F.O.I.A.

JULIUS ROSENBERG ET AL.

FILE DESCRIPTION

HQ FILE

SUBJECT Morton Sobell

FILE NO. 101-2483

VOLUME NO. 44

SERIALS 1708 to 1732

Inventory Worksheet
FD-503 (2-18-77)

File No: 101-2483 Sect 4/4 Re: Sobell Date: (month/year)

Serial	Date	Description (Type of communication, to, from)	No. of Pages Actual	No. of Pages Released	Exemptions used or, to whom referred (Identify statute if (b)(3) cited)
1708	11/7/67	WFO A/T HQ and encl.	2/74	2/74	
NR	12/5/67	Deleted memo to Tolson	2	—	Disposition in J. Rosenberg 65-58236-2412
NR	12/6/67	HQ let 3rd party and encl.	1/3	—	Disposition in J. Rosenberg 65-58236-2411
1709	11/9/67	WFO A/T HQ	2	2	b2 b7D
1709	11/20/67	HQ let DOJ	2	2	b2 b7D
1710	12/27/67	WFO let HQ and encl.	1/11	1/11	
1711	1/10/68	WFO let HQ and encl.	1/9	1/9	
1712	1/15/68	Branigan memo to Sullivan	2	2	
1713	1/15/68	WFO A/T HQ	1	1	
1714	2/27/68	WFO A/T HQ and encl.	1/7	1/7	
1715	3/5/68	WFO A/T HQ and encl.	1/1	1/1	
1716	3/7/68	WFO A/T HQ	4	4	
			125	119	0 0 6 0

see ref deny w/ assumed privs FB

Inventory Worksheet
FD-503 (2-18-77)

File No: 101-2453 sect 44 Re: Sobell Date: (month/year)

Serial	Date	Description (Type of communication, to, from)	No. of Pages Actual	No. of Pages Released	Exemptions used or, to whom referred (Identify statute if (b)(3) cited)
1717	3/20/68	NY ltr HQ	2	2	b2 b7D
1718	3/27/68	WFO ltr HQ	1	1	
1719	3/29/68	PH ltr HQ	1	1	
1720	4/3/68	NY ltr HQ and encl.	1/3	1/3	b2 b7D
1721	4/22/68	WFO ltr HQ	1	1	
1722	6/18/68	NY AIT HQ and encl.	2/17	2/17	
1723	6/20/68	Branigan memo to Sullivan	2	2	
1724	6/27/68	PH ltr HQ	1	1	
1725	6/27/68	NY AIT HQ	1	1	
1726	6/27/68	PH AIT HQ	1	1	
1727	7/23/68	PH AIT HQ	2	2	
1728	7/30/68	NY AIT HQ and encl.	1/20	1/20	
			56 serials	56 released	0 deleted 0 referred 0 withheld 0 pending

FBI/DOJ

Inventory Worksheet
FD-503 (2-18-77)

File No: 101-2483 Sect 44 Re: Sobell Date: (month/year)

Serial	Date	Description (Type of communication, to, from)	No. of Pages Actual	No. of Pages Released	Exemptions used or, to whom referred (Identify statute if (b)(3) cited)
1729	8/15/68	PH ltr HQ and encl.	2/1	2/1	
1730	8/27/68	PH ltr HQ	1	1	
1731	10/4/68	PH ltr HQ	1	1	
1732	10/11/68	WFO ltr HQ and encl.	1/25	1/25	
			31	31	0 0 0 0

FBI/DOJ

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

FBI

Date: 11/7/67

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

Via AIRTEL (Priority)

TO: DIRECTOR, FBI (101-2483)

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

MORTON SOBELL
ESP - R
(OO:NY)

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 5/4/87 BY 3049 PWT/lmw

ReWFOairtel 10/26/67.

Enclosed for information of the Bureau is copy of petition for writ of certiorari, filed in the U. S. Supreme Court (USSC) 11/6/67, in the case entitled MORTON SOBELL vs. the United States. Appended to the petition is opinion of Judge EDWARD WEINFELD, U. S. District Court for the Southern District of New York, rendered 2/14/67, denying in all respects, without a hearing, SOBELL's motion to vacate and set aside a judgement of conviction SOBELL's motion to vacate and set aside a judgment of conviction entered upon a jury verdict returned in March, 1951, under which he is now serving a thirty-year term of imprisonment. Also appended thereto is per curiam decision of the U. S. Court of Appeals for the Second Circut, decided 6/26/67, affirming orders of district court, as well as transcript of portion of testimony of DAVID GREENGLASS on 3/9/51 relating to the Government's Exhibit No. 8 (cross-section of the "A"bomb).

SOBELL, through various attorneys representing him, seeks to have the USSC review and overturn judgment of the

(3) - Bureau (Encl. 1 ENCLOSURE) 101-2483-1708
2 - New York (100-37158) (RM)
1 - WFO

C. C. - Bishop ENCLOSURE ATTACHED

8 NOV 7 1967

MAT:bkd
(6)

EX-108

AIRTEL

Approved: _____ Sent _____ M Per _____

Special Agent in Charge

SOVIET SECTION

70 NOV 24 1967

Court of Appeals, alleging the ends of justice can only be served by affording SOBELL an evidentiary hearing. SOBELL is alleging, in part, his conviction had been fraudulently contrived, in that the Government knowlingly used false, perjured and forged evidence, suppressed evidence which would have impeached its case, and the prosecution falsely characterized and exaggerated the evidence adduced against the defendant.

The petition contains various references to FBI investigation of the case.

The investigation reported above was conducted on 11/6/67 by SA RALPH C. VOGEL.

WFO will follow progress of this case in the Supreme Court.

IN THE

Supreme Court of the United States

October Term, 1967

No. ————

MORTON SOBELL,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

MARSHALL PERLIN
36 West 44th Street
New York, New York 10036
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VERN COUNTRYMAN

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IN THE

Supreme Court of the United States

October Term, 1967

No. ————

MORTON SOBELL,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays for a writ of certiorari to review a judgment and order of the United States Court of Appeals for the Second Circuit which affirmed an order of the United States District Court for the Southern District of New York denying a motion for a hearing pursuant to Title 28, U.S.C., Section 2255.

Opinions Below

The opinion of the district court denying petitioner's motion for a hearing is reported at 264 F.Supp. 579. The opinion was rendered on February 14, 1967 and modified on February 16, 1967 (Appendix 1). The decision of the court below affirmed the opinion of the District Court on June 26, 1967 (Appendix 2), 378 F.2d 674.

Jurisdiction

The judgment of the Court of Appeals was entered on June 26, 1967. On September 14, 1967 the time for filing a petition for a writ of certiorari herein was extended

to and including November 6, 1967 by order of Mr. Justice Harlan. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28 U.S.C. Section 1254 (1).

Questions Presented

Petitioner moved for a hearing pursuant to Title 28, U.S.C., Section 2255 charging that his conviction had been fraudulently contrived, in that the government knowingly used false, perjured and forged evidence, suppressed evidence which would have impeached its case, and that the prosecution falsely characterized and exaggerated the evidence adduced against the defendants.

The prosecution introduced into evidence upon the trial of petitioner and his co-defendants a purported sketch and description of the Nagasaki plutonium bomb which it said was a copy of one that had been transmitted to the Soviet Union, and on the basis of alleged expert testimony by a government employee and the prosecutor's own statements and representations, it caused the court and jury to believe that the alleged original of such data constituted "this nation's most deadly and closely guarded secret weapon" which had been passed to "Soviet agents". Petitioner alleges, on the basis of extrinsic evidence including affidavits of scientists fully acquainted with the facts, that the government knew that the material so created for the trial was garbled, ambiguous and highly incomplete, that it was a false, misleading and essentially meaningless and ignorant conception of the bomb, so incorrect and lacking in qualitative or quantitative information as to be of no service or value to its alleged recipients.

The government also introduced into evidence on the trial as an exhibit a purported photostat of an alleged original hotel registration card to corroborate testimony which the prosecution knew to be false and perjured, to

establish a meeting of certain government witnesses on June 3, 1945 and by these means prove that petitioner and co-defendants were parties to the transmission of classified data to the Soviet Union. The petitioner upon direct and circumstantial evidence *dehors* the record alleges that the exhibit was a forged and after-contrived document and the alleged meeting never took place.

The government has not denied the facts set forth in the moving papers but relies upon the files and records of the case.

Petitioner's motion was denied without a hearing.

The questions presented are:

1. Whether upon the files and records of this case and the moving papers and the standards applicable to a Section 2255 proceeding petitioner's motion should have been denied without a hearing.

2. Where the motion is based upon substantial extrinsic evidence charging the knowing use by the government of false and perjured evidence and suppression of exculpatory evidence, and said extrinsic evidence is thus necessarily in conflict with the files and records of the case, whether it was error for the lower court to ignore or reject the extrinsic evidence without a hearing and to deny the motion upon the files and records of the case.

3. Whether the lower court erred in determining the issues raised upon the affidavits and supporting papers without a hearing.

4. Whether the lower court erred in determining that the evidence charged by petitioner to have been false to the knowledge of the government had no impact in procuring a conviction because such evidence was not essential to prove the crime alleged in the indictment.

5. Where a prosecutor falsely characterizes evidence and resorts to other deceptive devices to obtain a convic-

tion, whether such conduct must be held to have deprived the defendant of a fair trial rendering his conviction void and subject to collateral attack.

6. When the government presents evidence in an area of scientific information of which it has exclusive control, whether it has a constitutional duty to advise the court and the defendant of infirmities and errors in such prosecution evidence, knowledge of which would have been available to the defense in the absence of such exclusive government control.

7. Whether, under the circumstances of this case petitioner has waived the right to collaterally attack his conviction on the ground that the prosecution had obtained it by fraudulent devices.

STATUTES INVOLVED

Title 28, United States Code, Section 2255

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

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

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

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing

thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

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

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

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

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. (June 25, 1948, ch. 646, 62 Stat. 967; May 24, 1949, ch. 139, § 114, 63 Stat. 105.)

Prior Proceedings

The petitioner was tried under a superseding indictment returned January 31, 1951 charging him and his co-defendants, Julius and Ethel Rosenberg, and others with having conspired to transmit to the Soviet Union material relating

to the national defense in violation of Title 50 U.S.C. Section 34 (R. 2).*

On April 5, 1951, after trial before a jury, petitioner was sentenced to 30 years imprisonment. His co-defendants, Julius and Ethel Rosenberg, were sentenced to death. On February 25, 1952, the Court of Appeals for the Second Circuit affirmed the judgment of conviction, Judge Frank dissenting as to the petitioner, 195 F. 2d 583.

A petition to this Court for a writ of certiorari was denied on October 13, 1952, Mr. Justice Black noting his opinion that the petition should have been granted. 344 U.S. 838. A petition for rehearing was denied November 17, 1952, Mr. Justice Black adhering to his views. 344 U.S. 889. As Mr. Justice Black later observed in *Rosenberg* v. *United States,* 346 U.S. 273, 301:

> "It is not amiss to point out that this Court has never reviewed this record and has never affirmed the fairness of the trial below."

Since the original conviction and appeal petitioner and his co-defendants have instituted several collateral proceedings pursuant to Rule 35 of the Federal Rules of Criminal Procedure and Section 2255, Title 28, U.S. Code. The instant petition is based upon new facts *dehors* the record and upon issues and grounds relating thereto which never have been presented or litigated in any other post-trial proceeding.

At no time has petitioner or his co-defendants been afforded an evidentiary hearing in any of the post-trial

* The printed record of the trial is referred to as "R". This record was printed by this Court in 1952. "A" references are to the appellant's appendix on appeal a copy of which has been certified and delivered to this Court. "Op" references are to the opinion of the District Court contained in Appendix 1 of this petition.

proceedings, nor has this Court ever reviewed the denial of a hearing.

The indictment named as additional co-defendants David Greenglass and Anatoli A. Yakovlev. Greenglass pleaded guilty and testified as a government witness. Yakovlev was a Soviet national beyond the jurisdiction of the court. Harry Gold and Ruth Greenglass were named as co-conspirators, and were government witnesses. Max Elitcher was the sole witness who sought to implicate the petitioner as a member of the conspiracy. He testified that J[redacted]s Rosenberg sought to engage him in espionage activity and that Sobell thereafter with Rosenberg sought his cooperation to that end. There was no evidence that petitioner had unlawfully possessed or transmitted classified information.

Since this was a conspiracy trial, Sobell was made to bear the burden of all the testimony directed against the Rosenbergs, the overwhelming portion of which was focused upon the alleged theft of the Nagasaki atom bomb by the Rosenbergs through Greenglass and its transmission to the Soviet Union. This was said to be the prime proof of the existence of the conspiracy and the refutation of the defendants' claims and testimony of innocence.

The Present Section 2255 Motion

On May 9, 1966 petitioner moved for a hearing and ultimate relief pursuant to Title 28 U.S.C. Section 2255. That motion was directed to Government Exhibit 16, a photostat of a purported hotel registration card and the testimony of Harry Gold and Ruth and David Greenglass to prove an alleged meeting among them on June 3, 1945 in Albuquerque, New Mexico, allegedly arranged by the Rosenbergs. Shortly prior to the filing of that petition, the petitioner had obtained an order permitting an examination of Government Exhibit 8 and the descriptive testimony of

Greenglass, impounded since the time of trial—the exhibit said to be an accurate and authentic drawing and description of the Nagasaki (plutonium) bomb used in the summer of 1945; and the testimony said to contain information as to its construction, component parts and functions. That was the crucial evidence constituting the alleged theft of the bomb, and it was said to have been transmitted to the Soviet Union.

After Exhibit 8 and the Greenglass testimony had been unsealed and after consultation with scientists who had been intimately involved in the development of the bomb, petitioner found that there were clear grounds based upon the new disclosures entitling him to relief. Leave to amend was sought and ultimately obtained and the amended petition was filed on August 22, 1966.

On July 25, 1966 petitioner successfully moved to amend the petition with an affidavit in support which attached as exhibits the unsealing order of the District Court, a copy of Exhibit 8, and the Greenglass testimony, all in support of the application. The government immediately sought to reseal and impound the Exhibit 8 material stating in an affidavit that the data as demonstrated by the trial record had been considered top secret at the time of the trial. The affidavit further stated that the application was based upon correspondence emanating from the Atomic Energy Commission in support of its application that the material should not be made public (A. 78).

The district judge was thus led to believe that the national security was about to be imperiled, and he felt it necessary therefore to take judicial action upon the mistaken impression of a violation of his order (A. 102-120). Upon the affidavit and the statements of the United States Attorney's office, the court concluded that it was still imperative, 15 years after the trial, to seal and impound for an indefinite time the Exhibit 8 material under strict security conditions, and indeed to impound the affidavit of

petitioner's counsel which demonstrated that the impounded material had been previously publicly disseminated in documents prepared under the aegis or in cooperation with the Atomic Energy Commission.

The government thereafter submitted an order, under the terms of which not only would the Exhibit 8 material be sealed but also the entire 2255 proceedings would be held *in camera* save those portions the government might choose to make public (A. 122-128). When directed to present evidence to prove that the national security would be imperiled by public disclosure, the government, having known all along that its position had no basis in fact and that the AEC had stated the material had been declassified since 1951 and could be publicly disclosed, thereupon abandoned the secrecy melodrama and withdrew its application for *in camera* proceedings and the resealing of the Exhibit 8 material (A. 195).*

From that moment on the government has reversed its position and has stated that the impounded material had none of the attributes given it by the government at the time of trial.

The government, in its answering papers, did not deny any of the factual allegations of the amended petition or those contained in the accompanying affidavits and supporting documents.

Argument was had on September 12, 1966, on petitioner's right to a hearing.

There are two separate but related branches of the present Section 2255 petition. The "atomic" branch added by the August, 1966 amendment, is directed to Government Exhibit 8 and testimony relating thereto, and government claims and representations as to their significance, accuracy and authenticity.

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* These proceedings are found in petitioner's Appendix on Appeal to the lower court (A. 10-207).

The June 3rd branch of the petition is addressed to the perjured testimony of an alleged meeting between Gold and Greenglass and a forged hotel registration card, Exhibit 16, used to corroborate the meeting and to prove involvement of the Rosenbergs in the transmission of classified information to the Soviet Union.

In setting forth the pertinent facts and analysis of the opinion below, each branch of the petition, to the extent possible, is dealt with separately.

Summary of the Atomic Branch of the Motion

The basic thrust of the petition is that the government, in order to prove to the jury the existence of a conspiracy and to obtain a conviction, used deceptive devices to effect a fraud upon the court and jury and defense as well, and thereby created a courtroom atmosphere which could not permit a finding of innocence by the jury.

David Greenglass, who had worked at the Los Alamos project as a machinist, had testified that he had drawn a cross-section of the Nagasaki bomb and prepared a 12 page description of its construction, component parts and operation and delivered them to the Rosenbergs in September of 1945.*

John A. Derry, an employee of the Atomic Energy Commission, was called as an expert by the government to establish that the Greenglass material constituted an authentic and accurate depiction and description of the Nagasaki bomb and its construction and also contained "the principle" of the bomb.

The government, from the inception of the proceedings, even prior to trial, falsely claimed that the information

* After the dropping of the Nagasaki bomb and the issuance of the Smythe Report, *Atomic Energy for Military Purposes,* September 1, 1945.

allegedly obtained from Greenglass was of transcendent importance, that it contained the most closely guarded vital secrets of the atom bomb.

The arrest of the petitioner and his co-defendants came at a time of national crisis, immediately after the start of the Korean War, a short time after this country had learned of Soviet possession of atomic weaponry and the activities of Klaus Fuchs. This case was said to be the American portion of a giant conspiracy, and the sequence of these events made this a case of national and world-wide interest. All of these factors provided a setting for the prosecution to create the inflammatory atmosphere in which the trial took place.

The government resorted to various devices to deprive petitioner and his co-defendants of a fair trial. We list them in summary form below:

(a) The government disseminated false and misleading information to the mass media prior to and during the trial to the effect that the petitioner and his co-defendants were spies who had delivered the atom bomb to the Soviet Union.

(b) The prosecution falsely imported to the Court and jury and the defense as well that Dr. Urey and Dr. Oppenheimer would be called to testify and would support the prosecution's claims.

(c) After allowing Greenglass to give a purported description of the Nagasaki bomb (Ex. 8) which the prosecution and those associated with it knew to be an essentially meaningless, misleading and misdescribed drawing of the bomb, the prosecution then presented the witness Derry, an employee of the Atomic Energy Commission, falsely holding him out as an expert, and then knowingly permitted him to give false and perjured testimony authenticating and attesting to the accuracy and signifi-

cance and content of Exhibit 8 as described by Greenglass.

(d) To further establish the importance, authenticity and accuracy of the material tendered, the prosecution advised the jury that the material had been reviewed by the Atomic Energy Commission and the Joint Congressional Committee on Atomic Energy (whose representatives were present at the trial) and falsely stated that the information was of such vital importance that it had been only temporarily declassified and would be immediately reclassified by the Commission in the interest of national security.

(e) The prosecutor made false statements and representations as well as grossly exaggerated claims to the court and jury as to the meaning, content and attributes of the Exhibit 8 sketch and description.

(f) The prosecution suppressed by guile or gross negligence facts which would impeach the prosecution case and aid the defense, information which was unavailable to the defense since the subject matter involved was cloaked by a governmental shield of security and control.

It is clear that by these means the melange of misinformation elicited from Greenglass induced the judge and jury to believe that his alleged "information" revealed the mythical secret of the Nagasaki bomb and that Greenglass was in fact a true source of this vital espionage material.

The "validation" of Greenglass in this respect could have sufficed to cause the jury to accept the Greenglass testimony in its entirety and reject the Rosenbergs' testimony which denied the very existence of a conspiracy.

The prosecution's statements to the jury concerning the extreme consequences of the alleged offense, the breaking of the American monopoly on atomic weapons, the peril imposed, giving the Soviet Union the means to destroy this nation were such as to make it virtually impossible for the jury to consider the question of reasonable doubt or to find for the defendants.

The Trial

After the first indictment, the Rosenbergs * moved for an order permitting the examination of the sketches and experiments and other documents referred to in the indictment. The government in opposition argued *inter alia* that the motion would have to be denied in that the data had been

> ". . . 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."

The motion was denied by the district court on October 6, 1960, *United States* v. *Rosenberg*, 10 FRD 521, 523-24 (Weinfeld, J.), in part, in reliance upon the statement in the affidavit that it would be contrary to the national welfare to make the material available to the defense.

In the days preceding the trial, the government, with concurrent publicity, filed and served a list of witnesses to be called by the government including Dr. J. Robert Oppenheimer and Dr. Harold C. Urey, scientists whose names were known not merely to the worldwide scientific community but to the public at large in connection with their work in the development of the atomic bomb (A. 228).

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* Petitioner was not then named in the indictment, although he was in custody. A similar application was later made by petitioner and denied on the same grounds.

Upon the *voir dire* examination of the 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 question posed by the court and the response of the panel removes any question but that the jurors were aware that the charge was that of atomic bomb espionage and theft** (R. 63, 71, 156).

In fact neither Dr. Urey nor Dr. Oppenheimer had ever been asked to appear as witnesses, and they had no knowledge of what they would have been asked (A. 229).***

Yet the prosecution, by these means, as well as by pre-trial publicity, helped to create in the minds of the jurors a preconceived basis for accepting the false claims and testimony to be subsequently tendered.

The Claims, Statements and Representations of the Prosecution.

The Court is *not* here presented with the issue whether transmission of information concerning the atom bomb project at Los Alamos constituted a violation of the Espionage Act. The transmission of information to a foreign country concerning location, personnel, the layout of the

* The jury panel indicated by their response to questions posed their knowledge of these scientists.

** Dr. Oppenheimer and Dr. Urey figured prominently in the voir dire. One juror asked to be excused because he casually knew a brother of Dr. Oppenheimer and another juror because his daughter had worked with others under Dr. Urey (R. 137, 156).

*** Dr. Oppenheimer shortly before his death confirmed his oral statement to this effect in a letter dated October 25, 1966, stating:

> "No one ever asked me to appear and no one indicated to me what I might be asked were I to appear." (See affidavit of Marshall Perlin in seeking leave of the Court of Appeals to admit petitioner to bail.)

project, Greenglass' machining of lens molds (not used in the bomb) is, for the purpose of this motion, assumed to be a violation of the Espionage Act, even if the information be deemed inconsequential.

The conduct of the prosecution, including the representations made and the attributions given by it to Exhibit 8, the testimony of Greenglass and Derry, is where we find the greatest deception.

In its opening to the jury, the prosecution, after referring to the atom bomb, declared:

> "We will prove that 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." (A. 221; R. 183)

The nature of the crime was equated with treason (R. 183-184). In order to exaggerate the importance of the alleged Greenglass information, the prosecution sought to equate it with that given by Fuchs when it stated:

> "When one spy after another was caught and confessed, Klaus Fuchs, Harry Gold, David Greenglass, these defendants . . . put into operation an elaborate prearranged scheme . . . to seek refuge behind the iron curtain." (R. 183)

After exhibits 2, 6 and 7, sketches of metallic lens moulds had been introduced into evidence through Greenglass * (not

* Exhibit 2 is a crude sketch of a two-dimensional flat type lens mold used to form shaped charges, not in fact used in any way in the atomic bomb. Government Exhibit 6 was said to be a lens mold of a high explosive for the purpose of testing. Exhibit 7 is the "mold being used in an experiment" [sic] (R. 462). The misconceptions and misdescription obviously flow from the fact that Greenglass was in fact in no way involved in the utilization of the molds or the explosives formed by them.

(Continued on page 16)

claimed to be the secret of the bomb) the prosecution stated that even this matter had been declassified only for the purposes of the trial and would be reclassified thereafter. As we have subsequently learned, this statement was false. (A. 164, 165, 232; R. 479)

In view of what had transpired, when Exhibit 8 was about to be introduced counsel for the Rosenbergs, accepting and relying on the representations of the prosecution that this data (concededly prepared for the purpose of the trial) was not only accurate and authentic but that its exposure might be of such importance that in 1950 it could "be used to the advantage of a foreign power" (A. 239; R. 500), asked that it be impounded; and he was prepared to concede that it was top secret and not challenge the attributes given to it by the prosecution.

Out of the presence of the jury, the prosecution advised the court and counsel that this entire matter had been discussed and reviewed by his entire staff in conjunction with the Department of Justice and the entire Atomic Energy Commission as well as the Joint Congressional Committee on Atomic Energy, and that:

> "The ultimate resolution was that it was left in my discretion as to how much of this material should be disclosed. . . ." (A. 239-240; R. 501)

Continued from page 15)

Dr. Koski, the only scientist called at the trial, who appeared in the course of the Greenglass testimony, merely used the drawings as a point of departure to explain some of the functions of the actual and ultimate lenses used in the implosion of a plutonium bomb. No evidence as to the actual lenses used in the bomb was ever given at all at the trial. Dr. Koski did not attest to the correctness of the description Greenglass gave as to the use and testing of the product of these lens molds but solely directed his comments to the simplistic drawings themselves. (A. 230-231; R. 470-479.)

After counsel had been unable to work out a satisfactory stipulation, regarding Exhibit 8, it was agreed that the evidence be presented *in camera*. The court then advised the jury:

> "Now, this is a matter of some concern to me personally, that the witness is about to testify to, and the concern I have is as to the method that this testimonly should be handled . . . Mr. Cohn was about to take detailed proof on certain descriptive matters concerning the atom bomb . . . that while it might not be in the best interests of the country was yet a matter that is necessary in the trial of the [redacted] and under our democratic form of government." (R. 504)

Mr. Bloch, crediting the government claims and statements now known to have been false, advised the jury and the court that he was concerned that the material would reveal matters which "should not be revealed to the public" and that hence the matter should be dealt with *in camera* (R. 504-505). The prosecution then advised the jury:

> "The character of the proof has 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 Commi[redacted]n, and the Joint Congressional Committee on A[redacted]ic 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 AEC have been in attendance here at the trial, as Your Honor knows, have been in constant consultation with me and my staff on the subject."

And again the prosecution falsely represented:

> "I think I stated before that solely for the purposes of this trial, the AEC had released—had authorized the release of this information so that the court and jury might have it." (R. 505; A. 240-243)

Greenglass then gave his testimony purporting to describe the component parts, operation, principles and secrets of the Nagasaki plutonium bomb (A. 243-247; App. 3).* This testimony was given *in camera* with representatives of the government agencies previously noted present.

In the cross-examination of Greenglass, counsel, while attacking the testimony of the witness's alleged relationship with the Rosenbergs, did not challenge the accuracy and importance of Exhibit 8 and the description given but sought only to establish that it was beyond the competence of Greenglass to give such "complex scientific information", suggesting that he obviously had been coached.

Some days later, just prior to the calling of John A. Derry as an expert as the stand-in for Dr. Oppenheimer and Dr. Urey, the prosecution advised the court:

> "This is a security matter which relates to the atomic bomb. The witness is going to establish the authenticity of the information that Greenglass gave to Rosenberg. I think your Honor will want to take the same precautions that have been taken heretofore, perhaps even more."

And he added that he was going to read to the witness the Greenglass description as well as show him the exhibit and

> ". . . have him establish the authenticity of the cutaway sketch that he gave Rosenberg in September of 1945." (R. 902)

Deferring for the moment the examination of the testimony, we set forth in part the summation by the prosecution as it refers to this portion of the trial. The prosecutor referred to the nature of a conspiracy trial and the

* Appendix 3 of this petition is the formerly impounded testimony of Greenglass and Exhibit 8. The dot in the center of the drawing is not a marking. The paper was pierced by the compass when the drawing was made.

fact that the actual crime need not be completed but added that in this case it was (R. 1512). He stated:

> "You heard Mr. Derry, who testified in respect of Government Exhibit 8, *the cross section of the atom bomb itself, the Nagasaki bomb*" (R. 1519) (emphasis supplied).

