IN THE

Supreme Court of the United States

October Term, 1967

No. 791

MORTON SOBELL,

Petitioner,

against

UNITED STATES OF AMERICA.

~~MOTION FOR LEAVE TO FILE AN~~ *AMICUS CURIAE* BRIEF IN SUPPORT OF THE PETITION OF MORTON SOBELL

Amicus Curiae,

CHARLES CORYELL,
BERNARD T. FELD,
WILLIAM HIGINBOTHAM,
SETH NEDDERMEYER,
EUGENE RABINOWITCH,

HARRY KALVEN, Jr.,
111 East 60th Street,
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To The Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Statement of Interest

Now, Charles Coryell, Bernard T. Feld, William Higinbotham, Seth Neddermeyer and Eugene Rabinowitch respectfully move this Court for leave to file the accompanying brief in support of the petition of Morton Sobell for certiorari. The consent of the attorney for the petitioner herein and the consent of the attorney for the United States to the filing of the brief are with the Clerk of the Court.

The amicus here are members of that special community of scientists who study those branches of science relevant to atomic energy. As scientists it has been their fate to play roles in the historic development of the atomic bomb by the United States and in the analysis of its impact on American policy. Charles Coryell is professor of chemistry at Massachusetts Institute of Technology, Bernard T. Feld

is professor of physics at Massachusetts Institute of Technology, Seth Neddermeyer is professor of physics at Washington University, William Higinbotham is head of the Instrumentation Division of the Brookhaven National Laboratory, and Past Chairman of the Federation of American Scientists, Eugene Rabinowitch is professor at the University of Illinois and co-founder of the Bulletin of Atomic Scientists and its editor since its inception.

As scientists and as citizens they have had a deep interest in the implications for national policy of the discovery of methods for releasing nuclear energy. They have had a special concern with the problems of communicating to the public and to the government the nature of the discovery of atomic energy. They have had a concern too with the appropriate methods of handling classified information in the area of science; they recognize a need for safeguarding certain scientific information but are sensitive to the consequences to the scientific community and to the public at large of such procedures.

It is in their role as scientist-citizens that they have a special interest in and a concern with this case.

Brief Statement of Argument to be Presented if Leave to File an *Amicus Curiae* Brief is Granted.

I

This case comes to the Court inescapably freighted with its special history. For better or for worse, it has become one of the great political trials of the twentieth century and had attracted world-wide attention.

The history does not perhaps lend the case any special claim to the attention of this Court now some sixteen years after the execution of the Rosenbergs, and sixteen years

too after Mr. Justice Frankfurter's dissent filed three days after their execution had enduringly reminded us: "... only by sturdy self-examination and self-criticism can the necessary habits for detached and wise judgment be established and fortified so as to become effective when the judicial process is again subjected to stress and strain" [346 U.S. 273, 310 (1953)].

Petitioner's application, however, does lay special claim to the attention of this Court. It raises an important question as to the obligations the Constitution imposes on prosecutors, a question whose general significance for American law is not narrowed by the circumstance that it arises in the context of an historic case. It asks whether there are any Constitutional limits on the calculated exaggerations of the prosecutor, at least in capital cases which have an overtone of treason. Where, it asks, is the line between the excesses of adversary prosecutor rhetoric and the conscious creating of a false and prejudicial image. The case thus affords the Court an important opportunity to trace further those principles of prosecutor decency it has been working out in the line of cases from Mooney v. Holohan, 294 U.S. 103 (1935), through *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *Napue* v. *Illinois*, 360 U.S. 264 (1959), to just last term *Miller* v. *Pate*, 386 U.S. 1 (1967) and *Giles* v. *Maryland*, 386 U.S. 66 (1967).

II

In its most summary form, the situation is this: an important step in the original trial sixteen years ago was the evidence as to the confidential atomic energy information the defendants were alleged to have passed to the Russians. That evidence consisted primarily of three items: the oral testimony of David Greenglass, an accomplice who turned state's evidence; the expert testimony of Major Derry, offered as expert testimony, as to the significance of what Greenglass said he transmitted; and a drawing, Exhibit 8,

which was offered as Greenglass's recollection of a sketch of the classified information he had transmitted. For a variety of reasons, some of which at least involved the strategy of defense counsel, Exhibit 8 was impounded at the trial and was not available as part of the public trial record. Some part of the testimony of Greenglass remained public, but the Exhibit and its description had been the centerpiece of the prosecution evidence as to the quality and gravity of the confidential information defendants were charged with having transmitted illegally.

In 1966 appellants obtained a court order, giving them at long last access to the impounded evidence. They then showed the evidence to certain scientists and obtained from them affidavits stating their view of its accuracy and significance.

A motion was made under Sec. 2255 seekig a post-conviction review based, in effect, on the discrepancy between the scientists' affidavits and the image created at the trial, a discrepancy which it was alleged was substantial, highly prejudicial to defendant, and knowingly created by the prosecution.

Judge Weinfeld below denied the motion for a Section 2255 hearing and was affirmed per curiam by the Court of Appeals. In a lengthy and careful opinion Judge Weinfeld held that there was no inconsistency between the affidavits of the scientists and the image of the evidence created at the trial; that it would be legally irrelevant if there had been any inconsistency, given the nature of the precise charge on which the defendants were convicted; and that in any event they had forfeited whatever rights they might otherwise have had by their failure more promptly to get at the impounded evidence and to raise this challenge.

The issue which the petition puts before this Court is whether Judge Weinfeld was correct in denying appellant's petition without granting him an evidentiary hearing. It is

an issue of high significance for the administration of Section 2255, and for the definition in constitutional dimensions of the obligations of the prosecutor.

We would urge that Judge Weinfeld was in error on each of the three premises on which he based his denial of the petition. We would urge that he was in error too in disposing of the issue without an evidentiary hearing. Because of the gravity of the issue and because the evidence is so technical and because there are genuine difficulties of communication between the law and the scientist in matters of this sort the petition cannot rationally be evaluated without recourse to a hearing.

III

The case turns on what might be called *the distance* between the image created by the current affidavits of the scientists and the image created at the trial which is preserved for us in a trial record now sixteen years old. The "measurement" of such distance is avowedly a subtle and difficult matter.

The decisive test of the impression created by the prosecution at the trial is found in the impact it had on the trial judge. When Judge Kaufman turned to the sentencing of the defendant Rosenbergs to death he furnished an indelible summary (R. 1613-15):

> The issue of punishment in this case is presented in a unique framework of history. It is so difficult to make people realize that this country is engaged in a life and death struggle with a completely different system. This [fol. 2450] struggle is not only manifested externally between these two forces but this case indicates quite clearly that it also involves the employment by the enemy of secret as well as overt outspoken forces among our own people. All of our democratic institutions are, therefore, directly involved in this great conflict. I

believe that never at any time in our history were we ever confronted to the same degree that we are today with such a challenge to our very existence. The atom bomb was unknown when the espionage statute was drafted. I emphasize this because we must realize tha we are dealing with a missile of destruction which can wipe out millions of Americans.

The competitive advantage held by the United States in super-weapons has put a premium on the services of a new school of spies—the homegrown variety that places allegiance to a foreign power before loyalty to the United States. The punishment to be meted out in his case must therefore serve the maximum interest for the preservation of our society against these traitors in our midst.

• • •

I consider your crime worse than murder. Plain deliberate contemplated murder is dwarfed in magnitude by comparison with the crime you have committed. In committing the act of murder, the criminal kills only his victim. The immediate family is brought to grief and when justice is meted out the chapter is closed. 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 [fol. 2452] more of 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. No one can say that we do not live in a constant state of tension. We have evidence of your treachery all around us every day—for the civilian defense activities throughout the nation are aimed at preparing us for an atom bomb attack.

This is an experienced trial judge speaking at a moment of uttermost solemnity and choosing his words with care. And if this is the way he read the gravity of evidence

presented at the trial, there is no need to speculate on how the jury read it.

This then is the image created at the trial—the mysterious piece of paper had held the most awesome secret in the world, a secret of formidable technical complexity and sophistication and had made possible the transmission of it to the enemy the way one might transmit a unique complicated password.

The scientists' affidavits, although difficult to summarize neatly, convey what is surely a quite different image. Professor Linschitz (314a-338a) notes "a basic ambiguity" as to the principle; "a major lapse" in omitting the tamper shell; the key failure to give any clue as to scale in a matter where precision is all; the kind of thing that would result from an attempt "to condense the results of a 2-billion dollar development effort into a diagram, drawn by a high school graduate machinist on a single sheet of paper." Professor Morrison (339a-349a) notes the testimony and sketch "entirely omit two important spherical components"; that "a grossly false impression" is given of the size of the most costly and critical component; that one element "beryllium" is misdescribed and mislocated; that "a key element polonium" is "entirely" omitted; and in the end summarizes the sketch as "a caricature" of the bomb. Professor Christy (422a-425a) states he is "in detailed agreement" with Professor Morrison's evaluation; that "the sketch contains basic errors and these are compounded by additional errors in the description"; at most it conveys to someone already familiar with the implosion "the germ of the ideas involved."

Further the scientists emphasize that there was no single secret or single principle involved but rather "a complex set of technical tricks, devices and processes combined with an immense and versatile industrial capacity".

This then is the image of the evidence created by the scientists' affidavits—at best a rudimentary, amateurish, marginally useful sketch and description.

The test of the matter, we repeat, is the impact of the prosecution evidence on Judge Kaufman. Would he conceivably have spoken and reacted as he did had any of the scientists' qualifications of Exhibit 8 been introduced at the trial?

IV

Equally important, Judge Weinfeld was in error in holding that any contradiction between the affidavits and the evidence at the trial was irrelevant because the defendants were not charged specifically with transmitting the secret of the atomic bomb, but with transmitting classified information; that therefore even the scientists' diluted version of the Exhibit would support the conviction.

This misconceives the appellant's grievance. The argument is not that the affidavits show the information to have been utterly without value to the Russions, nor is it that the affidavits directly contradict the indictment, and if believed establish the innocence of the defendants. The argument rather is that the affidavits establish the exaggeration that was severely *prejudicial* to the defendants at the trial for at least three reasons:

> i) There was a sharp conflict of testimony in the case between Greenglass and the Rosenbergs and thus a critical issue of credibility. *The fact that Greenglass could produce a sophisticated version of the bomb must have seemed to the jury enormously to underwrite his credibility*; *cf. Alcorta* v. *Texas*, 355 U.S. 28 (1957); *Napue* v. *Illinois*, 360 U.S. 264 (1959).

> ii) Evidence that "the very secret of the bomb itself" was implicated must have had a devastating emotional impact on the jury, productive of hatred and hostility toward the defendants.
>
> iii) At the very least the difference between altering the history of the world and an amateurish effort at espionage must rationally have an impact on the penalty; cf. *Brady* v. *Maryland*, 373 U.S. 83 (1963).

V

Judge Weinfeld did not find it necessary to address himself to the third leg of appellant's argument, namely, that the government had consciously created the false impression.

The government was unequivocal in its assertion throughout the trial that Greenglass was transmitting the "very bomb itself".

It set the stage with its opening statement to the jury: ". . . an elaborate scheme which enabled them to steal through David Greenglass this one weapon which might well hold the key to the survival of this nation and means the peace of the world—the atomic bomb . . . the evidence will show how . . . Greenglass stole . . . sketches and descriptions of secrets concerning atomic energy and sketches of the very bomb itself" (R. 183).

In the direct examination of Greenglass he is asked point blank: "Did you draw up a sketch of the atom bomb itself?" (R. 497). And in the next ten questions, Mr. Cohn put to him, the phrase "atom bomb" appears four more times (R. 497-8).

The expert witness, Col. Derry, is used expressly to authenticate "the cross-section sketch of the bomb" (R. 908) and is asked whether the testimony and the sketch:

"demonstrate substantially and with substantial accuracy the principle involved in the operation of the 1945 atomic bomb."

And in its closing the government reminds the jury: "You heard Mr. Derry who testified in respect to Exhibit 8 the cross-section of the atom bomb itself, the Nagasaki bomb" (R. 1518) and confidently tells it: "We know that these conspirators stole the most important secrets ever known to mankind . . ." (R. 1519).

One detail in the record, apparently trivial, now takes on significance. Pursuant to the mandate of 18 U.S.C. § 3432, a provision designed as a special protection for defendants in treason and capital cases, the government filed just before the start of the trial "a list of the witnesses to be produced on the trial for proving the indictmet." The list contained some 100 names but only 22 were actually called. Of more interest, however, is the circumstance that the list included General Groves and three of the world's most distinguished atomic scientists: George Kistiakowski, J. Robert Oppenheimer,* and Harold C. Urey. None of the four were called at the trial and the petition now alleges that Dr. Urey had been unaware he had been listed as a government witness and had never been contacted by the government (229a). The list, however, played a role in the voir dire. It was read to the prospective jurors and they were asked if they knew any of those listed (R. 52). At least two jurors were to raise questions about their degree of contact with Dr. Oppenheimer and Dr. Urey (R. 137, R. 156).

Perhaps the deliberate listing of distinguished witnesses it had no intention of calling was just a petty ignoble

* As petitioner's counsel states in his brief, there is available in the records of this case a letter from Dr. Oppenheimer dated October 25, 1966, stating in response to a question as to whether he had ever been asked to be a witness, "No one ever asked me to appear and no one indicated to me what I might be asked were I to appear."

strategy on the part of the government designed to intimidate the defense. But it now would appear also to have been part of a larger strategy of creating in the minds of the court and jury an impression that they were dealing with a matter of the highest scientific sophistication and that the government had the highest scientific credentials on its side.

And in this context the government's selection of Col Derry as its expert for for the purpose of authenticating the accuracy of Exhibit 8 emerges as a major puzzle. The point goes not to Derry's integrity nor to his being in some sense an expert but rather to the circumstance as Professor Morrison notes (346a) that Derry who was an engineer and liaison officer would seem to have lacked the intimate scientific experience with the bomb, available to so many scientists accessible to the government, that would compel him to add qualifications to the Greenglass version. And it is to be noted that the government chose Derry as its expert for its most crucial and technical scientific point in the trial while finding it unnecessary to call upon Dr. Urey, Dr. Oppenheimer, Dr. Kistiakowski or for that matter Dr. Koski whom they had used on another point.

In *Miller* v. *Pate*, 386 U.S. 1 (1967), this Court reversed a murder conviction where the prosecutor had displayed to the jury a pair of paint-stained shorts and misrepresented the paint stains as blood stains. The essence of appellant's charge is that the prosecution was holding before the jury paint-stained shorts in this case too.

VI

Judge Weinfeld also erred in charging the appellant with laches in failing to seek to unimpound the evidence and to raise their point earlier, and in finding the current motion for review repetitious of the prior motions made unsuccessfully by the appellant.

It is most doubtful as a matter of law that a doctrine such as laches is appropriate where section 2255 is involved; *Price* v. *Johnston*, 334 U.S. 266 (1947); *Sanders* v. *U.S.*, 373 U.S. 1 (1962); and in any event as a matter of fact it is most difficult to see a lack of diligence in appellant's efforts to get at the impounded evidence. Moreover, until the decision on the impounded evidence, scientists engaged on the project, could not safely speak concretely about any defects in the sketch in question.

Nor is it seemly for Judge Weinfeld to show impatience with appellants for taxing the judicial process with this sixth post-conviction effort. It is obviously not duplicative of the other motions and it raises a point that is surely not frivolous. The historic political significance this case has taken on may not entitle appellant to any favors from the law. It is important that it not in the end deprive him of its equal protection.

VII

There remains then the final step in the argument—to connect these matters with the defendant Sobell in view of the fact that there was no connection at the trial that *he* was engaged directly in the transmission of the atomic bomb. Two points need be made. First, given the stress of the times and the drama of the case, Sobell by being tried with the Rosenbergs was made inevitably a partner in their fate. The credibility of the case against them inevitably affected the credibility of the case against him, the emotion and hostility against them inevitably infected the mood toward him, the perception of the gravity of the Rosenberg offense inevitably affected the perception of the gravity of the Sobell offense. The more the evidence was made to appear to show a skillful professional espionage ring, the more likely Sobell's complicity would have appeared to the jury, as compared with a case where the evidence showed a bungling amateur effort at most. Second, it will be remembered that in the original appeal in the case, Judge Frank dissented arguing that it was error to have tried Sobell with the Rosenbergs as engaged in a single conspiracy. *United States* v. *Rosenberg*, 195 F. 2d 583 (CA 2d 1952). The calculated exaggeration by the prosecution of the atomic bomb evidence was, certainly as prejudicial to Sobell as to the Rosenbergs.

