United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 22478

UNITED STATES OF AMERICA,
Appellee,

against

ALGER HISS,
Appellant.

APPELLANT'S BRIEF

On Appeal from Order Denying Motion for New Trial

BEER, RICHARDS, LANE & HALLER,
Attorneys for Appellant.

CHESTER T. LANE,
ROBERT M. BENJAMIN,
HELEN L. BUTTENWIESER,
of Counsel.

The Hecla Press - - New York City
39
[1838]

TABLE OF CONTENTS

CITATIONS

Cases:

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 22478

UNITED STATES OF AMERICA,
Appellee,

against

ALGER HISS,
Appellant.

APPELLANT'S BRIEF

Introductory Statement

The appellant, Alger Hiss, was convicted by a jury in the United States District Court for the Southern District of New York on both counts of an indictment charging perjury. The judgment of conviction, rendered by the Honorable Henry W. Goddard, United States District Judge, and entered on January 25, 1950, sentenced appellant to imprisonment for five years on each of the two counts, the sentences to run concurrently. After an appeal to this Court (185 F. 2d 822), a petition for rehearing, and a petition to the Supreme Court of the United States for certiorari (340 U. S. 948), all unsuccessful, this Court's mandate of affirmance was issued on March 16, 1951, and on March 22, 1951, the appellant surrendered to the United States Marshal. At the present time appellant is confined in the United States Penitentiary at Lewisburg, Pennsylvania.

This is an appeal from an order of Judge Goddard, filed on July 22, 1952, which denied a motion made by appellant on January 24, 1952, for a new trial based on the ground of newly discovered evidence.* The motion was denied on affidavits and memoranda submitted on both sides, and after argument of counsel, held on June 4, 1952, but without any hearing of the witnesses proffered by appellant in support of the motion or of the witnesses proffered by the Government in opposition.

Grounds of Appeal

A motion for a new trial on the ground of newly discovered evidence is addressed to the sound judicial discretion of the trial court. See, *e.g.*, *Prisament* v. *United States*, 96 F. 2d 865, 866 (C. A. 5th, 1938). The concept of sound judicial discretion, however, implies the possibility of its abuse, and the consequent commission of reversible error. On this appeal we contend that the trial court abused its discretion, and that its order denying the motion should be reversed by this Court.

---

* The order is contained in Judge Goddard's opinion, dated July 22, 1952. Neither the appellant nor his counsel have ever been officially notified of the entry of any separate formal order, nor indeed of the filing of the opinion itself, and it might therefore be that technically the time for appeal has not yet started to run. See *Oddo* v. *United States*, 171 F. 2d 854 (C. A. 2d, 1949), cert. denied 337 U. S. 943; *Carter* v. *United States*, 168 F. 2d 310 (C. A. 10th, 1948). However, upon being advised by newspaper reporters of the filing of the opinion, appellant's counsel secured a photostatic copy from the clerk's office, bearing a rubber-stamp notation showing filing on July 22, 1952. Under the recently amended rules of the District Court for the Southern District of New York, a memorandum of the determination of a motion, signed by the judge, constitutes the order (General Rule 10, effective March 1, 1952). See also *United States* v. *Rockower*, 171 F. 2d 423 (C. A. 2d, 1948), cert. denied 337 U. S. 931. Appellant accordingly, for safety's sake, elected to assume that the time for appeal began to run on July 22, 1952, and filed notice of appeal on July 31, 1952. The record on appeal was filed and the appeal docketed on September 9, 1952.

In asserting that the trial court abused its discretion in denying the motion, we do so in full appreciation of the accuracy of the court's observation "that the granting of new trials on the ground of after-discovered evidence is not favored by the courts and they are granted with great caution" (F. 907).* But if new trials are not to be lightly granted, it is equally true, we believe, that motions for new trials are not to be lightly considered or disposed of by the court to which they are addressed.

We intend to show on this appeal

that the trial judge misconceived the burden which the defense was required to carry in order to support the motion;

that he misstated or misunderstood much of the evidence offered in support of the motion;

that he passed over or neglected to consider vital elements of proof offered;

that he resolved issues of fact, depending on the credibility of witnesses, uniformly in favor of the Government, without hearing the witnesses or permitting their credibility to be tested by direct and cross-examination;

that he accepted the Government's unsubstantiated gossip and rumors as sufficient to controvert sworn statements of defense witnesses who were presented as ready and able to support their affidavits in open court;

that in the face of an uncontroverted showing that evidence needed to establish the innocence of the defend-

---

* References "F. ....." are to folios in the Appendix to this brief. References "R. ....." are to pages of the record on the original appeal to this Court, 185 F. 2d 822. References to portions of the record on the current appeal which have not been printed in the Appendix will be specifically so designated.

References "H.H. ....." are to pages of the published testimony before the Committee on Un-American Activities (Hearings Regarding Communist Espionage in the United States Government), House of Representatives, Eightieth Congress, Second Session.

ant was in the possession of the FBI, or was withheld by others from the defense for fear of the FBI, he declined to permit a hearing at which the defense might be enabled to bring such evidence out into the light.

However decorously we may phrase our criticisms of the trial court's action, they will inevitably be recognized as amounting to a charge of predetermination of the motion, without hearing of the witnesses and without that just and fair consideration which even once-convicted defendants are entitled to receive at the hands of our courts when evidence of a miscarriage of justice is offered. We cannot make any lesser charge. We believe that the trial court's handling of the motion displayed such predetermination, without fair hearing, as to amount to an abuse of its discretion, and thus to constitute error requiring reversal by this Court.

Statement of Facts

In their nature, motions for new trials on the ground of newly discovered evidence can be tested for sufficiency only by comparing the proffered new evidence with the evidence which was before the jury on the trial.* Consequently, as background for an intelligible argument, we must first state not only the substance of the new evidence (which Judge Goddard held insufficient to call for a new trial), but also the substance of the evidentiary case made against appellant at the trial which resulted in his conviction. We first summarize the trial evidence.

---

* This is so whether the applicable rule is that of the *Johnson* and *Berry* cases (*Johnson* v. *United States,* 32 F. 2d 127, 130 (C. A. 8th, 1929); *Berry* v. *State,* 10 Ga. 511, 527 (1851)) or that of the *Larrison* case (*Larrison* v. *United States,* 24 F. 2d 82, 87-8 (C. A. 7th, 1928)). See opinion below, F. 903-5.

I. The Case Against Alger Hiss.

This case had its origin in a charge made by Whittaker Chambers to the effect that he had known Alger Hiss as a member of the Communist Party in the middle 1930's. The charge was first publicly made by Chambers before the Committee on Un-American Activities of the House of Representatives on August 3, 1948. Alger Hiss asked immediate opportunity to reply to the charge, and denied it under oath before the Committee on August 5, 1948. At a later hearing before the Committee on August 17, 1948, after Hiss had identified Chambers as a man he had once known under a different name, Hiss challenged Chambers to repeat his statements where they would not be privileged against suit for libel. Chambers did so, and Hiss on September 27, 1948, instituted action against him in the United States District Court for the District of Maryland.

In this Baltimore action Hiss's attorneys on November 4, 1948, began a pre-trial examination of Chambers and his wife, Esther. Up to that time Chambers had consistently maintained that, though Alger Hiss had been a member of the Communist Party, his assignment had had nothing to do with espionage activities.* Even on the opening days of the pre-trial examination (November 4, 5, 1948) he reiterated this assertion, and specifically denied ever having "transmitted a State Department document from Mr. Hiss to the Communist Party".† He was asked on Novem-

---

* Before the House Committee on August 3, 1948, Chambers had testified: " * * * I should perhaps make the point that these people were specifically not wanted to act as sources of information. These people were an elite group, an outstanding group, which it was believed would rise to positions—as, indeed, some of them did—notably Mr. White and Mr. Hiss—in the Government, and their position in the Government would be of very much more service to the Communist Party—" (H.H., 577). Similarly, before the Grand Jury on October 14, 1948, he testified that he did not have "any knowledge that people in the employ of the Government furnished information" (R. 352).

† Transcript, pp. 303, 317.

ber 4th to produce any correspondence or other papers he might have received from any member of the Hiss family. He produced none that day or the next, and the hearing was adjourned. On November 16th it was resumed for testimony by Mrs. Chambers, and on the following day, November 17th, Chambers reappeared, this time bringing with him a set of papers. They consisted of four pencil notes and forty-three typewritten documents—full or partial summaries, paraphrases, or copies of State Department documents—all of which he claimed at the trials had been written by Hiss or typed on the Hiss family typewriter by Mrs. Hiss and given to him by Hiss in the first few months of 1938 for microfilming and transmittal to Russia. He had forgotten about them, he said, but had just a day or two earlier (November 14, 1948) found them in an envelope which he had left with his wife's nephew, Nathan Levine, in 1938 and which Levine had kept over a disused dumbwaiter in his mother's house in Brooklyn for the last ten years.