After describing the defendants as "traitorous Americans" who delivered "safeguards to our security into the hands of a power that would wipe us off the face of the earth and destroy its peace" (R. 1518-1519), referring to the atom bomb, he stated:

> "We know that these conspirators stole the most important scientific secrets ever known to mankind from this country and delivered them to the Soviet Union". (R. 1519)

and further:

> "On David's September furlough Rosenberg got from him the cross section of the atom bomb itself and a 12 page description of this vital weapon." (A. 221, R. 1523)

At the conclusion of his summation, lest the jury for one moment forget the gravity of the crime claimed to have been committed, the prosecution stated:

> "These defendants before you are parties to an agreement to spy and steal from their own country, to serve the interests of a foreign power which today seeks to wipe us off the face of the earth. It would use the produce of these defendants, the information received through them, from these traitors, to destroy Americans and the people of the United Nations.
>
> • • •
>
> "No defendants ever stood before the bar of justice less deserving of sympathy than these three." (R. 1535)

The court, in its charge to the jury, stated that the success of the venture, as a matter of law, was the best proof of the conspiracy (R. 1551). The court then noted:

> "In this case the government claims that the venture was successful as to the atom bomb secret". (A. 221-222; R. 1551-1552)

After the jury verdict at the time of sentence the prosecution persisted in making false and grossly exaggerated claims as to the meaning of Government Exhibit 8 in evidence, and the consequences of the defendant's deeds, stating:

> "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)

That the court had been deceived and misled is clearly manifest in the observations made at the time of sentence. Obviously impressed by the remarks of the prosecution, the court, addressing the defendants, noted:

> "But in your case I believe your conduct in putting into the hands of the Russians the A bomb years before our best scientists predicted Russia would perfect the bomb has already caused, in my opinion, the Communist aggression in Korea, with the resultant casualties exceeding 50,000 and who knows but that millions more innocent people may pay the price of your treason. Indeed by your betrayal you undoubtedly have altered the course of history to the disadvantage of our country . . . when they passed what they knew was this nation's most deadly and closely guarded secret weapon to Soviet agents . . . I feel that I must pass such sentence upon the principals in the diabolical conspiracy to destroy this God fearing nation . . . it is not in my power, Julius and Ethel Rosenberg, to forgive you. Only the Lord can find mercy for what you have done" (R. 1615-16)

The government in its brief to the Court of Appeals on the original appeal falsely stated:

> "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, 1328-20). The sketch furnished by Greenglass was a cross section of the atom bomb (1335, Exhibit 8). With the descriptive material and sketch a scientist could proceed with the actual construction of the bomb itself." (1330; Gvt. Brief, p. 11.)

The Greenglass-Derry Testimony.

Directly after Dr. Koski left the stand, Greenglass was recalled. Only then was Exhibit 8 introduced into evidence as a replica of the sketch of the atom bomb dropped at Nagasaki claimed to have been delivered to the Rosenbergs in September of 1945; and Greenglass said the exhibit was the same as the 1945 drawing (R. 498-499; A. 234-237; Exhibit 8; A. 313 (a)). His description of "the bomb" is set forth in Appendix 3.

Derry, an employee of the AEC, when called to the stand, was given the sketch, and the impounded testimony of Greenglass was read to him *in camera*. From 1944 to 1946 Derry had been a liaison officer between General Groves and the Los Alamos laboratory and thereafter continued to work for the AEC (R. 906-908.) The trial court, in view of the stated purpose for which he was called, advised the jury:

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

To further establish the expertise of the witness, additional questions were asked by the court and prosecutor

which elicited the testimony that Derry *knew each and every detail of the construction of the Nagasaki bomb and what went into it and he understood the entire subject matter* (A. 252-253; R. 910).

He thereupon testified that Exhibit 8 as described:

> (a) demonstrated substantially and with substantial accuracy the principle involved in the operation of the 1945 atomic bomb;
>
> (b) was such that in effect any scientist could perceive from the exhibit and testimony the actual construction of the bomb;
>
> (c) was the bomb dropped at Nagasaki, similar to it;
>
> (d) was substantially the bomb as it had been perfected in 1945; and
>
> (e) that he had seen the bomb many times, as well as drawings, and recognized the exhibit (A. 252-255; R. 911-914).

In response to a question as to whether it was a complete description of the cross section of the bomb and the function of the bomb, the court *sua sponte* intervened and in substance stated that there was no claim it was complete in every detail but that it contained "the principle involved". (R. 915-916.)

This brief aside between counsel and the court could hardly have affected the jury's impression that they had been privy to data constituting the theft of the bomb.

The Scientists' Affidavits.

In support of the petition are affidavits of four scientists who were intimately involved with the development of the Nagasaki bomb: Dr. Morrison, Dr. Linschitz, Dr. Urey and

Dr. Christy.* Dr. Morrison and Dr. Linschitz were involved in the actual assembly of the bomb set off at Alamogordo and over Nagasaki. Dr. Christy participated in and was responsible for the implosion design of the atomic bomb. Dr. Urey, Nobel laureate, was one of the original organizers and initiators of the atomic bomb research in 1940 and thereafter played a vital role in the theoretical and engineering problems entailed in obtaining the necessary fissionable material, uranium 235 and plutonium 239.

No one can challenge their knowledge, competence and expertise in the field.

Addressing themselves to the Greenglass exhibit and testimony, the scientists note various misdescriptions, mislabeling and omissions. Greenglass drew a circle and described it as a beryllium plastic sphere used to protect the high explosive from radioactivity. [There was no beryllium plastic sphere nor was beryllium used as a protector of explosives. Beryllium is in fact a neutron source. (A. 343-345.)] The drawing and description omit the *tamper*, uranium 235, which had at least three important functions essential to the operation of the bomb (A. 322). Also omitted is the "initiator" without which the device could not function; and no reference is made to an essential element, polonium (A. 318, 321-322, 343-345). Other constituent elements such as boron and aluminum were similarly omitted. The initiator involved a combination of theoretical and engineering problems both in physics and chemistry. It was one of the most difficult aspects of the bomb problems posed which, in turn, affected the design of the entire weapon.

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*In the course of correspondence with Dr. Oppenheimer substantiating the fact that he had never been asked to testify, he made particular note that he was fully in accord with the affidavit of Dr. Morrison noting: "What Philip Morrison writes is true enough, as one might expect . . . as a statement of a physicist who knew what was going on, it is an acceptable and factual account."

There was also the basic question of the size of the internal cavity of the plutonium sphere which affected the very nature and type of the bomb, its construction and operation. This too was absent from the Greenglass material and could not be even suggested in view of the lack of scale of the drawing, relatively or absolutely (A. 318-321, 325). The area designated high explosive, "H.E.", contained no information whatsoever and, as stated by one of the scientists, it was perhaps "analogous to drawing a cross-section of a new rocket and in a certain rectangular space therein writing 'fuel and engine'" (A. 317, 323).* As an added fillip we have Greenglass' false statement that the bomb was dropped by parachute. Two other entire functioning systems of the bomb device are not even touched upon (A. 341).

Dr. Morrison, noting that the Greenglass cross section and its description were grossly incorrect and incomplete, stated it gave "a false depiction of what is purported to be the cross section of the atom bomb", then pointed out several of the glaring omissions, misdescriptions and the lack of comprehension evidenced by the maker of the described sketch. He finds factually not only that it lacks any "correct quantitative information", but that it is also "qualitatively incorrect and misleading" (A. 342, 346). These statements of fact are in direct conflict with the testimony of Derry, who Dr. Morrison states categorically

> ". . . . had neither the scientific background to equip him with knowledge of the design and construction of the atom bomb nor was he closely associated with the technical aspects of the project" (A. 346),

* No indication is given as to the chemical composition of the explosive, whether one or more were involved, their structure, the question of lens interfaces and construction. Thus the information given "would not enable anyone to build even a flat lens, let alone many large three-dimensional ones." The resolution of this problem, the mathematics involved, the "cut and try method" that had to be followed is enough to indicate the scope of the problem, none of which is even suggested in the Greenglass material. (A. 324, 329)

further evidenced by his failure to correct or disassociate himself from the gross errors in the Greenglass testimony and sketch (A. 347-348). The affidavit denies the Derry testimony that he knew each and every detail of the construction of the bomb, what went into it, and that he understood the entire subject matter (A. 252-253; R. 910).

In response to Derry's claim that one could perceive from the sketch the construction and he had seen the bomb and sketches thereof many times, Dr. Morrison noted:

> ". . . he ought to have added 'and it did not look like that'. . . . In reality an inside view [of the bomb] cannot be obtained. It is doubtful that such a sketch was to be found anywhere on the project . . ." (A. 347).

Factually finding no foundation for the Derry testimony to the effect that the material was such that "one could perceive the actual construction of the bomb" and that it was the bomb that was dropped at Nagasaki or similar to it, Dr. Morrison stated that the only correct and honest answer which could be given by one having knowledge would be:

> "Say rather it is a caricature of that bomb" (A. 348).

Based upon these clear and unequivocal facts, one can only conclude that either Derry was lying as to his expertise or he was, with knowledge, falsely authenticating the Greenglass material and falsely attesting to its accuracy and the information it conveyed.

Dr. Linschitz, similarly analyzing the Greenglass evidence, points out several of its gross errors and major omissions, and finds the material presented to be a "garbled, ambiguous and highly incomplete description" of the Nagasaki bomb. He noted the lack of the essential principles involved, and referred to some of the many vital principles underlying the development of the bomb not at

all reflected in the questioned material which Derry "authenticated" as "accurate" (A. 317-321).

After stating some of the numerous primary principles involved, Dr. Linschitz directed himself to one basic problem, the principle underlying the initiation and actual detonation mechanism which determined the very nature of the entire bomb design, its components and construction. All of this was dependent upon the size of the plutonium's internal cavity as well as the physical state of the element, which would determine whether the point of criticality was reached by geometric change of the form of the plutonium or by some alteration of its density. Exhibit 8 and its description gave no information whatsoever in this regard. In pointing out this one crucial omission, Dr. Linschitz makes clear that he does not thereby import that it was lacking or defective merely in this one respect. This is evidenced in his concluding statement:

> "The information in question to describe the construction of a plutonium bomb was too incomplete, ambiguous and even incorrect to be of any service or value to the Russians in shortening the time required to develop their nuclear bombs" (A. 338).

In so stating he was also directing his comments to the claims of the prosecution concerning the nature and significance of the information allegedly transmitted, noting:

> "I have also considered various statements in the record of the trial regarding this material and its possible value in assisting the development and construction of a Russian implosion bomb" (A. 316).

It is in the factual sense, not the legal, that he dealt with the atttributes, meaning and value given the evidence by the prosecution throughout the trial, and how this caused the experienced trial judge to accept the claim of the "theft of the bomb" and the assumed consequences.

All of these affidavits read together not only attest to the lack of authenticity, let alone accuracy, of the Exhibit 8 information, but also make clear that only a scientist who already knew of the nature, construction and operation of the Nagasaki bomb could derive any meaning from the sketch by imposing thereon his prior knowledge, deleting the errors and filling in the omissions.

The basic theory of the possibilities of obtaining a fast neutron fission chain reaction was publicly known in the international scientific community and was discussed in various mass media as early as 1939 and 1940. The basic question then unresolved was whether the hypothesis or possibility was in fact true and achievable. This was answered and made known to the world in August 1945, when the Hiroshima and Nagasaki bombs were set off.

That the Nagasaki bomb was a plutonium bomb was announced to the world in August of 1945; that beryllium was a source of neutrons was a fact known almost contemporaneously with the scientific finding of the existence of neutrons, which long precedes the beginning of World War II. Any scientist considering the method of detonating an atomic bomb would, at the very threshold consider the gun method, implosion or some autocatalytic means. Exhibit 8 merely describes an unscaled area of the bomb said to contain a high explosive [sic]. The phrase "high explosive lens" itself is a vague, uninformative phrase, concealing a multitude of theoretical and practical questions as to the type, composition and structure which can only be resolved pragmatically and are obviously not contained in any of the Greenglass testimony (A. 323-324).

The listing of some of the omissions, mislabelling and misconceptions set forth above does not even touch upon innumerable other scientific theoretical problems and their means of application necessary to develop the various systems of the bomb and the actual construction of the

bomb. The information required to state "principles" is so lacking in Exhibit 8 and its description as to make "discussion of 'principle' superfluous" (A. 321-322).

Perhaps the most fundamental false assumption and claim, both contained in the Derry testimony and in the statements of the prosecution, which obviously misled the jury, was that there was "a secret", "a principle" and "a key formula" for the construction of the bomb. The jury was told it had been given the secret, the key to the principle and the construction of the bomb in the Exhibit 8 material. But Dr. Linchitz states:

> "The layman still clings to the misconception that there is *a* 'secret' or key 'formula' for the construction of an atomic bomb. This notion was even more obsessively held at the time of the Rosenberg-Sobell trial, even by the defense, and the record shows important statements by the prosecution and presiding judge which only served to reinforce this dangerously false impression" (A. 333-334).

It is in light of all these facts that the statements of the prosecution as well as the authentication of the Greenglass testimony by Derry must be considered in evaluating whether a showing has been made mandating that petitioner be given a hearing.

The Opinion of the District Court on the Atomic Branch of the Petition.

In deciding to dismiss the petition, the lower court misread or disregarded factually supported allegations of the petition and the substantial fact evidence found in the affidavits submitted in support.

The petitioner is entitled to a hearing to substantiate the charges. The district court had the duty to find the issues of fact, rather than determine issues *ex parte*. It well may be that the district court's lack of understanding of the thrust of the petition arose out of the esoteric and

technical nature of the scientific fact questions involved, which particularly cry out for a hearing to permit resolution and establish effective communication between the law and the scientist.

The lower court did not face and deal with the false statements, claims and representations of the prosecution, and the impact they had in causing the jury to accept, in that light, the testimony of Greenglass and Derry, and thus to convict petitioner and his co-defendants. As a concomitant of this error, the court extracted from its consideration of the case the prosecution's claim that the defendants had successfully stolen the atom bomb, and our most vital secrets and premised its denial of a hearing upon the theory that the transmission of information, however fragile, marginal or insignificant, nevertheless as a matter of law would have constituted a violation of the Espionage Act. The court concluded that defendant would have been convicted in any event and finds as a fact that the jury was in no way misled.

The lower court's summary of the trial testimony was erroneous and inaccurate in a number of areas. Much is made of the fact that Greenglass was "assigned to a machine shop concerned with high explosives" (Op.). But Greenglass only machined metallic lens molds. He was not involved with their use in forming a lens or the explosives shaped thereby. He was physically far removed from the area where the lenses were made and tested (and even those were lenses not used in the bomb) (A. 257; R. 471, 625, 626).

The lower court further erred in concluding that Dr. Koski had testified as to the accuracy of Greenglass' descriptions of the experiments and their details. Dr. Koski testified only as to drawings (other than Exhibit 8) and he did not verify or authenticate the Greenglass testimony describing Exhibits 6 and 7 (Op. 6).

In summarizing the testimony of Derry, the court failed to note that the government had called him for the declared purpose of establishing the authenticity of Exhibit 8 and the description given; that he was characterized by the court to the jury as an expert qualified to do so. Derry stated not only that he "understood the entire subject matter" (Op. 8), but also that he knew "every detail of the construction of that weapon" (A. 252; R. 910). That testimony was flatly and factually refuted by the Morrison affidavit (A. 252-253, 346-348; R. 910).

At no time in the opinion does the lower court juxtapose the statements made by Derry with the statements of fact of the scientists directed to his testimony. The court deals with these fact issues as varying "opinions" between two experts while the evidence presented establishes factually that Derry was either not an expert or was perjuring himself.

In its trial summary the district court made no reference to the numerous statements and representations made by the prosecution itself. This is inexplicable in that the petition plainly points to these statements as a major part of the deception practiced upon the jury and trial court (A. 220-224, 232-233, 239-240, 271-272). The failure of the court below to weigh or discuss these aspects of the petition resulted in an opinion premised upon a trial completely different from the one held.

We deal below with some specific errors in the opinion shown by pertinent record references.

Opinion.

> The lower court in summarizing the petition asserted that it faults Greenglass "because Exhibit 8 and his exposition of the descriptive material failed to measure up to a scientific standard of perfection as to accuracy, precision and detail" (Op. 12); that the scientists supporting the position "do not grade Greenglass' drawing and his descriptive testimony 100% . . . judged by their scientific and engineering standards" (Op. 15). The court noted that neither Greenglass nor the government had claimed that the material was "definitive" (Op. 14); that it was admittedly "not to scale", "a schematic sketch, not a blueprint" (Op. 14); and the jury could not have been "misled as to what it represented" (Op. 14).

The opinion thus portrays the trial as one in which the petitioner and his co-defendants had been charged with having transferred marginal, although classified, material to the Soviet Union.

In reality the petition attacks the government and Derry for falsely claiming that Greenglass' Exhibit 8 and testimony had attributes of accuracy and authenticity which, as a matter of fact, and not opinion, were wholly lacking. The thrust of the petition is particularly against the role of a prosecutor in using the Derry testimony in conjunction with that of Greenglass and enlarging upon the false testimony; falsely importing that the claims had been approved by Dr. Oppenheimer, Dr. Urey and others; that the AEC and the Joint Congressional Committee on Atomic Energy, whose representatives were present at the trial, were in full accord. The prosecution's assertions were more far-reaching than the lower court seems to have realized. Greenglass did testify in response to a series of obvious leading questions posed by the prosecution that it was "a cross section of the atomic bomb" (A. 236-243), the phrase "the atomic bomb" being used again and again, along with a 12-page description of "vital secret data" (A. 244). No piddling hunt for isolated disparaging words can erase that falsehood (Op. 14, fn. 31, 32). The impact of its falsity was intensified by the prosecution's statements that this information constituted the theft of "this one weapon", "the most important weapon ever known to mankind" (A. 221; R. 183); that Derry authenticated "the cross section of the atom bomb itself,

the Nagasaki bomb" (R. 1519); that the defendants had stolen "the most important scientific secrets ever known to mankind" (R. 1519) by delivering "a twelve page decription of this vital weapon" (A. 221; R. 1523), which could "wipe us off the face of the earth". The trial judge described the government's claim of the crime as to the theft of "the atom bomb secret". (See the comments of the court on sentencing (R. 1613-1615.)

Opinion.

> The lower court conceived the direction as well as the content of the scientists' affidavits to be expression of opinion. (Op. 13)

The scientists, as a point of departure, first analyzed the Greenglass material to place them in a position in this context to deal with the testimony of Derry and the claims and representations of the prosecution. It is then that they set forth the pertinent facts in connection with the development of the bomb to factually demonstrate that the Derry testimony and the prosecution's claims had no foundation in fact, were scientifically false, and that the diagram and description were essentially meaningless except to one who already knew the construction and operation of the bomb.

Opinion.

> The court concludes that what the scientists say is not "relevant" because Greenglass' "role was to get classified information—to get what he could" (Op. 14), and since the drawing was admittedly not to scale "a schematic sketch, not a blueprint, there is no warrant for a contention that the jury or defense counsel were misled as to what it represented". (Op. 14)

Yet if the trial court was misled, the false testimony and statements of the prosecution obviously had a greater impact upon the jury than the lower court now opines. The Greenglass material must be considered in the context

of the Derry testimony, the prosecution claims, the impact upon the alleged authentication by the AEC and the imputed approval by leading scientists. The distinction between a "blueprint" (the lower court's term, not ours) and a drawing with the value and attributes claimed by the government and Derry, was insignificant to a lay jury.

Opinion.

> The lower court says that "the issue of secrecy and value of the information to the Soviet Union was determined upon the merits in the first Section 2 motion". (Op. 13)

The challenge there was to the power of the government to classify as "secret" activities it was engaged in at Los Alamos in developing the bomb. The value of Exhibit 8 and its description could not be an issue in that it was not before the court or seen by the scientists. In the first motion the court held that it need not and did not reach the question of scientific value but that the data was properly classified and thus encompassed by the statute.

That petition was primarily based upon the claim of knowing use of perjured testimony when Greenglass testified that he had obtained no outside aid or technical da in drawing Exhibit 8 and giving the description and e planation. A similar attack was based upon this testimony as it related to Exhibits 2, 6 and 7. The crux of the matter is that the defense then believed the government's false representations as to the accuracy and authenticity of the impounded Exhibit 8 material and it was on this premise that Greenglass' testimony was said to be false. In the petition to this Court (*Rosenberg* v. *United States*, October Term, 1952 Docket No. 687, pp. 13-14, 345 U.S. 965) it was stated:

> "Derry . . . stated that the exhibit was a substantially accurate representation of the cross-section of the Nagasaki atom bomb and affirmed, as well, the substantial accuracy of the oral explanation (C.R.:

908-15) . . . It is patent that Greenglass' testimony was false . . . as to his preparation of Exhibit 8 and its testimonial explanation from memory alone and without any outside aid."

Opinion.

The lower court states that the scientists merely "disagreed with Derry's opinion" and that different opinions do not "establish [the] falsity" of Derry's testimony. (Op. 15)

But Derry falsely claimed a scientific knowledge which he did not have and such knowledge was a prerequisite for the kind of testimony he was asked to give and gave. He has subsequently admitted that he was "unaware of how he had been chosen to testify . . . there were plenty of people at Los Alamos who knew much more than he . . . he was not a scientist but a construction man, and didn't know much physics" (A. 421). (Also see the affidavit of Dr. Morrison (A. 436-48).)

Derry testified that Exhibit 8 was authentic and accurate and contained the undefined single "principle" of the construction of the bomb. That testimony was false in fact. The scientists have sworn that this "caricature" of a bomb (A. 438) omitted at least two vital component parts (A. 343-44), was "garbled and highly incomplete" (A. 317), "naive", "bizarre" (A. 318); that it "leaves a basic ambiguity" and omits "essential information needed to make clear the 'internal principle'" (A. 321); that it contains "no information regarding lens construction" and that the information given is essentially worthless (A. 328-331). These affidavits raise issues of fact, not a "mere difference of opinion".

Opinion.

Credibility was for the jury, referring to Derry's "opinion". (A. 454)

The court overlooks the fact that the falsity of Exhibit 8 was not known at the trial, and the judge, jury and defense relied on the government in accepting Derry's false qualifications as an expert.

Opinion.

The court finds that petitioner's accusation that the government falsely presented Derry as an expert and adduced by him false and inaccurate testimony "dissolves when considered against the indictment charged" because "the conspiracy was not limited to atomic bomb information." (Op. 16)

This is a non-sequitur. And the court once again has overlooked and ignored the basic claims of the government in its statement to the court and jury in opening, in summation, and at the time of sentencing, that the defendants were successful "atom bomb spies". It cannot be said as a matter of law that without these claims by the prosecution and the falsehoods of Derry the jury would nevertheless have found the defendants guilty. The conspiracy charged in the indictment is one thing; the substantive crime falsely proved on the trial was used to produce the conviction and prove the conspiracy charge, and compel a verdict of guilty.

Opinion.

The court states that the petitioner had been "free to call witnesses to contradict Derry . . . no action of the government prevented him from doing so". (Op. 16-17)

If the government commits a fraud to obtain a conviction it cannot be defended on that ground. Moreover, the circumstances existent at the time of the trial (the Russian development of the bomb, the Korean War, the Fuchs confession) and the restraints imposed upon by the Atomic Energy Act, made it virtually impossible to reach

any atomic scientists able or willing to testify. This was particularly so in light of the government's falsely-stated intention of calling the most prominent scientists as prosecution witnesses (A. 228-29). The legal considerations and the facts of scientific life at the time would have required any scientist so intrepid as to offer to testify for the defendants to clear his testimony in advance with the AEC, the agency seemingly attesting to the authenticity of the material. No scientist was obtainable, and that is a fact.

Opinion.

> The lower court says the scientists' opinions of Derry's testimony were "measured by their standard of scientific perfection" and it is in this light that Exhibit 8 and the Greenglass description were found to be "both qualitatively and quantitatively incorrect and misleading". The lower court finds that the issue at the trial was whether the material demonstrated "substantially and with substantial accuracy the principle involved in the operation" of the bomb" and that one can "perceive what the actual construction of the bomb was" rather than "accuracy and completeness as a description of the plutonium bomb". (Op. 17)

Once again the lower court obviously misread or misconceived the contents and meaning of the scientists' affidavits which only serve to re-enforce the fact that these issues cannot be resolved without an evidentiary hearing. The scientists did not use "a standard of perfection" They directed themselves to the very same questions in answer to which Derry had falsely testified that Exhibit 8 contained "the principle" of the operation of the bomb and would permit and enable a scientist to construct the bomb from the Greenglass misinformation. As stated by Dr. Christy, it would convey only "the germ of the ideas involved" to "one already familiar with the bomb design" (A. 424-425). The entire content of the affidavits of the

scientists overwhelmingly establish factually the falsity of the Derry statement that the Exhibit 8 data gave "with substantial accuracy the principle of the operation of the 1945 atomic bomb" and the "secret of the atom bomb". They state there was not a single secret or principle or key formula underlying the construction and operation of the bomb except one—that it worked.

Opinion.

> The opinion notes that Exhibit 8 was admittedly "not to scale", yet the scientists "condemn it [redacted] Derry's testimony because it was not so drawn." (Op. 17-18)

The scientists state as a matter of fact that the relative dimensions were so critical that if not drawn to scale the sketch and description could not possibly have any value or any of the attributes given the material (A. 319-21). Of even greater importance is the fact that the government knew that without the "scale" factor their representations as to the meaning of the material was in truth a grand hoax. Similarly, if Derry was the expert he claimed to be he would have known this to be a fact.

Opinion.

> The lower court refers to the statement of Dr. Christy that "the sketch presented is the kind of diagram I would use to explain the ideas involved in the bomb." (Op. 19)

But the court ignores his statement that he finds himself "in general and detailed agreement" with the affidavit of Dr. Morrison, and this would apply not merely to the sketch but as to Derry's expertise and his testimony. A pedagogical device or a sketch as such has no meaning particularly as to the complex scientific data here involved unless a person having the full knowledge of the subject matter is explaining and describing it and giving "a cor-

rect verbal description and explanation of components and functions".

Opinion.

> The court quotes language in the affidavit of Dr. Linschitz (A. 325) and asserts that "it would not have been difficult for a scientist to fill in the gaps—hardly different from Derry's testimony quoted above" (Op. 19-20).

It is unfair to petitioner to extract from a lengthy, informed and crushing analysis of the Exhibit 8 material a single phrase out of context and to disregard the balance of the Linschitz affidavit. This may be effective strategy on cross-examination but it is not the standard to be used to determine whether petitioner is entitled to a hearing.

Dr. Linschitz, after dealing with one "basic 'principle' " and showing its complete absence from the Greenglass drawing and description, notes that "a research expert who has devoted hard years of work and worry to the problem" can "correct and fill in the gaps subconsciously" based upon his intimate knowledge of the subject matter. This does not import that any scientist from the drawing as described could "fill in the gaps". The court below misread the affidavit, which in fact is different from and in conflict with Derry's testimony. The lower court fails to allude to the statements by Dr. Linschitz in analyzing the material (A. 317, 318, 323, 324). The test was not stated to be one of "scientific perfection"; but that the alleged Greenglass information was

> "too incomplete, ambiguous and even incorrect to be of any service or value . . . . " (A. 338)

Opinion.

> Dr. Morrison's affidavit is said by the lower court to be based upon "a standard of scientific perfection and detail and not upon the evidence given at the trial." (Op. 20)

Unless the lower court did not understand the affidavit, it is difficult to find the basis for the court's conclusion, for Dr. Morrison specifically adverted to the testimony of Derry and Greenglass (A. 346). His affidavit flatly contradicts the testimony of Derry (A. 342-348).

Opinion.

> The opinion goes on to say that both petitioner and the scientists maintain that the gravamen of the complaint is that Greenglass failed to achieve perfection or provide sketches and specifications required for a large scale production and construction of the atomic bomb (Op. 20-21).

The lower court has set up another straw man and promptly knocked it down. Nowhere does the petitioner claim directly or indirectly that the government was required to produce such evidence or that the infirmity in the government's case was of such a nature. We must again refer to the government's statements as well as the testimony of Derry. The lower court seems to have ignored that the prosecutor played an important role in this case and his statements can be said with a reasonable degree of certainty to have had some impact upon the jury. These statements must be considered, particularly when there is such a substantial showing that they were false, grossly exaggerated and highly inflammatory.

Opinion.

> The lower court under part "Fourth" of its opinion claims that the petition "rests upon a distortion of the record, a disregard of the substance of the testimony, reference to matters out of context, and others not presented to or not occurring in the presence of the jury . . ." (Op. 21-22)

This unwarranted disparagement is supported by no record reference and is assumedly an introductory comment to the details that follow.

Opinion.