CONCLUSION

For the foregoing reasons and in view of the important principles of law involved as to the obligations of prosecution and in view of the historic importance of this case itself, it is respectfully urged in our role as amicus curiae that this petition for certiorari be granted.

HARRY KALVEN, JR.,
Counsel for Amicus Curiae.

CHARLES CORYELL,
BERNARD T. FELD,
WILLIAM HIGINBOTHAM,
SETH NEDDERMEYER,
EUGENE RABINOWITCH.

UNITED STATES GOVERNMENT

Memorandum

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

TO : Mr. W. C. Sullivan

DATE: January 15, 1968

FROM : W. A. Branigan

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

SUBJECT: MORTON SOBELL
ESPIONAGE - RUSSIA

This is to advise that the United States Supreme Court denied Morton Sobell's petition for a writ of certiorari on this date.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 6/4/87 BY 3042 PWT/lmw

BACKGROUND:

Morton Sobell was convicted in 1951 along with Julius and Ethel Rosenberg of conspiracy to commit espionage on behalf of the Soviets. The Rosenbergs were executed and Sobell was sentenced to 30 years in prison. Since that time, numerous efforts have been made to upset Sobell's conviction without success.

In May, 1966, Sobell filed his sixth motion in the United States District Court, Southern District of New York, to set aside his conviction claiming the Government knowingly used forged documents, perjured testimony, and suppressed evidence which would have proved his innocence. He also claimed that the Government had deliberately exaggerated the value of the evidence concerning the atomic bomb which was transmitted to the Soviets by the Rosenbergs. This motion was denied on February 14, 1967, by Judge Edward Weinfeld in a 79-page opinion. On June 26, 1967, the Circuit Court of Appeals, Second Circuit, affirmed the opinion of Judge Weinfeld.

CURRENT ACTION:

On November 6, 1967, a petition for writ of certiorari was filed on Sobell's behalf with the United States Supreme Court.

Supervisor Courtland Jones of the Washington Field Office telephonically advised today that the petition for certiorari was denied by the Supreme Court on this date.

101-2483-1712

101-2483 REC 55

APL:slc
(6)

EX 101

16 JAN 16 1968

CONTINUED - OVER

SOVIET SECTION

59 JAN 22 1968

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

Mr. Justice White and Mr. Justice Marshall took no part in the consideration or decision of this petition. Mr. Justice Douglas was of the opinion that certiorari should be granted.

ACTION:

None. For your information.

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

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

FBI

Date: 1/15/68

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

Via AIRTEL ______________________
(Priority)

TO: DIRECTOR, FBI (101-2483)

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

MORTON SOBELL
ESP - R
(OO: NY)

ReWFOlet to Bureau dated 1/10/68.

The U. S. Supreme Court issued an order today, (1/15/68), denying petition for writ of certiorari in the case entitled "MORTON SOBEL Vs. the U. S., Case #791 Appellate."

Included in the order is the statement Mr. Justice DOUGLASS is of the opinion certiorari should be granted. The order states further Mr. Justice WHITE and Mr. Justice MARSHALL took no part in the consideration or decision of instant petition for certiorari.

This case has now been concluded in the Supreme Court.

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

RCV:teb
(6)

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

REC 30 101-2483-1713

EX 104

11 JAN 16 1968

C. C. - Bishop

66 JAN 19 1968

Approved: ______________________ Sent ______________ M Per ______________
Special Agent in Charge

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

FBI

Date: 2/27/68

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)

ReWFOairtel 1/15/68.

Enclosed herewith for the Bureau is copy of PETITION FOR REHEARING ON DENIAL OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS. This petition was filed in the U. S. Supreme Court on 2/9/68 in the case of Morton Sobell vs the United States of America, Case #791.

The enclosed copy was furnished to SA RALPH C. VOGEL by WILLIAM GULLICKSON, Assistant Clerk, USSC, who advised it need not be returned.

WFO will follow the progress of this latest legal step of counsel for subject and advise of the court's decision in the matter.

ENCLOSURE ATTACHED

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

MAT:teb
(6)

EX 106

REC-40 101-2483-1714

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 5/4/80 BY 3042 DPWT/lmn

14 FEB 27 1968

SOVIET SECTION

C. D. Bishop

Approved: ______________________ Sent ______________ M Per ______________
Special Agent in Charge

FEB 1968

IN THE

Supreme Court of the United States

October Term, 1967

No. 791

MORTON SOBELL,

Petitioner,

against

UNITED STATES OF AMERICA.

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

MARSHALL PERLIN,
36 West 44th Street,
New York, N. Y. 10036,
WILLIAM M. KUNSTLER,
ARTHUR KINOY,
MALCOLM SHARP,
BENJAMIN O. DREYFUS,
VERN COUNTRYMAN,
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1967

No. 791

MORTON SOBELL,

Petitioner,

against

UNITED STATES OF AMERICA.

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

The district court in its opinion, adopted by the Court of Appeals, noted that in deciding the present motion it also examined and considered all of the various post-trial applications made by the petitioner and his co-defendants. In the petition for a writ of certiorari the merits of the prior applications were not examined and, except in one instance, their relationship to the present application was not touched upon. Equally, the adequacy of the administration of our criminal law as applied to this case in the post-trial proceedings was not discussed although encompassed in the moving papers as part of the files and records of this case.

The sentencing court on an occasion stated that "judicial impartiality requires that the court be free from extraneous and conflicting pressures." *United States* v. *Sobell*, 142 F.Supp. 515. But an examination of the post-trial proceedings will reveal that one of the most important reasons why petitioner and his co-defendants had never been granted an evidentiary hearing and had been denied relief was that there were extraneous and conflicting pres-

sures bearing upon the administration of the federal criminal law and the courts in this " 'political' trial of this generation." 54 Col. L.R. 219 (1945). As stated in that note, entitled *The Rosenberg Case: Some Reflections on Federal Criminal Law*, the defendants were charged with having "transmitted the secrets of this destruction [the atomic bomb] to a foreign power. . . ." The subject of the note as there stated was:

> "This Note is concerned with how one of our institutions, the system of criminal law, functioned in an atmosphere of clashing ideologies and fearful expectations. More specifically the inquiry is whether federal criminal law and procedure were in fact adequate to dispense justice in the outstanding 'political' trial of this generation."

The note directed its attention to only one post-trial application—the application made on June 16, 1953 raising the question of the applicability of the Atomic Energy Act of 1946 and the contended impact of that statute upon the Espionage Act of 1917. On June 17, 1953 Mr. Justice Douglas issued a stay of execution of the death sentences and directed that the petitioners proceed in the district and appellate courts in that he felt that a substantial question had been raised and he had serious doubts whether the law as then prevailing would permit the imposition of the death sentence unless a jury recommends it and finds an intent to injure the United States.

For the first time in its history at the request of the Attorney General and for extra-legal reasons the Court was asked to reconvene for a special term to vacate the stay of execution. The Court reconvened on June 18, 1953, directed that argument immediately be held and the next morning vacated the stay of execution although three members of this Court were convinced that there was a substantial question and the execution should be stayed, and

whether the Court had the power to vacate the stay. *United States* v. *Rosenberg*, 346 U.S. 273, 292-293. While millions of people in this country and throughout the world joined by statesmen and religious leaders were calling for a stay of execution and a re-examination of the entire case as well, and their numbers were growing day by day,* the President deemed it necessary to make a statement he believed to be true in justification of his action in denying executive clemency. He stated in part:

> "The execution of two human beings is a grave matter but even graver is the thought of the millions of dead whose deaths may be directly attributable to what these spies have done." **

We now know the President was misled.

In looking to the events of the week of June 15, 1953 the Columbia Law Review note previously cited found:

> "The inevitable conclusion is that in this last stage of an extraordinarily protracted litigation, the rights of the Rosenbergs did not receive the precise and extensive consideration that must characterize the administration of the criminal law. Whether the Rosenbergs were in fact guilty is beside the point. In the vindication of their rights they were entitled to the equality of treatment afforded by the technical safeguards of the law." (p. 260)

Since that article was written in 1954 there have been other post-trial proceedings and we believe their disposition would only enforce such a conclusion. The answer to the basic question is that insofar as this case is concerned the system of criminal law and its administration

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* A consideration which undoubtedly impelled the government to ask the Court to reconvene in that it may not have been possible, in view of world opinion, to have attempted to carry out the death sentence in the Fall of 1953.

** New York Times, June 20, 1953.

has not in fact been adequate to dispense justice in the "'political' trial of this generation" and neither petitioner nor the Rosenbergs received the precise and extensive consideration or quality of treatment to which they were entitled under the law.

The Court, by declining to review this case at any time, forecloses judicial vindication to the petitioner and his co-defendants. Thus petitioner is denied any opportunity to establish that he did not receive a fair trial and that the very heart of the case upon which the conviction rested and which impelled the imposition and carrying out of the severest sentences was in fact false. Until the present 2255 motion the myth of the delivery of the bomb to the Soviet Union, said to have been encompassed in Exhibit 8 as described by Greenglass, prevailed and affected the entire proceedings including each and every one of the post-trial applications.

Without going into a detailed review of all of the post-trial applications it can be fairly stated that in most instances the applications for relief were not denied on the grounds that there was no merit but primarily that the issues were not timely raised and thus the judgment of conviction could not be subject to collateral attack. Nevertheless some of the conduct of the prosecution raised in the prior applications warrants consideration in this petition for rehearing; in that the present motion is directed toward the flagrant abuse of power and disregard of the responsibilities of a representative of the United States in a criminal prosecution.

In the course of the trial the prosecution unsealed the indictment of one William Pearl whose name was on the list of witnesses presented to the defense just prior to the trial. The indictment was made public and statements were made by the prosecution to the press that Pearl had been indicted for perjury in denying any personal association with the "atomic spies", a term which encompassed

the petitioner as well as the Rosenbergs and was so disseminated in the press. When the matter came up in court out of the presence of the jury there were some discussions had off the record; and defense counsel, as alleged in the first 2255 motion, was advised by the prosecution that the unsealing of the indictment was not done intentionally or timed to influence either the climate or the jury.* Upon that representation the defense did not move for a mistrial. The Court of Appeals in its opinion affirming the denial of an evidentiary hearing acknowledged that such conduct if done intentionally constituted tactics which could not be "too severely condemned." *United States* v. *Rosenberg*, 200 F. 2d 666, 670. The Court also found that such clear prosecution misconduct would have entitled petitioner and his co-defendant to a mistrial but that the motives of the prosecution were irrelevant regardless of the extent of its impact on the jury, and that the defendants had waived their right to collaterally attack the conviction on that ground.

In 1962 petitioner moved for relief, one of the grounds being founded upon this Court's decision in *Grunewald* v. *United States*, 353 U.S. 391. Ethel Rosenberg, after giving her direct testimony, was subject to a grossly unfair cross-examination by the prosecution. She had, in appearing before the grand jury, invoked her Fifth Amendment privilege in response to all questions posed. In her direct testimony she answered questions on the same subject matter. The prosecution assiduously brought out the prior invocations of the privilege not merely as an attack upon her credibility but as proof of her guilt; that now having been indicted she was willing to perjure herself to avoid the conviction she deserved. Both Julius and Ethel Rosenberg were asked questions as to their political affiliations while on the stand and in both instances asserted their privilege. The prosecution did not wish to press the point in that it

* We do not here discuss the climate created by the prosecution prior to the trial, a ground tendered after trial and ruled untimely.

had already implanted in the minds of the jury that the assertion of the privilege was equivalent to an acknowledgment of guilt. Little wonder that the petitioner's counsel advised him not to take the stand in view of the paucity of the evidence against him when he would have been subject to a political inquisition. Under the theory of proving intent the prosecution was equating Communist association with the crime of espionage.

The government acknowledged in argument before the court of appeals that were Ethel Rosenberg alive and if the *Grunewald* policy were to be applied to her direct appeal from the judgment of conviction she would have been entitled to a new trial. The conspiracy nature of the case is such that it would mandate a new trial for all of the defendants. The Court of Appeals ruled that *Grunewald* did not reach such constitutional proportions as to be retroactive and since the issue had not been timely raised petitioner was not entitled to relief and in any event it would not enure to the benefit of petitioner in that his co-defendant was merely testifying, insofar as he was concerned, as a witness. The Court also held in its opinion that in any event the results would have been the same. This is hardly a ground to deny relief if the fault constitutes a denial of a fair trial.

The present 2255 motion and the proceedings subsequent to the unimpounding of Exhibit 8 and related testimony and the attack upon the alleged June 3, 1945 meeting and registration card went to the heart of the entire case and destroyed the myth of the alleged delivery of the bomb to the Soviet Union.

When one considers the acts of the prosecution—the unsealing of the Pearl indictment in the midst of the trial, the inexcusable, unfair cross-examination of Ethel Rosenberg, equating of the assertion of the privilege with a confession of guilt, along with the numerous false statements made by the prosecution concerning Exhibit 8 and related testimony, the showing made in the present motion is further strengthened and enhanced as to the knowing use of false testimony and a forged document by fraud and prosecution misconduct. Yet the lower courts, as we previously pointed out, in their consideration of the present application failed to consider the unrefuted false statements made by the prosecution as to the alleged atom bomb theft, and that the prosecution was dedicated to obtaining a conviction by any means, fair or foul, whether warranted or not.

Both the government in its brief and the lower court in its opinion essentially disregarded in their review of the trial the basic charge of the theft of the bomb, and essentially conceded that the information allegedly transmitted might well have been of marginal, or no value. It was said that such facts are irrelevant in that the indictment itself did not require a finding of the successful theft and delivery of the Nagasaki bomb. They ignored the fact that the enormity of the charge and the fraud probably led to the conviction. It is almost equivalent to rereading the history of the Salem witchcraft trials and justifying the burning of a "witch" by pointing out that the indictment had alleged "casting an evil eye", for example, and that the label was irrelevant if there was some evidence of the overt act of looking.*

We have referred to extraneous and conflicting pressures and extra-legal considerations. What were some of them?—The fact that Fuchs had transmitted information to the Soviet Union unknown and undetected by the government; that at least one American undetected by us had been his courier; that this nation truly believed that it had a monopoly on atomic weapons and that the Soviet Union could not have independently developed their own by 1949 although this in fact was not so; that there was an anti-

* See *The Crucible* by Arthur Miller; *St. Joan* by George Bernard Shaw.

Communist hysteria abroad in this land and a senator from Wisconsin was claiming that our government was permeated by spies of left persuasion and in 1953 we had suffered "twenty years of treason"; and that the institutions of government as well as substantial portions of the public were led to equate Communism and espionage. All this led to the execution of the Rosenbergs and, once they were executed a desire to leave the matter untouched and forgotten. But it also left the petitioner in jail and neither he or untold others forgot or would let it be forgotten, whether the other parties to the proceedings wished it or not.

It is not an accident of history that the family of Colonel Dreyfus has appealed to this country in behalf of both the petitioner and his co-defendants. Nor is it a surprise that the sister of Bartolomeo Vanzetti has made similar application and that Warren K. Billings of the *Mooney-Billings* case has organized public support in this country in behalf of petitioner.

There have been cases in history where the courts afforded no judicial relief to those who were entitled to it. In the case of *Spies* v. *People,* 122 Ill. 1; *ex parte Spies and others,* 123 U.S. 131 (the Haymarket bombing), it was Governor Altgeld who granted relief when the courts had failed even though some of the defendants had already been executed. See Altgeld, *Reasons for Pardoning Fielden, Neebe and Schwab.* In the Mooney-Billings case 18 years after the conviction this Court in *Mooney* v. *Holohan,* 294 U.S. 103 advanced the cause of the fair administration of the criminal law in granting judicial relief where there is prosecution misconduct and remanded the matter to the courts of California with the direction that Mooney be afforded his remedies under the state writ. Here too judicial relief was denied although a hearing was held. (see *in re Mooney,* 10 Cal. 2d cert. den. 305 U.S. 598) and it was the intervention of Governor Olson of California who re-

viewed the case and found Mooney innocent that led to his release as well as the release of Warren K. Billings. It should be noted that the judicially imposed death sentence against Mooney was revoked by intervention of President Wilson.