Chambers's production of these documents * brought the pre-trial examination to a standstill. On Hiss's instructions his attorneys immediately turned the documents over to the Department of Justice (R. 2251, 2451-4). About two weeks later—December 2, 1948—Chambers led agents of the House Un-American Activities Committee to a pumpkin patch on his Westminster, Maryland, farm, and produced for them there, out of a hollowed-out pumpkin, two strips of developed microfilm which he claimed to have found in the same envelope in Levine's house. These microfilm strips consisted of photographs of State Department documents

* At the second trial the four handwritten notes were designated Government's Baltimore Exhibits 1-4, and the forty-three typewritten documents were designated Government's Baltimore Exhibits 5-47. The respective State Department documents which at the trial were shown to have underlain the copies or summaries were designated Government's State Exhibits 1-4 and 5-47. These designations are used in this brief.

which he said Alger Hiss had given him for copying and transmission to Russia.*

Chambers's production of these various documents and microfilm strips led to further testimony by him before the House Committee,† and also before a Grand Jury of the Southern District of New York. Alger Hiss was also called before the Grand Jury, and there, on December 15, 1948, he gave the testimony on which the indictment was founded.

The indictment, in brief, charged that on December 15, 1948, Alger Hiss lied when he testified to the Grand Jury that neither he nor his wife, Priscilla, in his presence had ever turned over to Chambers any documents, or copies of documents, of the State Department or of any other Government organization (Count I), and that he thought he could say definitely that he had not seen Chambers after January 1, 1937 (Count II).

The Government's case consisted largely of the testimony of Whittaker Chambers. It is quite unnecessary here to give the detail of Chambers's elaborate and circumstantial tale of his alleged contacts with Hiss, from their first meeting in 1934 when Hiss was serving as counsel to the Senate committee investigating the munitions industry (the "Nye Committee") down to Chambers's break with the Communist Party on April 15, 1938. It is equally unimportant

---

* The microfilm strips were designated Government's Exhibits 11 and 12 at the second trial. The State Department documents photographed on the strips were designated Government's State Exhibits 48 and 50-55 (there was no Government's State Exhibit 49). Three additional microfilm strips—these undeveloped—were found in the pumpkin by the House Committee investigators and, according to Chambers, had likewise been kept in the envelope over Levine's dumbwaiter; but Chambers made no attempt to link these three strips with Hiss, and they were not introduced in evidence at the trials.

† This further testimony has been kept secret by the Committee, except for a brief excerpt read into the record in the course of later testimony before the Committee by Henry Julian Wadleigh.

to recite the defense's answering evidence which, at almost every point where Chambers was incautious enough to suggest a fact susceptible of verification or disproof, forcefully showed either that Chambers was lying or that he had been in a position to inform himself specifically for the purposes of the trial.* Since this was a perjury case, Chambers's testimony, however effectively it might have survived the devastating defense attack on it, would have been insufficient to support a conviction unless either confirmed by the testimony of a second independent witness or substantiated by corroborative evidence under the rule of *Weiler* v. *United States,* 323 U. S. 606.

So far as Count I was concerned,† there was no second independent witness. The corroborative evidence offered consisted essentially of the handwritten and typewritten documents, and the two developed microfilm strips, produced by Chambers as above described. State Department officials produced and authenticated the original official State Department documents from which the copies, paraphrases, summaries, and photographs derived. The defense conceded that the handwritten notes were in Alger Hiss's handwriting; and an FBI expert, Ramos C. Feehan, testified without contradiction by the defense that the typewritten documents, with one exception (Government's Baltimore Exhibit 10), were typed on the same machine as had been used to type certain other documents in evidence (known as the Hiss Standards) which had concededly been

---

* The substance of Chambers's story, and of the defense's rebuttal, is stated in one of the affidavits supporting the motion (F. 25-45).

† Neither the motion, nor this appeal, is concerned with the "corroborative" evidence offered by the Government on Count II. Since the trial court charged the jury that if they found Hiss guilty on Count I they should also find him guilty on Count II (R. 3275), it must be assumed that the jury did not necessarily consider any of the separate evidence under Count II. See *Stromberg* v. *California,* 283 U. S. 359. The disposition of this motion by the court below was in no way based upon any failure to attack the evidence under Count II.

typed on a Woodstock typewriter owned by the Hisses in the 1930's. In addition, the Government offered evidence that Alger Hiss had had access to most of the State Department documents which had been copied, abstracted, or photographed.*

A mute but dynamic witness for the Government, too, was a battered Woodstock typewriter, #N230,099. This, it is true, was introduced as a defense exhibit, Exhibit UUU. Following Chambers's production of the typed documents in Baltimore, both the Government and the defense had instituted a search for the typewriter which the Hisses had owned in the 1930's. Though the Government had thirty-five FBI agents on the trail in the Washington area alone (R. 739, 2998), it was the defense that finally located a machine which was apparently the original Hiss machine. A defense attorney bought it from one Ira Lockey; the trail which had led to it—starting with former servants of the Hisses who had received it from them in late 1937 or early 1938—indicated that it was probably the Hiss machine; and the defense introduced it in evidence on that assumption, at both the first and the second trial.†

The defense thus took initial responsibility for Woodstock #N230,099 as being the original Hiss machine. The Government, however, soon adopted it, and used it as though it were a living witness. It sat before the jury throughout the second trial. Several witnesses were called by the Government to identify it by at least superficial characteristics as the one given away by the Hisses to their maid's family. An FBI man typed on it in front of the jury to

---

* The Government did not undertake to show that Hiss alone had had access to the documents in question, and the defense showed, from routing marks and other indicia, that a number of them were most *unlikely* to have been available to him, and most *likely* to have been available to others who might have been Chambers's sources in his espionage work. See our brief on the original appeal, pp. 14-27, and petition for rehearing, pp. 9-12.

† Between the trials it was impounded in the clerk's office by order of the trial court. Since the end of the second trial it has been in the possession or under the control of defense counsel.

show that it worked (R. 3019, 3253). The prosecutor, in his summation, pointed to it and said dramatically: "They [the Baltimore Documents] were typed on that machine (indicating). Our man said it was"; * and he invited the jury to take it to the jury room with them when they retired to consider their verdict (R. 3262). And the trial judge charged the jury that it was "the contention of the Government that this is the typewriter upon which Baltimore Exhibits 5-47 (with the exception of Exhibit 10) were typed" (R. 3271-2).

This, then, was the essential Government case on Count I—Chambers's own story, and the Baltimore Documents, the microfilms, and the typewriter offered to the jury as corroborations to substantiate his story. Of human witnesses to support Chamber's charge there were none.

But there was one important human witness brought on by the Government—important before the jury, even though she corroborated nothing relevant to either count of the indictment. This was Edith Murray, the woman produced on the last day of the second trial to testify that she had worked as a maid for the Chamberses † in 1934-5 at 903 St. Paul Street and in 1935-6 at 1617 Eutaw Place, in Baltimore, and that during the latter period she had seen Priscilla Hiss three or four times, and Alger Hiss once for about five minutes, as visitors at the Chambers apartment. She knew nothing about Chambers's alleged espionage activities with Hiss; but she was one independent human being ‡—and the only one the Government was ever

---

* R. 3254. As with Sherlock Holmes's "curious incident of the dog in the night," the most startling fact was that neither "our man" —Feehan of the FBI—nor any other Government witness had said anything of the kind. There was no *testimony* whatsoever at the trials that Woodstock #230,099 was the machine that typed the Baltimore Documents or the Hiss Standards.

† Knowing them, however, under the false name of "Cantwell."

‡ Mrs. Chambers (who in any event testified only to events alleged under Count II) can scarcely be classed as "independent". As she herself testified, if her husband were so to direct, "We would go [tomorrow] to Ypsilanti and we would be Hogans" (R. 1063).

able to produce—whose testimony tended to suggest that the Government's case might be something more than a product solely of Chambers's imagination and skillful deceit. The prosecutor himself told the jury, in his summation, that it was Edith Murray "that really put the lie back where it belonged" (R. 3247; cf. F. 116-119).

II. The Evidence in Support of the Motion.

A. Evidence of the possibility of forgery by typewriter.

At the trial the linking of the typed Baltimore documents to Hiss was provided by the testimony of the FBI expert Feehan, who compared them with the Hiss Standards,* and on the basis of ten peculiarities of imprint apparently recurring in the two sets of documents expressed the opinion that the same machine had been used to type both sets.† Underlying his opinion was the assumption, common at the time to all qualified document examiners (see Miss McCarthy's affidavit, F. 169), that no two typewriters could ever, merely by accidental coincidence, make identical impressions, and also that it would be as a practical matter impossible to change or adapt any one machine to the extent necessary in order to enable it to duplicate the product of another machine so closely that an expert examiner could not detect the difference. At the trial defense counsel had had no basis for questioning the validity of the assumption, and on this issue of identification had not even subjected Feehan to cross-examination.

---

* At the trial these were designated Goverment's Exhibits 34, 37, 39 and 46B and Defendant's Exhibit TT. Feehan, for unstated reasons, did not include in his comparison Defendant's Exhibit TT.

†Although Feehan testified before the jury that his opinion was based on these ten peculiar characteristics, he states, in an answering affidavit submitted by the Government on this motion, that before testifying he had "examined each and every character of typewriting appearing on the questioned and known documents" (F. 632).

Following the trial, however, defense counsel did begin to question the validity of the assumption, and to test it out in a practical manner. They engaged an experienced typewriter engineer, Martin K. Tytell, to construct, if possible, a machine which would so closely duplicate the typing of Woodstock #230,099, the machine in evidence, that an expert examining the products of the two could not tell them apart.* Tytell constructed such a machine without ever seeing the machine which he was duplicating, succeeding, in his opinion and those of other experts, to such a point that the typing from his machine would pass, by any standard expert test, for typing from #230,099, and would be indistinguishable from it at least by any expert who had not been closely identified with the process of constructing the duplicate (F. 163, 174, 189-90).

