

MELVIN B. LEWIS

ATTORNEY AT LAW

ANNOVER 8-2946

77 W. WASHINGTON STREET
CHICAGO 2, ILLINOIS

December 4, 1959

Mr. Alger Hiss
c/o Helen L. Buttenwieser, Esq.
Beer, Richards, Lane, Haller & Buttenwieser
150 Broadway
New York 38, New York

Dear Mr. Hiss:

Consequent upon our meeting with you in Chicago, we have undertaken additional research into the legal problems then discussed. You will recall it was our thought that the proper method for obtaining relief would be by petition for writ of error coram nobis under United States v. Morgan, 346 U.S. 502.

Morgan has been considered and applied in approximately thirty reported cases. From an examination of these cases (the bulk of which are listed in the Sheppard Citator, particularly the current standing supplement), it is our belief that the following general observations are in order:

1. Where the petition states a prima facie case, the question as to whether or not the matter should be further entertained is not to be left to judicial discretion. The District Court must, under such circumstances, grant a hearing and appropriate relief.
2. It need not be alleged or proved that the petitioner was in fact innocent, or that the matters relied upon were unknown to the trial court at the time of judgment. In this respect, coram nobis is broader now than at early common law.
3. One clearly established ground for relief is the knowing use of perjured testimony. We find no case which delineates the type of "knowledge" on the part of prosecuting authorities to which the injunction refers. See Mooney v. Holohan, 294 U.S. 103, 79 L. Ed. 791; Cobb v. Hunter, 167 F 2d 888, 889. Clearly, a prosecutor's mere distrust of his witness does not constitute such knowledge. On the other hand, an allegation that the prosecutor participated in a conspiracy to convict the defendant, and that perjury was one of the instruments of the conspiracy, was sufficient. United States v. Rutkin, 212 F 2d 641, 644, 3 Cir. 1954.
4. Violations of the constitutional rights of defendants may come within the scope of the writ if these violations (a) contributed directly to

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the conviction; (b) were not waived; and (c) were not previously adjudicated on a factual basis, unless the petitioner were prepared to show a substantial violation of his rights incident to that determination.

5. Violation of a purely statutory right of the defendant, involving no constitutional considerations, would not ordinarily afford a basis for the writ.

Based upon the understanding of the record in your case to which we have been able to attain from the sources available to us, we here attempt to delineate the areas in which we think a petition might enjoy the most favorable chance of success.

Chambers' testimony as to the date on which he left the Communist Party was changed to accommodate the dates of the documents ultimately introduced into evidence against you. The record is clear that the change was made upon consultation with the prosecuting authorities. While the authorities had every right to attempt to reconcile inconsistencies in Chambers' story, they had no right to build a case by revising his story to fit facts which could not conveniently be revised, where his original story would have precluded your guilt, owing to its inconsistency with such irrevivable facts.

Granted that the prosecution probably cannot be shown to have "known" that Chambers' second story was false in the same sense that one is taken to know his own address. The fact remains that Chambers was encouraged to alter his story--not to reconcile inconsistencies within his story, but to fit a theory. Under these circumstances, it would have been mere coincidence had the truth been obtained; and if the result were a falsity, it was a result procured by the prosecution, acting with knowledge that the true state of affairs could never be revealed by such methods.

It must be remembered that Chambers had previously denied on oath that any "document espionage" had occurred. He maintained that your role was quiet infiltration with the ultimate purpose of affecting Government policy, and that this goal was not to be jeopardized by the possible exposure involved in an overt act of espionage. The date of his disassociation from the Communist Party as originally given was consistent with the "quiet infiltration" theory, but was inconsistent with the theft of documents theory. So the Government chose to cause a revision in dates to fit the latter accusations rather than accepting the first story or, most logically, neither story. We would urge that under these circumstances, the Government influenced the change at the peril of finding the conviction thereby obtained invalidated. The falsity of the testimony as to the date ultimately selected is demonstrated by the provable fact that Chambers had gone into hiding and was working on a German translation for English publishers, before some of the documents even existed.