In this case not only has there never been an evidentiary hearing granted, and no review by this Court of the fairness of the trial, but moreover the executive has refused to act. Indeed, the Pardon Board has, consistent with the request of the sentencing court, refused to parole the petitioner although he has been a model prisoner and long entitled to that relief.

We have set forth what has transpired in the past. Yet today the Department of Justice and its associated agencies, in spite of the sufficiency of the papers, vigorously oppose review by this Court and the consequent hazard of an evidentiary hearing. It does not do so because of its concern with the abuse of the Great Writ or the vague fallacious argument that the matter had been litigated before. It does so because it wishes silence and wishes to keep its files and records secret. It fears exposure of the truth. Otherwise the government would be saying "Let us have this hearing once and for all. Let us put to rest these unfounded claims." But these claims are not unfounded and there is the dilemma which is avoided by judicial abstention.

This Court has the option of granting certiorari upon this petition for rehearing which, it is respectfully submitted, would result in remanding the matter for an evidentiary hearing. The refusal to grant the petition for rehearing would in the alternative result in remanding this case to judicial oblivion and thus foreclose the utilization of our federal system of criminal law as an instrument to determine whether petitioner and his co-defendants received a fair trial or whether their conviction was a result of fraud and deception and prosecution misconduct. If the latter course is followed the petitioner must serve out his re-

maining time under a judgment of conviction which was unfairly obtained. But our Constitution and institutions created thereunder and in particular the administration of criminal justice will have been marred and stained, and no convenience of the moment can justify such a result. This case is ingrained in the minds of too many who will not forget or accept gross injustice. The case will then be a shameful page in our nation's history. The accusations here made are true and have as much merit as the "J'Accuse" in the *Dreyfus* case. France had the capacity to acknowledge error in a "political" case. Has our country less vigor?

As stated in a letter by the petitioner:

> "The debasement of justice which this case exemplifies is not an isolated, atypical aberration that only occurred during a moment of great stress and presumed national peril, and it cannot be assumed that it has no bearing on the present administration of justice. What an illusion! No miscarriages of justice, be they large or small, ever stand isolated from all other acts of a nation—and so long as a society is not willing to confess its errors of the past it will continue to find itself incapable of rising above the morass of the acknowledged and unacknowledged evils that engulf it."

The alternative paths are set forth. It is for this Court to decide. The right path is clear. The petition for rehearing should be granted and the writ of certiorari issued.

Respectfully submitted,

MARSHALL PERLIN,
WILLIAM M. KUNSTLER,
ARTHUR KINOY,
MALCOLM SHARP,
BENJAMIN O. DREYFUS,
VERN COUNTRYMAN,
Attorneys for Petitioner.

Certification

I hereby certify that the foregoing petition for rehear
ing is presented in good faith and not for delay and i
restricted to the grounds specified in the rules of this Court

MARSHALL PERLIN,
One of the Attorney's for Petitioner

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

FBI

Date: 3/5/68

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

Via AIRTEL (Priority)

Mr. Tolson	✓
Mr. DeLoach	
Mr. Mohr	✓
Mr. Bishop	
Mr. Casper	
Mr. Callahan	
Mr. Conrad	
Mr. Felt	
Mr. Gale	
Mr. Rosen	
Mr. Sullivan	W.C.S.
Mr. Tavel	
Mr. Trotter	
Tele. Room	
Miss Holmes	
Miss Gandy	

TO: DIRECTOR, FBI (101-2483)

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

MORTON SOBELL
ESP - R ESPIONAGE - RUSSIA
(OO: NY)

ReWFOairtel 2/27/68.

On 3/4/68, there was issued by the United States Supreme Court, a brief order denying the petition of SOBELL for rehearing on the denial of his petition for a writ of certiorari to the U. S. Court of Appeals. There were no written opinions and no dissenting votes. Justices BYRON R. WHITE and THURGOOD MARSHALL did not participate.

The information reported above was furnished to SA RALPH C. VOGEL by WILLIAM GULLICKSON, USSC.

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

MAT:teb
(6)

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 9/4/87 BY 3042 PWT/mw

REC-100 100-2483-1715

15 MAR 5 1968

SOVIET SECTION

54 MAR 14 1968

Approved: _____ Sent _____ M Per _____

Special Agent in Charge

SC-113a ((9-29-65)

Q

Domestic Intelligence Division

INFORMATIVE NOTE

Date 3/6/68

Morton Sobell was convicted in 1951 along with Julius and Ethel Rosenberg of conspiracy to commit espionage on behalf of Russia. The Rosenbergs were executed and Sobell sentenced to thirty years in prison. In May, 1966, Sobell filed his sixth motion to set aside his conviction charging the Government knowingly used forged documents, perjured testimony, and suppressed evidence favorable to him. The U.S. District Court, Southern District of New York, denied this motion 2/14/67; the Circuit Court of Appeals affirmed the denial 6/26/67. On 1/15/68, the U.S. Supreme Court denied Sobell's petition for writ of certiorari. We have now been advised that the Supreme Court denied Sobell's petition for a rehearing on 3/4/68.

JPL:slc

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

FBI

Date: 3/7/68

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

Via AIRTEL _____ (Priority)

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

TO: DIRECTOR, FBI (101-2483)

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

MORTON SOBELL
ESP - R
(OO: NY)

ReWFOairtel 3/5/68.

This is to advise concerning civil suit filed on 1/18/68 in the U. S. District Court for the District of Columbia by MORTON SOBELL against the United States and the Director, U. S. Bureau of Prisons.

The docket reflects civil case #136-68 was filed 1/18/68 and is an action for declaratory judgment and injunctive relief. On 2/9/68, the plaintiff filed a motion for summary judgment in the cause. On 2/6/68, the Government filed a motion requesting change of venue. On 2/27/68, an order was issued enlarging the time for the defendant to respond to plaintiff's motion for summary judgment until 15 days after the action is received in the district to which transferred, or until 15 days after the motion is denied.

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

MAT:tjd
(6)

AIRTEL

101-2483-1716

REC-34

12 MAR 12 1968

EX-114

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 6/4/85 BY 304 RWT/lmw

C. C. - Bishop

Approved: _____ Sent _____ M Per _____

66 MAR 18 1968

Special Agent in Charge

The petition claims jurisdiction of the court under District of Columbia Code 11-521, Title 5, U. S. Code 702, 703, 704, 706 and Title 28, U. S. Code 2201. It alleges plaintiff is in custody at Lewisburg, Pennsylvania, by virtue of sentence imposed in the Southern District of New York. It declares SOBELL was arrested 8/18/50 at Laredo, Texas, and has been in Federal custody continuously to the present time. He was sentenced on 4/5/51 to 30 years imprisonment. The petition sets forth an alleged colloquy between counsel for SOBELL and the trial judge following pronouncement of sentence as follows: "Mr. PHILLIPS (attorney for plaintiff): Before the court adjourns are the months already served taken into consideration?" "The Court: No they are not, but I will have to so sign the judgment. They have to be considered."

The petition states SOBELL was incarcerated from date of arrest until 4/5/51, the date of sentence, and from 7/20/51 to 11/19/52 in New York City during preparation of his appeal to the Court of Appeals. It is alleged he signed a document "Election Not to Begin Service of Sentence" in July, 1951, to allow his transfer to the Federal House of Detention in New York City to consult with counsel. It is claimed this document was signed under coercion. The petition pleads if credit is given for the two periods, mandatory release of SOBELL will occur 7/28/68 instead of 4/3/70. Judgment is asked (a) declaring sentence should be computed from the date of plaintiff's arrest on 8/18/50; (b) ordering defendant to compute the mandatory release date as required by Title 18, U. S. Code 4163 on that basis; and (c) for such other relief that may be just and proper.

The defendant's motion for change of venue file 2/6/68, stated the contention that in such cases raising issues unrelated to this jurisdiction, the cause should be transferred to an appropriate forum and the district of sentencing (New York) is appropriate in this case.

The motion of the defendant, described above, was argued on 3/6/68 before Judge GEORGE L. HART and denied. The court ordered defendant to have 20 days in which to oppose plaintiff's motion for summary judgment. Order expressing the judgment of the court to be presented later.

Counsel for the Government and defense as shown in the pleadings are listed as follows:

U. S. Counsel

DAVID G. BRESS
JOSEPH M. HANNON
NATHAN DODELL

Counsel for MORTON SOBELL

DAVID REIN
711 14th Street, N.W.,

THOMAS I. EMERSON
2400 19th Street, N.W.

WILLIAM M. KUNSTLER
ARTHUR KINOY
511 5th Avenue,
New York City

MALCOLM SHARP
1915 Roma, N.E.,
University of New Mexico
School of Law
Albuquerque, New Mexico

VERN COUNTRYMAN
Law School
Harvard University

BENJAMIN DREYFUS
501 Fremont Building
341 Market Street
San Francisco, California

MARSHALL PERLIN
26 West 44th Street
New York City

LEAD

WASHINGTON FIELD OFFICE

AT WASHINGTON,D.C. Will follow and report further developments in this suit.

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

UNITED STATES GOVERNMENT

Memorandum

TO : DIRECTOR, FBI ([redacted]) DATE: 3/20/68

CLASSIFIED BY: [redacted]
DECLASSIFY ON:

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

DECLASSIFIED BY 3040PWT/lmw ON 5/4/07

SUBJECT: MORTON SOBELL
ESP-R
(OO: NEW YORK)

ReWFOairtel dated 3/7/68.

On 3/13/68, [redacted] who has furnished reliable information in the past, furnished the following information:

The last regular meeting of the Committe to Free MORTON SOBELL was held in NY, on 3/7/68, presided over by HELEN SOBELL, wife of subject.

Upon arrival of HELEN at this meeting, she was given a Special Delivery letter which had just arrived from DAVID REIN, one of subject's attorneys in WDC. According to HELEN, REIN advised that the Attorney General had just made a recomputation of the time subject had remaining on his sentence, and have allowed subject credit for half of the time they were fighting to have him credited with. She said that, according to her computations, this would mean that subject could get out of prison at least 9 months earlier and perhaps a year earlier, if time for good behavior were added.

HELEN said instead of subject getting out of prison in April, 1970, he should now be out by July, 1969, at the latest. HELEN stated that this good news called for a celebration and pointed out that this was an example of what a pressure group can do. She said that if they persisted, possibly they could recover all of the time they have been fighting for.

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

101-2483-1717

2-Bureau (RM)
2-Washington Field (101-2316) (RM)
1-New York

REC 5

MAR 22 1968

PFD:ram
(5)

SOVIET SECTION

APR 3 1968

5010-108

CONFIDENTIAL

When several members mentioned their disappointment with recent legal action, HELEN stated that the Justice Department wants to have the case, which is presently pending in Washington, transferred to NY, but their attorneys are protesting this. HELEN said she wants this case to remain in Washington because they have a good Court of Appeals there, and better judges than in NY. She also stated that since the case had met with so many disappointments in NY, they would like to feel there is a possible better chance in Washington, than in NY.

It was mentioned that subject was coming up soon for a parole hearing. HELEN stated even if subject was offered parole he might not take it because of the restrictions it would impose.

The above is furnished for the information of the Bureau and Washington Field.

LEAD:

WASHINGTON FIELD

AT WASHINGTON, D. C. Will follow and report action presently pending in USDC in captioned case.

CONFIDENTIAL

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

UNITED STATES GOVERNMENT

Memorandum

TO : DIRECTOR, FBI (101-2483) DATE: 3/27/68

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

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

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 5/4/87 BY 3040 PWT/lmw

Re WFO airtel 3/7/68.

Copy of refairtel is enclosed herewith for Philadelphia for future assistance.

The Civil Docket in Case #136-68 in the U. S. District Court for the District of Columbia was examined on 3/26/68. Latest recorded entries showed on 3/8/68 the United States filed motion for reconsideration of the Court's denial of defendant's motion for change of venue to the Southern District of New York.(SDNY). On 3/13/68 plaintiff filed points and authorities in opposition to the Government's motion, and on 3/19/68 the Government filed reply to the plaintiff's points and authorities in opposition to the Government's motion.

Reference to the records in the office of the Motions Clerk disclosed this case was argued on 3/21/68 before Judge George L. Hart, Jr., who granted the motion of the United States and ordered the cause transferred to the Middle District of Pennsylvania (which covers the Lewisburg Penitentiary where MORTON SOBELL is incarcerated). It was indicated an order expressing the will of the Court would be prepared. The Government was represented by NATHAN DODELL and plaintiff was represented by DAVID REIN and THOMAS I. EMERSON.

WFO will follow and report filing of the order of the Court transferring the case of Middle District of Pennsylvania.

ST 115

101-2483-1718

(2) - Bureau
1 - Philadelphia (1 Enc)(RM)
1 - New York (100-37158)(RM)
1 - WFO

REC 10

MAR 28 1968

MAT:teb/144
(5)

SOVIET ACTION

5 APR 4 1968

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

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

UNITED STATES GOVERNMENT

Memorandum

TO : DIRECTOR, FBI (101-2483) DATE: 3/29/68

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

SUBJECT: MORTON SOBELL
ESP - R

Re Philadelphia letter to the Bureau dated 10/31/67.

On 3/22/68 THOMAS O. SAVIDGE, M.D., Staff Physician, U.S. Public Health Service, U.S. Penitentiary, Lewisburg, Pa., advised there has been no noticeable change in the mental or physical health of SOBELL since previous check.

LEAD

PHILADELPHIA

AT LEWISBURG, PA.

Will make periodic checks with the U.S. Public Health Service, U.S. Penitentiary, regarding any change in the mental or physical health of the subject and advise the Bureau of the results.

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 5/4/05 BY 3042 PWT/IMW
NSC-103

101-2483-1719

MAR 29 1968

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

SOVIET SECTION

APR 3 1968

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

UNITED STATES GOVERNMENT

Memorandum

TO : DIRECTOR, FBI (101-2483) DATE: 4/3/68

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

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

ReNYlet to Director, dated 3/20/68.

Enclosed herewith for the Bureau are 5 copies of a LHM containing information regarding captioned subject.

The confidential source mentioned in the enclosed LHM is [redacted]

The enclosed LHM is classified "Confidential" since it contains information from an informant of continuing value, the disclosure of whose information would be against the national defense interest of the country.

Any additional pertinent information received regarding the subject will be furnished to the Bureau for information.

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 5/4/85 BY 3049 PWT/lmw

ENCLOSURE

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

PFD:ram
(3)

AGENCY RAD(ISD)
REQ. REC'D
DATE FORW. 4/10/68
HOW FORW.
BY

REC 18 101-2483-1720

APR 4 1968

EX-105

APR 12 1968

SOVIET SECTION

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

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

In Reply, Please Refer to
File No.

New York, New York

April 3, 1968

~~CONFIDENTIAL~~

[redacted]

DECLASSIFIED BY [redacted] 3042PWT/lmw
ON 5/4/87

Morton Sobell

On March 13, 1968, a confidential source, who has furnished reliable information in the past, furnished the following information:

A regular meeting of the Committee To Free Morton Sobell was held in New York, New York on March 7, 1968, which was presided over by Helen Sobell, the wife of Morton Sobell.

Upon arrival at this meeting, Helen Sobell was given a Special Delivery letter which had just arrived from David Rein, Washington, D. C., one of the attorneys retained by Morton Sobell. After reading the letter, Helen Sobell commented that the Attorney General of the United States had just made a recomputation of the time that Morton had remaining on his sentense, and had allowed him credit for half of the time they were seeking to have him credited with.

Helen Sobell stated, that as a result of this, and according to her computations, this would mean that Morton Sobell could get out of prison at least nine months, and perhaps one [redacted] earlier, if time for good behavior were added. [redacted] stated that instead of getting out of prison by [redacted] he should now be out by July, 1969 at the latest.

Helen stated that this good news called for a celebration, and she pointed out that this was an example of what a good pressure group can do. She added that if they persisted, they could possibly recover all of the time they were seeking to have Morton credited with.

APPROPRIATE AGENCIES AND FIELD OFFICES ADVISED BY ROUTING SLIP(S) OF Declassification DATE 5-23-78 JL

~~Classified by 2355 ... 10-9-75~~
~~Exempt from GDS, Category~~
~~Date of Declassification Indefinite~~

Declassify 23... WAB/KND 1/1/...

