of this time he had not only added belated revisions of his story but had also lied to the government and his attorneys and had perjured himself before the Grand Jury on August 2, 1950 (Reel 6, pp. 66-71, Reel 7, pp. 1-56).
>
> C. The first occasion Gold made any mention of a meeting with "a G.I." (name unknown), at the time of his alleged June trip in 1945 was on June 14, 1950, the day before David Greenglass was taken into custody. He did not reduce this aspect of his story to writing until June 16, 1950. (See Exhibit 8 handwritten statement of Harry Gold entitled

"Chronology of Work for Soviet Union.)* (Reel 4, pp. 43-45, 53, Reel 5, pp. 35-44).

D. He had no recollection of the recognition name, but rather "Bob sent me or Benny sent me or John sent me or something like that" (Reel 5, p. 40).

E. Gold did not identify himself as "Dave from Pittsburg" but rather used a name like Raymond Frank (Reel 5, pp. 40-41).

F. No recognition signal other than that of a name was referred to in Gold's statement and no reference was made to a jello box or any other paper-matching device or other method of identification (Reel 5, pp. 40-41).

G. There was no reference to any discussion with Ruth Greenglass concerning conversations had with "Julius" nor was he given Rosenberg's telephone number or address or identity. See *supra*.

H. Gold related his stay at the Hotel Hilton solely to his September trip to Albuquerque and he said he had checked his baggage at the railroad station in June 1945 ( ).

I. In his alleged May 1945 discussion with Yakovlev concerning Greenglass, no reference was made to the inability of an alleged woman courier to make the trip as planned.**

J. At the trial he stated that the material received from Greenglass was said by Yakovlev to be "extremely excellent and very valuable". Gold in his statement to his attorneys said that the G.I.'s information was "not of much consequence" (Reel 5, p. 42). In his "chronology dated June 15-16, 1950 it was described "to have been unimportant"—but *while in custody* he "learned it was highly valuable". In his October 11, 1950 statement he said Yakovlev told him it was of "no value", to deceive him.

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* Additions were written on this document, some no earlier than August, 1950.

** This was absolutely added to support the "Sidorovich story" given by Greenglass relative to the Jello box (R. 821).

In the course of Gold's interview with his attorneys not only are frequent references made to his utilization of notes previously written in conjunction with his interview with government representatives but the record further establishes that:

(a) He claimed that he was telling his attorneys everything, that he was giving them with particularity all the facts he had given to the FBI (Reel 1, Side 1, pp. 14, 17).

(b) On several occasions in the development of his story he received information from the FBI about various individuals such as Slack, Brothman, and Smilg, their background, and what they were saying (Reel 3, p. 33, Reel 5, p. 51, Reel 7, pp. 44, 46-48).

(c) For a long time after his arrest he had no "recollection" of the alleged meeting with the "G.I." (Exhibit F, pp. 1084-1085).

(d) The government furnished him with reels of moving pictures of Albuquerque to help him "find" the Greenglass residence and photographs of several thousand individuals.

(e) The government gave him a list of 20 names to choose from including that of Greenglass and by a cooperative method of selection, "Lo, Greenglass was at the top".

(f) After advising his attorneys of his perjury before the Grand Jury in August 1950, he had suddenly been able to recall, although this had been consistently denied by him in the past, that his Soviet contacts advised him of the possible necessity of his having to leave the country in the event of any possible exposure of the grand conspiracy (Reel 7, pp. 29, 33-34).

(g) As part of this sudden recall and after the arrest of Julius Rosenberg he then says that he had seen Rosenberg in February of 1950 after the arrest of Fuchs and that the Soviet agents had sent Rosenberg to check on Gold's possible surveillance by the FBI * (Reel 7, pp. 32, 34, 35).

* This story was further elaborated and altered in content in October of 1950 and again in 1956.