As the first link in the chain of our new evidence on this motion, accordingly, we presented to the court below thirty documents, some typed on #230,099 and some on Tytell's duplicate, but without indicating which was which.† We presented also a set of enlarged details photographed by an expert in photomicrography, again without revealing which detail was taken from which machine.‡ We supported these illustrative documents with expert opinions as to the completeness of the duplication (F. 174, 189-90). And we challenged the Government to controvert, if it could, the soundness of our contention by having its experts tell the documents apart.

On the record this challenge not only has remained completely unanswered by the Government; even the fact of its existence has been ignored both by the Government and by the court below (F. 753-4, 852-4, 889).

---

* Woodstock #230,099 was selected for the test solely for the purpose of adapting the experiment as closely as possible to the conditions which would have had to be met if Chambers had been having an early Woodstock duplicated.

† Photocopies of these thirty documents were filed with the unprinted record on this appeal (p. 81); see also F. 175-7.

‡ See unprinted record on this appeal, p. 81; also F. 189-90, 201.

B. Evidence of a forged typewriter in this case.

The next link in the chain of evidence presented in support of the motion related to the typewriter in evidence at the trial—Defendant's Exhibit UUU, Woodstock #230,099. As it became increasingly apparent that in spite of prior expert opinion to the contrary the creation of a fake machine, capable of producing forged documents, would have been possible, defense counsel began to turn their attention, more closely than had theretofore been practicable or had seemed likely to be fruitful, to the history and make-up of #230,099 itself. The investigation led to positive conclusions that #230,099 was not a genuine original Woodstock, merely worn by time and usage and subjected to normal repair. In the language of Dr. Norman, an expert in, among other things, the physical and chemical analysis of metals, "Woodstock N230099 is not a machine which has worn normally since leaving the factory, but shows positive signs of having been deliberately altered, in that many of its types are replacements of the originals and have been deliberately shaped" (F. 378). This being so, the conclusion is inevitable that #230,099 is not the original Hiss machine, but is a deliberately fabricated, synthetic machine, put together for the purpose of deception, by someone in whose interest it was to make Chambers's story of the Baltimore Documents stand up.

The evidence falls into two categories, one historical and one scientific. Each lends force to the other.

(1) *History.* There is no dispute as to the source from which the Hisses acquired their typewriter. It had belonged to Mr. Thomas Fansler, Priscilla Hiss's father, who had acquired it new for purposes of his business as Philadelphia General Agent of the Northwestern Mutual Life Insurance Company of Milwaukee, Wisconsin. The exact date of his acquisition of it remains uncertain, at least to the defense; for Mr. Fansler closed his office and gave the machine to one of his daughters in the early 1930's; both

he and the salesman from whom he purchased it are dead; his secretary has refused to discuss the matter without the permission of the FBI (F. 87-8); the Woodstock factory records (at Woodstock, Illinois) do not reflect retail sales data; and the pertinent sales records of the concern which was the Woodstock sales agency in Philadelphia from 1927 to 1938 have been taken over by the FBI and never returned (F. 231-2, 236).

Notwithstanding these disheartening road-blocks encountered in the investigation into the history of the typewriter, it was still possible, at length, to uncover certain important facts establishing that Woodstock #230,099 cannot be the original Fansler machine, and therefore cannot be the machine owned by the Hisses in the 1930's.

(a) After many months of apparently fruitless effort, defense counsel finally induced the Northwestern Mutual Life Insurance Company to permit an examination to be made of typed letters in its file written from Mr. Fansler's office at times running from July, 1927, to February, 1930. The examination was permitted on condition that it be conducted by the firm of Tyrrell & Doud of Milwaukee, document examiners in whom the Northwestern Mutual officials had confidence (F. 96-97). The conclusions of Mr. Doud, who conducted the examination, were presented in a letter (F. 241-58), and may be summarized as follows:

(i) That letters dated July 8, 1929, and thereafter were written on an "apparently quite new" Woodstock machine different from the machine used for the earlier letters (the latest of which earlier letters was dated June 29, 1929).

(ii) That the letters dated July 8, 1929, and thereafter, "agree in typeface pattern with the so-called Hiss Standards", as well as with the Baltimore Documents, and show a tendency "toward the development of typeface defects that later became so highly identifying in the 1933 and 1935 specimens and the Baltimore Letters."

(iii) That the model typewriter all these later letters were written on was of a kind made from 1926 "until some time the latter part of 1928 or early in 1929," and that the letters show "complete agreement in typeface style" with specimens of typewriting from Mr. Doud's files dated in 1926, 1927, and 1928.

Accordingly, Doud's examination shows that the typewriter used by the Hisses in the 1930's must have been manufactured long enough before July 8, 1929, to allow for shipping to the sales agency in Philadelphia, sale to Mr. Fansler, and placement in use in his office by that date. Further, its typeface style was one discontinued in manufacture in 1928 or *early* 1929 at the latest.

(b) After many similarly discouraging months of apparently fruitless effort and conflicting reports, the defense was permitted to examine the surviving production records at the Woodstock factory at Woodstock, Illinois (now R. C. Allen Business Machines, Inc.), and to discuss them with responsible officials of the company. From the examination and discussions it appeared that Woodstock records no longer showed the date of manufacture or shipment of a machine with a given serial number, but that they did show the serial numbers at the beginning and end of the year 1929, and also the number of machines manufactured in each month in that year (Ex. II-B, F. 206-13). On these facts, and making every possible allowance for error, on no conceivable theory could Woodstock #230,099 have been manufactured before July 3, 1929 (Ex. II-D, F. 217-22). It would be manifestly beyond reason to suppose that, particularly in an era before air mail freight, a machine could have been packed, shipped from Woodstock, Illinois, to Philadelphia, received by a distributor, unpacked, sold, and put into use by the purchaser all in a period of five days which included the 4th of July and a weekend.

Accordingly, Woodstock #230,099—the machine in evidence as Defendant's Exhibit UUU—could not be the original Fansler-Hiss machine.

(2) *Scientific.* Growing suspicions of the authenticity of #230,099, based on the peculiarities of its history, led defense counsel to submit the machine to metallurgical analysis, at the hands of Dr. Daniel P. Norman, of Boston, a leading expert in the physical and chemical analysis of metals, paper and other materials, with wide experience in such work on behalf of the Armed Services, and other branches of the Federal Government, as well as for major private industrial firms.

Dr. Norman's conclusions (F. 367-99) are unequivocal. On the basis of an intimate study of Woodstock #230,099 itself, and comparison of its characteristics with those of other Woodstocks of the same vintage, he finds that Woodstock #230,099 deviates from the norm in the manner in which many of its type faces are soldered to the bars, and in the metal content not only of the solder, but also of many of the type faces themselves. Further, many of the types show tool marks and abnormal characteristics in their surface finish which show incontrovertibly that the striking faces have been mechanically altered. In short, Woodstock #230,099 is a deliberately fabricated machine.*

The statement last made does not rest solely on Dr. Norman's evidence. Evelyn S. Ehrlich, an expert in the detection and photomicrographic demonstration of documentary forgeries (F. 178-80, 463-4), has examined specimens of typing from #230,099, and compared them with the Hiss Standards.† On the basis of this comparison she states the

---

* Ira Lockey, from whom the defense purchased #230,099, testified at the second trial that when he acquired it in 1945 it was out in a heavy rain in a Washington backyard (R. 1558). Dr. Norman establishes that Woodstock #230,099 has never been so exposed to the elements—thus raising the alternative inference that it is not the machine which Lockey originally acquired, or that Lockey did not acquire it when and how he said he did.

† As explained below, p. 18, the four Government exhibits included in the Hiss Standards (Nos. 34, 37, 39 and 46B) were finally made available to the defense for study by direction of the court below on March 21, 1952.

positive opinion that #230,099 cannot be the machine that typed at least three of the five Hiss Standards * (F. 474).

On this motion we do not purport to show—we do not yet know—how and when the typewriter in this case was concocted, or by what devious means it was planted on the defense as apparently the authentic Fansler-Hiss machine. But by historical and by scientific evidence we show that it is a fraud. And if the typewriter is shown to be a fraud, the plot to incriminate Alger Hiss is exposed, even though some details of the plot may still be undiscovered, since there is no possible innocent explanation—no conceivable theory for its injection into the case except by or on behalf of Whittaker Chambers.

C. Evidence of the forgery of the typed Baltimore Documents.

In the papers initially filed in support of this motion we offered no evidence dealing specifically with the physical characteristics of the Baltimore Documents. The defense had photographs of some of them; but those had been taken early in the case, before the defense experiments had exposed the techniques by which forgery by typewriter could be accomplished, and were not adapted to the kind of examination which needed to be made in the light of our new knowledge. The defense had sought, before and during the second trial, the opportunity to make a paper content analysis of the documents themselves; the Government had objected strenuously, but had been finally, after the second trial was more than half over, required to surrender a small blank corner of one of the documents (Government's Baltimore Exhibit 32), which had promptly been consumed in the course of inconclusive experiments.

---

* In an earlier affidavit Mrs. Ehrlich had expressed a tentative opinion, based upon examination of a photocopy of one of the Standards (46B), that it might not have been typed on #230,099 (F. 193). Even after the originals were made available by the Government she found two of them inadequate for comparison purposes, because of the quality of paper and ribbon used—and she noted, incidentally, that these two were the ones on which Feehan had primarily relied at the second trial (F. 472-4).