101-2483-1720

ENCLOSURE

~~GROUP 1~~
~~Excluded from automatic downgrading and declassification~~

THIS DOCUMENT CONTAINS NEITHER RECOMMENDATIONS NOR CONCLUSIONS OF THE FBI. IT IS THE PROPERTY OF THE FBI AND IS LOANED TO YOUR AGENCY; IT AND ITS CONTENTS ARE NOT TO BE DISTRIBUTED OUTSIDE YOUR AGENCY.

~~CONFIDENTIAL~~

[redacted]

Morton Sobell

[redacted]

Several members mentioned their disappointment with recent legal action in the case of Sobell. Helen stated that in connection with the presently pending proceedings in United States District Court, Washington, D. C., the Justice Department was attempting to have the proceedings transferred to New York, but that the defense attorneys were fighting this. Helen stated that she hoped that the case would remain in Washington, because they have a very good Court of Appeals there, and better Federal judges than in New York. She also mentioned that since in the past the case had met with so many disappointments in New York, she felt that their chances in Washington might be better than in New York.

It was mentioned that Morton Sobell would soon be coming up for a parole hearing. In regard to this, Helen stated that even if parole were offered, Morton would probably not accept it, because he did not desire to have the restrictions that parole would impose upon him.

Morton Sobell was convicted on March 29, 1951, in United States District Court, Southern District of New York, of conspiracy to commit espionage on behalf of the Soviet Union, and was sentensed on April 5, 1951 to thirty years imprisonment. He is currently serving his sentense in the custody of the Attorney General.

[redacted]

CONFIDENTIAL

APPENDIX

1.

COMMITTEE TO FREE MORTON SOBELL

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

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

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

The Address Telephone Directory for the Borough of Manhattan, New York City, published by the New York Telephone Company on March 20, 1967, lists the above Committee's address as 150 Fifth Avenue, New York, New York.

CONFIDENTIAL

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

UNITED STATES GOVERNMENT

Memorandum

TO : DIRECTOR, FBI (101-2483) DATE: 4/22/68

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

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

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 5/4/87 BY 3040PWT/lmw

Re WFO airtel 3/27/68.

Civil Docket Case #136-68 in the office of the Clerk of the U. S. District Court for the District of Columbia was again examined on 4/19/68. The most recent entries disclosed an order issued 3/28/68 from Judge GEORGE L. HART, JR., transferring this action to the Middle District of Pennsylvania.

It was further shown that on 4/2/68 the original file was mailed to the clerk of that court pursuant to the order of 3/28/68 and on 4/5/68 acknowledgement and receipt for the original papers and certification of docket entries was received.

PHILADELPHIA OFFICE

Will in the U. S. District Court for the Middle District of Pennsylvania follow and report further developments in this case.

2 - Bureau
2 - Philadelphia (RM)
1 - New York (100-37158)(RM)
1 - WFO

MAT:teb
(6)

EX 101

REC 3 101-2483-1721

16 APR 23 1968

SOVIET SECTION

54 APR 26 1968

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

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

FBI

Date: 6/18/68

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

Via AIRTEL _____ (Priority)

TO: DIRECTOR, FBI (101-2483)

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

SUBJECT: MORTON SOBELL
ESP - R
(OO: NEW YORK)

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 12/10/86 BY 3042 /mt-BJC

AUSA STEPHEN F. WILLIAMS, SDNY, has advised that attorneys for subject, on 6/10/68, filed in USDC, SDNY, an Order to Show Cause requesting that under Section 2255, Title 28, USC, the government should show cause why subject should not be granted an evidentiary hearing, released on bail to be present at the hearing, and be furnished with the pre-trial statements of HARRY GOLD, DAVID and RUTH GREENGLASS, and the confession of KAUS FUCHS.

In accompanying petition, requesting that a Show Cause Order be issued, subject's attorneys cite a recent decision of the US Court of Appeals for the Second Circuit, in the case US vs KEOGH, decided 2/2/68, and submitted to the Supreme Court, in which KEOGH was granted an evidentiary hearing because of suppressed evidence.

Subject's attorneys state that the material suppressed in subject's case had use beyond that of mere "forensic endeavors", because it related to the testimony of key prosecution witnesses and the issue of their credibility (GREENGLASS, GOLD and DERRY).

A copy of the above Order to Show Cause, together with the Petition of subject's attorneys, and an affidavit of HELEN SOBELL, is enclosed herewith for the information of the Bureau.

ENCLOSURE

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

REC-38 101-2483-1722

EX-105 10 JUN 19 1968

JUN 25 1968

PFD:dje
(11)

Approved _____ Sent _____ M Per _____
Special Agent in Charge

ENCLOSURE ATTACHED

70 JUN 27 1968

233

UNRECORDED COPY FILED IN

AUSA WILLIAMS has requested that in connection with the present proceedings, that he be furnished with a copy of all pre-trial statements made by HARRY GOLD to the FBI. (It is noted that the defense attorneys and the AUSA are already in possession of pre-sentence statements made by GOLD to his court appointed attorneys).

LEAD:

PHILADELPHIA

AT PHILADELPHIA, PENNSYLVANIA.

Is requested to furnish the NYO with a copy of all pre-trial statements of HARRY GOLD in accord with the request of AUSA WILLIAMS.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MORTON SOBELL,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

ORDER TO SHOW CAUSE

68 Civ 2360

Upon the annexed petition of MORTON SOBELL and on motion of MARSHALL PERLIN, ARTHUR KINOY, WILLIAM M. KUNSTLER, VERN COUNTRYMAN, BENJAMIN O. DREYFUS, and MALCOLM SHARP, attorneys for petitioner, it is

ORDERED, that the respondent herein show cause, if any, before the United States District Court for the Southern District of New York, in Room 318, United States Courthouse, Foley Square, on the 18th day of June, 1968, at 2:15 o'clock in the after noon thereof or as soon thereafter as counsel can be heard, why an order should not be made setting this motion down for a prompt evidentiary hearing pursuant to Title 28 U.S.C. Section 2255 and that pending such hearing why an order should not be made: (a) Directing that petitioner be released upon the posting of reasonable bail; (b) that petitioner be directed to be present at the hearing aforesaid and that petitioner and his counsel be furnished with the pre-trial statements of Harry Gold, David and Ruth Greenglass, and the

confession of Klaus Fuchs, all of which material is within the possession of the government, and for such other and further relief as to the Court may seem just and proper in the premises; and it is further

ORDERED, that service of this order and the papers on which it is granted on the respondent, on or before the 10th day of , 1968, at 5 o'clock in the afternoon shall be deemed sufficient.

Dated: New York, New York
June 10th, 1968.

S/ Thomas F. Murphy
U. S. D. J.

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

MORTON SOBELL,

Petitioner,

-against-

UNITED STATES OF AMERICA

----------x

68 Civ._____

PETITION

The petition of MORTON SOBELL, by his attorneys, alleges as follows:

1. Petitioner is unlawfully, unjustly and illegally detained and imprisoned and in the custody of the Attorney General of the United States in the federal penal institution at Lewisburg, Pennsylvania, pursuant to a judgment entered and a commitment issued at the United States District Court for the Southern District of New York, dated and filed April 5, 1951.

2. Petitioner realleges and incorporates herein and makes a part hereof his motion pursuant to Section 2255 of Title 28 U.S.C. filed in this court in 1966 (66 Civ. 1438) and also incorporates all of his papers, pleadings, exhibits, and affidavits in that action, including the brief submitted in his behalf at that time and thereafter, and all the files and records in his case (Cr. 134-245), and all post-trial proceedings previously had.

3. The last motion for a hearing and other relief pursuant to Section 2255 of Title 28 U.S.C. was denied without an evidentiary hearing on February 14, 1967. Petitioner's application to examine certain documents in the possession of the government never previously disclosed, was also denied. The opinion is officially reported at 246 F.Supp. 579 (S.D.N.Y. 1967). The United States Court of Appeals, per curiam, affirmed the denial of relief on the lower court's opinion on June 26, 1967. This is officially reported at 378 F.2d 674, C.C.A. 2 1967.

4. A petition for a writ of certiorari was denied by the Supreme Court on January 15, 1968, Mr. Justice Douglas being of the opinion that certiorari should be granted, 378 U.S. 1051. A petition for rehearing was denied on March 5, 1968, 390 U.S._____ 19 L.Ed. 2d 1197.*

5. Upon this petition and the papers incorporated herein, and in light of the decision of the United States Court of Appeals for the Second Circuit in United States v. Keogh, supra, and the principles there enunciated, petitioner is entitled to an evidentiary hearing and the ultimate relief requested.

---

* As a brief supplement to the petition for rehearing a memorandum citing a recent decision of the United States Court of Appeals for the Second Circuit, United States v. Keogh, Docket No. 31683, decided February 2, 1968, was submitted to the Supreme Court. It hardly requires citation to support the clearly enunciated principal that the denial of the petition does not constitute a determination in any respect as to the merits of the application or an affirmance of the lower courts' decisions.

The conduct of the prosecution in making certain false representations and exaggeration in the context of suppressing certain highly material facts deprived petitioner and his co-defendants of a fair trial, served to immunize false and perjured testimony, had an adverse and strong impact upon trial strategy of defense counsel, and most surely upon the trial jury and court as well.

6. In Keogh, the Court of Appeals noted that the allegations passed "the rather low threshold entitling him [Keogh] to an evidentiary hearing on his petition..." because of the failure of the prosecution to disclose certain information relating to the financial records of two of the government's important witnesses.

7. In Keogh the defense made no pre-trial request for any financial records, although such financial records would obviously be related to the issues raised in the trial. At the time of trial the defense was advised by the prosecution that all of the witnesses' financial records were lodged with the clerk of the court and were available for examination. After utilizing a minute portion of those records (bank deposit slips reflecting cash deposits), the defense indicated that it might later examine and offer into evidence deposit slips representing check deposits. It thereafter abandoned its request and did not attempt to do so. When one of the prosecution witnesses was

about to volunteer information on other bank accounts which related to the suppressed information, she was stopped by defense counsel.

8. The Court, in granting Keogh an evidentiary hearing, indicated that the suppressed data now known might well have been of only minimal value, but concluded that it does not "wholly obliterate the value the evidence might have had to the defense," and indeed opined with no independent evidence that the suppressed data might or might not have led to as yet unproven and indeed in part unclaimed conclusions favorable or helpful to the defendant.

9. A crucial aspect of the decision upon which the Court relied was that the suppressed data, if known, could have significantly affected the trial strategy of the defense and counsel might well have inquired into areas which it had so lightly abandoned, and such data would also have served as a basis for challenging other prosecution witnesses and would have affected the defense's summation to the jury.

10. In determining whether Keogh would meet the standards required in a coram nobis proceeding, which is higher than that required in a habeas corpus proceeding, the very question of the need for a hearing could not be resolved factually without at least an evidentiary hearing as to certain issues. The Court stated:

> "Our difficulty is that the record is not sufficient to tell us how the case should be decided under either of the standards we have sought to delineate. If the utmost Keogh's defense could have accomplished was to engage in the forensic endeavors outlined early in our discussion and non-disclosure was an excusable oversight, we would readily sustain the dismissal of the petition by the district judge. But we cannot be certain from the record that these 'if's' are so. However unlikely at this late date, it is not altogether impossible that petitioner might be able to show that Erdman's unexplained check deposits came from a suspicious source."

The court, in setting forth some of the areas of inquiry for the evidentiary hearing it directed, particularly sought information

> "as to what thought, if any, the prosecutors gave to making the FBI report available to the defense."

11. The holding in Keogh is that a judgment of conviction is subject to collateral attack even if the effect of the suppression only affected the trial strategy or tactics of the defense. Suppression subjects a judgment to collateral attack where it is deliberate; where the evidence was of such materiality or value that it could not have escaped the prosecutor's attention; where the defense requests information and the prosecutor suppresses the evidence which may have aided the accused either on the question of guilt or punishment regardless of good faith; and even where there was no deliberate suppression

and no request was made but where hindsight in light of subsequently obtained data discloses that the defense could have put the suppressed evidence "to not insignificant use." Where the matter suppressed has a substantial degree of materiality or value as to the issues raised at the trial including the credibility of prosecution witnesses, the prosecution may not excuse its failure to disclose by reason of the defense's failure to "flag the issue" by a formal request. Where the material suppressed might have been used to aid the defense so that it might have led the jury or a single juror to entertain a reasonable doubt of the defendant's guilt, that question itself must be disposed of by an evidentiary hearing in a habeas corpus proceeding. See Levin v. Katzenbach, 363 F.2d 287; Levin v. Clark _____ F.2d decided November 15, 1967 (C.A.D.C.).

12. Keogh holds that an evidentiary hearing should be granted in any event as to the motives or deliberation given by the prosecution, if any, in failing to disclose, and to what use the suppressed evidence might have been put and what impact it might have had upon the triers of fact and the sentencing court.

13. The material suppressed in the instant case had use beyond that of mere "forensic endeavors." It related to the testimony of key prosecution witnesses and indeed the basic issue of their credibility (the Greenglasses, Gold and Derry) as well as statements and representations made by the prosecution

all of which was highly material, prejudicial and played a decisive role in the minds of the jurors on the question of guilt or innocence--the existence of a conspiracy. The prosecution's suppression and other misconduct as set forth in detail in the prior petition seriously hampered and affected the entire trial strategy of the defense and led to the defense's proposal to impound government Exhibit 8 and the testimony relating thereto, the reluctance and incapacity of the defense to call scientific witnesses, the failure to cross-examine Gold, and the acceptance of government Exhibit 16.

14. The petitioner and his co-defendants, prior to trial, did seek to obtain the sketches purportedly relating to the atomic bomb and were denied such relief in substantial part upon an affidavit by the prosecutor that such sketches were top secret "subject matter vital to the defense of the United States and should not be the subject of disclosure under any conditions." United States v. Rosenberg, 10 F.R.D. 521, 523-24. The statements and representations of the prosecution both in and out of court were such as to mislead and deceive the defense into believing that any inquiry into the basic facts, particularly as they related to atomic information, would only serve to substantiate the contentions of the prosecution, while in fact the prosecution knew that the suppressed information was either exculpatory or would have been of substantial aid to all of the defendants.

15. The Court of Appeals in Keogh, in dealing with the question of suppression by the prosecution, referred: to the "easy cases"--where suppression is deliberate (not merely a considered decision but also a failure to disclose evidence the value of which could not have escaped the prosecutor's attention); and those cases where the defense requests information and the prosecutor suppresses the evidence favorable or helpful to the accused either as to guilt or punishment, regardless of good or bad faith. In every instance the judgment of conviction would be subject to collateral attack even if it only affected the trial strategy or tactics of the defense.

16. Suppression by the prosecution in petitioner's trial was clearly not accidental. The challeged testimony, exhibits and representations of the prosecution played such a predominant role in the trial that it cannot be contended that the information not disclosed was mere oversight and was not seriously considered by the prosecution in determining its course of conduct. No request during trial by the defense was necessary.

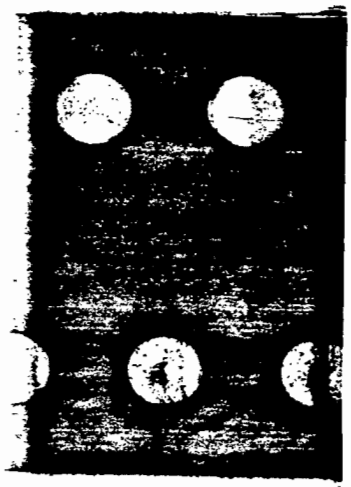
17. The court in denying petitioner's prior application, did so in substantial part because the conduct complained of, it was contended, could have been overcome by different defense trial strategy; that the defense could have avoided the impounding of certain exhibits and testimony; that

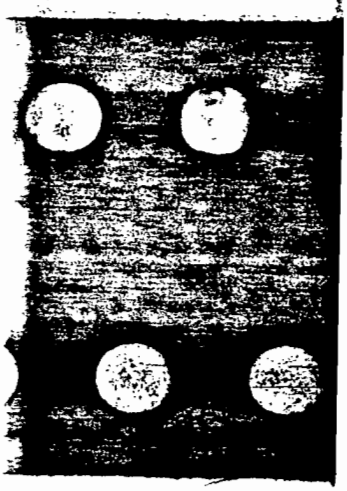
it could have called certain scientific witnesses including those set forth on the government's list of witnesses; that it could have cross-examined Gold and demanded the original of government Exhibit 16, the June 3, 1945, registration card. It then found, since the defense failed to do so as a matter of trial strategy the petitioner is precluded from any post-trial relief. The court in effect stated that hindsight trial strategy in light of extrinsic evidence subsequently acquired cannot furnish grounds for relief pursuant to Section 2255 and hence petitioner was not entitled to an evidentiary hearing. The holding of Keogh is directly to the contrary.