It can be stated absolutely that Gold gave one story at the time of his arrest and that he conferred for innumerable hours with governmental investigators and "added" or supplemented his stories prior to the time of his initial substantive interview with his attorneys on June 6, 1950. At the same time he was being interviewed by his attorneys he was still consulting with and being "interrogated" by the government authorities. The interviews with the lawyers were the results of these consultations with the government and were aided by notes made in conjunction therewith. Additions to the story as given to his attorneys substantially coincided in time with the arrest of Greenglass and appellant's co-defendants. He lied to his attorneys, the FBI and the indicting Grand Jury and after having committed perjury made basic revisions of his history of espionage activity, concocted a story which he had previously consistently denied, such as that he had been asked by his Soviet superiors to flee the United States because of the peril of exposure, while at the same time his Soviet superiors assigned Julius Rosenberg to subject himself to possible FBI surveillance in order to determine whether Gold was under active investigation by the FBI. The final story as given at the trial was an elaboration developed after more than 450 hours of discussion with the FBI and numerous discussions with the prosecution and it was this elaboration, not reflected in his interviews or statements, which were used to inculpate the Rosenbergs and therefore the appellant—the recognition signals, the names, the unavailable woman courier, as well as the stay at the Hotel Hilton in June of 1945.

The government was fully aware of these initial significant omissions, basic contradictions and belated additions and knew that Gold was altering his story and testifying falsely to meet the needs of the government. Notwithstanding this fact the government failed and refused to disclose to appellant and his co-defendants the important omissions and contradictions reflected in Gold's

pre-trial statements of which it was fully aware.* Thus, the government was an active party to the knowing use of false and perjured testimony and knowingly suppressed, refused and failed to disclose exculpatory evidence within its possession thereby tainting the entire proceeding and making the judgment of conviction and sentence subject to collateral attack.

The Lower Court's Opinion on the June 3, 1945 Meeting.

After giving a brief but incomplete summary of the Gold trial testimony the court below asserts that until the filing of the present petition Gold's testimony was essentially accepted as true.** But even the government admits this is not so in its affidavit in opposition (A. 374-379).***

Notwithstanding the fabricated hotel registration card, the essential contradictions between the Gold testimony and his pre-trial statements to the government. The lower court stated that there was "not a word of *direct* evidence to support these serious charges . . ."† (A. 478-479).

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* Naturally Gold's actual pre-trial statements to the government would even more clearly reveal the improper conduct engaged in by the prosecution.

** Admittedly trial counsel for the Rosenbergs did not cross-examine Gold or challenge the veracity of his testimony.

*** The government, in reviewing the case in 1956 and 1957 in view of continuing doubt of the fairness of the trial and the truthfulness of the evidence tendered by the prosecution, noted particularly the challenge to the Gold testimony as it related to the June 3, 1945 meeting and registration card.

† There is indeed direct evidence, and in any event circumstantial evidence is equally competent to establish the factually supported allegations in the petition and supporting papers of the appellant. The court's comment is interesting also in that vital and essential portions of the government's case against the appellant and his co-defendants were based essentially on circumstantial evidence. See *U.S.* v. *Rosenberg*, 195 F.2d 583. See also Wigmore on Evidence, Vol. 1, § 25.

The lower court "*finds* that his [appellants] charges are not sustained, that the contended for inferences are not warranted", and the material upon which appellant relies could have been obtained long prior to the present application. Thus, the lower court in essence resolved conflicting issues of fact and inferences *ex parte*, without all of the evidence before it upon standards not applicable to a habeas corpus application.

The court acknowledges that the handwriting of Mrs. Hockinson (A.K.)* was on the September 19th card and that Government Exhibit 16 in fact contained an imitation of her handwriting and her initials. The court makes a finding, *ex parte*, without a scintilla of evidence, that Mrs. Hockinson must have authorized someone else to write and subscribe her initials on this particular registration card and that such was the general procedure followed at the hotel (A. 479-481). While the government was not required by the lower court to prove either of these conclusions, the failure of appellant to present an affidavit from Mrs. Hockinson serve for the court as a sufficient evidentiary basis to infer that the June 3rd card was "kept in the regular course of business of the Hotel Hilton" (A. 483-484). Inconsistently, the government is not faulted for failing to produce an affidavit of a former FBI agent or anyone else to support its contention that the discrepancy of dates on the card could be explained by the fact that all June 3rd cards, now destroyed, were misdated.**

As stated by the appellant in the course of argument, he intended to call Mrs. Hockinson and she would be required to appear at the evidentiary hearing which appel-

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* Representing her intials in 1945 when she was unmarried.