After the initial motion papers were filed, offering for the first time proof of the practical possibility of forgery, defense counsel formally asked the United States Attorney for such access to the documents as would permit a real test of their genuineness. The request was refused; but at an informal hearing in chambers on March 21, 1952, the objection was withdrawn, and the trial judge ordered the documents made available to defense experts for study. Thus it was possible for the first time to secure and present to the court the evidence of forgery intrinsic in the documents themselves.

As background for the significance of the evidence thus presented, Chambers's trial story of the origin and history of the documents should be recalled. According to him, Mrs. Hiss typed them on the family machine, as her husband was no typist, and she wanted "an opportunity to satisfy that need which she felt" for activity in underground work (R. 290). The ordinary plan was to have Hiss bring home original documents overnight, so that his wife could make typed copies or summaries. Every week or ten days Chambers would come around to pick up the typed material, together with originals which Hiss might have brought home on that particular day. Chambers would take the copies and originals to Baltimore that night, to have them photographed; later the same night he would come back to Washington and return the originals to Hiss. The typed copies or summaries he would burn (R. 257-9). For some reason never yet convincingly explained, the crop of typed papers which Chambers produced in Baltimore he kept, instead of burning them.* He broke with the Party,

* This Court, in its opinion on the original appeal, says that what Chambers produced "was the fruit of his last such pick-up before, having lost sympathy with it, he renounced Communism in 1938 * * *" (185 F. 2d 822, 829). As we pointed out in our petition for rehearing (pp. 8-9), there was nothing in the record to support this statement, since Chambers gave no testimony whatsoever as to why or in what circumstances he preserved the Baltimore Documents. Moreover, the "last pick-up" could not possibly, consistently with Chambers's story of the operation, have comprised documents running over a three months' period, with a hiatus (except for one of the handwritten notes) of approximately a month in the middle.

and abandoned his document conspiracy, around April 15, 1938. The papers which he had kept, instead of burning, he put into an envelope which he gave for safe-keeping to his wife's nephew, Nathan Levine, in May or June of that year. Levine put the envelope in an old dumbwaiter shaft in his mother's house in Brooklyn, and forgot about it. He had no idea what was in it.

There the documents are said to have rested for more than ten years. At the Baltimore deposition hearing on November 17, 1948, Chambers produced them, for the first time injecting a note of actual espionage operation. At the trial he told how he had come to recollect the existence of the envelope that he had given so many years before to Nathan Levine; how he had asked Levine for it; how they had gone together on November 14th to the house in Brooklyn and Levine had pulled the dust-encrusted envelope out of the dumbwaiter shaft and given it to him; how he had opened it by himself in the kitchen, while Levine was cleaning up the dust which had fallen on the floor, and how he (Chambers) was amazed at finding that the envelope contained these typewritten sheets, which he had forgotten all about.

With the typewritten sheets were other things, he said. There were the short handwritten memoranda (Government's Baltimore Exhibits 1-4). There were some yellow sheets supposedly in the handwriting of Harry Dexter White.* There were two short strips of developed microfilm and three cans of microfilm, undeveloped.†

---

* Though these sheets were physically produced at the second trial and marked for identification as Government's Exhibit 20, and though the text was read into the Congressional Record by (then) Representative Nixon on January 30, 1950, the Government has still declined to permit the defense to examine the sheets themselves. In the Congressional Record the memorandum was said to consist of eight pages.

† In addition, according to Chambers's article in the Saturday Evening Post for April 5, 1952, there were "one or two smaller items of no particular importance" (F. 421).

The handwritten and typewritten papers Chambers produced in Baltimore three days later, on November 17th. The developed microfilm he did not; he held it for the House Committee, hidden in the pumpkin.

If Chambers was telling the truth in the foregoing recital, the typed Baltimore Documents must have been typed by one person (Priscilla Hiss), on one typewriter (the Hiss family Woodstock)* currently over the three months' period represented by the dates of the underlying State Department documents (January 5 to April 1, 1938). They must have been kept together in one specific, dust-encrusted, envelope for ten years, over a disused dumbwaiter in Brooklyn. They must have rested there, in that envelope, with three cans of undeveloped microfilm, and two short strips of developed film, as well as the eight yellow pages of the so-called Harry Dexter White memorandum† and the "one or two smaller items of no particular importance." ‡

As indicated above, on the trial judge's direction on March 21, 1952, the Baltimore Documents and the envelope in which they were supposed to have been kept, as well as the Hiss Standards, were at last made available to defense experts for study.

As a result of this study supplemental affidavits were filed in support of the motion, including affidavits by the three experts to whom the study had been committed. These affidavits show that every essential detail of Chambers's story of the source and history of the typed Baltimore Documents is false:

(1) That the Baltimore Documents cannot have been kept together in any one place over the ten years from 1938 to 1948.

---

* Fechan, the FBI expert, testified at the trial that Government's Baltimore Exhibit 10, a precis of a long War Department MID report routed to Mr. Hamilton, of the Far Eastern Division of the State Department, was obviously not written on the same typewriter as the others, and the Government made no contention that it was; but Chambers still pressed his recollection: "I believe Alger Hiss gave me that paper" (R. 1097-1101; R. 655; contrast R. 582).

† See note *, p. 19, *supra*.

‡ See note †, p. 19, *supra*.

(2) That in particular none of the Baltimore Documents can have been kept in the envelope which Chambers claims to have recaptured from the dumbwaiter and which was put in evidence as Government's Exhibit 19.

(3) That the Baltimore Documents were not typed by any one person, but by two or more, and in particular that none of them were typed by Priscilla Hiss.

(4) That the Baltimore Documents bear intrinsic proof of forgery, deducible in part from the use of miscellaneously different typewriter ribbons and faked typographical errors, plainly designed to confuse.

In short, the defense would, if the Court would permit, show by expert testimony and demonstration that the typed Baltimore Documents were not typed by Priscilla Hiss, or by any one person; that they were not kept together in the envelope over the dumbwaiter for ten long years; and that they are an ingenious set of forgeries.

D. Evidence of the falsity of Chambers's story of how he got the Documents.

The State Department documents reflected in the typed Baltimore Documents bore dates from January 5, 1938, to April 1, 1938, two of them bearing the latter date. If Chambers's story of how he got the Baltimore Documents from Alger Hiss were true, he would have had to be still getting documents from Alger Hiss as part of his Communist espionage conspiracy at least down to April 4, 1938.*

---

* This allows for the fact that April 1, 1938, was a Friday. One of the documents was not received in the State Department until 7:45 P. M. of that evening; and under Chambers's plan of operation he would not have secured the typed copies until April 4th at the earliest. See F. 137-8.

Before the Baltimore Documents had been produced, Chambers had fixed his break with the Party as in 1937, or at the latest in February 1938. But with the Baltimore Documents to be explained, a new story was needed. At the trial he testified to a date for the break late enough to allow for the reception of the last of them; he fixed the date of his break with the Party, and the end of his participation in the espionage operation, as about April 15, 1938. And particularly he fixed it with reference to a translation job for the Oxford University Press, which he said he got only after he had broken with the Party.

On a new trial the defense would establish, if the court would permit, that Chambers got his translation job long before April 1, 1938, and that, likewise, he had left the Party long before that date. We would offer the testimony of Paul Willert, the Oxford University Press official who gave him the job, Dr. Martin Gumpert, the author of the book translated, and Mrs. Rita Reil, the person first engaged to translate the book. And we would supplement their recollections by correspondence in the files of the Oxford University Press in New York, and in the files of Dr. Gumpert's literary agents in London. The testimony and documents which we offer would expose Chambers's fraud by testimony out of his own mouth.

E. Evidence on Edith Murray.

Edith Murray, alone of human beings (other than Chambers and his wife), testified that the Hisses had known and visited the Chamberses socially in a manner which the Chamberses had asserted and the Hisses had denied. The manner of her "discovery" and production as a Government witness provoked suspicion, if not of her veracity, at least of the accuracy of her recollection; and cross-examination strengthened the suspicion.* But the Government's

* See our brief on the original appeal, pp. 93-5.

tactics, of concealing her identity and withholding her as a witness until the last day of the second trial, effectively prevented the administration of the *coup de grace.*

To have had the knowledge to which Edith Murray testified, she would have had to have worked, as she said she did, as a maid in the Chambers-Cantwell menage at 1617 Eutaw Place in 1935-6. And the verisimilitudinous detail with which she invested her story requires, if it is to be accepted, that she should also have worked for the Chamberses at their previous residence, 903 St. Paul Street, in 1934-5.

On this motion the defense has offered the testimony of two witnesses, respectively familiar with 903 St. Paul Street and 1617 Eutaw Place at the times in question, who would, if the court would permit, testify that no such person as Edith Murray worked when and where she said she did. From this testimony, if believed, it would have to follow that her story of visits by the Hisses to the Chamberses was false.

ARGUMENT

The general rules applicable to the granting of new trials in the federal courts on the ground of newly discovered evidence need not be stated here, since they are quoted *in extenso* in the opinion of the trial court (F. 903-6). We contended below, and contend here, that our proffered evidence is such that "on a new trial [it] would probably produce an acquittal" (*Johnson* v. *United States,* 32 F. 2d 127 (C. A. 8th, 1929)), and also that it shows the use of false testimony at the trial, "without [which] the jury might have reached a different conclusion" (*Larrison* v. *United States,* 24 F. 2d 82 (C. A. 7th, 1928)). The trial court held (F. 907) "that under either rule he [appellant] is not entitled to a new trial."