> The court completed its prior comments by referring to "impermissible inferences". In the footnote the court gives a "prime example of petitioner's manner of reading the record" and petitioner's misuse of the word "secret" citing the discussion before the bench concerning a proposed stipulation that the Exhibit 8 material be deemed secret and confidential under the terms of the Espionage Act. (Op. 21-22)

But the lower court continues to ignore the plain and unequivocal statements of the government as to the attributes of the information alleged to have been passed, statements made to the jury, describing Exhibit 8 again and again and again as the secret which enabled the Soviet Union to construct the atom bomb and threaten our country with extermination. See pages 16-22, *supra*, and A. 221; R. 183, 504-505, R. 1519, 1535, 1602.

Opinion.

> In the same footnote the opinion goes on to justify the government's claim that Exhibit 8 "was a sketch of the very bomb itself" as proper no matter how inaccurate, incomplete the sketch. The court says the phrase was simply ordinary language. (Op. 22)

Here the court speculates and then concludes that the jury could not have been misled by the persistent references to Exhibit 8 as a sketch or cross section of the atom bomb we dropped on Nagasaki or as "the bomb itself." This is an impermissible inference on the part of the court who might have taken judicial notice of the definition of the word "itself" in Webster's New International Dictionary, Second Edition:

> "1. An emphasized form of the pronoun for the third person neuter;—sometimes two words *its self*. Its uses are
>
> a. *For emphasis;* as he was innocence *itself;* the text *itself* is well edited. . . The house looked *itself* again . . .

> 2. *Ir. exactly; indeed; in fact; . . .*" (emphasis supplied)

It is clear that it was the government's purpose in using the word, "itself" to establish in the eyes of the jury that it was the bomb "exactly, indeed, in fact", the Nagasaki bomb.

Opinion.

> The court faults the petition for the assertion that defense counsel were intimidated in their acti[illegible] by references to and the presence of represent[illegible]ves of the Atomic Energy Commission. (Op. 22)

The petition does state that the climate of opinion inflamed by the government by out-of-court publicity had an inhibitory impact upon the defense (A. 309). The petition did *not* allege that the presence of the AEC representatives intimidated defense counsel, but rather that their presence was used by the prosecution to give credence to false testimony and statements by the prosecution (A. 214, 268). It was the jury that may have been intimidated when the prosecution adverted to the fact that the evidence to be adduced had been the "subject of very grave consideration by my colleagues . . . by agencies of the government [illegible] the Atomic Energy Commission and the Joint Congress[illegible]nal Committee on Atomic Energy." (R. 505)

Opinion.

> The opinion states that "petitioner professes to see a conspiracy to suppress evidence and to mislead his counsel in the failure to call . . ." Dr. Oppenheimer, Dr. Urey and Dr. Kistiakowski although they were included in the list of witnesses. The opinion finds that no representation was made as to what these witnesses would say and hence the jury could not have been misled. (Op. 23-24)

The lower court fails to recognize the essence of the government's misconduct and that is to be found in its

deceptively listing as witnesses scientists it had never approached and whom it had no intention to call. To suggest, particularly in light of other prosecution activity and statements, that this could not have had impact upon the jury is at best an unfounded speculation which the lower court was not permitted to make in determining petitioner's right to a hearing. The prosecution in fact misused these names for the very purpose of imparting to the jury the assumption that the named witnesses supported the government's claim and Derry's testimony. The lower court could not deal with these elements of the fraud in isolation.

Opinion.

> The lower court concludes that the failure of the government to call the named witnesses was of no moment in that the defendants could have compelled their appearance by subpoena. (Op. 24)

We have previously discussed the problems of calling any scientific witness at the time of the trial (pp. 36-37, *supra*). To suggest the defense counsel would call as a witness a person whom the government has openly claimed as its own, who had allegedly been consulted with and who was prepared to support the government's contentions, lacks any element of reality.

Opinion.

> The trial court could not have been misled "as to the importance of the atomic information insofar as the petitioner is concerned" in that the court found that petitioner was not involved in the "atomic bomb project". (Op. 25)

The court conspicuously makes no mention of the impact of the claimed importance of the atomic information upon the jury which may well have been the basis of their finding that a conspiracy existed. Moreover, the emotional considerations and the misconceived premises upon which

the court imposed the death sentence upon the Rosenbergs cannot be said to have had no impact upon the court in imposing on petitioner the maximum sentence of thirty years and gratuitously advising that petitioner not be released on parole.

Opinion.

> The lower court insists that the availabilty of the impounded material was always known by petitioner and his counsel and further asserts that this was reflected both in the impounded testimony [redacted] in the public record. (Op. 26)

This is not a motion for a new trial on the ground of newly discovered evidence. If a fraud has been committed the conviction cannot stand. Petitioner has not been withholding his trump card while spending seventeen years in prison. The printed record *does not* indicate the availability of the impounded transcript and exhibit. The record reference (R. 903) adverted to by the lower court referred to its availability *solely* for the purpose of the examination of Derry. Why the trial court and the prosecution impounded that portion of the transcript which merely said that it will be available for any subsequent [redacted] proceeding is hard to fathom. To expect petitioner [redacted] have recall of that single sentence out of more than two thousand pages of testimony given while under the stress of this emotion-packed trial after which he was soon carted off to Alcatraz is an extremely unjust as well as unwarranted presumption. In fact, neither petitioner nor his co-defendants had ever seen the Exhibit 8 (R. 1097).

Exhibit 16 and the June 3, 1945 Branch of the Petition

In addition to fabricating authenticity and importance of information allegedly obtained by Greenglass, the government sought to establish that the conspiracy had been successful by proving there had been actual transmission of in-

formation to the Soviet Union, and that the Rosenbergs, hence petitioner, were part of the Gold-Fuchs-Yakovlev spy ring. To establish this "linkage" the government focused upon an alleged meeting between Gold and Greenglass on June 3, 1945 in Albuquerque, New Mexico where the link was said to have been established (A. 273-274, 277-278). The government corroborated this meeting by Exhibit 16, an alleged photostat of a purported Hotel Hilton registration card bearing the June 3, 1945 date on its face.

Gold and the card were the sole corroboration of the essential testimony of David and Ruth Greenglass. No one other than the Greenglasses stated that they had given information to the Rosenbergs and no one but Gold testified that it had been transmitted to the Soviet Union.

To establish this aspect of the case the government:

(a) knowingly caused and permitted Gold and the Greenglasses to give perjured testimony to the effect that there had been a meeting between them arranged by the Rosenbergs on June 3, 1945 in Albuquerque, New Mexico when in fact there had been none;

(b) introduced into evidence 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 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) having obtained the admission of Exhibit 16, a photostat, into evidence, the government, to prevent subsequent exposure of the fraud, disposed of the alleged original in August, 1951, knowing that by reason of such action it would not be subject to scrutiny in the event of a re-trial of the case, if indeed any original card existed.

(d) knowingly suppressed and continued to suppress evidence known to it but not known to the petitioner and his counsel which would have impeached and refuted the testimony against petitioner and his co-defendants (A. 215-16).

The Trial Record

Gold testified that in May of 1945 he met with Yakovlev, a Soviet national, in preparation for a meeting with Klaus Fuchs on June 2, 1945, and further:

i. was given an additional chore characterized by Yakovlev as "very vital . . . extremely important business" (R. 821);

ii. was replacing a woman courier * (R. 821);

iii. was given the name and address of Greenglass on an onion skin paper and told the recognition phrase was "I come from Julius" (A. 278; R. 822);

iv. was then given a cut piece of cardboard from a jello box as an additional recognition signal (A. 279; R. 822);

v. after seeing Fuchs in Sante Fe on June 2, 1945 and visiting the Greenglass apartment when they were not then at home (A. 822-23), he found a place to sleep in a hallway of a rooming house (A. 279; R. 825);

vi. upon arising and getting dressed on Sunday, June 3, 1945 he first went to the Hotel Hilton and registered and then went to the Greenglass residence, arriving at approximately 8:30 A.M. (A. 279; R. 825);

vii. gave the recognition signal "I come from Julius" and then the cardboard pieces were brought out and matched (R. 825);

* The Greenglasses had testified that an arrangement for a meeting in New Mexico had been made in January of 1945. The courier was said to be Ann Sidorovich who was allegedly present at the time of the arrangements. Petitioner recently learned that she had denied this testimony before the indicting Grand Jury. She was never indicted and her name as well as that of her husband appeared in the government's list of witnesses.

viii. after conversation he left and returned and was given an envelope by Greenglass (R. 827) and advised by Greenglass that Gold could get in touch with him if he wished by calling his brother-in-law, Julius, whose telephone number he also gave to Gold (A. 280; R. 827);

ix. he thereafter referred to two subsequent meetings with Yakovlev in June, 1945 (R. 829) and on the second occasion testified that Yakovlev stated that the information from Greenglass "was extremely excellent and very valuable" (A. 299; R. 831).

A major portion of Gold's testimony related to his dealings with Fuchs from 1944 to 1946. In the course of his testimony he referred to a second meeting in New Mexico with Fuchs on September 19, 1945 but made no reference to registering at the Hotel Hilton on September 19, 1945 nor was a registration card to corroborate the meeting tendered at the trial.

After Gold had left the stand without any cross-examination, 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." (A. 280-281; R. 867)

He stated that he had the original of the card on the way "together with a witness if required" * (A. 282; R. 867). He requested that Mr. Bloch stipulate as to the records rather than insist upon "strict technical proof". Mr. Bloch did so and the document was admitted into evidence

* The name of the witness was not designated although the clerk, Anna Kinderknecht, who purportedly filled out the registration card in 1945 and was still working at the hotel in 1951, was not on the list of witnesses. The only person associated with the hotel on the list of witnesses was Fletcher Brumit, who had not been connected with the hotel in 1945.

as a record "made in the regular course of business . . ." (R. 869).

The linkage testimony was heavily relied upon by the prosecution in its summation: the "history of the Jello box side, the greetings from Julius . . . furnished the absolute corroboration of the testimony of the Greenglasses, forged the necessary link in the chain" (R. 1521); the veracity of the witnesses was said to be "established by documentary evidence . . . the registration card from the Hotel Hilton . . . which shows that he [Gold] was registered there June 3, 1945," and each of the items of connection contained in the Gold testimony was specifically referred to (R. 1522-23), including the participation of Fuchs in the one grand conspiracy.

The court in its charge to the jury recognized the importance of the card and the June 3rd meeting to the prosecution's case, adverted to the same testimony and stated that by these means "the government attempted to show the *link* with the Russians . . ." (R. 1557) (see A. 283-286).

Petitioner does not claim that Fuchs and Gold never met, nor does he acknowledge that they ever did, or that Gold did or did not meet Fuchs on September 19, 1945. The petition affirmatively shows that Gold never met Greenglass on June 3, 1945 and did not register at the Hotel Hilton on June 3, 1945, after allegedly seeing Fuchs in Sante Fe on June 2, 1945.

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). In fact this was essentially conceded by the FBI at the time of the sentencing of Gold.

Exhibit 16

The formal arrest was made only after the FBI is said to have obtained the purported original of the Hotel

Hilton registration card dated September 19, 1945 bearing Gold's name (A. 288-289). The photostat of the September 19th card shows the initials of several FBI agents inscribed on the back along with the date of acquisition, May 23, 1950 (A. 316-362). It is not disputed that the FBI did send its agents to obtain all documents or records to establish Gold's presence in or about Sante Fe and 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 of the Hotel Hilton are so kept that there is an indexing both by name and by card number. Thus, if one registration card or invoice covering Harry Gold was to be found his other registration cards and invoices, if any, would have been found in the very same place and at the same time (A. 291).

But the FBI did not find the "original" Exhibit 16, the alleged June 3rd card, at the Hotel Hilton on May 23, 1950 and that is not contested by the government. Indeed there is no suggestion as to where or how it was found or by whom.

The government acknowledged in its briefs below that the June 3rd card was "acquired" at a different and obviously at a later time than the September 19th card and that the two cards were "handled in a different manner" (Gov't br., p. 53; A. 292). Every other exhibit obtained by the FBI introduced into evidence bore the initials of one or more FBI agents * (A. 301).

On September 7, 1966 Elizabeth McCarthy, an attorney and an acknowledged leading expert in questioned 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

* The photostat of a bank record which was introduced into evidence, Exhibit 17, will be discussed *infra*.

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 Anna Kinderknecht (Mrs. Hockinson) and that the writing on the June 3rd card was *not* her handwriting (A. 394-395).

Prior to rendering this expert opinion which is not disputed either by the lower courts or the government, Mrs. McCarthy found factual evidence by means of microscopic examination that in the very area of the June 3rd card where the simulated handwriting of Anna Kinderknecht appears there had been erasures of handwriting and the imitation script was overwritten in the very area of the erasure, and in some instances all of the prior handwriting had not been removed. There was also evidence of erasure and overwriting where Harry Gold's handwriting was found (A. 390-393).

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.

On August 4, 1951, four months after sentence, the government stated that it returned the original to the Hotel Hilton at Albuquerque at a time when by state statute and the custom of the hotel it was ripe for immediate destruction in the sixth year following the year of registration, i.e., 1951. In a letter to one of petitioner's counsel, the government presumed that the date of destruction was 1957, computing the five year period from the date of return rather than the date of registration (A. 302-303).

The September 19, 1945 card was retained until 1960 although never used in the trial and it then was destroyed by the government (A. 303).

Thereafter petitioner's counsel made innumerable inquiries to the Department of Justice concerning both the June 3rd and the September 19th cards, the time and circumstances of their acquisition, the persons involved, and any records reflecting the facts or information to be derived therefrom, all to no avail (A. 305-306).

Some time in June, 1961 Walter and Miriam Schneir obtained access to 14 hours of disc recorded pre-trial interviews between Gold and and his attorneys, John D. M. Hamilton and Augustus S. Ballard, along with numerous other written materials (A. 351-355). The Schneirs were independent investigators intending to write about the case after the completion of their research. They in turn made a taped copy of the interviews and reproduced copies of some of the documents given. This information and material was not made available to petitioner's attorneys until the latter half of 1965.

The recorded interviews between Gold and his attorneys had occurred on six occasions, June 1st, June 6th, June 8th, June 14th, June 23rd and August 9, 1950. At the fourth interview held on June 14, 1950, after he had been interrogated for at least 80 hours by the FBI alone and after 23 days in custody (Exhibit A), Gold, for the first time, made reference to a June 3rd meeting with an unidentified G.I. In narrating that story he made no reference whatsoever to registering or staying at the Hotel Hilton (reel 4, p. 53).*

Rather he stated that after leaving the rooming house he had checked his bags at the railroad station and from there directly sought to find the G.I. at the address given

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

(reel 5, p. 38). He was explicit in stating that he had stayed at the Hotel Hilton on one occasion only, that the investigating agents had verified this fact and that was on September 19, 1945. He stated in part:

> "I have made one omission with regard to Albuquerque, and that is the fact that I had registered at the Hotel Hilton in Albuquerque on the occasion of the second trip [to see Fuchs].
>
> "This was particularly necessary because I was running out of funds."

He went on:

> "I would like to state that my stay at the Palmer House on the occasion of the second trip, my stay in—at the Hilton Albuquerque had all been verified through information that I had given the investigating agents." (reel 4, pp. 72-73—June 14, 1950)

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

The government's sole response to all of this direct and circumstantial evidence was that it could, if compelled, give evidence to the effect that all cards of the Hotel Hilton of June 3, 1945, now admittedly all destroyed, were mis-stamped "June 4." It advised the court [illegible] it feared doing so lest it would create an issue of fact and thus result in a hearing (T.M. 117-120).*

The petition and its supporting papers *prima facie* establish as to Exhibit 16 the following:

> (a) Exhibit 16 contained the handwriting of someone other than Anna Kinderknecht and the simulated handwriting included her initials "A.K.".
>
> (b) It contained unexplained erasures of writing and overwriting at critical places particularly in the area of the simulated handwriting.

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

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

(d) The alleged original of the photostat, Exhibit 16, was obtained by the government at some undetermined time after the arrest of Harry Gold and from an unspecified place by a person whose identity the government refuses to disclose although the September 19th card by its markings was obtained by the FBI on May 23, 1950.

(e) Gold, in his pre-trial statements to his attorneys mentioned that he stayed at the Hotel Hilton in Albuquerque only once and that was in September, 1945.

(f) Unlike all other exhibits in the possession of and retained by the government, it bore no legend as to the date of its acquisition by the FBI and no FBI agent's initials.

(g) The alleged original of Exhibit 16 was returned by the government to the Hilton Hotel in August of 1951, when it was ripe for destruction, according to known hotel policy and practice.

The June 3rd Meeting

Gold's recorded statements to his attorneys, given over a period of two months, were made after extensive hours of interrogation by the FBI which, by August 9th, well exceeded 160 hours, the last interview being given after Gold had been in custody for 80 days. In the course of his interviews Gold added, amended and recast his story from time to time.

Gold stated from the very inception of his interviews that he was telling his attorneys with great particularity all of the facts he had given to the FBI. These interviews were given with the aid of elaborate notes which he had prepared in the course of his interviews, interrogations and discussions with the government (reel 1, side 1, p. 17; reel 2, side 2, p. 16; reel 3, pp. 28, 35; reel 4, p. 56; reel 5,

pp. 30, 31; reel 6, pp. 35, 55). He advised his attorneys that from time to time the FBI supplied him with information concerning the background, activities and attitude of those about whom he was giving information, and what they were saying to the government (reel 3, p. 33; reel 5, p. 51; reel 7, pp. 44, 46-48).

In his last interview he acknowledged to his attorneys, to their distress, that he had been telling deliberate lies to them and had perjured himself before the grand jury which indicted the Rosenbergs (reel 7, pp. 66-71; reel 7, pp. 38-39) and that it was necessary for him to recast substantial portions of the story as previously given and make additions thereto.

The record reveals that it was not until some time after the arrest of Greenglass * that Gold was able to "recall" his name with the aid of investigating agents who gave him a list of twenty names and by a cooperative method of selection "lo, Greenglass was at the top" (Exhibit F., p. 1085).**

After the arrest of Julius Rosenberg he then suddenly "recalled" that at one of his rendezvous in February of 1950 after the arrest of Fuchs he believed the Soviet agents had had Rosenberg check on Gold's possible surveillance by the FBI and after seeing his picture in the newspapers he now recalls seeing Rosenberg walking on the same side of the street smoking a cigar (reel 7, pp. 34-35). By the time Gold prepared his written statement of October 11th he had elaborated upon this alleged Rosenberg surveillance with recognition signals such as a curved stempipe, cigars

* News of Greenglass' arrest was immediately reported in the press.

** An October 11th statement prepared when all of the cast of characters had been completed and was an exposition of Gold's explanation of his conduct and proof of his atonement made in preparation for the time of sentence.

and other means of mutual identification (Exhibit F, p. 1085).

Some years later, Gold once again revised this after-acquired knowledge and placed Rosenberg in a restaurant looking at him through a window, the cigars and pipe omitted. The prosecution wisely chose to ignore this most obvious concoction made at a time when he was assiduously attempting to ingratiate himself with the government prior to his sentencing.

All of the pre-trial material which the petitioner has been able to obtain reveals that Gold did not include any of the "linkage" evidence (the jello box, Julius, the replacement of a woman courier). Further, the corroborative evidence of a stay at the Hotel Hilton in June of 1945 is refuted by his statements; as is his testimony that Yakovlev declared that the material obtained was "extremely excellent and very valuable".

The government, fully aware of the significant omissions, basic contradictions and belated additions, knew that Gold was altering his story and testifying falsely to meet the needs of the government. Notwithstanding this fact the government permitted itself to be an active party to the knowing use of false and perjured evidence and suppressed and failed to disclose exculpatory evidence within its possession.

The Lower Court's Opinion on June 3, 1945
Card and Meeting

The lower court's determination and finding that the evidence relating to Exhibit 16 did not constitute a sufficient showing to warrant a hearing, with the government standing silent, reveals, upon examination, that the court *ex parte* made fact findings on the issues presented upon speculation as to explanation not even tendered by the government in its briefs or argument. At best it played the role of an appellate reviewing court and avoided a "trial-type" proceeding.

The lower court acknowledges that Anna Kinderknecht did not write on Exhibit 16 and that her initials were not placed on that exhibit by her (Op. 30). It notes the inconsistency of the time stamp on the back with the date placed on the front of that exhibit (Op. 33), it admits "erasures and smudges" (but ignores the fact that the spurious handwriting was superimposed) and also acknowledges the lack of FBI initials or date of acquisition and assumes that the card was returned by the government to the hotel in August of 1951 (Op. 33).

In disposing of the Exhibit 16 charges the court also time looked at the totality of the facts presented which were sufficient to command that a hearing be granted to afford petitioner an opportunity to substantiate his charges. Each element of the factually supported allegations was considered in isolation and disposed of essentially by *ex parte* findings of fact. We shall deal with the findings seriatim below.

Opinion.

> The fact that the hotel clerk did not write the card that bore her initials "does not, in one fell swoop, permit the inference that it [Exhbit 16] was 'forged' ", nor "warrant the inference" that it was "not a record kept in the regular course of the Hotel Hilton's business; neither does it further warrant the inference that the card was fabricated and contrived". (Op. 31)

The petitioner does not claim that the forgery is proved "in one fell swoop". All of the evidence should be considered together; not one item of proof in isolation. Moreover, how and why the court could conclude that it was the practice of the hotel to have one undesignated person write another clerk's initials and simulate her handwriting is not set forth in the opinion. This is mere speculation not even tendered by the government. If there be an explanation, it is for the government to make and prove at a hearing.

Opinion.

> One need not be an expert to discern that the handwriting on the June 3rd card is different from that of the September 19th card. (Op. 30)

Gold did not testify as to his stay at the Hotel Hilton at Albuquerque in September of 1945. The June 3rd card was tendered after his testimony was completed and after two intervening witnesses. The September card was never presented at the trial and there were no two documents for the defense to compare. Comparison by an expert together with the other supportive circumstantial evidence, leads one to accept the petitioner's allegation of forgery. If Exhibit 16 ever was an original registration card of someone staying at the hotel, it has clearly been altered. If there be a better explanation, let the government advance it. Let a hearing be held. Let petitioner be put to his proof.

Opinion.

> The opinion disposes of the absence of FBI initials as a matter of no substance since Exhibit 17, a bank record, is also without an agent's initials. (Op. 33)

It must be noted that Exhibit 17 was a photostat of a permanent bank record still in the bank's possession and the original bank record itself has attached to it an FBI identification that it was delivered to the government at a designated time and examined at an FBI laboratory. Every other exhibit acquired by the government and introduced into evidence had such a stamp or notation and such is the standard operating procedure of that agency, a course of action followed except when the document has been elaborately certified. This is alleged in the petition and not denied (A. 301).

Opinion.

> The lower court justifies the return of the "original" of Exhibit 16 in that it was the photostat which was the exhibit. The court also concludes that the parent of Exhibit 16 was destroyed in 1957. (Op. 33)

True, the photostat was the exhibit. But the appeal had not yet been subject to appellate review when the government returned the "original". This was a capital case and the death sentence had been imposed. In the event of a new trial the prosecution might well have been required to produce the original hotel card, if there was one. The government knew that after destruction of the alleged original, the means and methods of determining when the writings on the card were imposed could not be scientifically determined. Under the practices followed by the hotel the card would be destroyed in 1951, after five calendar years had elapsed from the year of registration. The government's conduct in consenting and permitting the spoilation or destruction of a document creates a presumption of falsity, an inference which must be rebutted by the spoiler. (*Spoliator contra spoliatorem omnia praesumunter.*).

Opinion.

> An adverse inference is drawn from the fact that "Additionally and significantly, the petitioner is silent as to the absence of any affidavit from Mrs. Hockinson [the hotel clerk]. She is one person still available who can testify with respect to the June 3rd card, whether it was kept in the regular course of the hotel's business, whether it is authentic, and the practice with respect to the preparation of registration cards by the hotel clerks. The absence of an affidavit or an explanation takes on added significance since her whereabouts are known to the petitioner . . . " (Op. 32)

The question of the authenticity of the June 3rd card was brought to the attention of the government almost a year prior to the filing of the petition in May of 1966. Indeed, the FBI investigated and during that period

of time went to the Hotel Hilton and spoke to various persons and we are quite certain the government knows the whereabouts of Mrs. Hockinson. Yet no comment or adverse inference is drawn from the fact that the government or its investigative agents have not come forth with an affidavit from the "one person still available who can testify." Not every person with knowledge of the facts is disposed to make an affidavit, particularly in a case such as this. At a hearing the clerk could be subpoenaed to testify. Instead the court's response is, in effect, an unwarranted and impermissible adverse inference and finding against the petitioner only. The court has raised an issue of fact upon a speculation and opted an inference against petitioner and rejected one adverse to the government. This issue cannot be resolved by the court without a hearing.

Opinion.

> The court concludes, once again without any evidence, without any affidavit from the government, that the card was destroyed in 1957. (Op. 33)

The government might have obtained an affidavit as to the time of destruction. Apparently, for reasons of convenience or otherwise, it has again failed to do so and is not faulted. These representations by the government, upon which the petitioner will not rely are, nevertheless, utilized by the lower court as a basis for disposing of an issue of fact.

Opinion.

> It is stated that "petitioner suggests that counsel did not cross-examine Gold" because of the prosecution's statement of a witness being on the way with the original document and that such a suggestion "is demonstrably false". (Op. 33)

The court has once again set up a straw man, since no such suggestion appears in the record or petition. Whatever may be the reasons counsel did not cross-examine Gold, petitioner does not allege the one advanced by the court. It is perhaps errors such as this and a general misreading of the petition which permitted the district court to conceive the entire matter to be a "product of a fertile imagination" and permitted it to make the equally erroneous and unfair charge that the petition has substituted "vituperation" for "lack of evidence" (A. 483).

Opinion.

> The lower court explains Gold's omission of the June registration at the Hotel Hilton in his statement to his attorneys, stating: "However, in his June 14th recital to his lawyer of efforts to identify the G.I. and where the June 3rd meeting took place, among other matters he stated 'I have looked at dozens of reels of motion pictures *starting with the Hotel Hilton* and going all the way past undoubtedly the street where this G.I. lived'. [emphasis supplied] Transcript of Tape Recordings, reel 5, p. 43" (Op. 39 fn. 80).

Thus the court seeks to dispose of this crucial fact issue by inferring and finding that Gold stayed at the Hilton in June of 1945 because the persons working with Gold st[illegible]ed the showing of films of areas of the city at the Hotel Hilton. The statement quoted is more suggestive of Golds' susceptibility to adopt a suggested story than evidence of a stay at the Hilton in June of 1945. Clearly on the basis of that statement by Gold the court could not find that the files and records of the case conclusively show that petitioner was not entitled to a hearing. At best it might be used by the government at a hearing. The courts below erred in permitting this *ex parte* determination of a fact issue.

Opinion.

> In refusing to grant petitioner a hearing as to Exhibit 16 as well as the June 3rd meeting, the court found "there is not a word of direct evidence to

support the serious charges made upon information and belief" (Op. 29).

It is difficult to conceive how the court could say there was no direct evidence as to the physical object itself, government Exhibit 16. That the direct evidence must on this application be such as to prove the ultimate fact finds no support in law. The court's aversion to circumstantial evidence is particularly inappropriate in this instance. The Court of Appeals in rendering its opinion on the appeal from the judgment of conviction in 1952 found that the case upon which the conviction was obtained essentially involved lengthy circumstantial testimony, *U.S.* v. *Rosenberg,* 195 F. 2d 583, 594, and this is characteristic of many a conspiracy trial.

The court refers disparingly to statements made upon information and belief. In fact all essential elements of the petition is alleged on knowledge. Paragraph 63 of the petition alleges in light of the circumstantial evidence presented and the specific facts alleged that upon information and belief the government knew of the false testimony and the Gold statements established that it clearly helped in the creation of the false evidence. Paragraph 74 of the petition says that upon information and belief Fuchs misdescribed his courier to the British and American authorities. The source of this information was the article of J. Edgar Hoover, *The Crime of the Century,* Readers' Digest, May 1951. Other portions of that paragraph were attested to by FBI officials in court at the time of Gold's sentencing. The third allegation made upon information and belief is that for the period "from May 1st to June 1st, 1950 the broad outlines of the Gold "confession" were developed and altered from time to time with the aid, suggestion and endorsement of the government, but the false statement could not then be completely contrived since there was not yet a sufficient cast of characters and the necessary details of the false testimony could not at that time be in final form" (A295-296). The paragraph goes on to state that Gold met

with counsel on June 1st for a brief period and that the June 3rd meeting had not yet been developed and his memory had not yet been fully refreshed.