** The court's opinion particularly lacks consistency in this respect in that it found it impossible to draw any adverse inferences against the government for failing to call Drs. Urey, Oppenheimer and Kistiakowski.

lant seeks (as well as other witnesses pertinent to this issue) (T. M. 64-65). Rather than permit such a hearing the government would prefer silence.

An evidentiary hearing is of vital importance not only because it means confrontation, questioning, cross-examination; it means the power to compel by subpoena the production of relevant documents and the power to compel the attendance of witnesses who would not be disposed to voluntarily appear or submit affidavits in a controversial case such as this. The capacity to produce an affidavit cannot be the basis for inferring in this context any adverse inference against the appellant or derogate the strong showing he has made entitling him to an evidentiary hearing.

The lower court seeks to diminish the import of the destruction of the alleged original of Exhibit 16 by finding without evidentiary support that the "original" was destroyed in accordance with the hotel's policy *in 1957* (A. 484). The petition states quite to the contrary and that is not controverted by the government. But, says the court, what difference does it really make. The photostat, the "Exhibit" still is in existence. But surely it must be evident that the examination of the purported original would disclose when the spurious handwriting was imposed upon the forged card. Chemical analysis would determine the age of the ink and the paper, and one could more easily discern what had been erased or removed from the card in the area where the imitated overwriting was imposed. The court below was inordinately loath to draw the most inescapable inferences.

The lack of FBI initials is equally summarily disposed of by the court's finding that the photostat of the permanent bank records did not bear the initials of the FBI agents. (But see p. *supra*.) (It is possible that the FBI did not wish to be associated with Exhibit 16 or its "original"). The government does not contest the fact

that it is standard operating procedure to initial any original document obtained by the FBI with the date of acquisition noted thereon.*

In coming to this grossly erroneous conclusion the court perceives the omission from the Gold statements and interview of any linkage evidence or any fact concerning his alleged stay at the Hilton on June 3, 1945, but finds "the omissions are of no special significance" (A. 487). Without Gold's belated supplying of the omissions there would have been no connection between Rosenberg and the alleged Gold-Greenglass meeting and no proof of transmission of information to the Soviet Union. The government's case would not have worked any more than the Greenglass' bomb.

The lower court concludes that the government was completely unaware of the information given by Gold to his attorneys since those were privileged communications ** (A. 488) and studiously avoids the fact that, as these interviews reveal, he was working continuously with the FBI and the prosecution staff, making notes, and it was on the basis of those notes that he was narrating his story to his lawyers. The interviews mirror the FBI statements which are not privileged.

The court finds, *ex parte*, although contradicted by the transcript of interviews submitted to it by the appellant and other material submitted by the government, that Gold had in his earlier statements intentionally withheld the June 3rd episode and intentionally covered up the Greenglass involvement (A. 490). In fact, the transcript reveals

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* The lower court states that appellant contends that Gold was not cross-examined because of the card (A. 486). This is error. No such contention was made in the petition.

** It is acknowledged that the Gold interview and written statements and correspondence between him and his attorneys were given to the FBI on October 21, 1953.

that the only party whose identity he had withheld was that of Alfred Dean Slack and that this information was given to the investigating authorities on June 1, 1945;* that he had completely "forgotten" the G.I. episode and did not mention it, and therefore did not bring it to the government's attention until a substantial period after he was under arrest. The government does not contest the fact that the alleged recall and identification immediately preceded the taking into custody of Greenglass on June 15 and his formal arrest the following morning. The court's inferences are impermissible in the absence of a hearing.