18. In disposing of petitioner's attack upon government Exhibit 16, the purported photostat of a June 3, 1945, Hotel Hilton registration card, the court stated that any layman could see that the handwriting on the June 3, 1945, card and that on the September 19, 1945, card were clearly written by different persons and "it hardly needed an expert to make this observation." The court further observed that defense counsel had stipulated to the admission of Exhibit 16. The court assumed that the September card had been exhibited to the defense at the trial.

19. But the government suppressed the fact that it had in its possession an alleged September 19, 1945, registration card as well as the June 3, 1945, card and did not permit Gold to state he had stayed at the Hilton Hotel on September 19, 1945. The prosecution did, but the defense did not, have two cards to compare and note the difference in handwriting. Had this been

known, the defense may well have demanded the "originals," and a qualified document expert would then have discerned not merely the difference in handwriting, but the erasures and overwriting in the area of the forgery. With such knowledge the defense strategy would have been different, the hotel clerk or clerks would have been called, and Gold would have been cross-examined, and the FBI would have been required to account for the time and manner it acquired the government Exhibit 16 and the true source of the alleged original cards.





20. Had petitioner been afforded a fair trial and had the prosecution met the duties of its office by making disclosure of highly material and valuable evidence relating to vital claims of the prosecution and their witnesses, the results of the case could clearly have been otherwise and at least a single juror may have had good cause to hold a reasonable doubt of the guilt of the petitioner and his co-defendants and as to the existence of the claimed conspiracy. As a concomitant of the suppression, the prosecution was enabled to use Derry to corroborate the testimony of Greenglass and Gold to do likewise, enhanced by the use of Exhibit 16. Had there been true and proper disclosure, the false and exaggerated claims made by the prosecution could not have been stated and the jury might well have accepted the testimony of the Rosenbergs and hence rejected the testimony of the Greenglasses and Elitcher which would have meant a verdict of acquittal for petitioner and his co-defendants.

21. Petitioner is entitled to due process not only at the time of trial but at the time of the consideration of any post-conviction application for relief. In determining due process, a fair trial, the same standards must be utilized in this case in controversy which has been subject to enormous extra-legal pressures all to the detriment of the petitioner and his co-defendants as were applied in Keogh. Simply, the petitioner is entitled to equal protection under the law. The standards enunciated by the Court of Appeals in Keogh must be made applicable to petitioner's case. Once that is done, the answer is clear--petitioner must be afforded an evidentiary hearing and any necessary collateral relief. Neither the government nor any judicial system can, as a matter of decency and law, have a vested interest in an unjust conviction.

22. Petitioner makes this application praying that the judgment of conviction and his sentence be vacated and set aside and that he be discharged from detention and imprisonment pursuant to Section 2255, Title 28, U.S.C. on the grounds that his conviction was unlawfully and illegally procured in violation of the Constitution and the laws of the United States; that he was denied due process of law; that the sentencing court was without jurisdiction to impose this sentence; that he has not been afforded equal protection under the law; and that the judgment is vulnerable and subject to collateral attack.

WHEREFORE, petitioner asks that, upon this petition

and the papers and exhibits incorporated herein and attached hereto, and upon the files, records and exhibits of this case

the Court: This matter is brought on by order to show Cause why a writ of habeas corpus should not issue as prayed in the petition herein.

1. Grant a hearing to determine the issues and make findings of fact and conclusions of law in respect thereto; and, upon such findings of fact and conclusions of law, vacate and set aside the sentence and judgment of conviction and discharge petitioner forthwith from detention and imprisonment; or, in the alternative, grant him a new trial, and that, pending such hearing:

   (a) Petitioner be released upon the posting of reasonable bail;

   (b) in the alternative, petitioner be directed to be present at the hearing aforesaid;

   (c) petitioner be furnished with the pre-trial statements of Harry Gold and David and Ruth Greenglass, as well as the confession of Klaus Fuchs; and

2. Grant such other and further relief as to the Court may seem just and proper in the premises.

Dated: New York, New York
June 7, 1968.

MORTON SOBELL,

By: His Attorneys

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

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

VERN COUNTRYMAN
3 Suzanne Road
Lexington, Massachusetts

101-24-83-1772

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF NEW YORK

MORTON SOBELL,

Petitioner,

-against-

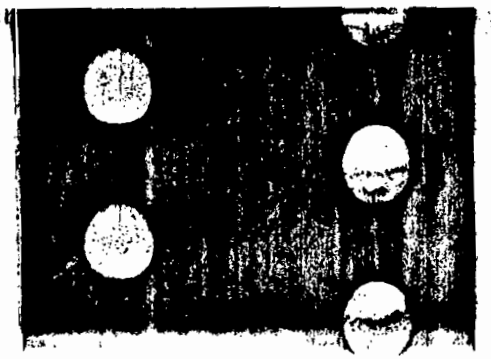
UNITED STATES OF AMERICA,

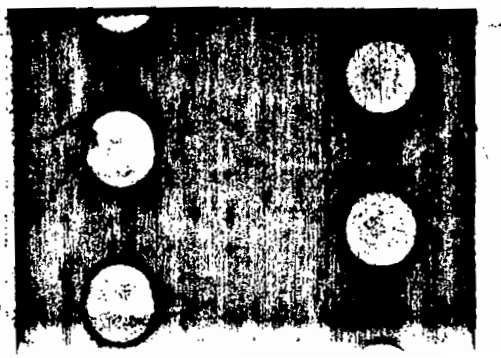
Respondent.

ORDER TO SHOW CAUSE

Marshall Perlin
ATTORNEYS FOR Petitioner
36 WEST 44TH STREET
BOROUGH OF MANHATTAN NEW YORK, N. Y. 10036
MO 1-1666

8-1840CV





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

HELEN SOBELL, being duly sworn, deposes and says:

That she is the wife of the petitioner, MORTON SOBELL, in the within proceeding; that she has read the foregoing petition and knows the contents thereof; that the same is true to her own knowledge except as to matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true. She further says that the reason this verification is made by her and not by petitioner is that petitioner is presently incarcerated in the United States Federal Penitentiary at Lewisburg, Pennsylvania, and that by reason thereof, he is not this day available to his counsel in New York to verify the same, and she is authorized to act on his behalf in verifying this petition.

Her husband, Morton Sobell, shall in the immediate future be receiving this petition and attached papers and shall verify the same.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows: Much of the material set forth in the within petition was of necessity not obtained by the petitioner in view of his incarceration, and the sources of such other information are individuals who have personally investigated the same, acquired the information, and seek the relief asked in the within petition.

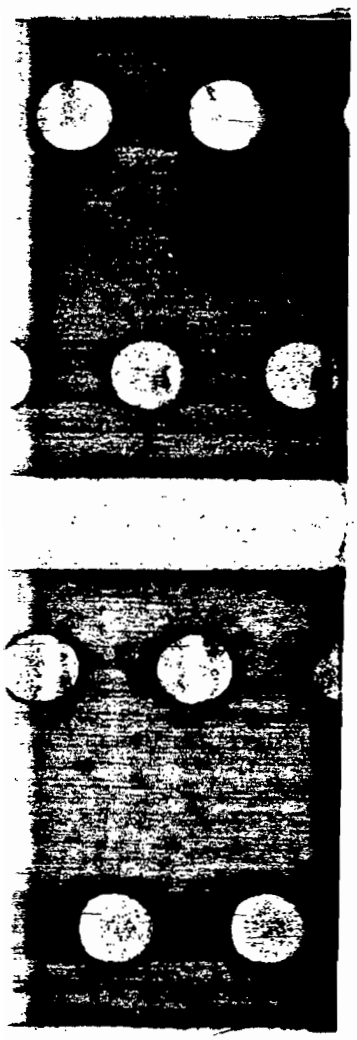
Helen Sobell
HELEN SOBELL

Sworn to before me this
7th day of June, 1968.

MARSHALL PERLIN
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-8327700
Qualified in New York County
Commission Expires March 30, 1970

BENJAMIN O. DREYFUS
341 Market Street
San Francisco, California

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



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

UNITED STATES GOVERNMENT

Memorandum

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

TO : Mr. W. C. Sullivan

DATE: June 20, 1968

FROM : W. A. Branigan

SUBJECT: MORTON SOBELL
ESPIONAGE - RUSSIA

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 5/4/87 BY 3042 PNT/ImW

Memorandum reports that Morton Sobell has filed an Order to Show Cause requesting the Government to show why he should not be given an evidentiary hearing, released on bail and furnished with pretrial statements of the main Government witnesses.

BACKGROUND:

Morton Sobell was convicted in 1951 along with Julius and Ethel Rosenberg of conspiracy to commit espionage on behalf of the Soviets. The Rosenbergs were executed and Sobell was sentenced to 30 years in prison. Since that time numerous efforts have been made to upset Sobell's conviction without success.

CURRENT ACTION:

Sobell is in effect attempting to initiate his seventh attempt to obtain a new trial. In May, 1966, he filed his sixth motion for a new trial claiming the Government had knowingly used forged documents, perjured testimony and had suppressed evidence which would have proven his innocence. In February, 1967, Judge Edward Weinfeld, U.S. District Court, Southern District of New York, denied this motion and wrote a 79-page opinion in which he said that there was not one word of direct evidence to support the allegations of the defendant. This decision was affirmed in the Circuit Court of Appeals and the U.S. Supreme Court denied certiorari in January, 1968.

101-2483-1723

101-2483

REC- 38

EX-105

JUN 24 1968

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

JPL:slc
(5)

CONTINUED - OVER

70 JUN 27 1968

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

Sobell now claims that the Circuit Court of Appeals, Second Circuit, in the case entitled "U.S. vs. Keogh" decided on February 2, 1968, ruled that the defense was entitled to an evidentiary hearing on the question whether information available to the Government and not furnished to the defendant would have had an impact on the trial judge and jury and to decide to what use such evidence could have been put by the defense. Based on that ruling, Sobell now claims that the Government should have made available all statements which were taken from Harry Gold, David Greenglass, and Ruth Greenglass, all Government witnesses, as well as the confession of Klaus Fuchs who was tried and convicted in England. The information from Fuchs led eventually to the identity by the Bureau of Harry Gold and the uncovering of the members of the Rosenberg ring.

The Assistant U.S. Attorney Stephen Williams, Southern District of New York, has requested that he be furnished with a copy of pretrial statements made by Harry Gold to the FBI and the Philadelphia Office has been requested to furnish these statements to the New York Office for the use of Mr. Williams.

ACTION:

For information. This matter is being closely followed.

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

UNITED STATES GOVERNMENT

Memorandum

TO : DIRECTOR, FBI (101-2483) DATE: 6/27/68

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

SUBJECT: MORTON SOBELL
ESP - R
OO: NEW YORK

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 5/4/6 BY 3042 PWT/lmw

Re WFO letter to Bureau, 4/22/68.

On 6/19/68 RICHARD P. BOWEN, Chief Deputy Clerk, U. S. District Court, Middle District of Pennsylvania, Lewisburg, Pa., advised the case of MORTON SOBELL vs. the Attorney General of the United States and Director of Bureau of Prisons, was transferred from the U. S. District Court, Washington, D. C., to the Middle District of Pennsylvania, Lewisburg, Pa., on 4/11/68. A hearing on the plaintiff's motion for Summary Judgement and defendant's motion to dismiss motion for Summary Judgement was held in U. S. District Court, Lewisburg, Pa., before District Judge FREDERICK V. FOLLMER, 4/29/68. The plaintiff was represented by Attorneys THOMAS I. EMERSON and DAVID REIN of Washington, D. C., and MOREY MYERS of Scranton, Pa. PAUL C. VINCENT, Internal Security Division, Department of Justice, represented the Government.

BOWEN advised the Court has not issued a decision on this action, Docket #68-144 in MDPa.

Philadelphia will follow and report further developments in this case.

REC-15 101-2483-1724

EX-105

15 JUN 28 1968

2 - Bureau (101-2483) (RM)
1 - New York (100-37158) (RM)
1 - WFO (101-2316) (RM)
2 - Philadelphia (65-4372)
PMM/JBK
(6)

SOVIET SECTION

59 JUL 9 - 1968

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

5010-106-01

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

FBI

Date: 6/27/68

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

Via AIRTEL _____ (Priority)

TO: DIRECTOR, FBI (101-2483)

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

SUBJECT: MORTON SOBELL
ESP - R
(OO: NEW YORK)

ReNYairtel to Director, dated 6/18/68.

AUSA STEPHEN F. WILLIAMS, SDNY, has advised that subject's motion of 6/10/68 to be granted an evidentiary hearing was argued in USDC, SDNY, on 6/25/68, before USDJ THOMAS F. MURPHY. At that time the court reserved decision on subject's motion.

The above is furnished for the information of the Bureau and Philadelphia.

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 5/4/87 BY 3040 PWT/lmw

3 - Bureau (RM)
1 - Philadelphia (65-4372) (INFO) (RM)
1 - New York

PFD:dje
(7)

101-2483-1705

REC-19

C. C. Bishop

EX-105

JUN 28 1968

SOVIET ESPIONAGE

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

70 JUL 5 1968

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

FBI

Date: 6/27/68

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

Via AIRTEL REGISTERED MAIL (Priority)

TO: Director, FBI (101-2483)

FROM: SAC, Philadelphia (65-4372)

SUBJECT: MORTON SOBELL
ESPIONAGE - R
OO: New York

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 12/10/86 BY 3042 pwt-dtc

Re New York airtel, 6/18/68, which requested Philadelphia to furnish New York Office with a copy of all pre-trial statements of HARRY GOLD in accordance with the request of AUSA STEPHEN F. WILLIAMS, SDNY.

Enclosed herewith for the New York Office are the following:

(1) Envelope entitled "Confession of HARRY GOLD" received 5/22/50, which envelope contains the 10-page statement of HARRY GOLD.

(2) Envelope entitled "Statement of HARRY GOLD consenting to remain voluntarily with Agents of this office" dated 5/22/50.

REC 49 101-2483-1726

4 - Bureau (RM)
3 - 101-2483 (MORTON SOBELL)
1 - 65-57449 (HARRY GOLD)
3 - New York (Encs. 5) (RM)
2 - 100-37158 (MORTON SOBELL)
1 - 65-15324 (HARRY GOLD
2 - Philadelphia
1 - 65-4372 (MORTON SOBELL)
1 - 65-4307 (HARRY GOLD)

EX 106

JUN 28 1968

SOVIET SECTION

CS:ELS
(9)

XEROX JUL 2 1968

C.O. Bishop

51 JUL 10 1968

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

139

FBI

Date: 7/23/68

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

Via AIRTEL _____ (Priority)

WAB

TO: DIRECTOR, FBI (101-2483)

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

SUBJECT: MORTON SOBELL
ESP - R
(OO: NEW YORK)

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

Re Philadelphia airtel to Bureau, 6/27/68.

On 7/19/68, Chief Deputy Clerk, U.S. District Court, MDPa., Lewisburg, Pa., advised a decision on the plaintiff's motion for Summary Judgment and defendant's motion to dismiss motion for Summary Judgment, was handed down by USDJ FREDERICK V. FOLLMER, USDC, Lewisburg, Pa., on 7/1/68.

BOWEN advised the entire docket and copies of Judge FOLLMER's decision were forwarded to the Clerk of USDC, Scranton, Pa.

C. C. - Bishop

LEAD

PHILADELPHIA
AT SCRANTON, PA.:

Review Docket #68-144 in office of USDC Clerk, Scranton, Pa., and decision of Judge FOLLMER and furnish results to Bureau, New York and WFO.

(3) - Bureau (101-2483) (RM) Dated
1 - New York (100-37158) (Info) (RM)
2 - Philadelphia (65-4372)

REC 17 101-2483-1727

PMM:kma
(6)

JUL 25 1968

SOVIET SECTION

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

53 AUG 2 1968

(3) Envelope received 5/22,23/50 entitled "Interview Log of HARRY GOLD, May 22,23, 1950."

(4) 29-page statement dated 7/10/50 concerning HARRY GOLD's various meetings with KLAUS FUCHS.