In fact the Gold interviews with his attorneys support all of the fact statements in that paragraph and were such as to establish a *prima facie* showing of prosecution misconduct. A reading of the opinion would give the impression that Gold intentionally withheld the June 3rd affair until directed to disclose these facts by his attorney on June 1, 1950 and at that time he advised the authorities of this event (Op. 36-37). A reading of the transcript of the interviews establishes that he had given the event and names of the people allegedly involved, except one (Reel 1—June 1, 1950, p. 8). But in a subsequent interview he advised his attorneys of the withheld name—Alfred Dean Slack (Reel 4—June 8, 1950, pp. 5-6). Even in his October 11, 1950 statement Gold claimed he had no "recall" of the June 3rd affair until "sometime after my arrest" (Exh. 7, p. 1085). The lower court erred in making the finding that Gold *must* have told about this affair prior to June 14, 1950, the day prior to Greenglass' being brought into Federal custody. In his chronology of events dated June 15, 1950 this event was entirely missing and was not placed in his chronology until June 16, 1950 at the earliest (Exh. B).

The court's opinion reads more like one given after an evidentiary hearing had been held, the issues of fact framed, and petitioner had presented all his witnesses and documentary evidence to substantiate the serious charges. The sufficiency of a showing cannot be equated to the proof required upon which the judgment of conviction should be vacated and set aside. Using the wrong standard the court faults the petitioner for not having produced all of his evidence but nevertheless excuses the government for its failure to present any evidence to refute the factually supported allegations of the petition, consisting in substantial part of facts *dehors* the record.

Gold testified at the trial that *Yakovlev said the material was* "extremely excellent and very valuable" (R. 831). But on June 14, 1950 Gold stated to his attorneys that *Yakovlev stated* "the information received had not been of very much consequence at all" (Reel 5—June 14, 1950, p. 43). In a "Chronology of Work" (Exh. B) Gold wrote on June 16, 1950 "*Earlier I have said* that I believed the information to be unimportant *but I have since learned* that it was highly valuable. In the October 11, 1950 statement (Exh. F, p. 1085), he said, "as has been said before, until some time after my arrest all memory of this incident had fled from me (probably this was because *Yakovlev* had subsequently—and with intent to mislead—*told me* that the information received was of no value)". These statements reveal not merely that Gold was giving false testimony with the knowledge of the prosecution as to what Yakovlev allegedly stated, but that it was the government who told Gold to say that the information was "highly valuable" and based upon this suggestion from the government he falsely incorporated it into the alleged Yakovlev discussion.

The lower court found that "it is not altogether clear from the record that in fact this is a contradiction" (Op. 39, fn. 81). The court goes through an elaborate attempt to remove this "contradiction" and then finds that it could not possibly support the allegations of perjury. Here once again the court exceeded its authority in thus disposing of the matter without a hearing.

The concluding portion of the opinion is one that might possibly be directed to a motion for a new trial based on newly discovered evidence—petitioner could or should have attempted prior to and during trial or in any event at an earlier date to obtain this information. Implicit in such a statement is that prosecution misconduct, the obtaining of a conviction by fraud, can be immunized by some statute of limitations. The meaning of the Writ and the decisions of this Court deny such interpretation.

Previous Post-Trial Applications

The first 2255 motion has previously been discussed (see pp. 34-35, *supra*).

The second 2255 motion also sought relief under Rule 33 of the F.R.Cr.P., based upon newly discovered evidence concerning a console table; the discovery that Greenglass had lied in concealing the fact that he had stolen uranium from Los Alamos; and that his testimony was in conflict with a portion of a one-page pre-trial statement to his attorney. The motion did not deal with Exhibit 8 or Exhibit 16. No hearing was granted.

The next proceeding was instituted in the Supreme Court by writ of habeas corpus, seeking to set aside the sentences imposed on the ground that they were not authorized by the Atomic Energy Act of 1946, which superseded in this respect the Espionage Act of 1917. A stay of execution, pending a determination of this application, granted on June 17, 1953, was vacated some two days later, the Rosenbergs were executed, and thereafter petitioner's application on the same grounds was denied.

In 1956, Sobell instituted a 2255 motion, charging knowing use of perjured testimony as to a claimed deportation by the Mexican authorities in that he was actually abducted by individuals acting under the control of officials of this country. Relief was denied without a hearing.

In 1962, a 2255 motion was made by petitioner on the grounds that (a) the Court had been without power to impose a war-time sentence, in that there was no charge to or finding by the jury that petitioner had joined the conspiracy in time of war; and (b) under *United States* v. *Grunewald*, 353 U.S. 391, the cross-examination of Ethel Rosenberg on her assertion of the Fifth Amendment at the time of her appearance before the Grand Jury, was unfairly used as an attack upon her credibility and as proof of her guilt, thereby depriving all of the defendants of a fair trial. That motion was denied on the legal issues posed.

Reasons for Granting the Writ

1. The order of the district court, affirmed *per curiam* by the Court of Appeals on the opinion below, denying petitioner's request for a hearing, constitutes such a substantial departure from accepted standards in habeas corpus and Section 2255 proceedings, as to require this Court to exercise its power of supervision. The opinion below disregards the issues and facts posed in the present motion and leaves unchallenged conduct of the prosecution in the course of a criminal trial which cannot be condoned and if left uncorrected can only have an adverse effect upon the administration of criminal justice.

2. At no time since the judgment of conviction has this Court ever reviewed and determined the fairness of the trial. Judicial evaluation of petitioner's trial is inextricably intertwined with the fate of his co-defendants who were said to have committed a crime the consequences of which were claimed to have imperiled the very existence of this nation. It was in this belief that the jury convicted them, as well as the petitioner, and the sentencing court felt impelled to impose sentences of death. The petitioner, while not said to have been directly involved in the transmission of atomic information, was said to have been a member of the notorious conspiracy established on the trial by the "proof" of the importance of the data said to have been transmitted, and thus he received the maximum prison sentence of thirty years.

The present petition now presents well substantiated allegations of fact which, if established at a hearing, would constitute proof that petitioner and his co-defendants were deprived of a fair trial. A reconsideration of the fairness of the original trial in respect of petitioner's two co-defendants has, as Mr. Justice Frankfurter pointed out, "the appearance of pathetic futility." *Rosenberg* v. *United States*, 346 U.S. 273, 310. But as the Justice also reminded

us, "Perfection may not be demanded by law, but . . . the capacity to counteract inevitable though rare frailties is a mark of a civilized legal mechanism." 346 U.S. 310. The fact that a hearing might establish that the Rosenbergs' conviction and execution were unfairly obtained should not become an unstated obstacle to petitioner's right to a hearing. The capacity to permit inquiry and accept the facts if proved, to engage in "sturdy self-examination and self-criticism", is the underlying judicial responsibility presented by the present application.

Petitioner asks only that he be afforded a hearing because he has made a sufficient legal and factual showing entitling him to such relief. He asks that he be afforded, in spite of his involvement in a controversial case, equal protection under the laws, that the normal standards applicable to the Writ as enunciated by this Court be applied to him.

Indeed, it is in circumstances such as this that the Great Writ affords a remedy in "the unceasing contest between personal liberty and government oppression . . . a central role in national crises . . . not only in England in the 17th century, but also in America from our very beginning and today. . . . Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment; . . .". *Fay* v. *Noia*, 372 U.S. 391, 400-402.

There can be no doubt that petitioner's trial was held in a setting wherein "the claims of order and of liberty clash most acutely," when habeas corpus must play "a central role." *Fay* v. *Noia, supra.* It is the essence of the Great Writ that serious charges of fraud, whenever discovered, be aired in open court and that injustices of a former day shall not be forever entombed behind the walls of the finality of judgments.

3. The rules which guarantee that this instrument of judicial correction will not be deprived of meaning and

power are clear and have been fully articulated by this Court.

(a) A district court is required to grant a hearing unless in the words of the statute "the motion and files and records of the case conclusively show that the petitioner is entitled to no relief." *Sanders* v. *United States,* 373 U.S. 1; *Townsend* v. *Sain,* 372 U.S. 293; *Fay* v. *Noia, supra; Commonwealth of Pennsylvania* v. *Claudy,* 350 U.S. 160; *Chessman* v. *Teets,* 350 U.S. 3; *Machibroda* v. *United States,* 368 U.S. 487. To deny petitioner a hearing, the factual allegations must be clearly and "patently frivolous or false on a consideration of the whole record." *Commonwealth of Pennsylvania* v. *Claudy, supra.* Even if the allegations were improbable or unbelievable, when based upon extrinsic evidence, that may not serve to deny one an opportunity to be heard and present evidence. *Walker* v. *Johnston,* 312 U.S. 225; *United States* v. *Hayman,* 342 U.S. 205; *Smith* v. *United States,* 270 F. 2d 291 (App. D.C.). A hearing must be granted unless the allegations are merely "vague, conclusory or palpably incredible. . . ." *United States* v. *LaValle,* 319 F. 2d 308 (C.A. 2).

(b) A district court is required to accept as true all of the allegations of the petition and facts tendered in support thereof not conclusively refuted by the record in determining its legal and factual sufficiency. *Ex parte Hawk* v. *Olsen,* 326 U.S. 271; *Durley* v. *Mayo,* 351 U.S. 277 (dissenting opinion).

(c) A collateral attack charging a denial of a fair trial based upon extrinsic evidence must, by the nature of the charge, be "inconsistent" with the files and records of the case. Where such issues are raised upon facts outside the record a hearing must be granted and the petitioner must be afforded an opportunity to substantiate his allegations. Thus, where there is extrinsic evidence and factual issues are raised thereby, the denial of a judicial proceeding, an evidentiary hearing, with all the powers of process associated with it is of itself a denial of due process and deprivation of the rights granted by the writ. *Sanders* v. *United States*; *United States* v. *Hayman*; *Commonwealth of Pennsylvania ex rel. Herman* v. *Claudy,* all *supra*; *Brown* v. *Mississippi,* 297 U.S. 278; *Pyle* v. *Kansas,* 317 U.S. 213; *Price* v. *Johnston,* 334 U.S. 266; *United States* v. *Rutkin,* 212 F. 2d 641; *Sanders* v. *United States,* 205 Fed. 2d 399 (C.A. 5).

4. In *Townsend* v. *Sain, supra,* this Court discussed at length the standards applicable to the granting of a hearing. In construing the mandate of Congress and the history of habeas corpus, this Court found that the writ was "plainly designed to afford a trial-type proceeding," and with all the powers to compel the production of witnesses and documents, confrontation and examination. This Court then noted that, in examining the files and records of a case, whether of a prior state or federal proceeding, the nature of the writ "refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review." Since "Constitutional claims turn upon the resolution of factual issues", a necessary corollary is that "Where the facts are in dispute the federal court in habeas corpus must hold an evidentiary hearing if the habeas corpus applicant did not receive a fair and full evidentiary hearing. . . ." While that discussion related to habeas corpus proceedings in a state court as noted in *Sanders,* these standards *a fortiori* are applicable to habeas corpus proceedings involving a federal conviction.

The lower court, in this instance, failed to apply any of the standards enunciated above, in effect assumed the facts as found in the files and records of the case, and overrode any issues of fact created by the extrinsic evidence contained in the present petition. The lower court considered its task that of appellate review. When faced with issues of fact, the court permitted its *ex parte* determination of the issues to be a substitute for a "trial-type proceeding".

Moreover, the lower court ignored substantial portions of the trial record to which the facts *dehors* the evidence were addressed. As a result, a hypothetical trial was reconstructed stripped of the very theme of the case as it has been structured by the prosecution—the actual theft of the bomb.

5. For the purpose of considering the sufficiency of the showing made by petitioner, we assume that if Greenglass had truly passed to a foreign power a facsimile of Exhibit 8 and a description of the bomb, however infantile and erroneous, such conduct would have constituted a violation of the Espionage Act. But the jury's determination that Greenglass gave Rosenberg such sketch and description for submission to the Soviet Union and that a conspiracy existed was, or might well have been, the result of its having been persuaded that the sketch had the attributes claimed by Derry and the prosecution. The petition and the supporting affidavits established *prima facie* that the Derry testimony and the government's statements were false. Yet the court below erroneously assumed that the jury would have made the same determination absent the false testimony of Derry and even if the government had not been guilty of false and inflammatory comments.

6. The court below could not constitutionally disregard the scientists' affidavits which contained an imposing number of statements of fact, true, scientific facts, but nevertheless facts, which the government did not deny. The various omissions of elements and necessary component parts of the bomb systems prerequisite to its construction and operation, the misdescriptions, the misleading nature of the entire sketch and accompanying testimony make evident that the information was not what it was stated to be either by Derry or the prosecution.

The scientists found that the lack of information and scale made the Greenglass material essentially meaningless and that such data was devoid of "the principle or formula

of the operation of the bomb." That there was no single formula or principle and that those that were involved were not reflected in any way in the questioned material and testimony is not disputed by the government.

Thus, we are left with at best a bizarre and garbled sketch and description, an ignorant caricature of the bomb, lacking any of the attributes given it by Derry or the prosecution at the trial. (See A.314-349, 412-414, 422-425 and pp. 23-29, 32, 33, 39, *supra.*)

The lower court was required to accept prima facie that the Derry evidence and the government statements were false or at any rate that there was a factual issue as to their falsity. The only attempted response found in the lower court's opinion is that somewhere, in this haze of confusion, it might be possible to speculate that the phantom "principle" involved in the operation of the 1945 atomic bomb and from it the "actual construction" might be discerned in Exhibit 8. Yet the scientists categorically state that there is no such principle involved in the operation of the bomb and they attest to the fact that no such principle was reflected in the challenged testimony. To arrive at a factual conclusion contrary to the scientists, the court must of necessity have resolved issues of fact which it could not lawfully do without a trial-type proceeding.

7. In light of the facts alleged in the petition and the supporting affidavits of the scientists, we look to the statements and representations made by the prosecution to the court and jury concerning the significance of the Exhibit 8 data. The prosecution stated that through Greenglass the defendants had stolen "this one weapon that might well hold the key to the survival of this nation . . . the atomic bomb" (A. 221, R. 183). Exhibit 8 was described as "the cross-section of the atom bomb itself, the Nagasaki bomb" . . . "We know these conspirators stole the most important scientific secrets ever known to mankind"

(R. 1519). The information received, it was stated, could then be used "to destroy America and the people of the United Nations" and therefore "no defendants ever stood before the bar of justice less deserving of sympathy than these three (R. 1535).

In detail the affidavits of Dr. Linschitz and Dr. Morrison, supported by those of Dr. Christy and Dr. Urey, established the utter falsity of those statements made to the jury at the most crucial moments of the trial—the opening and the summation. We do not for the moment refer to the false authentication and claim to accuracy made by Derry in the course of his testimony, which the prosecution used in part as authority for such statements. In fact, the prosecution's statements far exceeded the Derry testimony in their impact on the court and jury.

These false statements, misrepresentations and gross exaggerations by the government have not been considered or discussed in the opinion below.

The prosecution's conduct was not a marginal overstepping of the bounds of propriety or mere excess of advocacy; this was a prosecutor disregarding the obligation that justice be done. This was not a prosecutor acting with earnestness and vigor; rather, it was striking foul blows and clearly using "improper methods calculated to produce a wrongful conviction." *United States* v. *Berger*, 295 U.S. 78, 88; *United States* v. *Zborowski*, 271 F.2d 662 (CA 2); *Kyle* v. *United States*, 295 F.2d 507 (CA 2). These false statements related to the most inflammatory and prejudicial aspect, indeed the heart of the prosecution's case against the defendants. The prosecution created an atmosphere in the courtroom which not only misled and even intimidated the jury, but which overwhelmed them and forced them to conclude that they had an affirmative obligation to convict, reasonable doubt or not, and that their own existence, that of their immediate families and the entire nation had been put in imminent and extreme peril by the alleged traitorous conduct of the defendants whose conviction and punishment thus became a patriotic duty of the jury.

The bewildering success of the Soviet Union in constructing an atom bomb in 1949 was explained: it was the fruit of Exhibit 8!

These statements, along with other devices used by the prosecution, not only established the validity of the Greenglass testimony *in toto* in the eyes of the jury, it created a courtroom atmosphere no less hostile than that of a surging crowd on the streets demanding death for the defendants. The decisions of this Court from *Mooney* v. *Holohan*, 294 U.S. 103; *Pyle* v. *Kansas*, 317 U.S. 213; *Mesarosh* v. *United States*, 352 U.S. 1, *Napue* v. *People of the State of Illinois*, 360 U.S. 264, to *Giles* v. *Maryland*, 386 U.S. 66 and *Miller* v. *Pate*, 368 U.S. 1 decided by this Court this past term and the line of cases that they represent put beyond question that such misconduct vitiates the entire trial, and the judgment of conviction must be vacated.

The government has had the opportunity to deny the factual showing made by the petitioner but it has failed to do so. If it acknowledges the facts alleged in the petition, the judgment must be vacated. In the alternative, upon the substantial showing made, the decisions mandate that petitioner be granted the limited relief he seeks—a trial-type hearing.

8. The prosecution's misconduct was not limited to those statements. The prosecution advised the sentencing court that "The secrets they sought and secured were of immeasurable importance and significance . . . these defendants have affected the lives and perhaps the freedom of whole generations of mankind" (R. 1602). The sentencing court was led to believe the Korean War and its casualties were caused by the defendants' conduct and that their "betrayal" had altered the course of history to the disadvantage of our country by the passage of "what they

knew was this nation's most deadly and closely guarded secret weapon." When the prosecution in its brief to the Court of Appeals declared that with the Exhibit 8 material "a scientist could proceed with the actual construction of the bomb itself," it was once again perpetrating a horrendous fraud upon the court.

9. In the course of the trial the prosecution stated that the atomic information then being released was only temporarily declassified for the purpose of the trial in the light of its tremendous importance and that it would be immediately thereafter reclassified, it was making a false statement, as was learned in the summer of 1966 when the truth was out that the AEC had held that this material was declassified and subject to public disclosure at all times since 1951 (A. 165, 195). The false statements were made in the presence of the jury. In *Napue* v. *People of the State of Illinois, supra,* this Court quoted with approval Judge Fuld's statement in *People* v. *Savvides,* 1 N.Y. 2d 554, that "a lie is a lie, no matter what its subject, and, if it is in any way relevant to the case. . . ." a reversal must follow if the prosecutor knowing of the lie leaves it uncorrected. *Kyle* v. *United States, supra,* page 513. It can not be disputed that the lie was a lie in this instance and was "relevant to the case."

10. The magnitude of the fraud arising out of the prosecution's statements becomes even greater in its deceptive ploy of advising the jury that Dr. Urey and Dr. Oppenheimer (among other famous scientists) would be called as witnesses and of impressing the jury with the mistaken belief that these eminent scientists were in accord with the prosecution's claims, the testimony adduced by Greenglass and Derry, the authenticity and meaning of the Exhibit 8 data. The prosecution knew that it would not call these witnesses and did not even dare request their appearance or ask what they would say in the event they were called.

In similar light one must evaluate the impact upon the jury of the prosecution's statement that the Atomic Energy Commission had itself reviewed the entire matter and was in constant consultation with the prosecution throughout the trial. We now know that the Commission's evaluation of the material was quite different from that claimed by the government, but be that as it may, the jury knew that representatives of that Commission sat at the prosecution's table at the time of trial and were so identified.

11. Even if the prosecution had no personal knowledge and were it to be claimed that they acted in ignorant innocence, nevertheless the failure of the knowledgeable agencies of the government associated with the prosecution to advise the parties to the proceeding of the falsity of the statements or the errors or to dissociate themselves from such misleading statements or testimony renders the conviction vulnerable to collateral attack. *Brady* v. *State of Maryland,* 373 U.S. 83; *Alcorta* v. *Texas,* 355 U.S. 28; *Napue* v. *State of Illinois, supra*; *United States ex rel. Almeida* v. *Baldi,* 195 F.2d 815 (C A 3); *United States* v. *Wilkins,* 326 F.2d 135 (C A 2); *Barbee* v. *Warden Maryland Penitentiary,* 331 F.2d 842 (C A 4); *Giles* v. *Maryland, supra*; *Levin* v. *Katzenbach,* 363 F.2d 287 (App. D.C.); *United States ex rel. Thompson* v. *Dye,* 221 F.2d 763. Nor does the fact that the defense failed to request information lessen the fault of the government or reenforce the validity of the trial. See *Giles* v. *Maryland; United States* v. *Wilkins,* both *supra,* and cases cited above.

That the government agencies in this case failed in their duty cannot be disputed. The obligation of the government was even greater than usual in this case because it related to classified information, cloaked with a shield of secrecy which made it uniquely unavailable to the defendants. The error was further compounded in that the myth of the secret of the bomb established at the

trial and believed by the defense was such as to deter any request for classified data. It was only the government who knew the facts and therefore it was obliged to step forward with the requisite information to correct false or erroneous statements or testimony.

12. The witness called to authenticate the Greenglass exhibit and description was an employee of the AEC, John A. Derry. He was held out as an expert by the prosecution. He advised the court that he knew each and every detail of the construction of the bomb, what went into it, and he understood the entire subject matter. The court advised the jury that Derry was an expert whose help they needed in a subject so technical as that of the atomic bomb and its workings. (A 252-253 R 909-910). In authenticating and establishing the accuracy of Exhibit 8, Derry stated that it accurately gave the principle of the operation of the bomb, its construction, which any scientist could perceive, and that it was the bomb dropped at Nagasaki; and to substantiate his statements, he said that he had seen the bomb many times as well as drawings and he thus recognized Exhibit 8.

The scientists' affidavits and Derry's admission to Schnier establish that he was not an expert, that he lacked scientific background, and was not associated with the technical aspects of the bomb, and his claim to knowledge was false. The Exhibit 8 data, as the scientists have stated, does not disclose the construction of the bomb or the alleged single principle said to be involved in the operation of the bomb; it was *not* the bomb dropped at Nagaski; and that if Derry had seen the bomb, such view would not have disclosed its internal assembly; and, in any event, one would know that it was not as depicted in the sketch. If Derry were an expert and had knowledge, his authenticating testimony would necessarily be perjured. In either event, the Government knew his testimony was false.

13. The lower courts were required, in determining the sufficiency of the showing, to accept the factual statements contained in the petition and affidavits as true. That being so, the petitioner has made his showing of the knowing use of false and prejured testimony entitling him to a hearing. It cannot be disputed that if there was such knowing use of false or perjured testimony, the judgment of conviction must be vacated and set aside. *Mooney* v. *Holohan, supra*; *Brown* v. *Mississippi*, 297 U.S. 278; *Hysler* v. *Florida*, 315 U.S. 41; *Ex Parte Hawk, supra*; *White* v. *Ragen*, 325 U.S. 760; *Berk* v. *Georgia*, 338 U.S. 941; *Napue* v. *People of the State of Illinois, supra*; and *Giles* v. *Maryland, supra.*

The lower court's response to the petition was that any of the issues of fact which may have been raised as to the meaning or value of the Greenglass testimony were irrelevant in that the material allegedly passed to Rosenberg nevertheless constituted a technical violation of the Espionage Act. It ignored the impact of the statements of the prosecution and the Derry testimony in persuading the jury that Greenglass gave Rosenberg the sketch and that a conspiracy existed.

The court below incorrectly posed the issue as being whether Greenglass's testimony as to Exhibit 8 was given with his knowledge of its falsity. This is not the point of the petition. Greenglass may or may not have known of the infirmities of Exhibit 8, which he had created for the trial. It is the false claims of the prosecution and the false testimony of Derry which invalidate the judgment of conviction. The clear conflicts between the Derry testimony and that of the scientists were disposed of by the lower court by resolving the issues of fact *ex parte* against the petitioner. That in large part was done by misreading or taking out of context the scientists' statements, which may well be explained by the lower court's failure to comprehend the complex and technical concepts to which the scien-

tists were directing their comments in setting forth the facts concerning the truth or falsity, the accuracy or inaccuracy, of the Greenglass-Derry testimony and the prosecution's statements.

The lower court, therefore, did not address itself to the theory and thrust of the petition and the issues of fact raised. Hence, it could not see the prejudicial impact upon the jury of the prosecution's statements in conjunction with the Derry-Greenglass testimony.*

14. The lower court held that the question of "value" of the material concerned had been determined in the first 2255 motion and hence the statements of the scientists as to the lack of value, the absence of intrinsic worth, is merely a restatement of matters previously litigated. Even were that so, it would not preclude a subsequent petition based upon new facts previously not presented. The doctrine of *res judicata* is not applicable to a habeas corpus proceeding, as has been clearly and specifically enunciated by this Court. *Sandres* v. *United States; Price* v. *Johnston*; *Waley* v. *Johnston*, all *supra.*

But the issue of "value" of Exhibit 8 has never been previously litigated in any prior proceeding. In the first petition the issue was whether the government had capriciously and arbitrarily classified atomic information as secret under the Espionage Act in that the information was in the public domain. The court held that the govern-

* The government in the brief below attempted on the grounds of national security to justify Derry's failure to dissociate himself from or to correct the errors in the Greenglass testimony because to do so would have resulted in the release of classified information, stating:

> "As Major Derry was not asked about any asserted errors in Greenglass's testimony and would have had to reveal classified information to specify any errors, his failure to do so showed neither perjury nor lack of scientific background."

The government is stating that due process is not a constitutional requirement in a case such as this.

ment did not act capriciously or arbitrarily in classifying atomic bomb information. The scientific or use value of Exhibit 8 was not the issue.*

The scientists, as does the petition, address themselves to the question of value and substance, the attributes and meaning of the Exhibit 8 evidence as testified to by Derry and as stated by the prosecution. The affidavits establish that false testimony was given, and false statements made which, the record makes clear, misled the jury and the experienced trial judge.

15. The lower courts conclude that the Exhibit 8 data could have been obtained or unimpounded by the petitioner's counsel at an earlier time and they implicitly suggest that the scientific support presented could have been obtained sooner. This is a habeas corpus proceeding. The passage of time, the doctrine of laches, waiver or estoppel do not apply in habeas corpus proceedings. *Sanders* v. *United States, Commonwealth of Pennsylvania* v. *Claudy* *Price* v. *Johnston, United States* v. *Morgan, United States* v. *Wilkins, United States* v. *LaValle,* all *supra*; *Farnsworth* v. *United States,* 232 F.2d 59 (App. D.C.); *United States* v. *Morgan,* 222 F.2d 673 (CA 2). A judgment void *ab initio* because of fraud and governmental misconduct does not become vitalized by passage of time—to so hold "would in fact make a dead letter of the ancient writ." *Haywood* v. *United States,* 127 F.Supp. 485. The statement that the material could be made available for subsequent proceedings was itself impounded and sealed.** The statement made at the most emotion-packed moment of the trial,

* As noted by the district and appellate courts, in *United States* v. *Rosenberg,* 108 F.S. 798, 200 F. 2d 666, Exhibit 8 remained impounded and had never been seen by any of the affiants who supported that application on the question of "secrecy".

** As previously stated the record reference (R. 903) given by the lower court refers to its availability for the purpose of examining Derry at the time of trial only.

at the disclosure of the "the secret," was not so engrained in the mind of petitioner and in fact he had no such recall.

In any event, the defense belief of the accuracy and significance of Exhibit 8 was shaped by the prosecution. Moreover, the Exhibit 8 material by itself, was thought to be by reason of prosecution's statement reclassified and in light of the restrictions then prevailing, no scientist would have been as able to freely give the information now presented, until the major declassification of information in 1961 and 1962.**

16. The problems confronted by the defense in obtaining any scientific aid from persons having knowledge of the development of the atomic bomb continued after the trial. An examination of the first 2255 motion reveals that there were affidavits of four scientists, scientists outside of this country, none of whom had been in any way involved in the development of the atomic bomb or had seen the crucial evidence. They were directed solely to the competency of Greenglass to prepare Exhibit 8, then impounded, on the assumption that it had the attributes stated by Derry and the prosecution. That defense counsel were forced to seek aid of foreign scientists even for that limited purpose reflects the fact that none could be obtained from any scientist in this country who was party to the development of the atomic bomb. This was obviously the result of the strict security regulations and classification procedures which cut off any effective communication with knowledgeable scientists, especially as the defendants were "untouchables".

Thus the constitutional right of confrontation in its true sense was not granted petitioner and his co-defendants.