The lower court found no significance in the fact that the witness he finds so impressive continued to lie both to the Government, to his attorneys and to the Grand Jury which indicted the Rosenbergs, it essentially being the court's contention that Gold's full catharsis, his capacity for reaching the ultimate truth was not arrived at until the time of the trial of appellant and his co-defendants. To make these *ex parte* findings, the court had to and did conclude that it knew what was in the prior statements of Gold to the F.B.I., written by him or the interrogator, and having such knowledge could only thus explain the omissions and contradictions as reflected in his statements to his attorneys (A. 497-500).

The court, in reviewing the material submitted to it and the trial testimony, finds that there can be no claim of wrongful suppression or failure to disclose in that Gold did at some stage inculpate the Greenglasses and therefore that does "not undermine the fabric of essential matters" (A. 500). The essential matter of the linkage of the Rosenbergs to the June 3rd meeting are entirely absent from the

* But see Reel 1, p. 8, and Reel 4, pp. 5-6, clearly showing the one man's name consciously withheld was that of Alfred Dean Slack—not Greenglass. See Exibit F, fn., p. 1085.

Gold statements, this does undermine the fabric of the government's claim that Rosenberg was party to a June 3 meeting in any respect.

The fact that Gold stated to his attorneys, that he stayed only once at the Hotel Hilton and that was on September 19, 1945 does not concern the lower court, and this problem is surmounted by the court permitting itself to infer and conclude that he must have stayed there in June of 1945 because the FBI, when showing him moving pictures of the streets of Albuquerque, used the Hotel Hilton as a point of departure. Thus, the court, to use its language, in "one fell swoop" disposes of appellant's well-supported charges.

Further, the court concludes that since Gold was not cross-examined and his pre-trial statements were not requested at the time of trial this immunizes the conviction from a collateral attack made on the grounds of the suppression of exculpatory evidence and the knowing use of perjured testimony, and the use of a forged document (A. 501-502).

The lower court gratuitously rises to the defense of former counsel for appellant and his co-defendants, making note of the fact that they have passed away. But appellant does not attack former counsel. It was the government that destroyed the possibility of a fair trial and emasculated the defense. They were precluded from effectively representing appellant and his co-defendants by improper conduct on the part of the government. When Mr. Bloch, at the funeral of his clients, Julius and Ethel Rosenberg on June 21, 1953, cried out in anger at the ugly injustice that has attended this entire proceeding, charges were filed against him with the Bar Association. Were he alive today he would be joining appellant and his present attorneys in this application.

— — MORE TO COME — —

Commenting in the opinion on the allegations of the petition addressed to Exhibit 16 and the alleged June 3rd meeting, the lower court characterizes them as "the product of a fertile imagination", "invective" and "vituperation" (A. 483). The words seem most unfair in view of the hard evidence which the appellant presented. The affidavit of Walter and Miriam Schneir is factual (A. 357-362). The findings and report of Elizabeth McCarthy are factual (A. 389-395). The falsification of Exhibit 16 so clearly appears from the card itself that the court below grudgingly remarked "that it hardly needed an expert to make this observation" (A.480). The inconsistency between Gold's pre-trial statements on the one hand, and his trial testimony that he registered at the Albuquerque Hilton on June 3, 1945 and his linking Rosenberg to the alleged conspiracy on the other hand, is spelled out in detail supra.

Although the pre-trial statements by themselves would be sufficient to require a hearing, read in conjunction with Government Exhibit 16 they mandate a hearing. Each individual infirmity in the card cannot be considered in a vacuum. The totality of facts concerning the card, the spurious handwriting, the misdating, the curious lack of F.B.I. initials, the mystery of the time and manner of acquisition, the untimely disposition, the admitted

erasures and overwriting in the area of the imitated handwriting of the registration clerk, all in the aggregate cry out for full ventilation.