(5) Envelope containing handwritten reports by HARRY GOLD received 7/13/51. (This may or may not be of use according to the discretion of the New York Office.)

The above statements of HARRY GOLD were all that were contained in the exhibits section of the HARRY GOLD file in this office.

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

FBI

Date: 7/30/68

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

Via AIRTEL _____ (Priority)

TO: DIRECTOR, FBI (101-2483)

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

SUBJECT: MORTON SOBELL
ESP - R
(OO: NEW YORK)

ReNYairtel to Director, 6/27/68.

Enclosed herewith for the information of the Bureau is one copy of "Memorandum of the USA in Opposition To Seventh Petition of Morton Sobell Under 28 USC, Sec 2255", which was furnished by AUSA STEPHEN F. WILLIAMS.

USDC, SDNY, has not yet rendered a decision regarding subject's latest petition.

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

D. C. Bishop

REC-58 101-2483-1728

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

EX-105

JUL 31 1968

PFD:dje
(6)

ENCLOSURE

SOVIET SECTION

ENCLOSURE ATTACHED

54 AUG 6 1968

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

MORTON SOBELL, :

Petitioner, : 68 Civ. 2360

-v- :

UNITED STATES OF AMERICA, :

Respondent. :

----------x

MEMORANDUM OF THE UNITED STATES OF AMERICA IN OPPOSITION TO SEVENTH PETITION OF MORTON SOBELL UNDER 28 U.S.C. § 2255

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

STEPHEN F. WILLIAMS
Assistant United States Attorney

Of Counsel

SFW:flh
114863

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MORTON SOBELL,	:	
Petitioner,	:	
-v-	:	68 Civ. 2360
UNITED STATES OF AMERICA,	:	
Respondent.	:	

MEMORANDUM OF THE UNITED STATES OF AMERICA IN OPPOSITION TO SEVENTH PETITION OF MORTON SOBELL UNDER 28 U.S.C. § 2255

Preliminary Statement

By order to show cause signed June 10, 1968, Morton Sobell brought on his seventh petition, pursuant to 28 U.S.C. § 2255, to vacate his judgment of conviction and 30-year sentence entered on April 5, 1951. This petition relies solely upon the allegations of Sobell's sixth petition, filed August 22, 1966, and the affidavits filed in connection therewith (as well as the record of the case and the prior post-trial proceedings), and upon

a single subsequent judicial decision, United States v. Keogh, Docket No. 31683 (2d Cir., February 2, 1968). The sixth petition was denied on February 14, 1967 by the Honorable Edward Weinfeld, Sobell v. United States, 264 F. Supp. 579 (S.D.N.Y. 1967), aff'd per curiam, without opinion, 378 F.2d 674 (2d Cir. 1967), cert. denied, 378 U.S. 1051, rehearing denied, 390 U.S. 977 (1969). Despite the full and careful consideration given petitioner's allegations by Judge Weinfeld and the appellate courts, he again asks that those allegations be reconsidered. The prior judicial consideration of Sobell's conviction, upon direct and collateral attack, is itemized in Judge Weinfeld's opinion, 264 F. Supp. at 581 n.2 and n.3.

Facts

The relevant trial evidence, the allegations of Sobell's 1966 petition, and the history of his prior collateral attacks on his conviction are fully set forth in Judge Weinfeld's opinion. It is sufficient here to summarize briefly the principal allegations of Sobell's sixth petition and the conclusions reached by Judge Weinfeld after detailed study of the entire record:

(a) Petitioner submitted in 1966 affidavits of several atomic scientists, condemning as inaccurate and incomplete Government Exhibits 2, 6, 7 and 8, all replicas of sketches that David Greenglass, a co-defendant who pleaded guilty, testified he had transferred to Julius Rosenberg, a co-defendant convicted with Sobell, or to Harry Gold, a co-conspirator. They further criticized the testimony of John A. Derry, an engineer associated with the Manhattan Project, who 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 principal 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." 264 F. Supp. at 584.

Petitioner's 1966 affidavits also offered speculation as to the value to the Russians in 1945 of the information transmitted pursuant to the conspiracy. Noting that the

issues of scientific accuracy and value to the Russians were irrelevant to the case, Judge Weinfeld concluded that

> "Were there a complete consensus of the learned atomic scientists in the world that his [Greenglass's] description was deficient it would not have drawn in issue the truthfulness of his version of what he then transmitted to Rosenberg." 264 F. Supp. at 587,

and, further, that

> "*** 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." 264 F. Supp. at 589.

(b) Petitioner also relied in 1966 upon certain pre-trial statements made by Harry Gold to his attorneys, primarily in the form of transcripts of recordings of interviews between Gold and his counsel. These recordings and other statements were delivered to the Federal Bureau of Investigation on October 21, 1953, two and one-half

years after trial.* After a detailed comparison of the pre-trial statements with Gold's trial testimony, Judge Weinfeld concluded that,

> "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." 264 F. Supp. at 601.

In connection with his 1966 petition, Sobell also attacked the testimony of Gold and David Greenglass and his wife with an opinion of a handwriting expert to the effect that certain entries on Government Exhibit 16, a photostat of Harry Gold's registration card at the Albuquerque Hilton Hotel on June 3, 1945 (the day of his rendezvous with David Greenglass for the purpose of obtaining information for relay to the Soviet Union), were

---

* Petitioner would surmise that these statements duplicate exactly Gold's pre-trial statements to the FBI, thus ignoring the fact that Gold prefaced the portion of his remarks relating to his communications with the FBI, by saying that he would tell his attorneys "everything, at least in substance," that he had then told the FBI. 264 F. Supp. at 598; Transcript of Tape Recordings, June 8, 1950, Reel 2, Side 2, p. 16.

in a different handwriting from similar entries on a photostat of Gold's Albuquerque Hilton registration card for September 19, 1945 (the day of a rendezvous of Gold with Klaus Fuchs in Santa Fe), although both bear what appear to be the initials of the same clerk at the hotel. Petitioner's expert also expressed the view that although the clerk in question wrote the entries on the September 19 card, she did not write those on the June 3 card.

From these opinions, as well as ancillary allegations relating to a conflict between the dates on the two sides of Exhibit 16 and to the post-trial dispositions of the originals of the two cards, petitioner asked the court to conclude that the June 3 card was a forgery, that the Government knew it was forged, that Gold never stayed at the Albuquerque Hilton on June 3, and that Gold and David and Ruth Greenglass lied as to their meeting in Albuquerque on June 3. Judge Weinfeld found that the expert's opinion, combined with the additional allegations, did not "warrant the inference that government agents participated and fostered perjury on the part of Gold and Greenglass and manufactured the June 3 registration card". 264 F. Supp. at 596.

SFW:al
114868

Argument

UNITED STATES V. KEOGH DOES NOT REQUIRE RECONSIDERATION OF PETITIONER'S 1966 MOTION UNDER SECTION 2255

In United States v. Keogh, supra, the Court of Appeals found that a certain FBI report not disclosed to the defense counsel by the Government reached such a level of materiality that a hearing should be held to determine, if possible, "whether the Government's failure to turn over the report was sufficiently serious in its motivations or consequences to warrant the extraordinary relief of coram nobis." United States v. Keogh, supra, Slip Op., p. 1344. A comparison of the undisclosed report in relation to its factual context in the Keogh case, compared with the vague allegations of nondisclosure on the part of the Government in the trial of Sobell and his co-defendants, demonstrates that Keogh is not at all in point. The information allegedly suppressed in the instant case is so immaterial that the inquiry suggested in Keogh is wholly unnecessary. A study

of Judge Weinfeld's opinion, moreover, establishes that he took fully into account all the considerations that the Court of Appeals found relevant in Keogh.

The crux of the Keogh case* was the petitioner's allegation that the Government should have disclosed an FBI report that might have materially aided defense counsel in their efforts to undermine the key element of the Government's proof - - that the alleged bribe payments actually went to defendants Keogh and Kahaner.

The chief Government witnesses at trial were Moore and Erdman, who were both named as defendants but whose trials had been severed. Moore, who sought by bribes to obtain lenient treatment for himself and others arrested on a bankruptcy fraud charge, gave the bribe money to Erdman; the latter, a physician who was connected with one of Moore's co-defendants, transmitted the money to Keogh and Kahaner. An FBI report on Erdman's finances, submitted to the prosecutors in advance of trial, revealed that Erdman and his accountant were unable to

* The factual context of the Keogh decision appears in the February 2,1968 opinion of the Court of Appeals, supra, the decision of Judge Weinfeld, the trial judge, 271 F.Supp. 1002 (S.D.N.Y. 1967), and in the Court of Appeals decision affirming the original conviction, United States v. Kahaner, 317 F.2d 459 2d Cir.) cert. denied, 375 U.S. 836(1963).

explain certain bank deposits made by him in amounts totalling $15,539.95, or slightly more than the $15,000 that Moore and Erdman said constituted the first payment or payments. In denying Keogh's coram nobis petition, Judge Weinfeld noted that the deposits referred to in the FBI report were by check, while the alleged bribe payments were in cash. He further noted that the period of the deposits, February 6 - 17, 1961, antedated the first of the bribe payments. Erdman had testified at trial that the first $15,000 was paid on February 21, 1961 and picked up by Kahaner on February 23, 1961 (Slip Op.,p. 1335). Moore had testified, in his second day on the stand, that an initial portion of the first $15,000 was paid on February 20, 1961, and that his testimony on the prior day, giving February 10-13, 1961 as the time, was incorrect (Slip Op.,p.1335). Judge Weinfeld, therefore, concluded that there was "no basis for the claim of suppression of exculpatory evidence." United States v. Keogh, 271 F. 2d 1002, 1011 (S.D.N.Y. 1967).

In remanding the petition for a hearing, the Court of Appeals took a different view of the facts. Judge Friendly

noted that defense counsel (1) might have argued that Erdman had exchanged the cash for checks (Slip Op., p. 1333), and (2) might have effectively combined the FBI report with grand jury testimony of Moore that he paid the $15,000 to Erdman "at least a week before we were indicted, which indictment was about February 24, 1961" (Slip Op., p. 1334) and with his original trial testimony that he paid a portion of the $15,000 on about February 12-13, 1961 (Slip Op., p. 1335).

Sobell's present petition, while in keeping with the "reiteration of unsupported charges and conclusory allegations" and the "constant drumfire of vituperation" that characterized his sixth petition, Sobell v. United States, 264 F.Supp. 579, 582, 596, fails to specify the material petitioner contends the Government "suppressed" within the meaning of United States v. Keogh, supra. Many of the allegations contained in the sixth petition relate to "facts" which could not possibly have been suppressed at trial because they were not then in existence -- e.g., the Government's post-trial handling of the originals of the June 5, 1945 and September 19, 1945 registration cards, see Sobell v. United States, 264 F. Supp. at 596; many relate to

facts that were quite evident at trial, such as the discrepancy between the dates on the photostat of the June 3 card, Government Exhibit 16, which was read to and exhibited to the jury immediately upon being received in evidence. In any event, the only facts that petitioner could claim were suppressed are precisely those which Judge Weinfeld, with the concurrence of the Court of Appeals, found to be immaterial and, in fact, corroborative of the Government's proof: (1) the scientific critiques (not embodied in any writing at time of trial, so far as appears but now epitomized in the affidavits submitted with the sixth petition), which, Judge Weinfeld found, did not contradict the testimony of Greenglass or Derry or Exhibits 2,6,7 and 8, to which such testimony related; (2) Harry Gold's pre-trial statements to his attorneys, which came into the Government's possession two and one-half years after trial, and which, in any event Judge Weinfeld found to support Gold's trial testimony; and (3) the existence of the September 19, 1945 registration card, and the difference between its handwriting and that of the June 3, 1945 card, which Judge Weinfeld found wholly unsupportive of any inference of Government forgery or fraud.

In an effort to suggest that the Keogh decision imposes new standards, in the light of which the findings of Judge Weinfeld and the Court of Appeals require renewed judicial consideration, petitioner argues that Judge Weinfeld ignored the potential effects that Government disclosure might have had on defense counsel's trial strategy (Seventh Petition, pp. 7,9). Specifically, petitioner would attribute the defendants' trial counsel's strategy to alleged non-disclosures: "the defense's proposal to impound Government Exhibit 8 and the testimony relating thereto, the reluctance and incapacity of the defense to call scientific witnesses, the failure to cross-esamine Gold, and the acceptance of Government Exhibit 16." (Seventh Petition, p. 7).

In fact, all of these issues were raised in the 1966 petition and ruled upon by Judge Weinfeld and the Court of Appeals Judge Weinfeld specifically considered Sobell's contention that, by reason of the Government's 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 ...," 264 F.Supp. at 590. He found it to rest "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 occurring in the presence of the jury and impermissible inferences." Ibid.

Far from being thus tricked, Judge Weinfeld observed, defense counsel refused to concede even that the information furnished by Greenglass to the Rosenbergs and Gold "was secret, classified and pertained to the national defense, in consequence of which witnesses were called to testify on this subject." 264 F. Supp. at 591. Obviously, if defense counsel had been led to accept some inflated concept of the accuracy and value of the material transmitted, they would not have forced the Government to its proof on these issues of secrecy and relevance to the national defense.

Defense counsel's conduct, moreover, clearly demonstrates that their failure to call scientific witnesses was not the result of being deceived as to the value of the material transmitted, but of a realization that the sort of critique

offered by petitioner in 1966 was simply irrelevant to the issue of guilt. After trial, in an effort to demonstrate that a lenient sentence would be consistent with the probable value of the material transmitted to the Russians, counsel for the Rosenbergs urged upon the trial court an analysis quite similar to that offered in 1966. Quoting from James R. Newman, "Control of Information Relating to Atomic Energy", 56 Yale L.J. 769 (1947), he said, for example:

> "[T]he general principles underlying all processes are likely to be widely known being derived usually from some discovery of basic science. For example, the successful gaseous diffusion method of separating U-235 was based on identical principles enunciated by Lord Rayleigh as early as 1896. Thus, it is only the latest improvement or modification of an existing technique which can be held in camera, and then only for an indeterminate but usually brief period. Moreover, there is no likelihood whatever, with all our preeminence in technology, that the disparity between the level of our technical competence and that of other industrial countries-at least half a dozen could be named (e.g., Great Britain,Canada,Russia, France,Sweden,Czecho-Slovakia)-is such that the latter would be more than,at most, a few years behind us. Indeed, there is abundant evidence that other nations frequently develop technological methods and process distinctly superior to ours in a variety of fields." Trial Transcript, 2440-41.*

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* The above article,published four years before trial, demonstrates the absurdity of petitioner's suggestion that the Government "suppressed" scientific evaluation of the material transmitted pursuant to the conspiracy.

Counsel specifically applied these concepts to the data transmitted by Greenglass to Gold and the Rosenbergs (Tr. 2440).

Nor were trial counsel's decisions not to cross-examine Harry Gold or contest the admission of Government Exhibit 16 the result of any non-disclosure by the Government. As Judge Weinfeld observed, counsel were fully aware of the vast quantity of material available to impeach Gold's testimony:

> "...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 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." 264 F. Supp. at 601.

In this context, there is no foundation for the suggestion that counsel would have acted differently had they had possession of a pre-trial statement that "strongly corroborates Gold's trial testimony", 264 F. Supp. at 601.

Similarly, Judge Weinfeld noted that in 1966 petitioner insinuated that Government Exhibit 16 caused defense counsel not to cross-examine Gold, and that the insinuation was flatly contradicted by the record. As the photostat of the June 3, 1945 card was not mentioned by the Government until after the completion of the testimony of the two witnesses who followed Gold, "it could not have played the slightest part in the decision not to cross-examine Gold." 264 F. Supp. at 597.

The allegation based on the Government's non-disclosure of the September 19, 1945 registration card is equally absurd. Surely defense counsel, who already possessed substantial impeachment material, see p. 15 supra, and who elected not to cross-examine Gold when his testimony about the June 3 meeting was unsupported by any documentary corroboration, would not have reversed this strategy merely because another registration card, which in fact corroborated Gold's account of the September 19, 1945 meeting with Fuchs, had some entries in a different handwriting.