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It is our belief that a coram nobis petition, alleging the wilful use of perjured testimony by the Government, could be supported by evidence presently available. A petition on these grounds, followed by proof, would establish the existence of facts not heretofore generally known, which are completely incompatible with Chambers' testimony. Prior to our being asked for an opinion, we had not been made aware of the force of such facts.

We believe there is considerably more upon which a petition might properly be based. Your attorneys, in presenting your motion for a new trial, were denied access to pertinent matters in the possession of the Government. Examples of such matters are discussed in your book, and need not be repeated here. It is our opinion that these matters, or some of them, might very well fall within the doctrine of the recent decisions requiring such disclosure by the Government. See Jencks v. United States, 353 U.S. 657, 1 L. Ed. 2d 1103; United States v. Andolschek, 142 F 2d 503, 507, 2 Cir. 1944. Your attorneys proceeded with downright restraint in suggesting that they could see no reason for the Government's refusal to permit the requested access. Of particular interest are the records of the Woodstock Company, which that company had turned over to the Government.

Your motion for new trial suggested that if granted disclosure, you would obtain evidence which would necessitate the setting aside of the verdict. The trial court seemed to proceed on the assumption that an effort to obtain evidence by proper means was a matter addressed to its sound discretion. On a post-trial motion, in a proper case, the defendant is entitled to present evidence at "a hearing with all interested parties permitted to participate." Remmer v. U.S., 347 U.S. 227, 230, 98 L. Ed. 654, 656; Ryan v. U.S., 191 F 2d 779, 781, CADA 1951; Glasser v. U.S., 315 US 60, 87, 86 L. Ed. 680, 708.

The concept of a hearing at which the defendant is denied the right to compel the production of evidence, as guaranteed by the Sixth Amendment, is logically and legally offensive.

Consider also that at an early stage of the proceedings, your counsel requested an opportunity to examine samples of the typewriting of Mr. and Mrs. Chambers. In successfully resisting this request, the prosecutor submitted that it would be impossible to ascribe the documents in evidence to any individual typist by comparing typing characteristics. The Government called an expert in this field and made no attempt to establish the contrary. Nonetheless, the prosecutor stated to the jury that it would be possible, upon the basis of such comparison, to show that the typing had been done by your wife. He thereby constituted himself an unsworn witness against you, not subject to cross-examination. This unfairness was compounded by his earlier inconsistent position in resisting your

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request for samples of the typewriting of the Chambers'. In this connection, it should further be noted that on the motion for a new trial, the prosecutor again reverted to his original position. We have not had access to any documents that would indicate whether this point has been preserved.

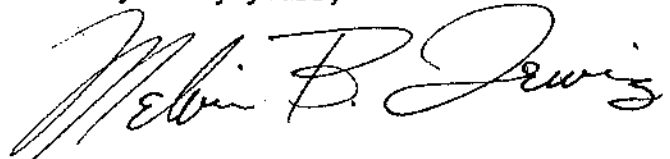
No discussion of post-trial relief would be complete without mentioning your cross-examination relative to the Congressional proposal for a polygraph examination. We regard this as so grossly improper as to have merited a mistrial on the spot by any judge, however biased against you. However, the failure to have objected at the time probably precludes this line of attack.

In recapitulation, we think it may fairly be said that the avenues of attack have been outlined here in the order of their relative probability of success. The first proposal, relative to the knowing use of perjured testimony, is particularly enchanting because it opens up avenues of proof that would constitute, effectively, relitigation of the case, and yet limit the issues to those areas in which the Government's position is most vulnerable.

We sincerely feel that it would be in your best interests that such a petition be interposed at the earliest appropriate juncture. We would be grateful if you would advise us as to your views on the matters herein set forth.

A copy of this letter is being sent to your New York attorneys, in order to facilitate your discussion of the subject with them.

Very truly yours,

A handwritten signature in cursive script, reading "Melvin B. Lewis". The signature is written in dark ink and is positioned above the typed name.

Melvin B. Lewis

MBL: nww