The government's misdeeds in a period of hysteria falsely engendered by external circumstances tainted this case from the very beginning. In this instance, the misdeeds had such tragic consequences, deaths and a 30-year sentence, as to make this case properly subject to sharp judicial scrutiny. The unwarranted characterizations used by the court below cannot conceal the factual showing made in the petition, nor can they justify the ex parte determination of such issues without a hearing.

New Facts Obtained Since the
Trial and the Prior 2255 Motions

Since the trial of the appellant and his co-defendants, the affirmance of their conviction by this court and the denial of the petition for certiorari from such decision in late 1952, and the prior 2255 motions, appellant has obtained certain information which was not known by him previously.

In 1966 it was learned for the first time that Government Exhibit 8 and the descriptive testimony had been declassified in 1951 and had never been reclassified by the A.E.C. It was also learned that the impounded testimony contained a statement that the

material was to be available at all times to the appellant and his co-defendants. This was not reflected in the public files and records of the case.*

In spite of the fact that former counsel believed that Exhibit 8 as described contained an accurate and authentic cross-section and description of the Nagasaki bomb, upon its unsealing in 1966 and examination by scientists with intimate knowledge of the facts, it was learned that this material was false, grossly inaccurate, incomplete and misleading and of extremely marginal, if any, value, and the attributes given it by the government in the course of the trial were false as the government well knew.

The obtaining of this factual evidence and expert evaluation of the material from scientists associated with the Manhattan Project and, in particular, the development of the bomb at Los Alamos was made possible by declassification of information relating to the bomb some years after the trial and first motion, and particularly in 1961 and 1962. Those declassifications and subsequent declassifications permitted the obtaining of evidence which would have previously been unavailable to the appellant.

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* There was a statement by the trial court at the time of the examination of Derry that the impounded testimony could be seen by counsel for the defendants but that related solely to their availability in the course of the examination or cross-examination of that particular witness in the trial itself (R. 903).

In 1966 appellant learned, contrary to representations made by the government in 1951 and in 1966, that the public disclosure of the impounded material would never have imperiled this nation's national security and there was no reason, in fact, to perpetuate its secrecy or require it to remain sealed, as the government well knew.

In the summer of 1965 pre-trial statements of Harry Gold to his attorneys which had been previously obtained by experienced investigators was made available to appellant's counsel. This not only included interviews between Gold and his attorneys but various other written statements and correspondence by or to Harry Gold or by his attorneys which revealed evidence never previously known and reflected statements made by him to the F.B.I. and other government agencies. Included in this evidence were records of times spent in interviews with the F.B.I. and other agencies of the government, a "Chronology of Work for the Soviet Union" which was purportedly printed in the Congressional Record in December of 1956 but the original of which differed from that printed in many vital respects.

A photostatic copy of an alleged original of a Hotel Hilton registration card dated September 19, 1945, made available to Walter and Miriam Schneir some time in February 1961, permitted

them to compare that card with Government Exhibit 16, a purported photostat of an alleged original of a June 3, 1945 registration card; and the product of that investigation was incorporated in a book written by them and published in 1965.

Appellant, on the basis of this material, was enabled to obtain the aid of an experienced and expert handwriting analyst who was able to determine from the examination of the photostats in the possession of the government that the handwriting on Exhibit 16 was made by someone other than the clerk whose handwriting it purported to represent and that this imitative handwriting was superimposed or overwritten on the card after erasures and removal of other handwriting on said card.

It was learned in the course of investigating the matter that the government had disposed of the alleged original of the June 3rd card when it was ripe for destruction in August of 1951 and itself destroyed the September 19th card in 1960; that the manner and time of acquisition, handling and disposition of the two cards materially differed in spite of the fact that the hotel records were kept in such a fashion in 1950 that if the F.B.I. found one of the cards it would, of necessity, have found the other. The government has refused to reveal the persons involved in the acquisition, handling or disposition of Government Exhibit 16 and records relating to the same.