** See Volumes I and II of *LAMS-2532 Manhattan District Project Y the Los Alamos Project* issued pursuant to contract with the Atomic Energy Commission distributed December 1961. See also the *New World, 1939-1946,* Volume I of *A History of the Atomic Energy Commission,* one of the authors an official AEC historian.

The right of confrontation is not merely the right to hear the evidence presented but it includes also access to documents or witnesses so as to evaluate the government's testimony and then to cross-examine the government's witnesses with the necessary information available. *United States* v. *Oliver,* 333 U. S. 257.

The defendants in this case were deprived of that possibility, which could have been ameliorated in some part only by the government's advising the defense of the defects, errors, omissions and deficiencies of the Gr[redacted]lass testimony and exhibits, known to the scientists then strictly controlled by the government. Rather the government suppressed these facts and compounded the fraud by false authentication through Derry and false statements by the prosecution of the value of the information allegedly transmitted.

17. The opinion below nevertheless declares that petitioner is belatedly asserting a ground for relief which he could have raised in a prior 2255 proceeding (Op. 25-26). Such a contention is particularly inappropriate. The government's continued suppression of the facts and its permitting the fraud to continue in the first 2255 application and its failure to observe its affirmative obligatio[redacted]re-clude the government from asserting as grounds for denying petitioner a hearing the doctrine of laches, waiver, estoppel, lack of diligence, let alone prior litigation of the issue. Suppression of information in any respect material to the offense charged or to issues of credibility, guilt or punishment, irrespective of good or bad faith on the part of the government, invalidates the judgment of conviction. *Brady* v. *State of Maryland*; *Alcorta* v. *Texas*; *Napue* v. *People of the State of Illinois*; *Brown* v. *Mississippi*; *United States ex rel. Almeida* v. *Baldi*; *Curran* v. *State of Delaware*; *Pyle* v. *Kansas*; *Giles* v. *Maryland*; *Levin* v. *Katzenbach*; *United States ex rel. Thompson* v. *Dye*; all *supra.*

Particularly appropriate is the statement of Mr. Justice Harlan in *Chessman* v. *Teets*, 354 U.S. 156:

> "Evidently it also needs to be repeated that the overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist. This Court may not disregard the Constitution because an appeal in this case, as in others, has been made on the eve of execution. We must be deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late, because courts, including this Court, were not earlier able to enforce what the Constitution demands. The proponent before the court is not the petitioner but the Constitution of the United States" (p. 165)

18. The lower court's disposition of the Exhibit 16 charges was based upon its refusal to accept factually supported allegations which made a prima facie showing that the exhibit was a forged, after-contrived document. The extrinsic evidence tendered by the petitioner clearly created issues of fact which had never been raised or presented before.

The court, nevertheless, found that it was *possible* to explain the fact that the handwriting on the June 3rd card was not that of the clerk whose initials were purportedly inscribed thereon by speculating that this *may* have been the regular course of doing business at the Hotel Hilton, without an iota of evidence to substantiate that speculation. It ignored the fact that the *spurious handwriting was super-imposed* on that portion of the card where there had been erasures of other writings, merely noting that there were smudges and erasures, and nothing more. While the court in its opinion found that the variation in date on the front and back of the card was of no moment, it did not mention that the government had tendered an explanation orally at argument and its sole

refusal to reduce the explanation to writing was that it would result in an evidentiary hearing.*

The fact that the government acknowledged that it obtained the card under different circumstances and that it was handled in a different manner than that of the September 19th card (which bore the date of acquisition and FBI initials) was ignored by the court even though the government had refused to disclose the time, place and persons involved in acquiring Exhibit 16. The court found as fact that the claimed original of Exhibit [redacted] was destroyed in 1957 while the facts as alleged in the petition placed the time of destruction in 1951—soon after the government hurriedly disposed of the alleged document in August of 1951. The September 19, 1945 card, the government states, was retained until February 11, 1960 and was then destroyed.

The pretrial statements of Gold indicating that he had stayed at the Hotel Hilton on only one occasion (September of 1945) was in "one fell swoop" disposed of by the court's noting that the FBI when showing films of Albuquerque to Gold started with the Hotel Hilton.

19. In determining whether petitioner was entitled to a hearing, the lower courts were required to def[redacted] the facts at issue based upon the extrinsic evidence. The opinion below found the facts in dispute, but then made *ex parte* determinations, and on that basis concluded there was no need for a hearing. In doing so, it ignored facts alleged and presumed no further proof would be adduced. It permitted argument and speculation to be a substitute for the fact finding process. In reaching these "findings" the court, in turn, premised its conclusions upon unwarranted or questionable speculations which find no support either in the files and records of the case or the papers presented. Hence, the petitioner was improperly denied an opportunity

* Transcript of argument held September 12, 1966, pp. 116-117.

to substantiate his sufficient showing and to prove facts at a hearing with the full powers of process available to him.

In *Townsend* v. *Sain, supra,* this Court enunciated standards to be applied in granting an evidentiary hearing. Even where there had been a prior hearing in the state courts, it was said to be necessary to determine whether an adequate trial-type hearing had been afforded which permitted the resolution of the factual disputes and whether "the fact finding procedure employed" was adequate.

The disposition of the petitioner's application was not based upon an adequate or proper "fact-finding procedure". Nor can it be said that the moving papers are merely "vague, conclusory or probably incredible" allegations or "patently frivolous or false on a consideration of the whole record." Even if the allegations, in the minds of the lower courts, had been improbable or unbelievable (a difficult hypothesis to assume), nevertheless as they were based upon extrinsic evidence, a hearing was required. *Commonwealth of Pennsylvania* v. *Claudy*; *Smith* v. *United States*; *Walker* v. *Johnston*; *United States* v. *Hayman*; *United States* v. *La Valle*; *Machibroda* v. *United States*, all *supra.*

The petitioner has made a sufficient showing, and he should be granted a hearing and put to his proof.

20. The petition alleges that there never was a Gold-Greenglass meeting in Albuquerque, N.M. on June 3rd, 1945, and Gold's testimony, as well as the Greenglasses', was false and perjured as the Government knew, and that the Government knowingly suppressed evidence which would have impeached this testimony. The opinion below acknowledges that in the course of Gold's interviews with his attorneys the first reference to a meeting with an unidentified GI was made on June 14, 1950. Greenglass was brought into custody on June 15, 1950 and it was not until some time after that Gold "identified" him.

It is not disputed that in his recorded interviews with his attorney, and written statements, both prior and subsequent to the Greenglass arrest, no reference whatsoever was made to any of the "linkage" testimony which the prosecution elicited from Gold at the trial in order to establish that the Rosenbergs arranged the alleged meeting to facilitate transmission of classified information to the Soviet Union. Absent from this material is any reference to a jello box or the phrase "I come from Julius", and there is a substantially different story given as to Gold's stay in Albuquerque and subsequent conversations had with the alleged Soviet contact with reference thereto. The court makes no reference to the fact that Gold admittedly altered and recast his story after hundreds of hours spent with investigators; that he acknowledged to his attorney that he had lied to them and to the Government that he had perjured himself in testifying before the grand jury in 1950 concerning the matters he testified to at the trial.

21. The lower court disposed of all the above by finding that Gold must have told the FBI of the June 3rd episode at an earlier date and assumes that this can be explained by the fact that the FBI and Gold's attorney "were not on parallel courses" in making their inquiries. The lower court also opined that the June 3rd affair may have been consciously withheld by Gold to protect Greenglass or that his failure to mention the event could be explained by the fact that the task of recalling fifteen or more years of intrigue would of necessity result in lapses of memory. Finally, while the linkage testimony is absent, says the court below, that does not "undermine the fabric of essential matters". Thus, what the prosecution and trial court felt essential, the lower court on this application considered of no significance. The lower court's reading of the transcript of the Gold interviews leads them to the conclusion that Gold is an impressive and persuasive witness and the allegations of collusive con-

trivance of his trial testimony are declared by the opinion to be insubstantial.

In response to the charge that the prosecution had suppressed evidence, the courts below find that as a matter of law petitioner has waived any rights he may have in this respect because Gold was not cross-examined and there was no demand for pre-trial statements. Government fraud cannot be so casually noted and disregarded.

22. The lower court erroneously assumed that the material presented by the petitioner represented the sum total to be offered at a hearing, and that since it was circumstantial rather than direct evidence, the matter could be disposed of *ex parte* without a hearing. The lower court was in error in deeming the reading of Gold's statements, which did not include statements made to the FBI, as equivalent to a hearing and that upon such reading it could make findings of fact. It compounded this error by holding in effect that the judgment of conviction, although obtained by prosecution fraud, the use of perjured testimony, or the suppression of evidence, was immune from collateral attack. The very nature and purpose of the writ would reject such a holding. The failure of trial counsel to cross-examine Gold was not an intentional relinquishment of a right to establish that the Government wrongfully suppressed evidence.

23. The facts upon which the allegations are based concerning the June 3rd meeting and card were first obtained by petitioner's counsel in the summer of 1965. These included the pre-trial statements of Harry Gold, a handwritten so-called "Chronology of Work for the Soviet Union" and various other documents, many of which were not included in the petition. The September 19, 1945 photostat of a purported original of a registration card was also made available to petitioner's counsel by Walter and Miriam Schneir at that same time. On this basis,

petitioner was enabled to further investigate the matter and obtain additional evidence in support of the petition.

24. The argument tendered by the government that the present application constitutes a misuse of the writ and that petitioner is barred by his prior 2255 motions is without merit. *Sanders* v. *United States*; *Price* v. *Johnston*; *Chessman* v. *Teets*, all *supra*.

In *Sanders* this court incorporated within Section 2255 the provision of Section 2244 that a hearing and relief would be denied only if the petition presents "no new grounds not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be satisfied by such inquiry." The facts tendered in the present petition have never been raised before, much of the evidence is recently obtained, the legal thrust and theory upon which the petition is premised, as intertwined with the new facts, is being raised for the first time and there has never been a hearing on the merits in any prior proceeding. The ends of justice can only be served by reaching the merits of the present application, and should doubts arise "they should be resolved in favor of the applicant."

The present application for relief is based upon evidence *dehors* the record; hence, as this Court stated in *Sanders* the "files and records of the case" cannot "conclusively show" that petitioner is entitled to no relief.

If the government wishes to resist the application on the claim that the issues could have or should have been raised before, the petitioner would be entitled to a hearing to present adequate reasons for not making the allegations earlier—this of itself becomes an issue of fact which must be resolved at a hearing. But as this court stated in *Price* v. *Johnston*:

> "And, if for some unjustifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary or reasonable to deny him the opportunity of obtaining judicial relief." (p. 291)

The nature of the application for relief and the facts upon which they are based, and the history of the prior post-trial proceedings, dispose of the Government's contentions in light of this Court's holdings. The ends of justice can only be served by affording petitioner the limited relief presently sought, an evidentiary hearing.

CONCLUSION

The petition for writ of certiorari should be granted. The order and judgment below should be reversed forthwith with instructions to grant a hearing on the petition.

Respectfully submitted,

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APPENDIX 1

Opinion of District Court

EDWARD WEINFELD, *D. J.*

Petitioner, Morton Sobell, moves pursuant to 28 U.S.C., section 2255, to vacate and set aside a judgment of conviction entered upon a jury verdict returned in March 1951, under which he is now serving a thirty-year term of imprisonment.

Petitioner was tried and convicted together with Julius and Ethel Rosenberg upon an indictment which charged that they, together with David Greenglass, Anatoli A. Yakovlev and others to the grand jury unknown, had conspired from June 1944 to June 1950, in violation of the Espionage Act of 1917,[1] to communicate to the Soviet Union documents, writings, sketches, notes and information relating to the national defense of the United States with the intent that they be used to the advantage of the Soviet Union. Named as conspirators but not as defendants were Ruth Greenglass, the wife of David Greenglass, and Harry Gold. The indictment was severed as to Greenglass and also as to Yakovlev, an official attached to the Soviet Embassy, who had left the United States prior to the return of the indictment.

Greenglass pleaded guilty before the start of the trial. The principal testimony as to the conspiracy came from Greenglass, his wife and Harry Gold. After trial Greenglass was sentenced to a term of fifteen years. Gold, at the time of trial, was serving a thirty-year sentence imposed upon his plea of guilty in the District Court of Pennsylvania to an indictment charging him and Dr. Klaus Fuchs with conspiracy to violate the Espionage Act. Gold's testimony involved Fuchs, a British scientist, in the conspiracy charged in the instant indictment. The Rosenbergs took the witness stand. The petitioner did not testify.

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[1] 50 U.S.C. § 32(a), 40 Stat. 218 (1917), which was recodified in 1948 as § 794(a) and (b) of Title 18, 62 Stat. 737.

Appendix 1

The evidence of petitioner's participation in the conspiracy came principally from Max Elitcher, a college classmate of both petitioner and Julius Rosenberg. Elitcher, who within the indictment period worked in the Navy Department and later in national defense plants engaged in classified projects, testified in substance that petitioner and Rosenberg had attempted to secure from him classified antiaircraft and fire control information for the Soviet Union, and had urged him not to leave his Navy Department job because he could be valuable there in espionage. Elitcher also testified that Sobell had in his possession material contained in a 35 millimeter film can described by Sobell as valuable information, and that he accompanied Sobell on the occasion of its delivery to Rosenberg. In addition, to establish consciousness of guilt, the government introduced evidence that petitioner fled to Mexico with intent not to return, and that the flight followed an escape pattern urged by Rosenberg upon the Greenglasses. The jury was instructed that if they disbelieved Elitcher they were to acquit the petitioner.

The petitioner's present charges are directed not against Elitcher, but the testimony of Harry Gold, David Greenglass and John Derry, another government witness, and exhibits in evidence—in broadest terms that the "government . . . knowingly created, contrived and used false, perjurious testimony and evidence and intentionally and wilfully induced and allowed government witnesses to give false, misleading and deceptive testimony in order to obtain the conviction of petitioner and his co-defendants." The "government," according to petitioner, is all-encompassing and includes "the prosecutive, investigative and other agencies of the United States and their agents or employees, as well as all those acting with its knowledge and at its behest, involved in the investigation and prosecution of this case."

Appendix 1

Petitioner previously attacked his conviction upon direct appeal [2] and in five separate collateral proceedings, either under the Federal Rules of Criminal Procedure or section 2255 of Title 28, all of which failed.[3] In the consideration of the charges here made the court has read the entire lengthy trial transcript, including the testimony of witnesses who are not impugned; also the various post-trial petitions by petitioner and those of his codefendants in which he joined, and the trial and appellate records of those proceedings.

The petitioner contends that in none of the prior proceedings were the issues here presented raised, and that some of the facts now relied on were not available until after 1963 and others not until July 1966. The government, to the contrary, asserts that the present proceeding is a repetition of charges previously heard and determined on the merits and petitioner's application should be denied under section 2255, which provides that the "court shall not be required to entertain a second or successive motion for similar relief." [4] Finally, the government urges that

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[2] United States v. Rosenberg, 195 F.2d 583 (2d Cir.), rehearing denied, 195 F.2d 609 (2d Cir.), cert. denied, 344 U.S. 838, rehearing denied, 344 U.S. 889 (1952), leave to file a second petition for rehearing denied, Sobell v. United States, 347 U.S. 1021 (1954), motion to vacate orders denying certiorari and rehearing denied, 355 U.S. 860 (1957).

[3] See United States v. Rosenberg, 108 F. Supp. 798 (S.D.N.Y.), aff'd, 200 F.2d 666 (2d Cir. 1952), cert. denied, 345 U.S. 965, rehearing denied, Sobell v. United States, 345 U.S. 1003 (1953), United States v. Rosenberg, 109 F. Supp. 108 (S.D.N.Y.), aff'd as to Rosenbergs, 204 F.2d 688 (2d Cir. 1953), aff'd as to Sobell, Oct. 8, 1953, Docket No. 22885, cert. denied, Sobell v. United States, 347 U.S. 904 (1954); United States v. Sobell, 109 F. Supp. 381 (S.D.N.Y. 1953); United States v. Sobell, 142 F. Supp. 515 (S.D. N.Y. 1956), aff'd 244 F.2d 520 (2d Cir.), cert. denied, 355 U.S. 873 (1957), rehearing denied, 355 U.S. 920 (1958); United States v. Sobell, 204 F. Supp. 225 (S.D.N.Y. 1962), aff'd 314 F.2d 314 cert. denied, 374 U.S. 857 (1963).

[4] Sanders v. United States, 373 U.S. 1, 15-17 (1963); Price v. Johnston, 334 U.S. 266, 287-89 (1948).

the records and files of this court not only show petitioner is not entitled to relief, but that his application is a flagrant abuse of section 2255 because it is totally groundless and because of failure to allege previously facts known or which with due diligence should have been known to him at the time of trial and on his various post-conviction applications.[5] Whatever the merits of these respective contentions, petitioner's charges must be considered.

Cutting through the highly repetitious, voluminous, argumentative and conclusory allegations in this present application, the nub of petitioner's claim that he was denied a fundamentally fair trial is twofold: (1) that the prosecution by various means created in the minds of the court, jury and defense the false impression that Exhibit 8, a sketch, and testimony with respect thereto contained the secret and principle of the atomic bomb dropped at Nagasaki; (2) that the government knowingly permitted Harry Gold and David Greenglass to give perjurious testimony as to meetings between them on June 3, 1945 at Albuquerque, New Mexico, and corroborated this perjury through a forged hotel registration card, Exhibit 16. We consider each claim separately.

A preliminary observation is in order. The constant repetition through the petition's 100 paragraphs of allegations of fraud, perjury, concealment of evidence and like epithets, and the "upon information and belief" charges make it desirable to state what ordinarily would be assumed—that reiteration of unsupported charges and conclusory allegations is no substitute for factual allegations.[6]

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[5] Sanders v. United States, 373 U.S. 1, 17-19 (1963); Price v. Johnston, 334 U.S. 266, 289-92 (1948). See also Latham v. Crouse, 347 F.2d 359, 360 (10th Cir. 1965).

[6] Sanders v. United States, 373 U.S. 1, 19-22 (1963); Machibroda v. United States, 368 U.S. 487, 495 (1962); United States ex rel. McGrath v. LaVallee, 319 F.2d 308, 312 (2d Cir. 1963); United States v. Mathison, 256 F.2d 803, 805 (7th Cir.), cert. denied, 358 U.S. 857 (1958); United States v. Pisciotta, 199 F.2d 603 (2d Cir. 1952); United States v. Sturm, 180 F.2d 413, 414

I. The Exhibit 8 Claims

Exhibits 2, 6, 7 and 8, which represent the atomic information Greenglass testified he turned over for transmission to the Soviet Union, were the subject of petitioner's first section 2255 motion brought on in November 1952. In order properly to evaluate the current charges centering about Exhibit 8, the trial testimony with respect to and the former attack upon all the exhibits must be considered.

The Trial Testimony

Greenglass was a high school graduate and had for limited periods attended Brooklyn Polytechnic and Pratt Institutes. After his induction into the Army, he was stationed, commencing in August 1944, at the Los Alamos project, New Mexico, where atomic bomb experimentation was being carried on and the most stringent security regulations were in effect. His particular experience was as a machinist and he was assigned to a machine shop in a group concerned with high explosives, headed by Dr. George B. Kistiakowski, and subsequently became foreman of the shop. His work consisted of machining various apparatus required in connection with experimentation on atomic energy, including a flat type lens mold and other molds then the subject of experimentation by Dr. Walter S. Koski.

Greenglass testified that while stationed at Los Alamos he became a member of the conspiracy in November 1944 at the instigation of the Rosenbergs, and that his activities extended to obtaining and transmitting classified information to them concerning experiments, locations, personnel, security measures and the nature of the camouflage at the project. Exhibit 2 was a replica of a sketch of an explosive lens mold used in atomic bomb experiments at Los Alamos which he had prepared and delivered to the Rosenbergs, together with descriptive material and a full report of the

experiments, as well as the names of scientists working there, in January 1945 while in New York City on a furlough.

Greenglass also testified that Exhibits 6 and 7 were schematic replicas of sketches of lens molds, one shown in an experimental set up which, together with a report on atomic experimentation, he delivered to Harry Gold on June 3, 1945 at Alburquerque, New Mexico. These exhibits he said were prepared from memory, Exhibits 2 and 7 during the trial, and Exhibit 6 at the time of his apprehension in June 1950.

After Greenglass had testified as to these exhibits he was excused and Dr. Koski was called. Dr. Koski testified that he was a professor of physical chemistry, a consultant in nuclear physics, and an engineer at the Los Alamos laboratory from 1944 to 1947, associated with implosion research connected with the atomic bomb; that all work at Los Alamos was of a highly classified and secret nature; that Exhibits 2 and 6 were substantially accurate replicas of sketches he had made and submitted to the shop where Greenglass worked; that Greenglass had access to the information shown on those exhibits; that Exhibit 7 was a rough sketch of an experimental setup for studying cylindrical implosion; that the sketches and information which Greenglass testified he had given in connection therewith were reasonably accurate descriptions of the experiments and their details as he, Dr. Koski, knew them at the time.

Dr. Koski also testified that knowledge of his experiments would have been to the advantage of a foreign nation; that his experiments were in a new and original field. He further testified that one familiar with the field could ascertain from Exhibits 2, 6 and 7 the principle and idea of the lenses and the nature and the object of the activities then under way at Los Alamos in relation to the production of the atomic bomb. Dr. Koski was not cross-examined by

petitioner's counsel, although the Rosenbergs' counsel did inquire.

Following Dr. Koski's testimony Greenglass resumed the witness stand. Preliminarily he testified that in January 1945 Rosenberg had described a bomb (which he subsequently learned was the type dropped on Hiroshima) so that he, Greenglass, would know what to be on the lookout for; that thereafter he met persons at Los Alamos who worked in different units of the project, others who talked of the bombs, how they operate, and that he himself worked directly on certain apparatus that went into an atomic bomb. Greenglass further testified that in September 1945, while on furlough in New York City, he told Rosenberg he thought he had "a pretty good description of the atom bomb,"[7] whereupon, at Rosenberg's request, he drew and delivered to the Rosenbergs a sketch of a cross-section of an atomic bomb and about twelve pages of descriptive material. Exhibit 8, he testified, was a replica of that sketch. When the government offered it in evidence, counsel for petitioner's codefendants, the Rosenbergs, immediately moved to impound the exhibit, petitioner's counsel acquiesced in this request, and subsequently, after the exhibit was shown to the jury, it was impounded. The prosecution then asked Greenglass to state what was contained in the written material which accompanied the sketch. Before Greenglass could answer, the Rosenbergs' counsel stated he was prepared to stipulate that the sketch and twelve-page description were secret, confidential and concerned the national defense; however, Sobell's counsel refused. Thereupon, with the consent of all counsel, Greenglass' testimony with respect to Exhibit 8 and the descriptive material, which relates to the component parts, mechanism and operation of an atomic bomb, was received in camera, although the press was permitted to

[7] Record, p. 490.

remain,[8] as were representatives of the Atomic Energy Commission.

John A. Derry, an electrical engineer, also testified as to Exhibit 8. Derry was assigned to the Manhattan District Project from December 1942 to August 1946 and was liaison officer between General Groves, Commanding General of the entire Manhattan Project, and the Los Alamos laboratory. His duties required him to keep General Groves informed of the technical progress of the research, development and production phases of the atomic bomb project at Los Alamos. He testified that all activity and work at the project were highly classified and top secret; that he was informed of many of the experiments incidental to the development of the atomic bomb; that he knew what went into parts of it and understood the entire subject matter; that in 1945, on many occasions, he saw the actual bomb that was being developed. Derry testified that Exhibit 8 and the Greenglass descriptive material related to the atomic bomb which was in the course of development in 1945; that they demonstrated with substantial accuracy the principle involved in its operation; that a scientist could perceive therefrom to a substantial degree what its actual construction was; that the information contained therein was top secret and related to the national defense of the United States; and that the information and sketch concerned a type of bomb similar to that dropped at Nagasaki.

The First Section 2255 Motion

The petitioner's first section 2255 attack was directed, among other matters, to Exhibits 2, 6, 7 and 8 and the

[8] The press was not enjoined to secrecy, but requested by the court to exercise "good taste." However, various publications, including "Life" and "Time," published in 1951 the substance of his testimony.

testimony of Greenglass, Dr. Koski and Derry with respect thereto.[9] Three separate claims were made:

(1) Concealment of Coached Evidence[10]

Petitioner alleged that Greenglass had perjured himself to the knowledge of the prosecution when he swore he had prepared these exhibits from memory and had not been aided in their preparation by a scientifically trained person. No factual evidence was offered to support this charge. What was relied upon was the opinion of scientists, set forth in affidavits, that it was "improbable," "impossible" or "inconceivable" that Greenglass with his limited technical education could have prepared the sketches represented by Exhibit 8,[11] as well as 2, 6 and 7,[12] and the descriptive material showing the workings, mechanism and component parts of the Nagasaki type bomb without outside coaching or the use of reference books.

(2) Claim of Lack of Secrecy[13]

Another claim then advanced was that the atomic information transmitted to the Soviet Union was not secret.[14] Koski's testimony that the information contained in Ex-

[9] These charges contained in the Rosenbergs' 1952 petition were adopted by petitioner. Sobell's 1952 petition, ¶ 25; and November 25, 1952 Amendment to Petition. Also his Petition for Certiorari, p. 34, Sobell v. United States, No. 719 (1952).

[10] Rosenberg petition, 1952), pp. 64-68.

[11] Affidavit of Thomas R. Kaiser, questions 7 and 8, attached to Rosenberg petition (1952).

[12] Affidavits of James G. Crowther, Thomas R. Kaiser, Jacques S. Hadamard and John D. Bernal, attached to Rosenberg petition, (1952).

[13] Rosenberg petition, (1952), p. 71, et seq.

[14] The opening paragraphs of petitioner's argument made clear that both Koski's and Derry's testimony was subject to attack. Rosenberg petition (1952), p. 71.

hibits 2, 6 and 7 was secret was challenged by a scientist who contended that this information was widely known and published throughout the entire world.[15] The petitioner branded Dr. Koski's testimony as false and argued that the classification by the government of the material was capricious and arbitrary. Although petitioner's scientist did not refer expressly to Exhibit 8 as he did to 2, 6 and 7, it is abundantly clear from his opinion,[16] the petition,[17] and his counsel's oral argument [18] that the attack on the secrecy extended to *all* the atomic information. With respect to this claim of nonsecrecy, petitioner alleged that "the detail of the atom bomb is trivial technically and most inconsequential as a secret," [19] and in conclusion urged:

> "5) The 'secret' which David Greenglass allegedly transmitted to the U.S.S.R. was no secret at all to any explosive expert.

[15] Affidavit of John D. Bernal, attached to Rosenberg petition, (1952). Challenged was Koski's testimony to the effect that Exhibits 2, 6 and 7 concerned "a new and original field," and could have been of advantage to a foreign nation. Record, p. 478.

[16] Affidavit of John D. Bernal, ¶ 5(b), attached to Rosenberg peptition (1952).

[17] Thus the petition attacked Derry's testimony as well as Koski's. Rosenberg petition, (1952), p. 71, and argued that the "method for the assembly of the fissile materials was just another detail." *Id.* at 80.

[18] The broadside nature of the attack appears from the oral argument of the motion. Petitioner asserted that "the alleged subjects of transfer from Greenglass to the petitioner Julius Rosenberg and the petitioner Ethel Rosenberg were, in fact, public property, and not secret." Transcript of Argument, November 28, December 1, 2, 1952, p. 41. He also asserted: "The third point shows that there were no secrets concerning (1) the alleged subjects of transfer here, and (2) with respect to any and all processes that went into the construction of the complete atom bomb that was first dropped at Hiroshima and later the improved bomb at Nagasaki . . ." *Id.* at 108.

[19] Rosenberg petition, (1952), p. 81.

> "6) The ability of any country to produce an atomic bomb rests upon its ability to mobilize the hundreds of thousands of scientists, technicians and laborers and its ability to make available the vast industrial plant required. It does not rest on stealing the 'secrets' of the United States." [20]

(3) Claim of Lack of Value to the Soviet Union [21]

Finally, petitioner claimed that the atomic information was of little or no value to the Soviet Union. Here he alleged that the Soviet Union "did in fact have the necessary scientists and technology for doing the job. . . . It did not need any American secrets to produce a bomb." [22] In support of this contention he relied upon the opinion of one of the scientists that "any advantage to any foreign nation by the divulging of the design of any particular lens would be nonexistent or very small. . . ." [23]

The petitioner's charges and those of his codefendants were rejected by Judge Ryan without a hearing in a carefully considered opinion,[24] and his ruling affirmed upon appeal.[25]

The Present Petition

In May 1966 Exhibit 8 and the Greenglass-Derry testimony with respect thereto were ordered unimpounded on

[20] Rosenberg petition, (1952), p. 98.