We do not underestimate the burden which lies on an appellant seeking to show abuse of discretion in the denial

of a motion for a new trial on the ground of newly discovered evidence. We are aware that in the interests of orderly judicial administration it is "important * * * that findings on conflicting evidence by trial courts on motions for new trial * * * remain undisturbed except for most extraordinary circumstances * * *." *United States* v. *Johnson*, 327 U. S. 106, 111.

But clearly these criteria do not preclude examination by an appellate court of the grounds given for the ruling, to the end of testing whether the trial court in fact fairly weighed the evidence offered in support of the motion—in the light of the opposing evidence, if any, submitted by the Government—and whether *judicially* it exercised its discretion.

In such a case as this, and in such times as these, where the mere imputation of Communist Party association serves to raise blind and often unreasoning passions and prejudices against the object of the imputation, the courts, we submit, carry an exceptionally heavy responsibility to ensure that fair and full consideration shall be given to evidence newly discovered and offered to disprove the charges of the Government. And, without questioning the decision of this Court on the earlier appeal, that the Government's "corroborating" evidence offered to substantiate Chambers's story at the trial under Count I was sufficient in spite of its patent weaknesses to take the case to the jury, we urge that those patent weaknesses * placed upon the trial court the duty to be especially alert to grant a fair and full hearing on this motion.

The ultimate question before the trial court on such a motion as this is to decide what effect the new evidence—assuming its credibility and relevance—would have had, or on a new trial would have, on the jury's verdict. Con-

---

* See our brief on the original appeal, especially pp. 12-52, 66-81, and our petition for rehearing, pp. 8-12. It is to be noted that the evidence at the trial, dealt with on the original appeal, fortifies the new evidence now produced, and is in turn fortified by that new evidence.

cededly, discharge of this ultimate function calls for the exercise of a peculiarly individualized quality of judgment. The judge hearing this motion, as by general practice, was the judge who presided at the trial, who was in a position to observe the witnesses, to experience the cumulative effect of the prosecution's case and the defense's answer, and to assay the probable influence of the various elements of the proof upon the jury. When a judge so situated hears proffered new evidence, it is proper that he should be accorded wide discretion to judge whether the presentation of that new evidence before the jury "might" have or "probably" would have changed the verdict.

On this appeal we do not concern ourselves with the scope of this Court's power to review a decision by a trial judge on that issue. For Judge Goddard did not reach that issue; he did not purport to judge what would have been the effect on the jury if we had been allowed to show them that the typewriter in evidence in the case was a fake, that the Baltimore Documents were forgeries, that Edith Murray was, at least, mistaken about seeing Alger Hiss in the Chambers apartment, and that Chambers lied when he changed his story to put his break with the Communist Party late enough to dovetail with the Baltimore Documents.

Instead, Judge Goddard undertook to analyze our proffered evidence, and to decide that it does not prove what we claim it does. In turn, we ask the Court on this appeal to analyze Judge Goddard's analysis of our evidence, and we ask the Court to conclude, on the basis of Judge Goddard's own opinion, that the motion was disposed of without the fair hearing which even a wide discretion requires, if it is to be judicially exercised.

In support of our contention we can show how the court below simply ignored vital parts of our proof, and how it resolved disputed issues of fact in favor of the Government without even hearing the witnesses. But if the validity of our contention is to become clear this Court must, we respectfully request, consider carefully not only

these more obvious defects in the opinion but also other features which to a perceptive ear will equally show predetermination—such features as the language which the court chose to select from the supporting affidavits for quotation, as contrasted with the language it chose to omit, the characterizing phrases which the court chose to use in introducing quotations or in discussing evidence, and the court's uncritical acceptance of unsupported, irrelevant, or patently fallacious assertions made in the Government's answering affidavits.

The opinion, we respectfully submit, bears all the earmarks of a document gotten together to justify a fixed determination—i.e., that in no circumstances must Alger Hiss be allowed a new trial—rather than a reasoned statement of the considerations leading to an exercise of true judicial discretion based on the evidence presented.

I

The Typewriter

A. Tytell's experimental machine.

At the outset we undertook to show that, notwithstanding general expert opinion to the contrary, it is possible, by mechanical fabrication of a typewriter, to duplicate the work of another machine so expertly that the forgery will successfully pass the scrutiny of an expert document examiner, at least if he has not been forewarned that two separate machines have been used. By demonstrating the feasibility of such forgery, we proposed so to undermine the testimony of the FBI expert Feehan as to destroy the essential link of the Baltimore Documents to Alger Hiss.

The major element of this demonstration consisted in the preparation and presentation to the court below of actual sample documents typed on Woodstock #230,099 (the machine in evidence) together with documents typed on

another machine, fabricated on behalf of the defense for the purpose of showing that Woodstock typing (in this instance the typing of #230,099) could be duplicated. We invited the Government to have its experts tell the difference, if they could, for we thought that whatever might be the weight accorded to abstract expert opinions on the possibility of forgery, an actual demonstration of successful forgery by typewriter could not fail to command respect.

So far as the trial court was concerned, we were apparently wrong. Throughout Judge Goddard's opinion (as throughout the Government's counter-affidavits, memorandum, and argument on the motion) there is not a single word to reveal that the proffered evidence included documents handed to the court to demonstrate successful forgery by typewriter.

Obviously, on the motion the Government faced a dilemma, caused by the inability of its experts to pass the test we had posed. It could concede the success of our experiment, and argue that nevertheless proof that forgery by typewriter *could* be done would have no weight with a jury on the issue whether forgery by typewriter *had* been done. This, the straightforward way of handling the situation, would still, however, have possibly entailed damaging consequences, for it could have been interpreted, publicly or otherwise, as an admission that there *might* be something wrong with the Government's case against Alger Hiss.

So the Government chose the alternative of shutting its eyes to our demonstration, of pretending that it had never been made, and of pressing upon the court dislocated passages from the affidavits to justify an assertion that even the defense did not claim to have been successful in its experiment.

And the court below followed the Government's lead, implicitly.

Of course, it was not possible for the court below to neglect the experiment altogether. Thus, the opinion quotes

the affidavit of Martin Tytell, the typewriter engineer, at sufficient length to show what he was retained to do, and how it had taken him longer than he expected. But the quotation omits the passage in which Tytell states that having once learned the technique he could readily create other duplicates, of even higher fidelity, in a fraction of the time needed for the first. This, if a fact, would be inconvenient to the Government's argument, and to the court's conclusion, that the defense's own papers showed that construction would necessarily take a longer time than would have been available to Chambers.

The opinion refers to the defense's retention of Evelyn S. Ehrlich for consultation as to the progress of the experiment. It refers to her invidiously as "an alleged document expert", and as one who "describes herself as a detector of spurious prints".* It quotes from her first affidavit those portions showing that when asked to examine and compare samples from #230,099 and from Tytell's machine she was able to separate the two sets of samples—and on this basis the court concludes that "they [presumably Mrs. Ehrlich and Miss McCarthy] were *still* able to distinguish between Tytell's work and that of #230,099" (F. 890; emphasis supplied). But Mrs. Ehrlich's comparison of the two sets of samples was made at an intermediate stage in the construction of the machine, and for the purpose of aiding in its perfection (F. 182); she did not purport to render an opinion on the final success of the experiment. And of the extent of the duplication even at the intermediate stage at which she considered it, she stated "it is my opinion that any document expert, acting with reasonable care, who applied those same criteria [as reflected in Feehan's trial testimony] to the samples sent me by Mr. Lane would reach the conclusion that a single machine had been used to type all of them" (F. 189). But of these facts,

* Mrs. Ehrlich's extensive experience in the technical examination and conservation of prints, drawings, manuscripts and typography, and in the use of photomicrography as a research tool in the detection and illustration of deceptive imprints and typography, is set out in her first affidavit (F. 178-80).

and of the photomicrographic demonstration which Mrs. Ehrlich attached to her affidavit (F. 185-188) and which the Government has never answered, the opinion says absolutely nothing.

The opinion quotes from the first affidavit of Elizabeth McCarthy, the examiner of questioned documents who, apart from assisting during the course of the experiment, gave an opinion as to the success of its results. It quotes at length her concession that, having been intimately concerned with the development of the experimental machine, she would still be able to identify its product. But of the fact that she attached to her affidavit samples from the two machines as a demonstration that other experts not so acquainted with the machines would be unable to differentiate their products, *there is not one word.* Miss McCarthy, an affirmative witness to the newly discovered practicability of forgery by typewriter, is by the opinion of the court converted by elision into a witness against the defense.

The object of the experiment was, of course, to undermine Feehan's testimony that the Baltimore Documents were typed on the then-owned Hiss machine, and thus to discredit the most vital element of the Government's case. We dealt with Feehan's testimony as it was given at the second trial—testimony based upon similarity of ten separate peculiar characteristics recurring in the Baltimore Documents and the Hiss Standards. By silently reading out of the case our most effective proof, the court below goes far to make our task impossible. But the court is not content. It characterizes our accurate citation of Feehan's own testimony in this respect as having "proceeded on an erroneous elementary assumption", and recites four grounds for the statement: (1) that Feehan in fact examined more than ten characters; (2) that he was only asked by the prosecutor for "some of" his evidence; (3) that he was not cross-examined on this issue; and (4) that defense counsel at the trial conceded the correctness of his opinion.