QUESTIONS PRESENTED

Appellant moved upon the files and records of the case and upon facts dehors the record for a hearing and ultimate relief on the grounds that the government knowingly used perjured and forged evidence, failed to correct false testimony which it knew or should have known to be false and perjured, suppressed or failed to disclose evidence impeaching the government's case and favorable to the appellant, and that the prosecution by false statements and representations and various devices practiced a deceit upon the court and jury and the defense, as well.

1. Upon the moving papers, including facts dehors the record and the files and records of the case, was a sufficient showing made requiring that appellant be granted a hearing?

2. Was appellant estopped from obtaining a hearing on the grounds of laches, waiver or lack of diligence, in that the facts might possibly have been obtained earlier and raised in a prior post-trial collateral attack?

3. When the facts upon which the appellant seeks relief were known to the government and never disclosed to the appellant, can the appellant be denied a hearing on the grounds of laches, waiver or lack of diligence?

4. Where appellant's moving papers are founded not only upon facts previously known, but also on facts subsequently obtained after prior post-collateral motions, and on grounds and legal theories not heretofore tendered, is appellant precluded from making a successive motion for similar relief?

Statutes Involved

Title 28, U.S.C. Section 2255 provides in relevant part:

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

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

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

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

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

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

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

Title 18, U.S.C. Section 3432 provides:

§3432. Indictment and list of jurors and witnesses for prisoner in capital cases.

A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, andof the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness. June 25, 1948, c.645, 62 Stat. 831.

POINT I

THE SUBSTANTIVE GROUNDS FOR RELIEF SET FORTH IN THE PRESENT PETITION ARE AUTHORIZED BY TITLE 28, UNITED STATES CODE, SECTION 2255

A. Title 28, U.S.C. section 2255 affords the identical grounds for relief from a judgment of conviction as is available by writ of habeas corpus.

For all practical purposes, the 2255 remedy and the writ are one and the same. Sanders v. United States, 373 U.S. 1; United States v. Hayman, 342 U.S. 205; Hill v. United States, 368 U.S. 424.

The present petition rests on various grounds, any one of which would invalidate the judgment and sentence and require the court to grant the relief requested. They are:

1. The knowing use of perjured and forged evidence.

2. Failure of the government to correct testimony or documentary evidence which it knew or should have known to be false, fraudulent, perjured or forged.

3. Suppression or failure to disclose evidence either impeaching the government's case or favorable to the defendants, whether wilfully, by guile or by negligence.

4. The practice by the prosecution and those acting in concert with it of a deceit upon the court and jury and the defense as well, by various devices to obtain the conviction of the defendants including inter alia:

a) Disseminating false and misleading information prior to and during the trial.

b) Falsely stating and misleading the court and jury and the defense as well to believe that certain leading experts would be called in the course of the trial to substantiate the claims of the prosecution.

c) Making false and grossly exaggerated claims in its opening to the jury as to the nature and significance of the crime allegedly committed by the defendants.

d) Impressing upon the court and jury and the defense as well, that certain evidence tendered or to be tendered in the course of the trial was authentic and accurate and that this evidence had been reviewed by the government agencies having jurisdiction and unique knowledge of the evidence and so found.

e) Falsely representing that a witness, an employee of the A.E.C. was an expert having full knowledge of the entire subject matter and who could authenticate and attest to the accuracy of evidence tendered in the trial, although the government knew such evidence to be false, not authentic and lacking all the attributes given it by the government's statements and witnesses.

f) Repeating such false and perjured statements and representations to the jury in summation although the prosecutor and government knew and should have known them to be false.

g) Repeating such false statements and representations to the court at the time of sentencing.

These grounds for relief are appropriate for collateral attack. This has been so stated in a long series of decisions from Mooney v. Holohan, 294 U.S.103, to decisions rendered by the Supreme Court in its present Term. See Giles v. Maryland, Docket No. 27, October Term, decided February 20, 1967; Miller v. Pate, Docket No. 250, October Term, decided February 13, 1967. The courts have not only reaffirmed but expanded the principle that a conviction and sentence which rests upon a violation of the prisoner's fundamental constitutional right, the right to a fair

trial, are subject to collateral attack.