[21] *Id.* at 74, et seq.

[22] *Id.* at 82.

[23] Affidavit of John D. Bernal, attached to Rosenberg petition, (1952).

[24] United States v. Rosenberg, 108 F. Supp. 798 (S.D.N.Y. 1952).

[25] United States v. Rosenberg, 200 F. 2d 666 (2d Cir. 1952), cert. denied, 345 U.S. 965, rehearing denied, Sobell v. United States, 345 U.S. 1003 (1953).

petitioner's motion and thereafter he filed the present amended petition enlarging previous charges of prosecution misconduct.[26]

First: Petitioner, now offering the affidavits of a different group of scientists from those relied upon in the 1952 proceeding, again attacks the evidence of the atomic information transmitted through Greenglass to the Soviet Union. The charges center principally about Exhibit 8, Greenglass' testimony and Derry's testimony; also involved are Exhibits 2, 6 and 7. Whereas in the original section 2255 proceeding it was charged that Greenglass committed perjury to the knowledge of the government because, according to the first group of scientists, it was "improbable" or "inconceivable" that he could have drawn the exhibits, now he is faulted because Exhibit 8 and his exposition of the descriptive material fail to measure up to a scientific standard of perfection as to accuracy, precision and detail.

Whereas in the original proceeding Dr. Koski's testimony was denounced as false,[27] and later as the "now apparent hoax,"[28] now Dr. Koski is accepted. Here the charge is that the government's failure to have him, a recognized scientist, instead of Derry, an electrical engineer, testify with respect to Exhibit 8 and the related testimony demonstrates that it knowingly introduced false evidence since the prosecution was aware that Koski or other scientists would not testify that the exhibit depicted with substantial accuracy the principle involved in the bomb developed at Los Alamos.

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[26] Petitioner in May 1966 filed a petition containing only the charges considered under Part II of this opinion.

[27] His testimony "that the theory of 'implosion' utilized for the purpose of assembling the critical mass of fissionable metal was invented and developed at the Los Alamos Project." Rosenberg petition (1952), p. 74.

[28] Sobell brief (1952), p. 35, Court of Appeals Docket No. 22571.

The scientists, with respect to the unimpounded evidence, according to one of them, pursued two inquires:

(1) its accuracy and completeness as a description of the plutonium bomb developed at Los Alamos; and

(2) its possible value in assisting in the development and construction of a bomb by the Soviet Union.

With respect to the first inquiry, the scientists find errors and omissions in Exhibit 8 and in Greengl[redacted]' testimony as to what was contained in the twelve-page description. With respect to the second inquiry, the experts aver that the construction of an atomic bomb involved no single "secret" in the scientific sense, but did involve "a highly complex set of technical tricks, devices and processes, combined . . . with an immense and versatile industrial capability"; that before bomb construction can even begin, a nation must build a full-fledged atomic energy industry, and obtain an adequate supply of fissionable material, all of which require research, development and construction activities measured in hundreds of millions of dollars; that Greenglass' testimony of the sketches was deficient because it omitted the requisite scientific and technical information needed for plutonium production; that t[redacted]nformation "was too incomplete, ambiguous and even incorrect to be of any service or value to the Russians in shortening the time required to develop their nuclear bombs."

Apart from the fact that the issue of the secrecy and value of the information to the Soviet Union was determined upon the merits in the first section 2255 motion, their criticism of Greenglass' testimony and his sketches is irrelevant in the light of the substance of his testimony. Their view might be relevant had Greenglass testified that he had purloined at Los Alamos and turned over to the Rosenbergs a set of buleprints, working drawings, dimensional plans and written specifications for the production of plutonium and the bomb, and that Exhibit 8 and the

twelve-page description purported to convey this information. But this was neither Greenglass' testimony nor his role in the conspiracy. His role was to get classified information—to get what he could.

Greenglass, it will be recalled, was given a decription in January 1945 by Rosenberg of an atomic bomb to alert him to the type of classified information that was desired. He testified that this was the first time he ever heard a description of any type of atom bomb, but after months of snooping, conversations, observations and his own machining work, in September 1945, as he informed his co-conspirators, he thought he had "a pretty good description of the atom bomb," and then drew the sketch and prepared the related material. Greenglass never claimed that he had obtained definitive documents, and on cross-examination readily acknowledged he had never taken such material and also that he was no scientific expert, although he knew something about the "basic theory of atomic energy."[29] Exhibit 8, as was expressly called to defense counsel's attention, contained the legend "not to scale."[30] It was represented as a schematic sketch,[31] not a blueprint, and there is no warrant for the contention that the jury or defense counsel were misled as to what it represented.[32]

[29] Record, p. 612.

[30] Record, p. 499.

[31] As Greenglass testified with respect to the sketches, "None of those are to scale. So they are all schematic." Record, p. 462.

[32] Upon the cross-examination of Greenglass, the following exchange occurred:

> "The Court: . . . The charge here is not that he gave him everything that might have been accurate in every minute detail, but that he transferred secret material pertaining to National Defense.
>
> "Mr. E. H. Bloch: That is correct.
>
> "The Court: And whether he might have turned something over, miscalculating a figure or making an error here and there, is not material to the charge. . . ." Record, p. 613.

That the scientists do not grade Greenglass' drawing and his descriptive testimony one hundred per cent, judged by their scientific and engineering standards of the information required to enable the Soviet Union in 1945 to construct an atomic bomb is not the test of Greenglass' credibility as to what classified information he did deliver to the Rosenbergs in September 1945. Were there a complete consensus of all the learned atomic scientists in the world that his description was deficient, it would not draw in issue the truthfulness of his version of what he then transmitted to Rosenberg.

Second: It is next urged that Derry's opinion as an expert as to what the exhibit and the Greenglass description portrayed was false. Other than the contrary opinions of the scientists, nothing is presented to impugn Derry's testimony. The fact that they disagree with Derry's opinion does not establish its falsity. Significantly, one of the scientists concedes that judgment on the matter "must be a highly subjective one indeed". Derry's credibility was for the jury and not a panel of experts, who sixteen years after the event seek to undermine it. This aspect of petitioner's motion renews the earlier attempt, also on the basis of affidavits of scientists who neither saw nor heard the witnesses, to condemn them as untrustworthy. Petitioner may no more do so now than the Court of Appeals permitted it to be done in 1952.[33]

Third: Next it is contended that even if Derry did not knowingly testify falsely, the government knew that Derry was not an expert, but nevertheless had him testify that Exhibit 8 and the description represented with substantial

[33] United States v. Rosenberg, 200 F. 2d 666, 670-71 (2d Cir. 1952), cert. denied, 345 U.S. 965, rehearing denied, Sobell v. United States, 345 U.S. 1003 (1953).

accuracy a cross-section and the principle of the atomic bomb dropped at Nagasaki; that it knew his testimony was false and inaccurate; that it failed to call Dr. Koski or other government scientists since it knew they would not so testify. The accusation dissolves when considered against the indictment charge, the substance of the Greenglass-Derry testimony and the hypothesis upon which the scientists predicated their opinions.

The conspiracy charge was not limited to atomic bomb information. The crime charged was a conspiracy to communicate to the Soviet Union documents, writings, sketches, notes and information to be used to the advantage of the Soviet Union. This was made clear to the jury both during the trial[84] and in the court's charge.[85] The evidence established the transmittal by the conspirators of other classified material relating to the Los Alamos project, as well as secret information of other defense activities.

There is no evidential support for the charge that Derry was not an expert or that the government knew he was not an expert. His experience and the nature of his work in relation to atomic bomb activity and construction were fully stated. The petitioner did not concede his qualifications as an expert; this was challenged and put in issue at the trial.[86] The petitioner was free to call witnesses

[84] During Greenglass' testimony the court admonished defense counsel in the presence of the jury: "You must remember that the conspiracy charge is a general statement to turn over information to the U.S.S.R. pertaining to national defense. It is not limited to atomic information." Record, p. 511.

[85] In its charge to the jury the court stated: "Bear in mind . . . that the Government contends that the conspiracy was one to obtain not only atomic bomb information, but other secret and classified information . . ." Record, p. 1557; also p. 1560.

[86] Upon the ground that ". . . this witness has failed to qualify as an expert on the ingredients and their functions contained in the statement just read to him." Record, p. 910.

to contradict Derry, but failed to do so and no action of the government prevented him from doing so. Petitioner's related claim that had Dr. Koski testified with reference to Exhibit 8 his answers would have differed substantially from Derry's is unsupported.

The charge that the government knowingly fostered false testimony through Derry is based upon the scientists' opinions that Exhibit 8 and the Greenglass description, measured by their standard of scientific perfection, were "both qualitatively and quantitatively incorrect and [illegible]-leading". Their opinion is based upon a self-propounded inquiry with respect to the now unimpounded material's "accuracy and completeness as a description of the plutonium bomb developed at Los Alamos in 1945". The scope of this inquiry is not the same as that directed to Derry at the trial. The questions put to him were:

> "Q. Does the knowledge as disclosed in the material . . . read in conjunction . . . with Exhibit 8 demonstrate substantially and with substantial accuracy the principle involved in the operation of the 1945 atomic bomb? A. It does.
>
> "Q. Can a scientist and can you perceive [illegible] the actual construction of the bomb was? A. You can." [87]

The record does not support the charge that the government used Derry through these answers to obtain deceptive testimony.

Although the exhibit shown to Derry specified "not to scale," the scientists now, as did one in the 1952 proceeding,[88] condemn it and Derry's testimony because it was

[87] Record, pp. 910-11.

[88] Affidavit of John D. Bernal, ¶ 5(b), attached to Rosenberg petition, (1952).

not so drawn. No statement, direct or indirect, was made either by Derry or the government that the exhibit and the Greenglass testimony purported to represent more than Derry's testimony indicates. Defense counsel acknowledged that the sketch and description were not "a complete description of the cross-section of the atomic bomb . . . and how it works and the principles under . . . which it works,"[39] and himself developed that a twelve-page description of the atom bomb "would not, of course, be a complete description. . . ."[40]

To fault the government because the sketch is inaccurate and incomplete, judged by scientific standards of "accuracy and completeness," is to fault it on the basis of questions which were impermissible in the light of the Greenglass evidence. A hypothetical question to any expert, whether

[39] "Mr. E. H. Bloch: Would you say . . . that [Exhibit 8 and the Greenglass testimony] would represent a complete description of the cross-section of the atomic bomb and the function of the atomic bomb and how it works and the principles under . . . which it works?

"The Court: I don't think it was offered on the theory that it represented a complete—is that true, or am I mistaken?

"Mr. Saypol: Indeed not. As I said when I had the witness Koski on the stand, the import of this whole thing is that there was enough supplied to act upon—

* * *

". . . You remember, your Honor, I used the colloquialism, tip off. That is exactly—

"The Court: I don't think it was offered as a complete or as a detailed description." Record, p. 915.

The prosecutor's references relate to the questioning of Koski with respect to Exhibits 2, 6 and 7: "And would I be exaggerating if I were to say, colloquially, that one expert, interested in finding out what was going on at Los Alamos, could get enough from those . . . exhibits in evidence which you have before you to constitute a tip-off as to what was going on at Los Alamos?" Record, p. 483.

[40] Record, pp. 914-15.

called by the prosecution or the defense, could only have been posited on matters in evidence—in this instance, the sketch and the Greenglass description of the twelve-page memorandum. But over and beyond this, an analysis of the scientists' affidavits, notwithstanding their depreciation of the Derry-Greenglass testimony, demonstrates the essence of Derry's foregoing testimony is not contradicted. Thus one of them states: "Re the nature of the information in Exhibit 8: *the sketch presented is the kind I would use to explain the ideas involved in the bomb*" [emphasis supplied], although understandably, in the light of the scope of the sceintists' inquiry, he adds: It can in no way be taken as an engineering drawing which could be used to construct the bomb." The same scientist, although of the view that eventually the Russian scientists would probably have arrived at the design of an implosion bomb during the time required for plutonium production, and hence he ". . . would not expect the information in Exhibit 8 was able to save them any significant time in the development of an atom bomb," does add: *"Instead, such information could save some effort."* [Emphasis supplied.] How much effort could have been saved or advantage gained he does not opine.

Another scientist states that the Greenglass description "is correct in its most vague and general respects that explosive lenses were used to achieve implosion of a core containing plutonium and beryllium components, the overall system being arranged in an essentially spherically symmetrical configuration." He queries himself and answers with respect to Derry's testimony:

> "Does this constitute a 'substantially accurate representation of the principle' of the bomb? In my opinion, no. Nevertheless, it is clear that such a judgment must be a highly subjective one indeed.

> A diagram that may obviously represent a 'principle' to a research expert who has devoted years of hard work and worry to the problem, and who cannot help but correct and fill in the gaps subconsciously with his own knowledge, may be totally useless to a technician who has actually to construct the device. We undoubtedly have such a situation in Exhibit 8."

Thus he acknowledges that it would not have been difficult for a scientist to fill in the gaps—hardly different from Derry's testimony quoted above. And why it is assumed that classified information transmitted to a foreign power would not be evaluated by a research expert is not discussed.

Still a third scientist states: "While the sketch contained in government Exhibit 8 illustrates the general points: the use of explosive lenses to make spherical implosion; the use of electrical detonation for simultaneity; the use of a plutonium sphere, and the use of beryllium os one component, it is barren of any meaningful or correct *quantitative* information," and the description is in some respects erroneous. He continues: "It is a somewhat schematized cross-section, which might be called a pedagogical descriptive picture." Again it is observed that the criticism is based upon a standard of scientific perfection and detail and not upon the evidence given at the trial.

The government was not required to produce evidence to establish that the espionage agents had not achieved perfection because of their failure to obtain and transmit to the Soviet Union all scientific and engineering sketches and specifications required for large scale production and construction of the atomic bomb. The record makes clear that the hypothesis upon which the scientists base their criticism is not the hypothesis upon which the trial was

conducted. Perhaps the short answer to their observations is the comment of Mr. Justice Douglas: "The Rosenbergs obviously were not engaged in an exchange of scientific information in the interests of science."[41]

Fourth: Petitioner next contends that by the use of Derry's testimony, by leading questions put to witnesses, by making known the presence at the trial of representatives of the Atomic Energy Commission and other government representatives, by references to renowned scientists, and by other means the government sedulously and falsely established in the minds of the jury, court and defense that the Soviet Union had obtained the "secret" of the bomb long before it had been predicted the Soviet Union could have produced one; that by reason of the aforesaid government conduct, defense counsel were deceived into accepting the testimony as to the accuracy of the sketch as fact, in consequence of which they were trapped into moving to impound the evidence and into not offering scientific evidence to contradict the Greenglass-Derry testimony, with the result that the jury was led to accept Greenglass' entire testimony; that as a further result the defense counsel in various respects failed adequately and effectively to defend petitioner.

A review of the entire record reveals that this contention rests upon a distortion of the record, a disregard of the substance of the testimony, reference to matters out of context, and others not presented to or not occurring in the presence of the jury and impermissible inferences.[42]

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[41] Rosenberg v. United States, 346 U.S. 273, 318 (1953).

[42] A prime example of petitioner's manner of reading the record is his claim that the government, in using the word "secret" in connection with the atomic information, was representing that the sketches convey "the secret" of the bomb. A reading of the passages found objectionable by petitioner reveals that the government's

Appendix 1

The motion by the Rosenbergs' counsel to impound Exhibit 8 was spontaneous and indeed caught the prosecution by surprise. The assertion that defense counsel were intimidated in their action by references to and the presence of representatives of the Atomic Energy Commission is repelled by the fact that it was this petitioner's counsel who in no uncertain terms,[43] and as indeed was his right, refused to concede that the material was secret, classified and pertained to the national defense, in consequence of which witnesses were called to testify on this

reference, in words or substance, to "secret" was to the classified or confidential nature of the information. Thus, for example, the court suggested that the problem of public disclosure with respect to Greenglass' description of Exhibit 8 could be avoided by a stipulation that the matters contained therein *"were of a secret and confidential nature."* [Emphasis supplied.] Record, p. 501.

Again, throughout the petition, petitioner attacks the government's use of such terms as "sketch of the very bomb itself" and "cross section of the atomb bomb itself" to describe the Exhibit 8 material. Petitioner's scientists do not contend that the sketch or description were of something other than the bomb. If a sketch of an object is inaccurate, it would still be a sketch of that object; it would simply be an inaccurate sketch. In using phrases such as these, the government was describing Exhibit 8 in ordinary language. Thus, in criticizing the accuracy of the exhibit, one of petitioner's scientists himself states: "The cross section and its description are not factually correct. . . ." See also nn. 43 and 44, *infra.*

[43] When asked to stipulate that the matter was secret and pertained to the national defense, petitioner's counsel stated: ". . . [W]e would not be defending the rights of our client properly by stipulating any such thing. We feel that our national defense is secure only in so far as . . . we secure the liberty of our present client, and tomorrow the next client, and so on, and because of that we feel that a confession [sic] of that kind would not be in the best interests of the defense of our client, not because of the nature of the testimony or anything like that." Record, p. 509.

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subject. Clearly the presence of these officials did not deter his counsel from contesting the issue.[44]

Petitioner professes to see a conspiracy to suppress evidence and to mislead his counsel in the failure of the prosecution to call Dr. J. Robert Oppenheimer, Dr. Harold C. Urey and Dr. George B. Kistiakowski to testify, although they were included in the list of potential witnesses served pursuant to 18 U.S.C., section 3432. The names of all those so listed were read to the jury on the voir dire to learn if any was known to the veniremen. Petitioner now asserts that because of this and other references to the three atomic scientists the government represented that they would testify, in consequence of which defense counsel were fraudulently induced to believe, and the jury was impressed, that the scientists would testify that government Exhibit 8 and the related testimony represented a true and accurate cross-section and description of the bomb, and so counsel accepted the accuracy of the Greenglass-Derry testimony and were trapped into moving to impound and also into foregoing any challenge to its accuracy. This is another oft-reiterated allegation which is without support in the record or otherwise. No statement was made as to the nature of the testimony to be given by

[44] Petitioner's suggestion that the government supplied the initiative for the Rosenbergs' counsel's offer to stipulate that the sketch and the description were secret and concerned the national defense is not supported by the record. After the motion to impound Exhibit 8, the government asked Greenglass to tell exactly what the descriptive material contained, and he was prevented from doing so by defense counsel's application that this matter, too, be kept secret. The prosecutor's statement with reference to his consultations with the AEC came after and in reply to this application by defense counsel. Also, the prosecutor's statement, as well as the comment that Derry's testimony was a "security matter" and would "establish the authenticity of the information that Greenglass gave to Rosenberg," was made out of the hearing of the jury. Record, pp. 499-501 and 902.

any of the listed witnesses. No representation, direct or indirect, was made as to what the three scientists would testify if called to the stand. When their names were mentioned to the jury, the trial had not begun and defense counsel were without knowledge of the contents of any of the exhibits in question or the nature of the Greenglass-Derry testimony with respect thereto. Moreover, as already noted, the fact is that after Exhibit 8 was in evidence, petitioner's counsel challenged its secrecy and pertinence to the national defense and did not at any time stipulate its accuracy or authenticity. Further, during the trial and even before Derry was called, the defense was advised by the prosecution that it did not intend to call all witnesses listed,[45] since it believed additional testimony would be cumulative.[46] The defense could have compelled the appearance of these witnesses by direction of the court or by means of its processes; or, if it preferred not to have them testify, since they were in government service, it could have asked for an appropriate instruction to the jury on permissible inferences from the nonappearance of witnesses under the control of a party.[47] Furthermore, this is not the first time that a claim has been made with respect to the failure to call Drs. Oppenheimer, Urey and Kistiakowski. As far back as 1952, upon the direct appeal, it was urged, "the prosecution failed to produce for ex-

[45] Record, p. 870. At another point, when a reference was made to a doctor on the list who was not called, the following occurred:

> "The Court: You mean to say that the Government has to call every witness listed on that?
>
> "Mr. A. Bloch: I didn't say anything of the kind. I am just identifying the man." Record, p. 1325.

[46] Although the list contained the names of 100 potential witnesses, only 22 testified.

[47] Indeed, defense counsel in his summation taxed the government for failure to call certain witnesses. Record, p. 1499.

amination the above named scientists, whose testimony could have clarified doubts about the accuracy of David (Greenglass), . . . with respect to his scientific exposition." [48]

Petitioner's attempt to bolster his argument with respect to the government's scientists by labelling "a deceptive ploy" the prosecution's questioning of Greenglass concerning scientists he knew were at Los Alamos is unavailing. The identity of these scientists was classified and Greenglass testified he transmitted their nam[redacted]to Rosenberg; the interrogation obviously was calculated to develop evidence in support of the charge.

There is no basis for the claim that the court was misled as to the importance of the atomic information insofar as this petitioner is concerned. The record makes clear that the court's evaluation of the importance of the atomic information played no part in its sentence of Sobell. Before imposing sentence upon him, the court stated: ". . . [T]he evidence in the case did not point to any activity on your part in connection with the atom bomb project." [49]

Fifth: Finally, the contention that the present [redacted]m is based upon newly discovered facts and therefore could not have been presented on prior applications and appeals because the material was impounded for sixteen years flies in the face of the record. Petitioner's statement that "The fact that it [the impounded material] would be avail-

[48] Rosenberg brief (1951), p. 7, Court of Appeals Docket No. 22201.

[49] Record, p. 1620. Even as to the Rosenbergs' sentence, the importance of the atomic information to the Soviet Union was strongly challenged by the Rosenbergs' counsel in his argument upon sentencing, Record, p. 1608, and the court's evaluation of the importance of the material was attacked upon the direct appeal as "egregious" and with "little substance." Rosenberg brief (1951), p. 139, Court of Appeals Docket No. 22201.

able in a subsequent proceeding was itself impounded and not known to petitioner or his present counsel until the successful application made in petitioner's behalf in late April 1966" is simply contrary to the record. Petitioner heard his counsel acquiesce in the motion to impound. He saw the exhibit. He heard the detailed descriptive testimony relating to it. He knew its importance. He heard the court's statement that it would be available to the defense at all times.[50] Nor was the impounded material a forgotten incident. Repeated references were made to it during the trial and in various post-conviction proceedings. Its significance was not lost upon petitioner since that exhibit, together with Exhibits 2, 6 and 7 were the subject of his 1952 section 2255 proceeding. Petitioner has been described by one of his lawyers as "a scientist and holder of a Master's degree . . . clearthinking and articulate."[51] He assisted in the preparation of his first petition,[52] as he did in this one. Moreover, the printed record on direct appeal contains a reference to the availability of the impounded testimony.[53] Thus, in addition to petitioner and his trial counsel, who continued to represent him in association with other counsel in several post-conviction proceedings, three of petitioner's present staff of six lawyers, who have represented him as far back as 1956,[54] knew from the printed record that the impounded material was available.

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

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

[52] *Ibid.*

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

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

II. The Claims with Respect to Exhibit 16 and to the Gold-Greenglass Meetings on June 3, 1945

Harry Gold testified he had been a member of the Soviet espionage system from 1935 to shortly before his arrest by the Federal Bureau of Investigation in May 1950; that from March 1944 to late December 1946 his superior was Anatoli A. Yakovlev, whom he knew only as John. In May 1945 Yakovlev directed him to meet Klaus Fuchs on the first Saturday in June 1945 (June 2nd) at Santa Fe, New Mexico, and then to proceed to Albuquerque, New Mexico on an important mission. Yakovlev gave him the name of Greenglass with an address on High Street, Albuquerque; also the recognition signal "I come from Julius," a piece of a cardboard box cut irregularly, and $500 cash for Greenglass. The identification pattern, the Greenglasses had previously testified, had been arranged between them and the Rosenbergs in January 1945 in New York City, when Greenglass was on furlough. Gold testified that, as directed, he met Fuchs on June 2, 1945 at Santa Fe and received from him classified information; that he went on to Albuquerque and sought Greenglass at the High Street address, but was told by an old man that the Greenglasses were out for the evening and would be in early the next morning; that he "finally managed" to obtain lodging in the hallway of a rooming house, and on Sunday morning registered at the Hotel Hilton under his own name; that he went to the High Street address that morning, met the Greenglasses, to whom he introduced himself as "Dave from Pittsburgh," exchanged identification signals, and gave them the envelope containing the $500 cash he had received from Yakovlev. Greenglass told Gold to return that afternoon, as the information was not ready. Upon his return he received from Greenglass an envelope which contained information on the atom bomb (Exhibits

6 and 7). Gold then returned to New York, arriving on June 5, 1945, and delivered to Yakovlev the material received from Greenglass and Fuchs.

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

Neither counsel for the Rosenbergs nor for petitioner cross-examined Gold. Two additional witnesses testified. Thereupon, at a bench conference, the prosecutor stated he had a photostat of the registration card of Harry Gold at the Hotel Hilton on June 3; that "the original [was] on the way, together with a witness if required";[55] and also he had testimony as to the bank records; that he wanted to offer a photostat of the registration card as a record regularly kept in the course of business. Defense counsel stated they had no objection. The matter was repeated before the jury, the prosecutor stating, ". . . [T]he government has available a number of witnesses from distant places to establish the authenticity of the records, hotel registration records, bank records."[56] Exhibit 16 was received in evidence under a stipulation that "it was made in the regular course of business by the party whose records it comes from."[57] Thereupon both the face and reverse sides were read and exhibited to the jury. At the next trial session a photostat of a ledger sheet of the Albuquerque National Bank, together with a bank credit slip showing a deposit of $400 to the account of Ruth Greenglass, were received in evidence as Exhibit 17.

Up to the filing of the present petition, Gold's testimony of the June 3 events not only has not been challenged,

[55] Record, p. 867.
[56] *Id.* at 868.
[57] *Id.* at 869.

but was accepted. Rosenbergs' counsel, in his summation to the jury stated: "I didn't ask him one question because there is no doubt in my mind that he impressed you as well as impressed everybody that he was telling the absolute truth, the absolute truth."[58]

Now, more than fifteen years after the trial, petitioner charges that there were no June 3 meetings between Gold and the Greenglasses at Albuquerque; that their testimony was perjurious; that upon information and belief the government knew their testimony was perjurious; that Gold was not registered at the Hotel Hilton on June 3, 1945; that Exhibit 16 showing Gold's registration at the hotel on June 3 is a forged, fraudulent and after-contrived document; that upon information and belief such false and perjured testimony and the forged and fraudulent exhibit "had been created and contrived by Gold and the government at the inducement and suggestion of the latter." There is not a word of direct evidence to support these serious charges made upon information and belief. Petitioner urges, however, that corrupt prosecution conduct may be inferred from Exhibit 16 itself; from the circumstances of its introduction into evidence; from the fact that allegedly the government, after trial, caused the destruction of the original (not in evidence) of Exhibit 16; and from pretrial statements of Gold which allegedly establish the falsity of his testimony and would have impeached his credibility, which were knowingly suppressed by the government.

The court has examined all the material relied upon by petitioner and finds that his charges are not sustained, that the contended-for inferences are not warranted; further, that matter now claimed as newly or recently discovered has been known or available to him for many years, some of it as far back as the trial itself.

[58] Record, p. 1479.

Appendix 1

EXHIBIT 16

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

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

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

9-19-45	521	5.00	ak.

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

The fact is that it hardly needed an expert to make this observation. Accepting the expert's opinion, it does not warrant the inference that the June 3 card was not a record kept in the regular course of the Hotel Hilton's

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

Appendix 1

business; neither does it warrant the further inference that the card was fabricated and contrived by the government and Gold.