We accept at face value Feehan's statement, in one of his affidavits opposing the motion, that before testifying at the second trial he had "examined each and every character of typewriting appearing on the questioned and known documents" (F. 632). Had he so testified at the trial there might be merit in the judge's reference to "an erroneous elementary assumption" (F. 872). He did not so testify,* and we submit that his testimony is not to be moulded for the Government's convenience by reference to the form in which the prosecutor had put the question, or to the failure of the defense to cross-examine. But this is not the issue. Regardless of whether Feehan examined ten characters, or every single imprint on every single document in the case, our point is that at the time Feehan testified, at the time the defense permitted his testimony to stand without cross-examination, all parties were acting in the light of the current belief that a typewriter forgery could not be effected so expertly as to defy the ordinary techniques of document examination (see McCarthy, F. 169-170). In neither of his affidavits opposing this motion has Feehan denied that his examination was conducted and his testimony given on that assumption. We have offered on this motion proof of the invalidity of that assumption, and we submit that disposal of our proof by smothering it is not a sound exercise of judicial discretion.

---

* His actual testimony covered ten characteristics, of which eight, as Miss McCarthy has pointed out, "are of a kind which are most likely to occur in old typewriters, particularly Woodstocks of this vintage" (F. 447). Speaking of these ten, and these ten only, he said "* * * as a result of not using only one of these characteristics but by using all of these characteristics, I reached the conclusion" that the Baltimore Documents and the Hiss Standards were typed on the same Woodstock machine (R. 1080-1).

B. The scientific evidence regarding Woodstock #230,099.

The defense sought to show that Woodstock #230,099, the machine put in evidence by the defense in the belief that it was the original Fansler-Hiss machine, was not in fact that machine, but was instead a cleverly faked substitute fabricated to resemble very closely the typing of the original machine. One branch of the proof resulted from a physical examination of the machine by Dr. Daniel P. Norman, of Boston, who offered affidavits outlining the basis for his findings and was prepared to testify in detailed support of them.

As with the proof regarding Tytell's machine, the choice facing the court was between accepting the proof, at least *arguendo,* and concluding that nevertheless a jury would not have been affected, or saying, simply: "There is no proof." The court chose the latter; it says: "The defendant has submitted no proof which would support a finding by a jury * * * that the typewriter was not the original Hiss machine" (F. 907-8).

Again we encounter the process of "belittling". For example, the court points out (although apparently not resting its opinion on the point) that the machine "was produced upon the trial by the defense and definitely identified by Hiss, Mrs. Hiss and several of the defendant's witnesses as the Hiss typewriter" (F. 874). Not a word of the facts that several Government witnesses similarly so identified it, that the prosecutor told the jury—incorrectly, as it happens—that the Government's expert had testified that the Baltimore Documents were typed on it, and that the judge himself had charged the jury that its identification was part of the Government's case (see pp. 9-10, *supra*). No disclosure of the fact that all identifications on both sides were superficial—to the effect that it "looked like" the Hiss machine (e.g., R. 2638), as would any Woodstock which had been deliberately made to look like the Hiss machine.

And of Dr. Norman himself: he is characterized as one "who describes himself as a consulting industrial chemist"

(F. 874), and by inference is not much good when it comes to metallurgical analysis. No reflection of the extensive experience of Dr. Norman and his organization "in the business of testing and analysis, both physical and chemical, of metals, chemicals, paper, and other materials, for the United States Armed Services, Federal, State and Municipal Departments, and major industrial firms" (F. 369), or of Dr. Norman's own particular expertness in spectroscopic analysis.

But these details, while atmospherically significant, are not the major weakness of the opinion on this point. That weakness consists in the uncritical acceptance of the Government's affidavits as controlling on a vital issue of fact, and the disposition of that issue without hearing the witnesses.

Dr. Norman saw the machine. He had it in his possession. He examined its types and solders, analyzed them spectroscopically, and compared them with those of other machines of the same make and vintage. He studied its type faces with the aid of photomicrography. He concluded, and is prepared to testify under oath, and to demonstrate to the court if allowed, that #230,099 is a deliberately altered machine, with many deliberately shaped replacements of original types (F. 378).

Against this the Government offers, and the court below accepts, as controlling of the fact issue, three affidavits of officials once or now connected with the manufacture of Woodstocks. They are described in the opinion as "Conrad Youngberg, assistant superintendent of the Woodstock plant for several years prior to 1930, thereafter superintendent; Otto Hokanson, superintendent of the plant until Youngberg took over; and Joseph Schmitt, the factory manager and employed by the plant from 1920 until date" (F. 877).

Of these three men, Hokanson has had no connection with Woodstocks (or apparently with typewriters at all) since 1929 (F. 683), and Youngberg has had no such connection since 1933 (F. 677), yet their recollections, after

twenty or so years, of exactly what 1929 Woodstock type, typebars, and soldering looked like, are accepted as controlling.

No one of the three has ever seen #230,099. No one of them even claims qualifications in the field of metallurgical or spectroscopic analysis. They say, in substance, that they have looked at the illustrative photographs attached to Dr. Norman's affidavit, and that they can see no evidence of irregularity. And because *they* say so, the court below, without hearing Dr. Norman or them, holds that there is *no* evidence which could justify a jury in concluding that #230,099 is a fake (F. 890, 908).

Indeed, the court goes further, and draws an insupportable inference from the Government's affidavits. Dr. Norman had found much greater nickel content (as well as other marked differences in metallic constituents) in the solder on keys of #230,099 which appeared for other reasons to have been altered than he did in the solder on the balance of the keys or on the keys of other contemporary Woodstocks (F. 388-9, 394). Youngberg and Hokanson, in their answering affidavits, state: "From my knowledge and experience in the repair of typewriters, it is not a normal practice to re-nickel a type bar and type after a type has been resoldered to a type bar" (F. 685).* From this the judge reasons that the Government's affidavits "indicate that the presence of nickel arises from the plating process and that if there were changes in type, there would probably be less nickel present than on type which had not been altered" (F. 878)—and therefore, presumably, Dr. Norman must be wrong in reporting that the keys with more nickel in their solder were "altered" keys.

Surely elementary principles of reasoning would show that if, as Hokanson and Youngberg say, less rather than more nickel would appear on keys after a *normal* repair job, and if, as Dr. Norman says (and no one has questioned his technical ability to detect nickel if it is there), more

---

* The quotation in the text is from Hokanson's affidavit. Youngberg's comparable statement is at F. 680.

rather than less in fact appears on the keys which have been replaced here, the replacement cannot have been part of a normal repair job.

Dr. Norman's evidence is supplemented and confirmed by that of Mrs. Ehrlich. She has stated, in her second affidavit, after detailed photomicrographic comparison between three of the Hiss Standards and typing from #230,099, that in her opinion #230,099 cannot be the same machine which typed those Standards (see pp. 16-17, *supra*).

The court below quotes Mrs. Ehrlich's opinion—introducing it with the phrase "she says only that" (F. 868).

What more could she or anyone else say on the issue of whether Woodstock #230,099 is the Hiss typewriter?

The court below might, on a hearing, after examination and cross-examination of Mrs. Ehrlich and Dr. Norman and of the Government's witnesses, conclude that the evidence of the former was not credible. But the court has held no such hearing. It has not even said it disagrees with their evidence. It has, in effect, said that they have given none.

> "In the absence of *any* proof and in view of the many improbabilities in the theory of the defense, a jury could not reasonably find that Chambers constructed a duplicate typewriter or that #230,099 is not the Hiss machine" (F. 890, emphasis in original).

> "* * * The defendant has submitted no proof which would support a finding by a jury that the typewriter received in evidence at the trial was constructed by or for Chambers or that the typewriter was not the original Hiss machine" (F. 907-8).

We submit that this is not judicial consideration of our proof.

C. The history of the typewriters.

Our scientific proof shows that Woodstock #230,099 is on its face a fake machine. The same conclusion follows from our historical proof that a Woodstock typewriter with the serial number 230,099 cannot be the original Fansler-Hiss machine.

We cannot take space here to restate the nature of the proof offered on this point (see pp. 13-15, *supra*). The holding of the court below, that we have "submitted no proof which would support a finding by a jury * * * that the typewriter was not the original Hiss machine" (F. 907-8), is presumably as much applicable to our tendered historical proof as to our tendered scientific proof. And the court's treatment of our proffered evidence here is no less revelatory of its failure to give our motion the consideration which the fair exercise of judicial discretion requires.