Indeed, petitioner's counsel did not concoct their present theory until 11 years after disclosure of the September 19 card. In 1955 one John Wexley published "The Judgment of Julius and Ethel Rosenberg" (New York), acknowledging his indebtedness to Benjamin Dreyfus, then as now one of petitioner's counsel. Although the book includes a paragraph on the existence of the September 19 card (Aff. of Robert L. King, July 11, 1966, p. 15, quoting the Wexley book verbatim), petitioner never raised the issue in either of the § 2255 motions (1956 and 1962) filed between publication of the Wexley book and filing of the 1966 motion.

Defense counsel's conduct, moreover, clearly demonstrates that their failure to call scientific witnesses was not the result of being deceived as to the value of the material transmitted, but of a realization that the sort of critique offered by petitioner in 1966 was simply irrelevant to the issue of guilt.

In view of petitioner's eleven years of inaction after awareness of the September 19, 1945 card, it hardly requires further inquiry to conclude that the information was trivial; that its disclosure would not have triggered a reversal of defense counsel's trial strategy; and that no sinister motive could have lurked behind the Government's non-disclosure.

Moreover, the trial conduct of the Government precludes the existence of any sinister purpose. On Gold's direct examination, the Government brought out the exact dates both of the June 3 meeting with Greenglass (Tr. 1191-92) and of the September 19 meeting with Fuchs (Tr. 1208). If the Government had engaged in any foul play in connection with the June 3, 1945 card, it would not have elicited the precise date in September, thereby exposing itself to a demand for the September 19 card as corroboration.

SFW:flh
114868

Conclusion

In sum, the record and files of the case conclusively show that the questions which, in United States v. Keogh, were thought to require a hearing, do not arise here - there was no suppression of evidence and the alleged non-disclosures were not "sufficiently serious in ... motivations or consequences" to warrant extraordinary relief (Slip Op., p. 1344).

Respectfully submitted,

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

STEPHEN F. WILLIAMS,
Assistant United States Attorney

Of Counsel.

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

UNITED STATES GOVERNMENT

Memorandum

TO : DIRECTOR, FBI (101-2483) DATE: 8/15/68

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

SUBJECT: MORTON SOBELL
ESP - R
OO: NEW YORK

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

Re Philadelphia airtel 7/23/68.

On 7/30/68 a news item appeared in the "Evening Bulletin," a daily Philadelphia newspaper, which indicated that MORTON SOBELL was appealing to the U. S. Court of Appeals for the Third Circuit to give him credit for time he was kept under detention while awaiting trial. It was indicated that SOBELL was in prison in default of bail for a period of up to 18 months.

The news clipping mentioned above is being forwarded to the Bureau herewith and a Xerox copy is being forwarded to the New York Office.

On 8/12/68 IC BRIAN F. MC LAUGHLIN checked docket #17349, Court of Appeals, Third Circuit, U. S. Courthouse, Philadelphia, Pa. This docket indicated the following:

7/5/68 - Notice of Appeal received and filed

7/9/68 Appearance of MOREY M. MYERS of Gelb, Carey, and Myers with Appellant was assigned

Appearance of JOSEPH FORER, Forer and Rein, for appellant filed

FILED

REC 17 101-2483-1729

7/12/68 Appearance of KEVIN T. MARONEY for appellee filed

22 AUG 16 1968

SOVIET SECTION

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

ENCLOSURE

70 AUG 22 1968

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

PH 65-4372

7/12/68	Order of WILLIAM H. HASTIE, Chief Judge, setting forth the briefing and argument schedule
7/30/68	Case argued before ABRAHAM L. FREEDMAN and COLLINS J. SEITZ, Circuit Judges, and CALEB R. LAYTON, District Judge

LEAD

PHILADELPHIA:
AT PHILADELPHIA, PA.

Will follow and report decision of Court of Appeals, Third Circuit.

FD-350 (Rev. 7-16-63)

(Mount Clipping in Space Below)

Sobell Appeals For His Release

Morton Sobell, a principal figure in a celebrated spy case during the 1950s, who is serving a 30-year prison term, made an appeal for freedom here today.

His lawyer, Thomas I. Emerson, asked the U. S. Court of Appeals for the Third Circuit, to give him credit for time he was kept under detention in default of $100,000 bail while awaiting trial.

Sobell was tried together with Ethel and Julius Rosenberg on charges of wartime spying for the Soviet Union. The Rosenbergs were executed.

Sobell was arrested on Aug. 18, 1950 and began serving his sentence on Nov. 18, 1952. It was imposed in the U. S. Court for the southern district of New York.

Emerson told Judges Abraham L. Freedman, Collins J. Seitz and Caleb R. Layton 3d, today that the time Sobell was held in default of bail could run up to 18 months.

He said that failure to give Sobell credit for [illegible] or presentence [illegible] result in his serving more than the maximum sentence imposed.

The court took the plea under [illegible]

(Indicate page, name of newspaper, city and state.)

p.26-"The Evening Bulletin" Philadelphia, Pa.

Date: 7/30/68
Edition: 4 star
Author:
Editor: Wm.B.Dickinson
Title:

Character:
or
Classification:
Submitting Office: PH
☐ Being Investigated

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

ENCLOSURE

101-2483-1729

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

UNITED STATES GOVERNMENT

Memorandum

TO : DIRECTOR, FBI (101-2483) DATE: 8/27/68

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

SUBJECT: MORTON SOBELL
ESP - R
(OO: NEW YORK)

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 5/4/85 BY 3040PWT/lmv

Re Philadelphia airtel 7/23/68 and letter 8/15/68.

The subject appealed the opinion of U. S. District Judge FREDERICK V. FOLLMER, MDPA., Lewisburg, Pa., on 7/3/68, to the U. S. Court of Appeals, Third Circuit, Philadelphia, Pa.

On 7/30/68, this appeal was argued before Circuit Judges FREEDMAN and SEITZ and District Judge LAYTON, who filed their opinion on 8/16/68. They decided that jurisdiction is with the Southern District of New York, and therefore, dismissed without prejudice the claim for pre-sentence credit and dissent from the dismissal on the merits of the claim for post-sentence credit.

LEAD

PHILADELPHIA:
AT LEWISBURG, PA.

Will make periodic checks with the U. S. Public Health Service, U. S. Penitentiary, regarding any change in the mental or physical health of the subject and advise the Bureau of results.

EX-100

101-2483-1730

3 - Bureau (101-2483) (RM)
2 - New York (RM)
2 - Philadelphia (65-4372)

TJW:LMH
(7)

REC-10

15 AUG 28 1968

SOVIET SECTION

54 SEP 3 - 1968

5010-106-01

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

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

UNITED STATES GOVERNMENT

Memorandum

TO : DIRECTOR, FBI (101-2483) DATE: 10/4/68

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

SUBJECT: MORTON SOBELL
ESP-R
(OO: NEW YORK)

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 5/4/87 BY 3045 PWT/lmw

Re Philadelphia letter 8/27/68.

On 9/26/68 docket #17349, U.S. Court of Appeals, Third Circuit, Philadelphia, Pa., was reviewed by IC BRIAN F. MC LAUGHLIN and reflected that subject's appeal was denied by this court on 8/19/68.

Mr. THOMAS QUINN, Chief Clerk, U.S. Court of Appeals, advised this appeal has been sent to the U.S. Supreme Court, Washington, D.C., by subject's attorney. He said since subject's appeal was denied by the Court of Appeals no further action will be taken unless the Supreme Court sends the case back for further action.

Lead

PHILADELPHIA:
AT LEWISBURG, PA.

Will make periodic checks with the U.S. Public Health Service, U.S. Penitentiary, regarding any change in the mental or physical health of the subject and advise the Bureau of results.

EX-109

(3) Bureau (101-2483) (RM)
2-New York (100-37158) (RM)
2-Philadelphia (65-4372)

REC 27 101-2483-1731

BFM/lek
(7)

4 OCT 7 1968

51 OCT 14 1968

SOVIET SECTION

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

5010-106-01

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

UNITED STATES GOVERNMENT

Memorandum

TO : DIRECTOR, FBI (101-2483) DATE: 10/11/68

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

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

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 5/4/87 BY SP2 PLST/ IMW

The information reported herein was obtained by SA RALPH C. VOGEL in connection with his liaison contacts at the Supreme Court.

Enclosed for Bureau is copy of petition for writ of certiorari in the case of MORTON SOBELL vs. Attorney General of the United States and Director, United States Bureau of Prisons, October Term 1968, Case No. 509, Appended thereto is opinion of the U.S. District Court for the Middle District of Pennsylvania, as well as decision of the U.S. Court of Appeals for the Third Circuit.

Instant petition was filed in the U.S. Supreme Court (USSC) on 9/12/68. It discloses the U.S. District Court for the Middle District of Pennsylvania heard extensive oral arguments on 4/28/68, on the issues of whether SOBELL is entitled to credit for pre-sentence custody (8/18/50, date of arrest, to 4/5/51, date of his sentencing) as wellas post-sentence custody during the time his appeal was pending before the Court of Appeals (7/20/51 to 2/25/52).

The district court denied SOBELL's claim for the period of pre-sentence imprisonment on the ground of lack of jurisdiction. It denied on the merits the request for appeal time credit. Under this ruling SOBELL's mandatory release date will not occur until on or about 4/3/70.

EX-100 101-2483-1732

The Court of Appeals, on 8/16/68, affirmed judgment of the district court. SOBELL now seeks to have the USSC review judgment of the court below.

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

406T23 1968

ENCLOSURE ATTACHED

REC-3

2 - Bureau (Enc. 2)
2 - New York (100-37158) (RM)
1 - Philadelphia (Info) (RM) (65-4372)
1 - WFO
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SOVIET SECTION

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 509

MORTON SOBELL, Petitioner

v.

ATTORNEY GENERAL OF THE UNITED STATES
and
DIRECTOR, UNITED STATES BUREAU OF PRISONS

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

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CASES CITED

STATUTES & RULES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No.

MORTON SOBELL, Petitioner

v.

ATTORNEY GENERAL OF THE UNITED STATES
and
DIRECTOR, UNITED STATES BUREAU OF PRISONS

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

Petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the Third Circuit affirming a judgment of the United States District Court for the Middle District of Pennsylvania.

OPINIONS BELOW

The opinion of the District Court is appended hereto as Appendix A. The opinion of the Court of Appeals is appended hereto as Appendix B. Neither has been reported as yet. The judgment of the Court of Appeals is appended hereto as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on August 16, 1968. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether a federal prisoner may, by a declaratory judgment or habeas corpus action, obtain judicial review of a determination by the Attorney General and the Bureau of Prisons that he should not be given credit towards service of his maximum-term sentence for a period of pre-sentence imprisonment.

2. Whether a federal prisoner sentenced to a maximum term must be given credit toward service of sentence for a period of pre-sentence imprisonment incurred by reason of his inability to make bail:

(a) Because denial of such credit violates due process and equal protection by imposing additional imprisonment because of the prisoner's financial inability to make bail; or

(b) By virtue of a proper construction of 18 U.S. Code §3568; or

(c) Because the oral sentence required that such credit be given.

3. Whether the prisoner is entitled to credit for the period of his imprisonment during the pendency of the appeal of his criminal conviction, despite the fact that he signed an election not to begin service of sentence in order to be transferred to a place of confinement where he could readily consult his attorney:

(a) Because denial of the credit violates due process and equal protection by imposing additional punishment because of the prisoner's financial inability to make bail; or

(b) Because denial of the credit imposes a penalty on the prisoner's exercise of his Sixth Amendment right to counsel; or

(c) Because denial of the credit imposes imprisonment in violation of the maximum statutory sentence and due process of law; or

(d) Because the July 1, 1966 amendment to rule 38(a)(2) of the Federal Rules of Criminal Procedure, eliminating elections not to begin service of sentence, should be applied retrospectively in the circumstances of this case; or

(e) Because the prisoner was not adequately informed of the consequences of the election.

STATUTES INVOLVED

(1) The Administrative Procedure Act, 80 Stat. 392, 5 U. S. Code § 701 ff. provides in part as follows:

Section 702:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Section 703:

> The form of proceeding for judicial review is the special statutory proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction . . . .

Section 704:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review . . . .

Section 706:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall–

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency actions, findings, and conclusions found to be–

(A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction; authority, or limitations, or short of statutory right;

* * *

(2) 18 U. S. Code § 3568 read as follows in 1950 (62 Stat. 838):

> The sentence of imprisonment of any person convicted of an offense in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence.
>
> If any such person shall be committed to jail or other place of detention to wait transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.
>
> No sentence shall prescribe any other method of computing the term.

On September 2, 1960, Congress amended the section, applicable to sentences imposed on or after October 2, 1960, to add the following proviso to the first sentence:

> "Provided, That the Attorney General shall give any such person credit toward service of his sentence for any days spent in custody prior to the imposition of sentence by the sentencing court for want of bail set for the offense under which sentence was imposed where the statute requires the imposition of a minimum mandatory sentence" (74 Stat. 738).

Subsequently, section 4 of the Bail Reform Act of 1966 amended § 3568, applicable to sentences imposed on or after September 20, 1966, so as to require the Attorney General to give a federal prisoner "credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed" 80 Stat. 217.

(3) 28 U. S. Code § 2255, 62 Stat. 967 reads in part as follows:

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released on 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."
>
> * * *
>
> "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."

STATEMENT OF THE CASE

Petitioner, Morton Sobell, is a prisoner in the federal penitentiary at Lewisburg, Pennsylvania. In this litigation he advances claims that he is being imprisoned beyond the term of his sentence because the Department of Justice has refused to credit towards the service of his sentence two periods during which Sobell was confined: (a) the period from Sobell's arrest on August 18, 1950 to the sentencing on April 5, 1951, and (b) the period from July 20, 1951, when Sobell signed an election not to commence service of sentence, to February 25, 1952, when his conviction was affirmed by the Court of Appeals for the Second Circuit. It is conceded by the government that if Sobell's contentions are correct, the mandatory date for his release from imprisonment was August 2, 1968.

Facts relating to the time of confinement

On August 18, 1950, Sobell was arrested on a charge of violating the espionage act, 18 U. S. C. § 794. Bail was set at $100,000. Sobell remained in custody continuously thereafter because of his inability to make the bail.

Sobell was tried in the United States District Court for the Southern District of New York. On April 5, 1951, he was sentenced to imprisonment for thirty years, then the statutory maximum term for the offense of which he was convicted. The following colloquy took place at the time of sentencing:

> "THE COURT: . . . I, therefore, sentence you to the maximum prison term provided by statute, to wit, thirty years.
>
> While it may be gratuitous on my part, I at this point note my recommendation against parole.
>
> The Court will stand adjourned.
>
> "MR. PHILLIPS [Sobell's trial counsel]: Before the Court adjourns, are the months already served taken into consideration?

> THE COURT: No, they are not, but I will have to so sign the judgment. They have to be so considered."

The written judgment provided for imprisonment for thirty years, making no reference to the pre-sentence custody.

After sentence, Sobell was transferred to the federal penitentiary at Atlanta, Georgia. He sought to be transferred back to New York in order to confer with counsel about his appeal and to procure new counsel for the appeal. To accomplish this transfer he was required to sign a form reading as follows:

> "ELECTION NOT TO BEGIN SERVICE OF SENTENCE.
>
> Having heretofore taken an appeal from my sentence imposed on April 5, 1951, in the United States District Court for the Southern District of New York, I now elect not to commence service of the sentence."

Sobell signed this form on July 20, 1951. A few days later he was transferred to the Federal House of Detention at 427 West Street, New York City. There he was put to work in a prison job and was otherwise treated in the same manner as prisoners in that institution who were serving their sentences.

On February 25, 1952, the United States Court of Appeals for the Second Circuit affirmed Sobell's conviction. On November 19, 1952, following denial of certiorari by the Supreme Court, the mandate affirming the conviction was filed in the District Court. Sobell was then transferred to Alcatraz.

This Litigation

Before this litigation was instituted, the government, in computing Sobell's release date, did not give him credit towards sentence for (1) the custody from arrest on August 18, 1950, to sentence on April 5, 1951, and (2) the cus-

tody from his signing on July 20, 1951, of the "Election Not to Begin Service of Sentence" to the filing on November 19, 1952, of the mandate affirming his conviction.