The card on its face has all the indicia of a registration card kept in the ordinary course of business by the Hotel Hilton; it is an Albuquerque Hilton card, bearing the appropriately printed title and number; the required descriptive information has been written upon it, and it bears the receipt and time stamp of that hotel. Taking as correct the expert's conclusion that the two cards are in different handwriting, it is by no means a reasonable inference that the June 3 card was not kept in the regular course of the business of the Hotel Hilton.[60] The circumstance that at a public and busy hotel[61] the same initials appear on the two cards and they and the data as to rate, stay, departure and room number are in different handwriting does not, in one fell swoop, permit the inference that it was "forged"; that the government knew it was forged or contrived its forgery; that Gold did not register at the Hotel Hilton on June 3; that he committed perjury as to meetings that day with the Greenglasses; that David Greenglass and his wife committed perjury in so testifying; that the prosecutor perpetrated a fraud when he stated a witness was on his way with the original to testify that it was kept in the regular and usual course of business; that a grand fraud had been perpetrated by the Federal Bureau of Investigation, the United States Attorney and government witnesses to establish falsely

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

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

that meetings occurred on June 3 between Gold and the Greenglasses at Albuquerque so as to give credence to Gold's testimony that the day before he had met and received from Klaus Fuchs classified material in order thereby to tax petitioner and his codefendants with the well-publicized activities of Fuchs in the Soviet spy system.

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

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

Nor do additional matters to which petitioner adverts warrant the inference that government agents participated and fostered perjury on the part of Gold and Greenglass and manufactured the June 3 registration card. The original of Exhibit 16 was returned by the FBI shortly after the trial to the Hotel Hilton, which allegedly destroyed it in 1957 in accordance with its policy as permitted by the laws of New Mexico. The government is accused of perfidious conduct in not retaining it and is charged with

deliberately sending it on to the hotel, knowing that it would be destroyed, with intent thereby to prevent handwriting examination. This contention, so typical of others recklessly made without factual support, falls of its own weight. The original registration card is not the exhibit in evidence. The photostat is Exhibit 16. This has been and still is available for, and indeed has been inspected by, petitioner and his handwriting expert who has rendered an unequivocal opinion based thereon. Just why it should have been assumed that in 1967, ten years after [redacted]had been destroyed in normal routine practice, petitioner would charge the government with fraud based upon the return of the original to the hotel in 1951 is not apparent.

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

Great stress is laid upon the fact that Exhibit 16 on its reverse side contains a time stamp, "June 4, 1945," as contrasted with the June 3 date on the face thereof, whereas the September 19 card contains the corresponding date on the reverse side. Both sides of Exhibit 16 were read to the jury. The difference in dates was evident. Just why an inference of corrupt conduct should now flow from this circumstance is not clear—any more than from the fact, noted by the handwriting expert, that erasures and smudges appear on both cards.

Petitioner suggests that counsel did not cross-examine Gold in reliance upon the prosecution's statement that the hotel registration card was authentic and that the original was on its way. Apart from the distortion of the prosecution's statement in requesting a stipulation as to the photostat, there is no showing that a witness was not on the way

with the original to testify that it was a registration card kept in the regular course of business. But more important, petitioner's suggestions that his counsel did not cross-examine Gold because he was misled is demonstrably false. Gold was still under direct examination on March 15 when the court adjourned for the day. The following morning, when he resumed the witness chair, the prosecutor stated he had no further questions. Thereupon both petitioner's and the Rosenbergs' counsel announced "no cross-examination." Government Exhibit 16 had not yet been offered. First Dr. George Bernhard testified and he was followed by William Danziger.[62] Not until after they testified was government Exhibit 16 offered and received in evidence.[63] Thus it could not have played the slightest part in the decision not to cross-examine Gold.

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

[62] *Id.* at 848-867.

[63] *Id.* at 867-869.

[64] The recorded discs, a complete transcription based upon taped recordings of these, and a transcription of excerpts therefrom were submitted. The October 11, 1950 statement, entitled "The Circumstances Surrounding My Work as a Soviet Agent—A Report" (hereafter cited October 11 Statement), is an amplification of a prior, July 20, 1950, statement. (The July 20 statement was not submitted.) The October 11 statement contains an account of Gold's motivation in becoming a Russian spy, biographical matter and details of his espionage activities, including references to the June 3, 1945 meetings with the Greenglasses at Albuquerque. In addition

The tape recordings and the October 11, 1950 letter to his lawyers were, of course, protected by the lawyer-client privilege, and afford no basis for charges of government suppression of evidence upon the trial assuming for the moment, as petitioner contends, they support his charges of perjury. However, with Gold's consent, the recordings and other statements to his lawyers were delivered to the FBI on October 21, 1953, two and a half years after the trial.[65] Petitioner urges the government is chargeable with prior knowledge of the contents of these statements, since he asserts similar statements were made to agents of the FBI, both before and after the appointment of counsel; moreover, he claims that once the government did obtain the lawyer-client statements late in 1953 they should have been made available to petitioner in connection with his post-conviction applications.

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

to these items, petitioner relies upon: A 2-page listing by Harry Gold of interviews had with FBI agents during the period May 22, 1950 and July 19, 1950; An 8-page handwritten statement of Harry Gold entitled, "Chronology of Work for the Soviet Union," the first five pages being dated June 15, 1950, the last three pages being dated June 16, 1950; Letter from John D. M. Hamilton to H. M. Harzenstein of the Federal Bureau of Investigation at Philadelphia, turning over thirty-three discs and other matter; a portion of page 6 of a letter of John D. M. Hamilton, dated September 30, 1960, setting forth the hours spent by Gold with the FBI during 1950-1955; A Letter from James V. Bennett, Director of Bureau of Prisons, to John D. M. Hamilton, dated July 11, 1955.

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

with the Fuchs case." [66] On May 21 he submitted to voluntary custody, and on the 22nd and 23rd confessed to espionage activities over an eleven-year period. But, as Gold later wrote, during these first days he sought to limit his confession to that which he thought the FBI already had knowledge of, his relationship with Klaus Fuchs, and to cover up the identities of others with whom he had espionage transactions.[67] In his effort not to inform on others, as he was later to acknowledge to his attorneys, he resorted to lies and evasions, but was aware that "even while endeavoring to cover up . . . I amazedly found myself irresistibly revealing more and more of the true facts." [68] The final decision to make a full and complete confession of his work as a courier in the Soviet spy system was greatly influenced by the fact that his father and brother, to whom he was deeply devoted and who were in disbelief that he was in any way implicated in any crime, were about to mortgage their home and go into debt for his defense.[69] Thereupon, on June 1, 1950, he accepted court-assigned counsel upon condition that he be permitted to tell the entire story to the FBI, and that counsel "must agree to let me plead guilty, because I was." [70]

On June 1 Gold met briefly with his court-appointed counsel. Upon Gold's insistence that he wished to plead guilty, his lawyer emphasized that any hope for leniency required that he not withhold important information from the FBI. Gold thereupon talked with an FBI agent out of counsel's hearing, and counsel's contemporaneous understanding was that Gold gave him "information about several other people . . . who had important places in the picture." [71] Gold's subsequent written statement of October 11, 1950 to his lawyer states he, on this occasion, told the agents of the FBI of the events of June 3, 1945 at Albuquerque and the Greenglass' involvement.[72]

[66] Transcript of Tape Recordings, June 1, 1950, Reel 1, p. 6.

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

[68] *Id.* at 1084.

[69] *Ibid.*

[70] *Ibid.* See also Transcript of Tape Recordings, June 1, 1950, Reel 1, p. 6.

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

The remainder of the June 6 interview and a portion of the next, June 8, were taken up with matters not here relevant. Midway through the June 8 interview Gold commenced telling "everything, *at least in substance*, that . . . [he had] told the FBI." [74] [Emphasis supplied.] In the chronological sequence of his espionage activities Gold mentioned the trip to Santa Fe and Albuquerque, New Mexico on June 2 and 3, but elaboration was postponed for the next interview, which took place on June 14, 1950. At this June 14 interview Gold told his attorneys about his trip, at the direction of "John," to Santa Fe and

[71] Transcript of Tape Recordings, June 1, 1950, Reel 1, p. 8.

[72] October 11 Statement, *op. cit. supra* note 67, at 1085.

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

[74] Transcript of Tape Recordings, June 8, 1950, Reel 2, Side 2, p. 16.

Albuquerque over the weekend of June 2-3, 1945, and of his call on the "GI" in Albuquerque. He recited his unsuccessful efforts on the night of June 2 to contact the Greenglasses; his meeting with them the next morning; a verbal name identification; the afternoon meeting; the receipt of atomic energy information; the delivery of the $500. In substance his statement to his lawyers at the June 14 interview closely parallels his trial testimony. However, certain details to which he testified upon the trial were omitted, and in one instance there is an alleged contradiction. He did not mention the Greenglass name or address, but only referred to the GI and his wife.[75] He did not mention a piece of a cardboard box as the identification signal.[76] He did not mention "Julius" as the recognition signal; he said, "Bob sent me or Benny sent me or John sent me or something like that."[77] He did not mention Rosenberg's name, address or telephone

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

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

[77] Listening to the passage in context, which reads, ". . . [W]hile this is not the exact recognition sign, I believe that it involved the name of a man and was something on the order of Bob sent me or Benny sent me or John sent me or something like that," it is clear that "Bob, Benny or John" were offered to explain the nature of the recognition sign and that a man's name was involved. Recorded Sound Disc No. X-23, Soundscriber Locator 5-6, June 14, 1950.

number.[78] He said he checked his bag at the railroad station.[79] He did not mention registration at the Hotel Hilton.[80] He said Yakovlev told him there wasn't much point in getting in touch with the GI, whereas upon the trial he testified that Yakovlev said the information was very valuable.[81]

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

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

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

[81] It is not altogether clear from the record that in fact this is a contradiction. At trial, Gold testified that in June 1945, Yakovlev told him that the information received from Greenglass had been very valuable [Record, p. 831], but that in November 1945, when Gold expressed a desire to meet with Greenglass or Rosenberg, Yakovlev told him to mind his own business and "cut me very short." [Record, p. 839.] In the October 11 Statement, *op. cit. supra* note 67, at 1085, apparently referring to the November meeting, Gold stated that Yakovlev had "subsequently—and with intent to mislead—told me that the information received was of no value." Describing these events to his counsel [Transcript of Tape Recordings, June 14, 1950, Reel 5, p. 42], Gold said that the trip to New Mexico ended the episode. "I never made any attempt to see him [Greenglass] again. I turned the information over to John. John never mentioned anything about it [apparently referring to further meetings between Greenglass and Gold] and on the one occasion when I did mention this man [Greenglass] sometime in the late fall of 1945 [the November meeting], John had said that we can forget all about him, that there wasn't much point in getting in touch with him.

Primarily, on the basis of the foregoing, Gold is accused of perjury and the government of suborning perjury and suppressing evidence. Considering the purpose and circumstances of the taped interviews, the omissions are of no special significance. And any delay in mentioning the June 3 Albuquerque incidents and the GI is accounted for by the chronological pattern of the interviews. Gold was recounting to his lawyer in compressed form, "at least in substance," the information he had related to the FBI over an extended period.[82] The lawyers' and the FBI inquiries were not on parallel courses. The nature of each inquiry was different. His counsel were seeking the substance of information furnished the FBI in order to present a plea in mitigation of the offense. The FBI was seeking minutiae of detail, leads and data to be investigated and verified. Further, when Gold finally decided to cooperate fully he was faced with the task of dredging his memory as to people, events and incidents spanning a decade of intrigue; the Greenglass incident itself occurred five years earlier. The recordings evince a clear purpose on the part of Gold and the FBI to avoid

And I got from the manner in which he made the remark that apparently the information received had not been of very much consequence at all and that they believed that the risk attendant upon seeing him did not make any such effort worthwhile." Thus it is not clear from the June 14 recording and the October 11 Statement whether Gold was relating to his lawyers what Yakovlev told him at the June meeting, or the subsequent one in November when Gold believed Yakovlev intended to mislead him. Even assuming that there is an inconsistency, it relates solely to the question whether Gold, in his pretrial statements, had mentioned Yakovlev's characterization of the information as valuable, and lends no support to petitioner's allegations of perjury.

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

faulty accusations—as Gold put it, ". . . bending over backwards in an effort not to do so." The check of his information and details involving others was time consuming.[83]

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

> "I have—would like to state one more thing. I have gone over and I have drawn a map of the area as well as I know. I have looked at maps of Albuquerque. I have looked at dozens of reels of motion pictures, starting with the Hilton Hotel and going all the way past undoubtedly the street where this GI lived.
>
> "I have described in detail the approach to the house. I have described the appearance of the house from the outside. I have described the appearance of the porch, the appearance of the steps leading up to the apartment, the appearance of the apartment. I have described the appearance of the old man whom I saw that evening, and I believe I have identified him. I have even succeeded in picking out what I believe to be the correct house, even though the house was subsequently altered after '45 and the porch no longer existed but had been turned into a living room.
>
> "And I believe that we had succeeded in identifying the person who was this GI. Our difficulties concerned—he has put on, if it is the man, he has put on over thirty pounds. His wife has, who was only a girl and a very recent bride, has undoubtedly had a child or two and has matured considerably in appearance. But there are still many circumstantial factors which would lead us to believe that the man we have finally selected is the one.
>
> "However, I would like to emphasize one point, and that is that I have been very careful, and so have the people from the FBI, in attempting to put the finger on a man merely to be able to do so, and that we are, if anything, bending over backwards in an effort not to do so. For instance, I looked at the pictures of several men before I finally picked out from them the one old man who I believe lived in the home at that time." Transcript of Tape Recordings, June 14, 1950, Reel 5, pp. 43-44.

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

A careful reading of the transcripts of the recordings and all other material, rather than supporting petitioner's charges, strongly corroborates Gold's trial testimony. The substance of Gold's statement to his lawyer on June 14, one day before Gold's arrest, is essentially the substance of his trial testimony; the major events, times, places and persons correspond. The pretrial statements, recorded or written, are as fully inculpatory of the Greenglasses as is Gold's trial testimony. The omissions and the claimed contradiction do not undermine the fabric of essential matters. The omissions, in the light of the limited purpose of his lawyers' inquiry were not material thereto. The omissions and the claimed inconsistency, themselves explained in the very statements submitted by petitioner,[84] do not even approach supporting the charge of perjury—much less the charge of government participation therein.[85]

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

Petitioner now asserts that he and his counsel were unaware until recently of the existence of prior state-

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

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

ments,[86] suggesting that such knowledge would have led trial counsel to cross-examine. But again the record contradicts the assertion. Counsel knew of Gold's background and activities. He was not a surprise witness suddenly called to the stand. Counsel knew that Gold was a self-confessed spy; that he had been interviewed extensively by agents of the FBI; that he had been cooperative with the authorities; that he had testified before grand juries; that five months before the trial of this case he had testified as a prosecution witness at the Brothman trial[87] in this district; that in the latter case, in which he was named as a co-conspirator on a charge of conspiracy to obstruct justice involving the giving of false testimony before a grand jury, Gold admitted he had lied before the grand jury; that his disclosure of his espionage activities had engendered great publicity.[88] There was ample basis on these matters alone for defense counsel to have undertaken a searching cross-examination in an attack upon Gold's credibility. Yet no request was made for pretrial statements, grand jury minutes, his trial testimony at the Brothman case (a matter of public record), or any other impeaching material. Trial counsel knew how to get impeaching matter within the then existing requirements.[89] They succeeded in obtaining Elitcher's statements to the FBI and his grand jury testimony,[90]

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

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

[88] Record, pp. 568-70, 836, 981 and 1019.

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

[90] Record, pp. 430-31.

and sought to lay a foundation for Greenglass' prior statements.[91]

The decision not to cross-examine, joined in by petitioner's counsel, was not inadvertent; it was deliberate. The Rosenbergs; counsel in his summation told the jury: "Gold got his 30-year bit and he told the truth. That is why I didn't cross-examine him."[92] The thirty-year "bit" was the maximum prison term authorized under the then existing Espionage Act.[93] Thus there was no basis for effective cross-examination upon a claim that Gold's testimony was motivated by consideration of sentence. Further, defense counsel appraised Gold as "a very bright and intelligent person."[94] These factors and a reading of his testimony, which is indeed impressive, suggests the reason counsel decided not to question him; cross-examination could well have served only to expand and emphasize the force of his testimony. That the decision was carefully weighed appears from the same counsel's acknowledgment on the first Section 2255 motion that it "was a calculated judgment on . . . his part which involved certain risks which . . . he accepted."[95] It is somewhat late in the day now to fault counsel for judgment on trial strategy.[96] Clearly this is an attempt by petitioner to make

[91] Record, pp. 587, 613.

[92] Record, p. 1479.

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

[94] In transcript of argument November 28, December 1, 2, 1952, p. 105.

[95] Transcript of Argument, November 28, December 1, 2, 1952, p. 107.

[96] See United States v. Garguilo, 324 F. 2d 795, 796-97 (2d Cir. 1963); United States v. Gonzalez, 321 F. 2d 638 (2d Cir. 1963); Frand v. United States, 301 F. 2d 102 (10th Cir. 1962); United States v. Duhart, 269 F2d 113, 115 (2d Cir. 1959).

the Jenks Act retroactive to 1951. Petitioner at his trial had a full opportunity in consonance with the existing procedure, to obtain all pre-trial material, but by deliberate choice waived it.

Strictures, sometimes direct and sometimes oblique, are levelled against the trial attorneys, who continued to represent petitioner and his codefendants in several of the post-conviction proceedings, although the force of criticism is sought to be attenuated by further allegations that counsel were "misled," "deceived," "trapped," "coerced" and "intimidated" by governmental fraudulent conduct. These lawyers are no longer here to defend their professional conduct. But their defense is contained in the files of the vigorously contested trial, appellate and collateral proceedings. The case, which has been "scrutinized with extraordinary care"[97] and has had "painstaking consideration"[98] by each of the Justices of the Supreme Court, afforded ample opportunity for judgment of the lawyers' competency and whether they measured up to the task at hand. They were adjudged "highly competent and experienced,"[99] "singularly astute and conscientious,"[100] and "lawyers who have ably and courageously fought the Rosenbergs' battle."[101] Nothing now asserted by petitioner or his present counsel warrants any change of judgment as to his (or the Rosenbergs') lawyers' professional competency in defending him.

In conclusion, the court, with respect to all charges, finds that petitioner was competently represented by counsel; that he has failed to sustain his charges; that the files and records of the case conclusively show that he is

[97] United States v. Rosenberg, 195 F2d 583, 590 (2d Cir. 1952).

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

[99] United States v. Rosenberg, 195 F2d 583, 593 (2d Cir. 1952).

[100] *Id.* at 596, n. 9.

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

not entitled to relief, and that no act or conduct on the part of the government deprived him of a fundamentally fair trial.

The motion is denied in all respects.

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

EDWARD WEINFELD
United States District Judge

APPENDIX 2

Opinion of United States Court of Appeals for the Second Circuit

No. 507—September Term, 1966.

(Argued June 15, 1967 Decided June 26, 1967.)

Docket No. 31259

MORTON SOBELL,
Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,
Respondent-Appellee.

Before:
HAYS and FEINBERG, *Circuit Judges*
and MCLEAN, *District Judge.**

* Of the Southern District of New York, sitting by designation.

Appeal from denial without a hearing of an application under 28 U. S. C. § 2255.

Affirmed.

Appendix 2

MARSHALL PERLIN, New York, New York (William M. Kunstler and Arthur Kinoy, New York, New York, Malcolm Sharp, Albuquerque, New Mexico, Benjamin O. Dreyfus, San Francisco, California, and Vern Countryman, Lexington, Massachusetts, on the brief), for *Appellant.*

ROBERT L. KING, Special Assistant United States Attorney, New York, New York (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Stephen F. Williams, Daniel R. Murdock and Michael W. Mitchell, Assistant United States Attorneys, on the brief), *for Appellee.*

PER CURIAM:

The order of the district court denying the petition without a hearing is affirmed on the opinion of Judge Weinfeld, 264 F. Supp. 579 (S. D. N. Y. 1967).

APPENDIX 3

(Transcript of portion of testimony of Greenglass in United States of America v. Julius Rosenberg, et al, on March 9, 1951. This portion of the testimony was directed to be omitted from the record by the Court and would have but for the Court's direction appeared on page 722 of the record.)

Mr. Cohn: May I proceed, your Honor?
The Court: Yes.

By Mr. Cohn:

Q. Mr. Greenglass, addressing yourself to Government's Exhibit 8, if you please, is that a cross-section of the atomic bomb? A. It is.

Q. That you gave to Mr. Rosenberg? A. It is.

Q. And have you placed on Government's Exhibit 8 certain letters? A. I did.

Q. And on additional pieces of paper did you place material descriptive of that sketch and in explanation of the various parts indicated by those letters on that sketch? A. I did.

Q. Did you give that material to the defendant Rosenberg? A. I did.

Q. I think we were up to the point now where you should tell us just what descriptive material you placed on the pieces of paper accompanying this sketch. Tell us how you described the cross-section of the atomic bomb?

A. I have a, which points to two detonators, each mold. Each high explosive lens, there were 36 of them, that I have pointed to as b had two detonators on them; that is, two detonators connected to capacitators which were charged by suitable apparatus and was set to go off by a switch that would throw all 72 condensers at once. There were two detonators on each lens so in case of failure of one,

the other would go off. And beneath the high explosive lens there was c, I have marked, a beryllium plastic sphere, which is a shield for the h.e., the high explosive. Then I have e, which is the plutonium itself, which is a fissionable material. That is also a sphere. Inside that sphere is a d, is beryllium. Inside the beryllium there are conical shaped holes f, marked f.

Now, the beryllium shield protects the high explosive from the radiation of the plutonium. This is to prevent the h.e. from deteriorating and not go off until it is set off. At the time of the discharge of the condensers the high explosive lens implode, giving a concentric implosion to the plutonium sphere on the inside. This in turn does the same to the beryllium, and the beryllium is the neutron source which ejects neutrons into the plutonium, which is now at a super or hypercritical stage because of the high pressure heat, and nuclear fission takes place.

Q. That completes the description of the atomic bomb as you furnished it to the defendant Rosenberg in September 1945? A. That is right, that does.

Mr. Cohn: May I now exhibit this sketch of the cross-section of the atomic bomb to the jury?

The Court: Yes. I might suggest, Mr. Stenographer, that that portion of the testimony will not be written up. I do not see any need for it. If it is agreeable with the defense the stenographer will not transcribe that portion of the testimony.

Mr. Bloch: Agreeable to us.

Mr. Kuntz: We won't have the benefit of that at some time.

The Court: The stenographer will read it back to you any time you want it. Rather than put it in permanent written form I would rather not have a transcript of this testimony wandering around.

Mr. Kuntz: That is agreeable.

The Court: Of course, I may say to the defense, for any subsequent proceeding it will be made available.

Mr. Cohn: Your Honor, I think that completes that.

By Mr. Cohn:

Q. Did you have any further discussion with Rosenberg about the actual atomic bomb, the actual description you gave him, or was that what you gave him in written material? Did that complete the matter?

A. Well, I talked with him about this in a general way and I told him some additional information such as the fact that the switch that set it off was set off by a barometric pressure device, and the bomb itself was on a parachute.

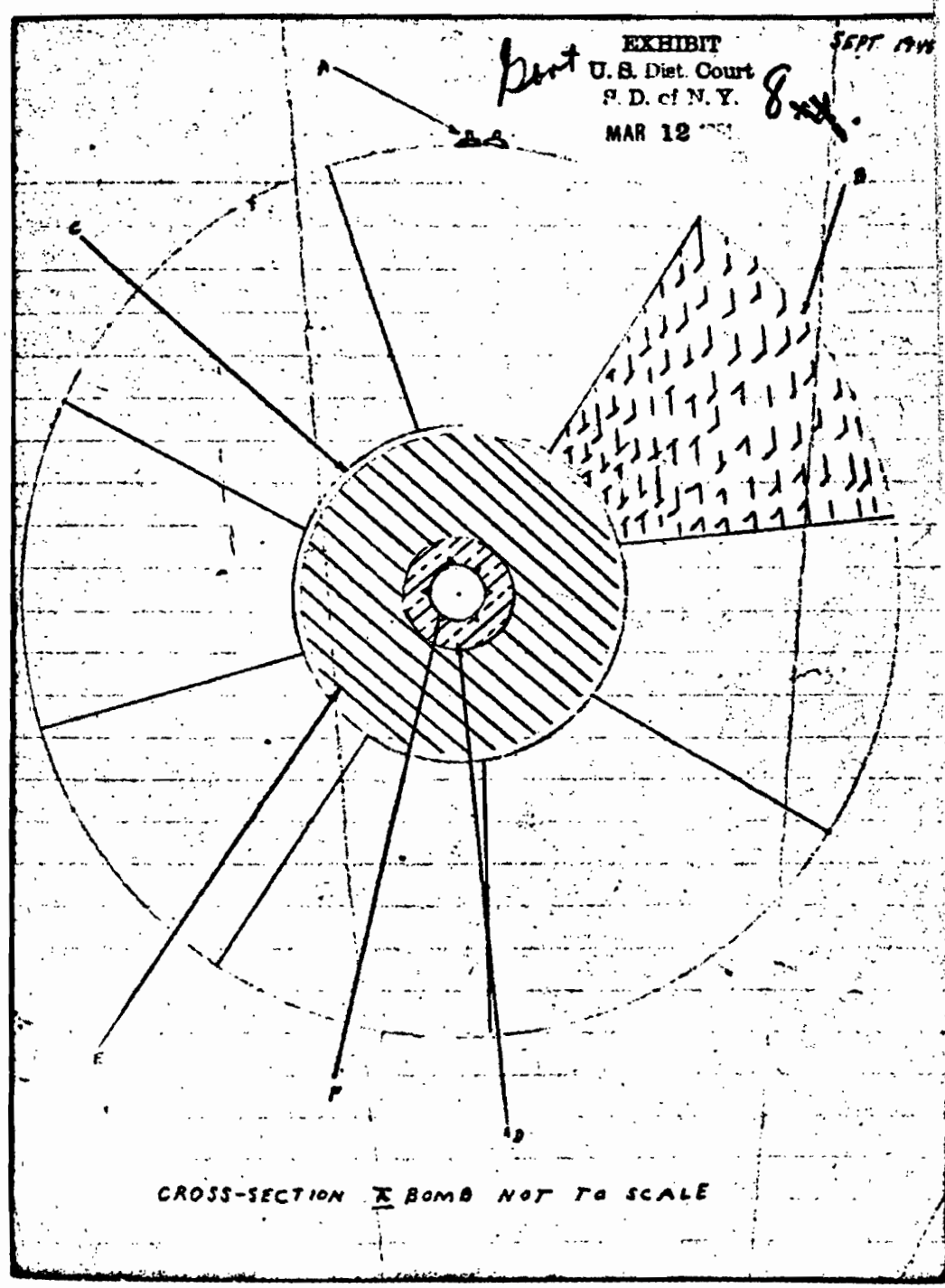
Q. That as you recall you all you told him verbally to supplement the written description? A. Yes, that is all.

Mr. Cohn: Your Honor, I think we are safe in having the courtroom reopen.

Appendix 3

Government Exhibit 8

(See opposite ☛)



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65-58236-2412

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2 Page(s) withheld for the following reason(s):
Disposition of document re J. Rosenberg
65-58236-2411

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101-2483 NR 12/6/67

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

FBI

Date: 11/9/67

Transmit the following in ~~CONFIDENTIAL~~ (Type in plaintext or code) CONFIDENTIAL

Via AIRTEL (Priority)

DECLASSIFIED BY 3040PWT/HMW ON 5/4/87

TO: DIRECTOR, FBI (101-2483)

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

SUBJECT: MORTON SOBELL
ESP - R

CLASSIFIED BY ~~SP/BLS 4913~~
EXEMPT FROM GDS, CATEGORY 2 3-15-78
DATE OF DECLASSIFICATION INDEFINITE

On 10/3/67, [redacted] who has furnished reliable information in the past, advised that HELEN SOBELL, wife of subject, indicated that subject was becoming very impatient regarding the present appeal of his case to the Supreme Court. HELEN said subject feels that they should look for a good Washington attorney who could handle the aspect of having him credited with time served in prison prior to sentencing. She said subject felt that it was not important that they secure the services of a "name" attorney, and that it might be better if they secured the services of some young attorney who had the time to do research on similar cases and prior decisions, and who could prepare a carefully prepared brief. X

b2
b7D

In regard to the above, HELEN stated that she had spoken to a friend about this. Her friend advised her that he knew of a young attorney in the office of EDWARD BENNETT WILLIAMS who would be suited for this and he promised he would speak to this attorney about the matter. She said the attorney mentioned, whom she did not identify by name, formerly worked for a judge, but had to resign because of his political thinking and involvements. X

3 - Bureau (RM)
1 - Washington Field (101-2309) (INFO) (RM)
1 - New York (100-107111) (CPMS)
1 - New York

101-2483-1709

REC 55

NOV 10 1967

PFD:dje
(8)

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

Declassified by EAA 10/14/75

APPROPRIATE AGENCIES AND FIELD OFFICES ADVISED BY ROUTING SLIP(S) OF
DATE

Lt to The AG 11/17/67
1 - The Deputy AG

SOVIET SECTION

Approved: ______ Special Agent in Charge

Sent ______ M Per ______

CONFIDENTIAL CONFIDENTIAL

On 11/7/67, [redacted] advised that HELEN SOBELL stated that she had secured the services of a Washington attorney who would work for them in an effort to have subject credited with time served which is currently being withheld from him. She identified the attorney as TOM EMERSON, formerly of Yale University, who is now teaching at George Washington University Law School. She stated that EMERSON has several friends in the Department of Justice, "including Dean Griswold, formerly of Yale, who is famous for his brilliant writings on the Fifth Amendment". HELEN stated that EMERSON would sound-out his friends in the Department concerning this aspect of their case.