For instance, we sought evidence as to the original date of sale, from the man who had been the Woodstock distributor in 1929. The court recognizes this, and states: "Kenneth Simon, a defense attorney, in his affidavit says he interviewed O. Carow, of Woodstock's Philadelphia office, to ascertain when Fansler's machine was sold to him but Carow could find no records on this matter" (F. 884-5). Fair consideration would have surely noted also that the reason Carow had no records was that the FBI had taken them and never returned them (F. 231-2, 236).*

We sought evidence from the Woodstock plant as to the date on which a machine numbered 230,099 would have been manufactured. The court recognizes that we secured a written statement from Joseph Schmitt, the Woodstock factory manager, that the machine would have been "built

---

* Of less technical pertinence, but of considerable interstitial importance, is the fact that the FBI were around at Carow's during the course of our investigation, trying to find out what we wanted (F. 235-6).

approximately in July or August 1929", and that we secured access to production records which verified this fact (F. 883-4). But the court comments that Schmitt "would not sign such an affidavit," and that another Woodstock official, J. T. Carlson, had made an "affidavit for the defense" to the effect that "serial No. 230,000 was built in April or May 1929", which, the court says, "would indicate that #230,099 was probably constructed shortly thereafter" (F. 883-4).*

As to Carlson's affidavit, it was submitted to the court as part of a fair presentation of the investigation, including its difficulties. It was not presented as establishing, and did not establish, the facts stated in it; Carlson later explained that it had been prepared for him by a clerk and that he himself was not familiar with the facts (F. 82), and he joined with Schmitt in producing for the defense records which showed that it was incorrect (F. 82-3, 206-13). The United States Attorney's own affidavit characterized its conclusions as having been "later identified as merely the speculation of some unnamed clerk" (F. 569).

These facts the court's opinion does not recite; instead, it describes the affidavit as an "affidavit for the defense", and uses it to answer our proof (F. 884). So indefensible a treatment of the record is, we submit, a denial of fair judicial consideration of our motion.

And as to Schmitt, fair judicial consideration would have noted that while he declined to sign the affidavit prepared on the basis of the Woodstock records he and Carlson had produced, on the ground that he must consult counsel first,† he has been produced, by affidavit, as a Government witness

---

* This dating would have made it physically possible for #230,099 to have been the machine Fansler bought.

† Counsel apparently never approved the dangerous precedent of making facts available for the vindication of one charged with Communist affiliation.

on another aspect of the motion,* but has said nothing to question the accuracy of the unsigned affidavit prepared from his records.

Finally, the opinion undertakes to cite, against this aspect of our motion, isolated language from a letter received from one Donald Doud of Milwaukee, who had been retained (see p. 14, *supra*) to compare the original Fansler letters to Northwestern Mutual with the Baltimore Documents and the Hiss Standards. The court omits reference to Mr. Doud's stated opinion that the machine used for the Fansler correspondence from July 8, 1929, on must have been one made "in 1926, 1927, 1928 or possibly early 1929",† from which it would follow that it could not have been #230,099. But the court does quote Doud to the effect that he has "worked conscientiously and diligently on this matter", but does not believe that #230,099 can be a fabricated machine, and "cannot subscribe to a statement tending to imply" that that might be possible (F. 886-7).

Surely fair reading of Doud's letters would disclose that Doud was consulted—at the insistence of Northwestern Mutual (see p. 14, *supra*)—for the limited job of helping to determine the date when Fansler originally acquired the machine which later became the Hiss family machine; that he never saw #230,099; that he was not consulted with regard to its authenticity; that he had nothing to do with Tytell's machine; that his findings on the limited issue on which he worked tended to prove that #230,099 could not be the genuine Fansler-Hiss machine; and that it was precisely because of a fear that his findings would establish that fact—and thereby undermine the prestige of "docu-

---

* The physical analysis of #230,099. See pp. 32-3, *supra*.

† F. 266. Doud says that this fact "would show Mr. Schmitt to be wrong" in placing the date of manufacture in July or August. But Mr. Schmitt said nothing about when the Fansler machine was made. His statement, and the records supporting it, referred to #230,099, and go to show, as does Doud's own opinion on a fair reading, that #230,099 cannot be the Fansler machine—which is our exact point.

ment experts"—that he refused to authenticate them by affidavit and wrote the letter he did.

In the light of all the foregoing we challenge wholly the statement of the court below:

> "The defense reasoning that #230,099 was manufactured after the Hiss machine is not sustained by any proof. Their theory is based wholly upon incomplete records from which they have drawn speculations from approximate dates of manufacture. Some of their own witnesses cannot support their theory" (F. 890).

On what basis can the court properly say that mathematically precise computations from given data are merely "speculations"? On what basis can the court properly say that precise records of year end serial number and monthly number of machines manufactured are in any relevant sense "incomplete records" involving "approximate dates of manufacture"? On what basis can the court properly say that "their own witnesses cannot support their theory", save by misuse of such documents as Carlson's affidavit (see p. 36, *supra*), or by twisting the fact that some of the people interrogated by the defense declined to verify their own statements or produce their own records because of the FBI or for fear of personally adverse consequences to themselves in being involved in this case? The very fact that there is enough color in the record to make it possible for a court to utter the last quoted statement should in itself be a challenge to a court to lend its aid to securing justice through a full hearing at which the defense might be enabled to procure the attendance of witnesses and the production of documents by subpoena.

And we challenge also the court's intimation that this motion must fail, if for no other reason, because we have not offered to prove exactly when and how Chambers had the fraudulent machine made, or that he personally had the equipment to make it (F. 887-9). This last—"there is

not a trace of any evidence that Chambers had the mechanical skill, tools, equipment or material for such a difficult task" (F. 888)—is surely a *reductio ad absurdum.* Would the court imply that even though we have conclusive proof that a faked machine had been injected into the case, we could create no issue for a jury unless we could also prove a personal manufacture job by Chambers himself? We do not believe that the authorities, or common sense, put any such burden on a defendant moving for a new trial on the ground of newly discovered evidence.

The passage of the opinon above referred to (F. 887-9) needs other comment. It is the judge's inference, solely, that it "has taken the defense's several experts at least one year to produce" a duplicate machine; the judge chooses to draw the inference from the lapse of time between the time Tytell was retained and the date of filing of the motion. The *much* shorter amount of time actually involved in construction would be one of the things we would show on a hearing. It is the judge who tried to confine the defense to a particular theory as to when the machine was made—only to ridicule it.* It was the judge who converted a defense suggestion that possible former underground contacts of Chambers's might have helped him, into the more easily ridiculed suggestion that Chambers got the Communist Party to help him in 1948 (F. 771-2, 888-9).

---

* See F. 767-8, 887-8. The defense memorandum in support of the motion had stated, as a possible theory only, that Chambers might have had the job done between the hearings in August and the production of the Baltimore Documents, as a defense against a possible libel suit. Defense counsel tried to emphasize that this was only one of a variety of possible explanations, but the judge would not have it so.

II

The Baltimore Documents

A. The condition of the Documents.

Nothing in the opinion of the court below shows clearer disregard of the evidence offered than the treatment accorded to the showing that from intrinsic evidence in the Baltimore Documents themselves Chambers's story of the manner of their custody over ten years and their fortuitous discovery by him in 1948 was false.

We have outlined in detail above Chambers's story (pp. 19-20, *supra*). We have described how, at long last, by direction of the court on March 21, 1952, the Government was required to give the defense for the first time opportunity to examine the documents carefully and to subject them to physical tests (pp. 17-18, *supra*). We have summarized briefly (pp. 20-21, *supra*) the conclusions set forth at greater length in Dr. Norman's second affidavit (Exhibits 28-III, F. 484, et seq.)—his findings that from the condition of the documents it is physically impossible that they should have been kept together for ten years and, more particularly, physically impossible that they should have been stored in the envelope allegedly kept over the dumbwaiter in Brooklyn. Dr. Norman has presented his findings by affidavit, and is prepared to develop, explain, and demonstrate them at a hearing.

Dr. Norman's evidence is damning to the Government's case. It is summarized in six lines of the opinion, tucked away at the end of a paragraph dealing with other matters (F. 876). In answer to it, the opinion quotes (F. 878-9) an FBI man to the effect that to determine age of papers certain characteristics must be examined—a generalization which may be sound, but scarcely controverts Dr. Norman's conclusion,* or even bears any relation to that significant

---

* Dr. Norman's affidavit indicated that apart from finding the documents all to be of the same general class of paper, he had specifically tested them for abnormal chemical properties. F. 494.

part of his evidence which would show from factors entirely apart from the age of the paper that the Baltimore Documents could not have been kept together in the envelope. And the opinion quotes another FBI man to the effect that the *envelope* showed paint markings similar to the paint on the dumbwaiter (F. 879-80)—which is totally irrelevant, since the defense has made no contention whatsoever as to where the envelope was kept.*

The insufficiency of these "answers" to our evidence should be obvious—and it is uncertain how far even the court below relied on them. For the disposition—as opposed to the discussion—of this portion of our evidence is as follows:

> "This purported new evidence of the defense regarding the condition and storage of the documents cannot be regarded as newly discovered evidence. Moreover, the documents were submitted to the jury which considered and passed upon this issue" (F. 880).

Such a statement is absolutely incomprehensible. The judge who wrote the opinion was himself the same judge who for the first time, on March 21, 1952, directed the Government to let the defense examine and test the documents. If evidence first discovered after, and as a result of, that direction is not "newly discovered", surely words have lost their meaning. And how, conceivably, can the jury be supposed to have "considered and passed upon" an issue created by evidence not known or available at the time of the trial, or presented to the jury thereat?

B. The identity of the typist.

As a by-product of the physical examination of the Baltimore Documents in the spring of 1952, the defense has advanced expert testimony to the effect that not one

---

* Nathan Levine at the trial supported Chambers's story as to the storage of the envelope, but neither he nor anyone else was ever produced to testify as to what was in it, and indeed Levine testified that he never saw the contents (R. 728-9).

but at least two typists typed the Baltimore Documents, and that none of them was typed by Priscilla Hiss.