On November 13, 1967, counsel for Sobell met with the Assistant Deputy Attorney General, who had been assigned by the Attorney General to discuss with them the proper date for the termination of Sobell's imprisonment. Counsel requested that Sobell receive credit toward his sentence for the periods of August 18, 1950 to April 5, 1951, and July 20, 1951 to November 19, 1952. The Assistant Deputy Attorney General thereafter informed them that their request was under active consideration and had been referred to the Attorney General for decision. On January 15, 1968, the Assistant Deputy Attorney General advised counsel by letter that, "After carefully reviewing the matter the Department of Justice has decided that Morton Sobell cannot be given credit administratively for the time he was in jail pending his conviction or while his case was on appeal."

On January 18, 1968, the complaint which instituted this litigation was filed in the United States District Court for the District of Columbia. The complaint sought a declaratory judgment and injunction to review the Attorney General's determinations not to credit Sobell with his confinement for the periods mentioned above.

On March 5, 1968, the Department of Justice notified Sobell's counsel that the Bureau of Prisons "has recomputed the plaintiff's time and given him credit for the period from February 25, 1952, when his conviction was affirmed by the Second Circuit Court of Appeals, to November 20, 1952, when the mandate was filed." The controversy has been reduced, therefore, to the periods of custody from August 18, 1950 to April 5, 1951, and July 20, 1951 to February 25, 1952.

Sobell moved for summary judgment, and the government moved to dismiss the complaint or, in the alternative, for summary judgment. The government also moved to transfer the action to the Southern District of New York.

Sobell opposed the transfer, arguing that the case should remain in the District of Columbia. He contended, however, that if the case were transferred, it could only be transferred to the Middle District of Pennsylvania, since under 28 U. S. C. § 1404(a), this was the only other district where the case "might have been brought."

On March 28, 1968, the District Court for the District of Columbia ordered the action transferred to the United States District Court for the Middle District of Pennsylvania. On July 1, 1968, the latter court entered an order denying Sobell's motion for summary judgment, granting on grounds of lack of jurisdiction the government's motion to dismiss that part of the action which sought credit for pre-sentence custody, and granting the government's motion for summary judgment for that part of the action which sought credit for custody between sentence and affirmance of Sobell's conviction.

On August 16, 1968, the Court of Appeals for the Third Circuit affirmed the judgment of the District Court. It expressly noted that its judgment was "without prejudice to the merits" on the issue of pre-sentence custody, but affirmed on the merits on the claim for post-sentence credit. The majority held that jurisdiction over the post-sentence custody period rested on habeas corpus principles. Judge Freedman dissented in part because in his view the District Court did not have jurisdiction on either claim. He added that both claims raised "serious questions on the merits."

REASONS FOR GRANTING THE WRIT

1. By August 2, 1968, petitioner had been imprisoned for the full period of time required to satisfy his 30-year maximum term sentence. Yet the Department of Justice is incarcerating him for an additional 15 months because it refuses to credit him with his confinement from arrest to sentence and from the date he signed the election form to the affirmance of his conviction. Petitioner would not have suffered this imprisonment in excess of the maximum statu-

tory term had he been financially able to make bail pending trial and appeal. Accordingly, this additional penalty offends the principle that in the administration of criminal justice it is constitutionally impermissible to discriminate between prisoners or defendants on the basis of their financial circumstances. *Griffin* v. *Illinois*, 351 U.S. 12; *Eskridge* v. *Washington State Board*, 357 U.S. 214; *Burns* v. *Ohio*, 360 U.S. 252; *Smith* v. *Bennett*, 365 U.S. 708; *Lane* v. *Brown*, 372 U.S. 477; *Douglas* v. *California*, 372 U.S. 533; *Roberts* v. *LaVallee*, 389 U.S. 40.

Application of the rule of equal protection in this case would not open the door to claims for the elimination of every inequality attributable to poverty in the administration of the criminal law. This is not simply a situation where the government extended a privilege to all but only the wealthy could take advantage of it. Here the government affirmatively and gratuitously aggravated the disadvantage stemming from the lack of financial resources. It is the government's refusal to allow credit for time spent in jail, not the mere inability to take advantage of the bail system, which is now producing the unequal treatment. The government's action is equivalent to inflicting a heavier sentence, an added punishment, on those who cannot afford bail.

The Bail Reform Act of 1966, 80 Stat. 267, 18 U.S.C. §3568, provides that persons sentenced after September 20, 1966, must be granted credit for periods spent in jail as a result of an inability to post bail. A number of circuits have held that the principle of the Bail Reform Act must be applied to prisoners who, like the petitioner here, were sentenced to maximum sentences prior to that date. *Stapf* v. *United States*, 376 F. 2d 326 (D.C. Cir.); *Dunn* v. *United States*, 376 F. 2d 191 (4th Cir.); *United States* v. *Smith*, 379 F. 2d 628 (7th Cir.); *Bryans* v. *Blackwell*, 387 F. 2d 764 (5th Cir.). As a result of these decisions, the Bureau of Prisons has ruled that persons sentenced to maximum terms between October 2, 1960 and September 20, 1966 must be

given credit for pre-sentence custody. Bureau of Prisons Policy Statement 7600.49A issued February 9, 1968. The October 2, 1960 cut-off date, which bars application of the policy to Sobell, was the effective date of a September 2, 1960 amendment to 18 U.S.C. § 3568, dealing with mandatory minimum sentences, supra p. 5. The rationale for the cut-off date escapes us. Between October 27, 1967 and February 9, 1968 the Bureau of Prisons gave administrative credit for pre-sentence custody confinement of maximum term prisoners convicted in the 4th, 7th or District of Columbia circuits, without regard to the date of sentence. Bureau of Prisons Policy Statement 7600.49 issued October 27, 1967. This policy statement was in effect at the time petitioner's counsel applied to the Attorney General for relief. The amended policy statement carrying the October 2, 1960 cut-off date was issued only after petitioner filed his complaint in the District Court for the District of Columbia.[1a]

The court below refused to consider the merits of the claim so far as pre-sentence custody was concerned,[1] thus leaving petitioner without any effective relief even though his mandatory release date has passed. So far as post-sentence custody was concerned, the majority below stated only: "While the result [i.e. the discrimination against petitioner for inability to make bail] may be unfair it is not sufficiently invidious to reach constitutional proportions." This view cannot be squared with the decisions of this Court or with ordinary concepts of "invidious" consequences.

---

[1] The majority found an absence of jurisdiction in the fact that the applicable statute, 18 U.S.C. § 3568, "was by no means decisive of the present issue" and there was no controlling opinion by this Court. The inference to be drawn is that if the legal issues were clear on the merits the court would have jurisdiction. We fail to follow this concept of jurisdiction that disappears when the court is called upon to resolve a difficult or novel legal question.

[1a] Policy Statements 7600.49 and 7600.49A are attached hereto as Appendices D and E respectively.

2. The decision below sanctions a procedure whereby the government exacts a price, namely, additional time in jail, as a condition to granting the right to effective counsel on appeal. The court below held that this procedure, though it "left much to be desired," did not violate the Sixth Amendment. The ruling is inconsistent with the holdings of this Court that the government may not in any way encumber the right to counsel. *Chandler v. Fretag*, 348 U.S. 3; *Glasser v. United States*, 315 U.S. 60, 70; *Commissioner v. Tellier*, 383 U.S. 687; *Bitter v. United States*, 389 U.S. 15. The ruling also collides with the general principle that the government cannot exact a price for the exercise of a constitutional right. See, e.g., *Sherbert v. Verner*, 374 U.S. 398; *United States v. Jackson*, 390 U.S. 570; *Simmons v. United States*, 390 U.S. 377.

The majority below held that petitioner was not denied any Sixth Amendment right because petitioner's "choice was between immediate proximity to counsel and credit on his sentence" and this was not "an impermissible burden." This ignores the realities that petitioner believed it necessary to be transferred to New York to consult counsel and the government agreed. It is too late to argue now that the government need not have transferred him and could have kept him in Atlanta. Even if petitioner had only a privilege and not a constitutional right to be transferred to New York in order to be near counsel, the government still cannot attach an unconstitutional condition (service of additional time), upon the exercise of the privilege. See, e.g. *Sherbert v. Verner, supra; Keyishian v. New York Board of Regents*, 385 U.S. 589.

Nor can the decision below be squared with the Fifth Amendment. The court held that the government may impose imprisonment on petitioner over and above the maximum sentence, for no better reason than that he asked and was permitted to be confined near his counsel. Imprisonment for such a reason is arbitrary, serves no legitimate governmental purpose, and hence violates due process.

3. The case also raises the important question as to whether a federal prisoner may employ the remedies of habeas corpus or declaratory judgment to challenge his being held in confinement after service of the sentence imposed upon him. The petitioner here was denied consideration of his claim for pre-sentence custody on the ground that he should have pursued his remedy in the sentencing court under 28 U.S. Code § 2255. Other prisoners who have presented to the sentencing courts claims under § 2255 that they have completed service of their sentences have been told that their proper remedy is habeas corpus in the jurisdiction of confinement. *Stinson v. United States*, 342 F.2d 507 (8th Cir.); *Allen v. United States*, 327 F.2d 58 (5th Cir.); *Freeman v. United States*, 254 F.2d 352 (D.C. Cir.); *Costner v. United States*, 180 F.2d 892 (4th Cir.).

The rule in most circuits appears to be that habeas corpus and not § 2255 is the appropriate remedy for a prisoner in a federal penitentiary who argues that he has fully served the sentence or sentences imposed upon him and therefore should be discharged from further confinement. *Darnell v. Looney*, 239 F.2d 174 (10th Cir.); *Mills v. Hunter*, 204 F.2d 648 (10th Cir.); *Paccione v. Heritage*, 323 F.2d 378 (5th Cir.); *Halprin v. United States*, 295 F.2d 458 (9th Cir.), and cases cited *supra*. This rule also conforms to the natural reading of § 2255, since a challenge to failure to credit periods of confinement is not an attack on the validity of the sentence.

Both branches of petitioner's complaint were based on the claim that he had, by August 2, 1968, fully served the sentence imposed upon him. Petitioner did not on either branch challenge the validity of the sentence. The majority below held that habeas corpus jurisdiction existed on the claim relating to the post-sentence period, but that the claim relating to pre-sentence custody could be entertained only in a § 2255 proceeding in the sentencing court. Judge Freedman, dissenting, believed that both aspects of peti-

tioner's case could be considered only in a § 2255 proceeding. Under the dissenting opinion, petitioner should have brought his entire case in New York; under the majority view, petitioner is required to bring half his case in New York, and half in Pennsylvania. Yet, if the government had not succeeded in maneuvering a transfer of the case from the District of Columbia[2] that court could have reached the merits on both aspects of petitioner's case, *Hurley v. Reed*, 288 F.2d 844 (D.C. Cir.); *Freeman v. United States*, *supra*.

Federal prisoners seeking release on the grounds that they have served their sentences and the government has erroneously computed the time served ought not to be shunted from court to court in order to get an adjudication on their claims, meantime remaining in confinement. The end result of such a process is that a prisoner may find that he was entitled to relief too late for the decision to be of any value to him.[3]

It is conceded that if petitioner is correct on the merits on both aspects of his claim he was entitled to a mandatory release on August 2, 1968. Petitioner timely sought relief by having his counsel seek an administrative determination from the Attorney General on October 31, 1967, and thereafter suing on January 18, 1968 to review the adverse decision of the Attorney General. Both the majority and the dissent below recognized that petitioner's claim to obtain credit for pre-sentence custody presented a seri-

[2]The transfer was sought and obtained not on any jurisdictional ground but solely on the contention that the courts in the District of Columbia were too busy to entertain cases where prisoners were confined elsewhere. See *Young v. Director, U.S. Bureau of Prisons*, 367 F.2d 331.

[3]Prior to the mandatory release date, we see no reason why the courts do not have jurisdiction under the Administrative Procedure Act (5 U.S.C. §§ 702-706), the declaratory judgment act (28 U.S.C. § 2201, and under 28 U.S.C. § 1331, to review administrative determinations denying credit for periods of confinement.

ous question on the merits. Yet petitioner, having been shifted from the District of Columbia to Pennsylvania, is now told he must go to New York, with no court as yet willing to consider the merits of this aspect of his complaint.

In the interests of the efficient and seemly administration of justice, the Court should take this opportunity to settle the appropriate procedure for prisoners to obtain judicial determinations of their claims that they are being imprisoned beyond the terms of their sentences.

CONCLUSION

Certiorari should be granted, the judgment below should be reversed, and the petitioner should be ordered discharged from custody.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MORTON SOBELL,
Plaintiff

v.

ATTORNEY GENERAL OF THE UNITED STATES and DIRECTOR, UNITED STATES BUREAU OF PRISONS,
Defendants

NO. CIV-68-144

OPINION

This matter is before the court on plaintiff's motion for summary judgment, and defendants' motion to dismiss or in the alternative for summary judgment.

Plaintiff originally filed a complaint in the United States District Court for the District of Columbia seeking a declaratory judgment and injunctive relief. The defendants filed a motion to change venue, requesting that the court transfer the case to the United States District Court for the Southern District of New York. Plaintiff then filed a motion for summary judgment, and by Order dated February 27, 1968, the defendants were permitted to postpone answering that motion until the motion for a change of venue was decided.

Defendants' motion for a change of venue was denied on March 6, 1968, and the government immediately filed a motion for reconsideration. Oral argument was heard on the motion and on March 28, 1968, the case was ordered transferred to this district. On March 26, 1968, the government moved to have the action dismissed, or in the alternative for summary judgment.

A hearing was held before this court on April 28, 1968, and extensive oral argument heard. In addition, both sides have filed supplemental briefs.

Plaintiff is presently incarcerated in the United States Penitentiary at Lewisburg, Pennsylvania, serving a sentence of thirty years, the maximum penalty for the offense of which he was convicted. He was arrested on August 18, 1950, and remained in custody from that date because of his inability to meet his bond, which was set at $100,000.00. He was sentenced on April 5, 1951, at which time he was transferred to the Federal Penitentiary at Atlanta, Georgia. On July 20, 1951, he was transferred back to New York City to enable him to consult with his attorney concerning his pending appeal. He remained there until November 19, 1952, two days after the Supreme Court denied a petition for rehearing in his case.

The issues in this case are whether the plaintiff is entitled to credit for (1) the period from August 18, 1950, the date of his arrest, to April 5, 1951, the date of his sentencing, and for (2) the period from July 20, 1951 to February 25, 1952, during which time his appeal was pending before the Court of Appeals. (After plaintiff instituted this action, the Bureau of Prisons, in accordance with its pre-existing policy, corrected plaintiff's sentence so as to give him credit for the time served between the affirmance by the Court of Appeals and the mandate of the Supreme Court).

If plaintiff is given credit for these two periods his mandatory release date will occur on or about July 28, 1968, if not, the date will occur on or about April 3, 1970. Accordingly, plaintiff's counsel requested from the defendant Attorney General a formal ruling that credit for these disputed periods be accorded to plaintiff. After full consideration, the Attorney General issued a ruling that the plaintiff would not be granted the requested credit. This suit was then instituted.

I

TIME SPENT IN CUSTODY BETWEEN ARREST AND SENTENCE

Plaintiff contends that he is entitled to credit for the time he spent in custody between his arrest and the date of imposition of sentence for several reasons. He argues that since he was given the maximum sentence allowable for his offense, failure to give him credit for the time spent in presentence custody would result in his serving more than the maximum sentence imposed, in violation of 18 U.S.C. § 3568. He also asserts that the sentencing judge intended that such credit be given. Finally, plaintiff contends that this additional penalty has been imposed upon him solely because of his financial inability to meet the bond set for his release, in contravention of the constitutional principles of equal protection.

The first question that must be answered is whether this is the proper court to decide the issue. The defendants have from the very outset of this case taken the position that the question of presentence credit properly should have been presented to the sentencing court of the Southern District of New York, since it is, in essence, an attack on the legality of plaintiff's sentence. Plaintiff, however, contends that he is not seeking to correct the sentence, but to obtain judicial review of an administrative decision of the Attorney General as to how the sentence should be calculated.

Plaintiff asserts that the District Court for the District of Columbia has ruled that this proceeding is rightly brought under the Administrative Procedure Act and the declaratory judgment provision, and that it is not a proceeding which could only be brought under 28 U.S.C. § 2255. To support this contention plaintiff points out that by transferring the case to this district, the judge necessarily ruled that it was not a 2255 proceeding, since this court would not have jurisdiction over such an action. Also, plaintiff states that if the District of Columbia Court had conceived that plaintiff's only remedy was under § 2255, so that it therefore did not