The above would appear to refer to ERWIN N. GRISWOLD, former Dean of Harvard Law School, and present Solicitor General.

The above is furnished to the Bureau and WFO for information purposes.

The above will not be mentioned to the USA, SDNY, UACB.

~~CONFIDENTIAL~~
~~CONFIDENTIAL~~

The Attorney General

November 20, 1967

Director, FBI

1 - Mr. DeLoach
1 - Mr. W. C. Sullivan
1 - Mr. Lee

REC 55 101-2483-1709

EX 109

NORTON SOBELL
ESPIONAGE - RUSSIA

DECLASSIFIED BY 3042 PWT/lmsw
ON 5/4/87

Information has been received from a source who has furnished reliable information in the past that Helen Sobell, wife of the subject, stated on November 7, 1967, that she had secured the services of a Washington, D. C., attorney who would work in an effort to have Morton Sobell credited with the time which is currently being withheld from him. She identified this attorney as Tom Emerson, formerly of Yale University, who is now teaching at George Washington University Law School. She said that Emerson has several friends in the Department of Justice "including Dean Griswold, formerly of Yale, who is famous for his brilliant writings on the Fifth Amendment." Mrs. Sobell said that Emerson would sound out his friends in the Department concerning this aspect of the case.

MAILED 24
NOV 21 1967
COMM-FBI

A discreet inquiry disclosed that a Dr. Emerson, a visiting professor from Yale University, is presently located in Room 510 at the George Washington University Law School Building.

Our files reveal that Thomas Irwin Emerson of Yale University was identified by Louis F. Budenz, former Communist Party official, on July 27, 1950, as a concealed member of the Communist Party and one who would at all times deny membership in the Communist Party. This individual has also been described by Eugene Lyons, author of the book entitled "The Red Decade," as a founder of the National Lawyers' Guild and a leader "of its extreme Communist faction." The National Lawyers' Guild has been cited as a Communist Party front by the House Committee on Un-American Activities in its publication entitled "Guide to Subversive Organizations and Publications" issued December 1, 1961. In addition, this individual reportedly

SEE NOTE PAGE TWO.

100-384660
62-78630-3
62-92017

JPL:sl
(8)

~~CONFIDENTIAL~~

GROUP 1
Excluded from automatic downgrading and declassification

53 NOV 28 1967

MAIL ROOM ☐ TELETYPE UNIT ☐

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

CONFIDENTIAL
[redacted]

The Attorney General

participated actively in drafting a report released January 23, 1950, entitled "Report of Special Committee of National Lawyers' Guild Appointed to Study Practices of the FBI." Reports concerning this individual have previously been furnished to the Records and Administration Office of the Department of Justice. This individual may be identical with the Tom Emerson reportedly retained by Mrs. Sobell.

The above is furnished for information purposes.

1 - The Deputy Attorney General

NOTE: Sobell was convicted in 1951 along with Julius and Ethel Rosenberg of conspiracy to commit espionage and is currently serving a sentence of 30 years in prison. He has in the past attempted to obtain credit against his 30-year sentence for time spent in prison between his arrest and trial as well as the time spent in prison in New York awaiting the results of his original appeal. Information concerning Dr. Emerson at GW was telephonically furnished to Section Chief W. A. Branigan by Supervisor Courtland Jones of the Washington Field Office on November 15, 1967.

The above reference appears to be to Erwin N. Griswold, former Dean of Harvard Law School and new Soliciter General of the U.S.

Thomas Irvin Emerson is included on the "Do Not Contact List." He is an SM - C subject, Bureau file 101-3315 and is on the Security Index.

This is classified "Confidential" in order to restrict the handling of this information within the Department of Justice and to afford further protection to the information furnished by [redacted]

b7
b7D

- 2 -

[redacted]

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

UNITED STATES GOVERNMENT

Memorandum

TO : DIRECTOR, FBI (101-2483)

DATE: 12/27/67

FROM : SAC, WFO (101-2316)

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

ReWFOairtel 11/7/67.

Enclosed herewith for the Bureau is copy of the brief for the United States which was filed in the Supreme Court on 12/22/67 in opposition to subject's petition for certiorari.

Copy of the above response was obtained on 12/26/67, by SA RALPH C. VOGEL who advised the Court will reconvene 1/15/68 and thereafter will make known whether it will consider further review of this case. WFO will continue to follow and report developments.

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

REC 26 101-2483 1710

"ENCLOSURE ATTACHED" EX 104

12 DEC 28 1967

ENCLOSURE

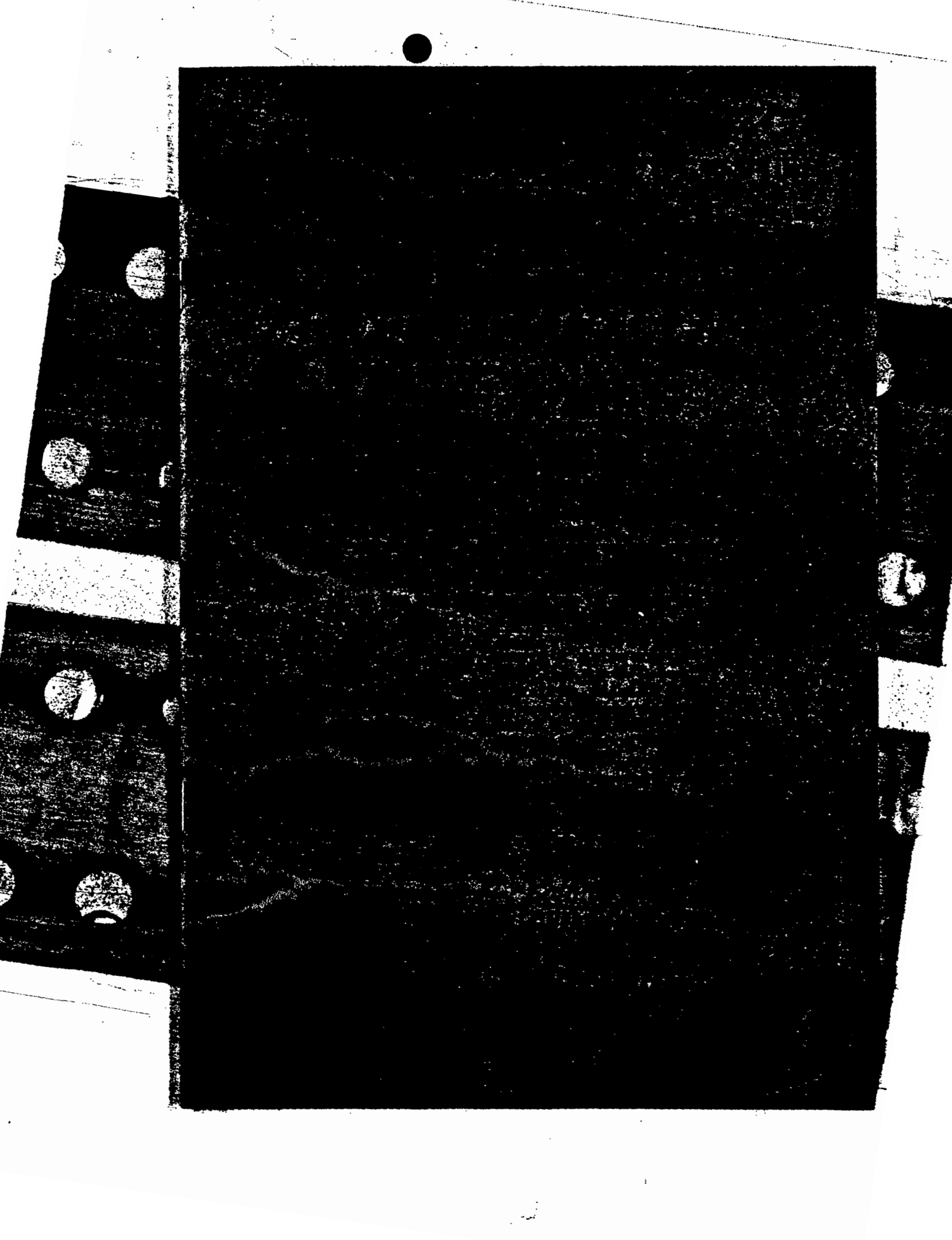
(3) - Bureau (Enc. 1)
1 - New York (100-37158) (RM)
1 - WFO

MAT:tjd
(5)

SOVIET SECTION

152
53 JAN 3 1968

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



INDEX

CITATIONS

285-483—67——1

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 791

MORTON SOBELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States District Court for the Southern District of New York is reported at 264 F. Supp. 579 (Pet. App. 1a). The *per curiam* opinion of the court of appeals is reported at 378 F. 2d 674 (Pet. App. 47a).

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1967. On September 14, 1967, the time for filing a petition for a writ of certiorari was extended to November 6, 1967, by order of Mr. Justice Harlan, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's motion under 28 U.S.C. 2255 to vacate his sentence for conspiracy to commit espionage should have been denied on the ground that it raises issues that were or should have been raised at earlier stages of the case.

2. Whether the district court properly determined that the records and files of the case establish that petitioner's allegations of fraud and perjury are unfounded.

STATUTE INVOLVED

Section 2255 of the Judicial Code, as amended, 28 U.S.C. 2255, is set forth in the petition at pp. 4–5.

STATEMENT

On March 29, 1951, petitioner and two co-defendants, Julius and Ethel Rosenberg, were found guilty, after trial by a jury, of conspiracy to commit espionage, in violation of former 50 U.S.C. 32 and 34 (now 18 U.S.C. 794). On April 5, 1951, petitioner was sentenced to thirty years imprisonment. His conviction was thereafter affirmed by the court of appeals, *United States* v. *Rosenberg,* 195 F. 2d 583, and this Court denied certiorari, 344 U.S. 838, and rehearing, 355 U.S. 860.[1]

[1] A general summary of the evidence adduced at trial is contained in the court of appeals' opinion affirming the convictions, at 195 F. 2d 588–590. The evidence adduced against petitioner is set forth in our briefs concerning petitioner's previous post-trial motions, see Brief for the United States in Opposition, Nos. 440 and 441, O.T. 1957, pp. 6–10.

The present motion is one in a series of collateral attacks which petitioner has made on his conviction.[2] Petitioner alleges broadly that the government knowingly "created, contrived and used false, perjurious testimony and evidence and intentionally and wilfully induced and allowed government witnesses to give false, misleadig and deceptive testimony in order to obtain the conviction of petitioner and his co-defendants" (A. 211a–212a).[3]

ARGUMENT

PETITIONER'S PRESENT APPLICATION FOR RELIEF PURSUANT TO SECTION 2255—HIS SIXTH SUCH MOTION—CONSTITUTES AN ABUSE OF THE STATUTE

Section 2255 provides in relevant part that the "court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." We recognize that, under the principles enunciated by this Court in *Sanders* v. *United States,* 373 U.S. 1, the fact that this is petitioner's sixth motion under 2255 is not in itself a bar to the consider-

[2] *United States* v. *Rosenberg,* 108 F. Supp. 798 (S.D.N.Y.), affirmed, 200 F. 2d 666 (C.A. 2), certiorari denied, 345 U.S. 965; *United States* v. *Sobell,* unreported, in S.D.N.Y. and C.A. 2, certiorari denied, 347 U.S. 904; *United States* v. *Sobell,* 142 F. Supp. 515 (S.D.N.Y.) (two motions), affirmed, 244 F. 2d 520 (C.A. 2), certiorari denied, 355 U.S. 873; *United States* v. *Sobell,* 204 F. Supp. 225, affirmed, 314 F. 2d 314, certiorari denied, 374 U.S. 857.

[3] References with the prefix "A." and "G." are to the petitioner's and the government's Appendix in the Court of Appeals, respectively. In the portions of the trial transcript reproduced in the government's Appendix, the number in parentheses designates the page of the printed transcript filed with this Court on June 7, 1952, and the number in brackets, preceded by "fol.", refers to the page on the stenographic transcript.

ation of the merits of the motion. However, the present petition does not raise any issue which has not been raised in prior petitions or which could not have been raised at petitioner's trial. In these circumstances the motion under Section 2255 is inappropriate.

As the district judge noted, despite petitioner's repetitious allegations, his present claims relate to two phases of the government's case at trial (Pet. App. 4a). He claims (1) that by various means the prosecution knowingly created the false impression that Exhibit 8, a sketch made by Greenglass, contained the principles of the atomic bomb dropped at Nagasaki; and (2) that the government knowingly allowed Harry Gold and David Greenglass to testify falsely that they met on June 3, 1945, in Albuquerque, New Mexico, and forged a hotel-registration card to corroborate their testimony in this regard.

At the outset, it should be noted that petitioner's first three § 2255 applications [4] were based on the same primary contention as the present motion—that the government knowingly used perjured testimony to convict petitioner—and in each case the courts unanimously rejected that contention.

The first motion was filed by the Rosenbergs and was adopted by petitioner. In that motion it was contended that Greenglass perjured himself when he testified that he had prepared, from memory alone, GX 2, 6, 7 and 8 (replicas of sketches of atomic-bomb information which Greenglass had delivered to Rosenberg and Gold). To "demonstrate" the falsity of this testimony, petitioners submitted affidavits of scientists saying it was "impossible" or "improbable" that Greenglass, lacking scientific qualifications, could have prepared these sketches solely from memory.

[4] See note 2, *supra*.

It was also alleged in that petition that the evidence failed to show that all the information which they conspired to transmit was of such a character as could properly be classified as "secret." 108 F. Supp. at 807. The petition contained the following allegation:

> "It [the petition] will then prove that the secret of the detonating mechanism—allegedly the secret transmitted by David Greenglass to the U.S.S.R.—is no secret at all. At the time of the trial, it was held by the Government and its witness, Walter S. Koski, that the theory of 'implosion' utilized for the purpose of assembling the critical mass of fissionable metal was invented and developed at the Los Alamos Project. The falsity of this statement will be shown by direct reference to the scientific and patent literature available prior to the initiation of the Manhattan Project." [Rosenberg petition, November 24, 1952, at 73–74.]
>
> "* * * The ability of any country to produce an atomic bomb rests upon its ability to mobilize the hundreds of thousands of scientists, technicians and laborers and its ability to make available the vast industrial plant required. It does not rest on stealing the 'secret' of the United States." [*Id.* at 98.]

> "* * * [T]he U.S.S.R. did in fact have the necessary scientists and technology for doing the job and * * * the principal reason that it could not make atom bombs during the course of the war was that all of its available manufacturing facilities were devoted to the more immediate necessity of producing well tested implements of war. It did not need any American 'secrets' to produce a bomb." [*Id.* at 82.]

In addition to a list of various treatises and texts on nuclear physics, this phase of the motion was supported by an affidavit of John Desmond Bernal, professor of physics at Birkbeck College, University of London, and a former Scientific Advisor to the Ministry of Home Security, 1939–1942, and to Combined Operations, 1942–45.

Thus, petitioner's original § 2255 motion contained in substance the same allegations which are made here—that the government falsely represented that the information which had been transmitted was valuable information containing secrets relating to the production of the atomic bomb. While, as the district court noted, petitioner has shifted the emphasis of his attack (Pet. App. 12a), the basic allegations of the alleged fraud are the same. Moreover, the court below correctly concluded that there was nothing in the present motion that could not have been produced at the time of the first motion (Pet. App. 25a–26a). In these circumstances, petitioner was not entitled to relitigate the same contentions in a new § 2255 proceeding. *Sanders* v. *United States,* 373 U.S. 1, 15–19.

Similarly, there is nothing new contained in the instant motion that would justify the present belated attack on the credulity of Gold and Greenglass concerning their meeting in June 1945, or the authenticity of the hotel registration. Here, it is significant that, at trial, defense counsel not only decided not to cross-examine Gold but that in summation the Rosenbergs' attorney said of Gold, "[H]e told the truth. That is why I didn't cross-examine him" (G. 199a). And petitioner's counsel, adopting a similar strategy, did not even refer to Gold in his summation. Petitioner's conclusory allegations of perjury do not change the fact that the substance of his argument is that there are alleged inconsistencies between certain pre-trial statements of Gold and his trial testimony. However, petitioner's trial counsel made a deliberate choice not to cross-examine Gold and not to seek to obtain any pretrial statement of Gold.[5] Similarly, the defects in Exhibit 16 which petitioner now relies on to show forgery appear on the face of the document which was introduced into evidence without objection. Thus, the present petition does no more than attempt to litigate issues which petitioner's trial counsel chose not to raise. It seems clear that petitioner "cannot now by way of motion under § 2255 assert a defense * * * which was available but not presented at the trial." *United States* v. *Branch,* 261 F. 2d 530, 533 (C.A. 2), certiorari denied, 359 U.S. 993.

[5] As the court below noted, trial counsel were able to obtain F.B.I. statements and grand-jury testimony during the cross-examination of Max Elitcher (Pet. App. 42a–43a).

285-483—67——2

THE DISTRICT COURT CORRECTLY DETERMINED THAT THE FILES AND RECORDS OF THE CASE SHOW THAT PETITIONER'S ALLEGATIONS OF PERJURY AND FRAUD ARE WITHOUT SUBSTANCE

In his opinion denying petitioner's motion, Judge Weinfeld stated that he had "read the entire lengthy trial transcript, including the testimony of witnesses who are not impugned; also the various post-trial petitions by petitioner and those of his codefendants in which he joined, and the trial and appellate records of those proceedings" (Pet. App. 3a). In a detailed opinion Judge Weinfeld carefully analyzed the allegations of the petition and demonstrated that, when viewed in light of the record of the trial, the petition is without merit. He concluded that petitioner "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" (Pet. App. 45a–46a).

As noted above, petitioner's contentions relate to the government's evidence bearing on two aspects of the case—(1) the secrecy and importance of the atomic information, and (2) the meeting of Gold and Greenglass in Albuquerque in June 1945.

Petitioner contends that David Greenglass and John A. Derry committed perjury in testimony concerning their own qualifications and the accuracy of a sketch relating to the atom bomb, Government Exhibit 8, which Greenglass identified as being similar to a sketch he had given Rosenberg. In connection with

this allegation, it is important to note that petitioner and his co-defendants were charged with conspiring to deliver information relating to the national defense to the Soviet Union. Thus, even if the information which Greenglass delivered to Rosenberg was not accurate, the charge that they were engaged in a conspiracy to obtain information about the atomic bomb would stand. Moreover, as Judge Weinfeld's opinion shows, the affidavits submitted in support of the motion failed to establish that Greenglass and Derry committed perjury (Pet. App. 11a–26a).

Greenglass testified that he had not obtained a college degree in science or engineering and was "no scientific expert" (G. 118a). Moreover, in testifying about a meeting that Rosenberg had arranged for him with a Russian, at which he was questioned about the lens molds for the atomic bomb that he was working on at his machine shop in Los Alamos, Greenglass admitted that "the things he [the Russian] wanted to know, I had no direct knowledge of and I couldn't give a positive answer" (G. 45a–46a).

With regard to Exhibit 8, Greenglass testified that in January 1945 Rosenberg had given him a description of the atom bomb which he later discovered was the type dropped on Hiroshima and that he thereafter attempted to gather information concerning the bomb (G. 82a, 85a, 86a). In September 1945 he returned to New York and told Rosenberg "I think I have * * * a pretty good description of the atom bomb." Greenglass testified that this bomb was one that was developed after the Hiroshima bomb and that he had

given Rosenberg 12 pages of materials relating to the bomb, including a sketch. Government Exhibit 8 was a sketch that Greenglass prepared prior to the trial which was, except for "a little difference in size," the same as the sketch he gave Rosenberg in September 1945 (G. 82a–91a).[6]

The government next called John A. Derry, who testified that he had a B.S. degree in electrical engineering and that during the period in question he had served as a liaison officer between the Los Alamos laboratory and General Groves, who was in charge of the entire Manhatten Project. It was his job to keep General Groves informed of the technical progress on the research, development and production phases of the atomc bomb project at Los Alamos and it was his "job to know what went into the parts" of the bomb (G. 184a–191a). Referring to Greenglass's testimony concerning the information and sketch he gave Rosenberg, Derry stated that they "demonstrate substantially and with substantial accuracy the principle involved in the operation of the 1945 atomic bomb" (G. 190a–192a). In response to a question whether the information "concerne[d] a type of atomic bomb which was actually used," Derry replied, "It does. It is the bomb we dropped at Nagasaki, similar to it" (G. 193a). During Derry's cross-examination it was conceded by the government that the information supplied by Greenglass was not a complete and detailed description of the bomb and only set forth the principle involved in its construction (G. 196a–198a).

[6] While petitioner's present counsel allege that the government went to great lengths to convey the impression that this sketch was highly secret, it was defense counsel who suggested that the sketch and testimony relating to it should be kept secret (G. 91a–97a).

Viewed in the light of the evidence concerning Exhibit 8 actually introduced at trial, there is clearly no merit to petitioner's contention that the prosecution deliberately misled the jury as to the importance or accuracy of the atomic information which Greenglass delivered to Rosenberg. Moreover, the affidavits of the scientists submitted in support of the petition, far from showing that Derry committed perjury, tend to support his testimony. Thus, one may compare to Derry's testimony that the sketch and description "demonstrate substantially and with substantial accuracy the principle involved in the operation of the 1945 atomic bomb" (G. 191a–192a), the following statements in the affidavits:

> "* * * the description is correct in its most vague and general aspects, that explosive 'lenses' were used to achieve implosion of a core containing plutonium and beryllium components, the overall system being arranged in an essentially spherically symmetrical confirguration * * * " (Linschitz, A. 317a);
>
> "* * * the sketch contained in Government Exhibit 8 illustrates the general points; the use of explosive lenses to make spherical implosion; the use of electrical detonation for simultaneity; the use of a plutonium sphere, and the use of beryllium as one component * * *" (Morrison, A. 342a);
>
> "* * * The sketch of Exhibit 8 * * * is a somewhat schematized cross-section [of an im-

plosion bomb], which might be called a pedagogical descriptive picture * * *" (Morris, A. 347a); and

"* * * The sketch presented is the kind of diagram I would use to explain the ideas involved in the bomb * * *" (Christy, A. 424a).

Moreover, the fact that these scientists may disagree with some of Derry's statements does not establish that the government knowingly used false testimony. As Judge Weinfeld noted (Pet. App. 15a):

> * * * The fact that they disagree with Derry's opinion does not establish its falsity. Significantly, one of the scientists concedes that judgment on the matter "must be a highly subjective one indeed." Derry's credibility was for the jury and not a panel of experts, who sixteen years after the event seek to undermine it. * * *

Similarly, the affidavits submitted in support of petitioner's motion fail to make a prima facie showing that the government used perjured testimony and a forged document to establish that Harry Gold met David Greenglass in Albuquerque, New Mexico, in June 1945. Here, again, it is important to note that it was the defense strategy not to cross-examine Gold at the trial.

To establish that Gold perjured himself at trial and that the government knew of this perjury, petitioner relies on the transcripts of interviews between Gold and his attorney in June 1954. These, petitioner alleges, are so inconsistent with Gold's trial testimony that the only conclusion that may be drawn from

them is that the prosecution and Gold concocted the trial testimony. However, as Judge Weinfeld concluded:

> A careful reading of the transcripts of the recordings and all other material, rather than supporting petitioner's charges, strongly corroborates Gold's trial testimony. The substance of Gold's statement to his lawyer on June 14, one day before [Greenglass's] arrest, is essentially the substance of his trial testimony; the major events, times, places and persons correspond. * * * The omissions and the claimed contradiction do not undermine the fabric of essential matters. * * * [264 F. Supp. at 601.]

Thus a reading of the record shows that on June 14, 1950, Gold pinpointed the very date of his Greenglass meetings five years earlier; and he relates times, places and conversations with substantial accuracy. The most striking feature of Gold's June 14, 1950, interview is not the omissions pointed out by petitioner, but the substantial completeness of Gold's account less than a month after his arrest and only two weeks after he first disclosed this incident to F.B.I. agents. This is particularly significant because Gold's disclosure to his attorneys of the circumstances of the June 3, 1945, meetings preceded by a day the arrest and interview of David Greenglass. In these circumstances, it is difficult to see how appellant can find in the Gold interviews any support for his claim that the June 3 meetings never took place.

While Gold's statement to his attorneys may omit several details found in his trial testimony, it is important to note that Gold himself has stated that his crime had been

> told with the most meticulous thoroughness to the FBI and, in somewhat less exhaustive detail, to my counsel. (Senate Internal Security Hearings on the Scope of Soviet Activity in the United States, 84th Cong., 2d Sess., Part 20, p. 1058 at 1087 (April 26, 1956), filed with court below October 13, 1966.)[7]

Moreover, the omissions in the statements are largely explained in the very statements themselves. While Gold, on June 14, 1950, did not state Greenglass's name and address and only referred to the "GI and his wife," the recording of that interview shows he was able through his description to direct the F.B.I. to the very house in Albuquerque where he met Greenglass, even though that house had been physically altered after 1945 (G. 225a–226a), and that he was able to identify Greenglass as the GI even though Greenglass had gained considerable weight since 1945 (G. 226a). While Gold also was unable on June 14 to remember the exact recognition sign "I come from Julius," he did remember that a sign involving the name of a man was used (G. 224a). While Gold did not mention staying at the Hilton in his June 14,

[7] The full circumstances surrounding Gold's interviews with his attorney are set forth in the district court's opinion (Pet. App. 35a–39a).

1950, interview, he did say in that very statement that in trying to locate the Greenglass apartment for the F.B.I. he had looked at films "starting with the Hilton Hotel" (G. 226a). And although he did not mention being given the phone number of Greenglass's brother-in-law Julius, he did state that he had been given the name and address, or name and phone number of the GI's "father-in-law or possibly an uncle of his who lived somewhere in the Bronx of New York" (G. 224a).

There is similarly no merit in petitioner's contention that the government knowingly used a forged registration card to corroborate Gold's testimony. In this regard petitioner relies on the following: (1) the card bears on the front the handwritten date of June 3, but on the back is stamped "June 4, 1945"; (2) there are erasures on the front of the card; and (3) the initials "ak" appearing on the June card were written by someone other than the person who wrote "ak" on Gold's registration card for September 19, 1945. Once again it is important to note that these alleged defects appear on the face of the exhibit and that trial counsel made no objection to its admission.[8] Moreover, as Judge Weinfeld noted in rejecting the contention (Pet. App. 31a–32a):

> * * * The circumstance that at a public and busy hotel the same initials appear on the two

[8] It is also significant that this exhibit was not introduced until after defense counsel had made their decision not to cross-examine Gold.

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

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

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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UNITED STATES GOVERNMENT

Memorandum

TO : DIRECTOR, FBI (101-2483) DATE: 1/10/68

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

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

ReWFOairtel 12/27/67.

Enclosed herewith for the Bureau is a copy of the Amicus Curiae Brief filed in support of the petition of MORTON SOBELL, which was filed in the U.S. Supreme Court, 12/29/67. The Amicus includes Scientists CHARLES CORYELL, BERNARD T. FELD, WILLIAM HIGINBOTHAM, SETH NEDDERMEYER, and EUGENE RABINOWITCH. Counsel for Amicus Curiae is HARRY KALVEN, JR.

The above described Brief was obtained 1/8/68, by SA RALPH C. VOGEL who advised the case continues under the consideration of the Supreme Court.

EX-102

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