B. Knowing use of perjured and forged evidence renders a conviction and sentence void for want of due process of law.

Due process of law in safeguarding the rights and liberty of a citizen constitutes the fundamental premise underlying our "civil and political institutions". The failure to satisfy that requirement by any contrivance in order to obtain a conviction by the knowing use of perjured testimony or false evidence must result in the invalidation of a conviction so obtained. Mooney v. Holohan, supra; Brown v. Mississippi, 297 U.S. 278; Hysler v. Florida, 315 U.S. 41; Ex parte Hawk, 321 U.S.114; White v. Ragen, 324 U.S. 760; Pyle v. Kansas, 317 U.S. 213; Burke v. Georgia, 338 U.S. 941; Napue v. People of the State of Illinois, 360 U.S. 264; Giles v. Maryland, supra.

C. The failure of the prosecution and those acting in concert with it to correct testimony or documentary evidence which it(or any other agency of government reasonably accessible to it) knew to be false, incorrect or misleading renders a conviction and sentence void for want of due process.

If the prosecution or any agency acting in concert with it permits any false testimony or evidence to be tendered in the course of the trial, whether solicited by it or not, to stand uncorrected without advising the court and jury of its falsity, and if conviction follows, the failure of the government to disclose the falsity or misleading nature of the evidence, vitiates the

judgment of conviction. The prosecution has the affirmative obligation to advise the court and jury of the falsity of the evidence if it has knowledge of such falsity or if by access to any other agency of government it could reasonably have known such testimony or evidence to be false. Brady v. State of Maryland, 373 U.S. 83; Mooney v. Holohan, supra; Alcorta v. Texas, 355 U.S. 28; Napue v. People of the State of Illinois, supra; Ashley v. State of Texas, 319 F.2d 80 (C.A.5); United States v. Wilkins, 326 F.2d 135 (C.A.2); Application of Kapatos, 208 F.Supp. 883 (S.D.N.Y.)

The failure of the prosecution to meet this affirmative obligation cannot sustain a conviction on the speculation that the verdict would have been the same without the false testimony, if it related to any of the material elements of the offense charged or even if it related solely to the question of credibility of an important prosecution witness. If there is a possibility that the false evidence might have had any impact upon the jury, a conviction so obtained cannot be permitted to stand. Giles v. Maryland, supra; Levin v. Katzenbach, 363 F.2d 287 (App.D.C.); Fahy v. State of Connecticut,378 U.S. 85; United States ex rel Thompson v. Dye, 221 F.2d 763; People v. Savvides, 1 N.Y. 2d 554; United States v. Zborowski, 271 F.2nd 661 (C.A.2); United States v. Tateo, 214 F.Supp.560 (D.C.N.Y.); Barbee v. Warden, Maryland Penitentiary,

331 F. 2d 842 (C.A.4).

Even if the prosecutor personally had no knowledge and acted in innocence, if he was not informed by the knowledgeable agency of the government associated with the prosecution, the failure to disclose in these circumstances would not immunize the conviction from collateral attack. Brown v. Mississippi, supra; United States ex rel Almeida v. Baldi, 195 F.2d 815 (C.A.3); Curran v. State of Delaware, 259 F.2d 707 (C.A.4); Barbee v. Warden, Maryland Penitentiary, supra.*

D. The prosecution's suppression or failure to disclose evidence either impeaching the government's case or favorable to the defendants whether wilfully, by guile or by negligence renders the judgment of conviction and sentence void for want of due process of law.

The suppression of evidence which would impeach the case against the defendant or which would favor or exculpate the defendant equally renders a conviction and sentence void for want of due process. Such a charge, if sustained, must result in the setting aside of the judgment of conviction and sentence. It is the historical function of the great writ to grant relief on the basis of such governmental misconduct. Pyle v. Kansas, supra; Mooney v. Holohan, supra; Napue v. People of the State of Illinois, supra;

* There the court stated, "The cruelest lies are often told in silence."