To this the court below answers two things: (1) an FBI counter-affidavit asserts that certain of the tests applied by our experts "cannot be applied to an inexperienced typist who is copying documents" (F. 881); and (2) "the identification of Mrs. Hiss as the typist is not an essential element of the case against Hiss" (F. 882).

We reply: (1) a large number of the Baltimore Documents were not copies, but were full or partial paraphrases and summaries, requiring careful thought on the part of the typist; and (2) Chambers made the identification of Mrs. Hiss as the typist a part of the Government's case, by testifying positively and consistently that she was the typist (R. 290, 293). Moreover, the prosecutor himself, towards the close of his summation, made this a vital issue by inviting the jury to compare the Baltimore Documents with the Hiss Standards and conclude that Mrs. Hiss typed them.* As to the identification of Mrs. Hiss as the typist not being, in the court's phrase, "an essential element", there was no testimony that Alger Hiss typed them, or could type at all; and we respectfully submit that if the jury were shown that Chambers lied when he said Mrs. Hiss typed them for him, it could not have retained any credence whatsoever in Chambers's story.

On this, as on other branches of the motion, the court below has not given the fair consideration to the evidence submitted which the exercise of sound judicial discretion requires.

---

* R. 3258; see also our brief on the original appeal, pp. 108-9.

III

Chambers's Break with the Communist Party

Before the Baltimore Documents were produced Chambers testified that he left the Party in 1937 or very early 1938. In order to have gotten the Baltimore Documents from Alger Hiss when and as he said he did, he would have had to be still in the Party down to April 4, 1938. After he produced them he changed his story and fixed the date as April 15, 1938.*

Chambers himself fixed the date of the break by reference to a translation which he said he got, following the break, from Paul Willert, of the Oxford University Press in New York. We have offered on this motion the affidavit of Mr. Willert that he gave the translation to Chambers well before April 15, 1938; and we have supported Willert's recollection beyond dispute by the contemporary records of the Oxford University Press.

In disposing of our evidence on this point, the court below points out that "the defense has not shown that this evidence could not have been offered at the trial if it thought it worthwhile and used due diligence" (F. 900). It is, we believe, a harsh rule of diligence that would require the defense in such a case as this to canvass every one of Chambers's vast panorama of lies within the period of even two trials—especially when the vital evidence lay with a man who had been out of the United States for many years. There are limits to the manpower and money available for the defense of even one who, as the court below points out, "was ably represented by competent counsel" (F. 900). But technically we must concede that on this branch of our motion—as distinct from all the others—the evidence now produced was in existence and theoretically available at the time of the second trial.

* At the first trial Chambers explained when and how he came to realize that the date he had given earlier was wrong. He said it was "when I began to go over the whole story with the FBI and in relation to the documents" (1st Trial Transcript, p. 575). His going over the whole story with the FBI took from December, 1948, to May, 1949 (id., p. 576).

Yet we cannot let the lower court's disposition of this issue rest on this concession alone. For here, as elsewhere, the court in its discussion of the evidence discloses either inaccurate reading of it or inadequate comprehension of it.

Our evidence that the translation came to Chambers weeks before April 15, 1938, is so compelling that even the Government concedes (F. 612) that "Chambers erred by approximately one month"—a vital month if ever there was one in history. And the court, accepting the concession, minimizes its significance by calling Chambers's assertion "an approximation" and "a statement in reference to a collateral incident" (F. 899). To Chambers it was not collateral; it was part of the *res gestae;* his testimony about the close connection between the incidents was circumstantial and emphatic (R. 264-5). It is impossible to read his testimony fairly without seeing that securing the original translation was an essential incident in his break.

We thus question the lower court's analysis of the testimony. But far more significant is the fact that Paul Willert has stated under oath in support of this motion that when he gave Chambers the translation—a date which the Government and the court below now accept as being at least as early as March 18, 1938 (F. 898)—Chambers was already "in fear of his life as he was being hunted by the G.P.U." (F. 361). And the testimony of Dr. Martin Gumpert, the author of the book translated, is to the same effect (F. 290-1).

This proffered testimony the court totally ignores.

IV

Edith Murray

The significance of the testimony of Edith Murray is set forth above, at pp. 10-11, 22-23. Two witnesses are now offered by the defense to establish that she did not work for the Chamberses when and where she said she did, and that therefore she cannot have seen Alger Hiss visit the Chamberses when and where she said she did.

With William Reed Fowler, the witness with respect to 903 St. Paul Street, we will not concern ourselves here,

for it was not at that address but at 1617 Eutaw Place that Edith Murray claimed to have seen Alger Hiss.

The witness regarding 1617 Eutaw Place is Louis J. Leisman, the janitor at the adjoining No. 1619. His knowledge of Chambers, his opportunity for observation, and his reasons for being certain that the Chamberses had no colored maid at the time, are set forth clearly in his affidavit (F. 280-5).

The court below concludes (F. 895) that the opportunities of Leisman to observe Murray were "limited", and that "there appears to be no reason why * * * Leisman should have noticed Murray particularly nor why [he] should, sixteen years later, recall not seeing her."

So far as we can know with certainty, Leisman might be wrong in his recollection. But against the speculation by the court below that he might be, may be set the fact that Leisman voluntarily telephoned defense counsel to contradict Murray, promptly upon reading of her testimony in the newspapers.* There is no conceivable reason why he should have injected himself into the case unless he had felt impelled to tell the truth.

Doubtless the court below was influenced by assertions of the Government "that Leisman has in the past used aliases, has been twice convicted, is a heavy drinker, and in general is irresponsible" (F. 894). Perhaps Leisman was, but the Government has adduced no proof on that score, beyond the unsupported affidavit of the United States Attorney that the Government has been "informed" or "advised" by unidentified persons to that effect (F. 598-605).

Possibly, the assertions of the United States Attorney are correct. Even if they are, they do not necessarily preclude a genuine motive to help avert a miscarriage of justice; in fact, the willingness of a man with such a vulnerable past to volunteer as a witness in such a case as this would in itself be some proof of the *bona fides* of his

* The circumstances of Leisman's appearance in the case are set forth in a memorandum which, though not printed in the Appendix, will be found at pp. 303-4 of the record on this appeal. Prompt as was Leisman's response, it was still too late to rebut a witness held off by the Government till the last day of the trial.

testimony. But be that as it may, we respectfully submit that unsupported assertions and innuendoes have no place in our courts as a substitute for submitting the witness and his anonymous accusers to cross-examination.*

Finally, the court below comments that "there is no indication that the defendant or his lawyers made any effort to elicit this information and offer it at the trial—no request for an adjournment or continuance was requested at the time—and the facts do not justify the inference that this information was sought with due diligence" (F. 895).

So far as this statement seeks to imply that the defense was derelict in not having prepared to impeach Edith Murray on her production, it is contradicted by the record. Edith Murray was deliberately held by the Government until the last day of the second trial, although she had been available in the court house at its beginning (F. 113-4). Until she was produced, the defense had no knowledge of her existence, and it outrages reason to suggest that the defense should have been prepared to disprove her story before being informed that she was the person whose story was going to be told.

That "no request for an adjournment or continuance was requested at the time" (F. 895) is an accurate statement. But surely the test of due diligence is not what might technically have been done, but what practicably and wisely could have been done. This Court is familiar with the atmosphere of the case from the record on the original appeal. Having no knowledge of the existence of the witness till her production at the very end of a long trial which had already exhausted all concerned, counsel could have no assurance that a few days of investigation would produce any information as to the whereabouts of a negro maid in Baltimore fourteen years earlier, and could hardly dare risk the extreme damage to the defense which would have followed from its having requested an adjournment and then having had to come back and report that nothing had been found.

---

* Although we have not emphasized the evidence of William Reed Fowler in this brief (see p. 44, *supra*) we should at a hearing offer his testimony also.

The Government handled Edith Murray so as to make it impossible for the defense effectively to discredit her at the trial. To foreclose the defense now from discrediting her would be simply using "judicial discretion" to guarantee the Government the fruits of its sharp practice.

CONCLUSION

We have undertaken to show in our Argument that the court below has misconceived or misstated our evidence in vital respects—to an extent indicating a failure to give our motion that fair consideration which is requisite to a sound exercise of judicial discretion. We believe that our showing calls for a mandate of this Court reversing the order below, and directing the granting of a new trial. We may, as the court below has pointed out (see, e.g., F. 887-9), have failed to prove—because we do not yet know—all the *minutiae* of Chambers's fraudulent scheme. Under the law as we understand it, no such complete showing is needed to secure a new trial. We must show, if we are to meet the standards of the *Johnson* case (*supra*, p. 4, n.), that our evidence on a new trial "would probably produce an acquittal"; but to meet this test we do not have to diagram every detail of Chambers's machinations nor demonstrate the innocence of the defendant beyond peradventure. Under instructions which would be given by the court on a new trial a jury would have to acquit if the evidence presented raised in their minds a reasonable doubt as to the defendant's guilt (see *Coates* v. *United States*, 174 F. 2d 959, 960 (C. A. D. C., 1949)). Respectfully disagreeing with the court below, we do not see how our evidence could do less than raise such a reasonable doubt, and therefore produce an acquittal.

It is true, as the court below points out, that "this motion has not answered the handwritten documents produced by Chambers which were admittedly in Hiss' handwriting" (F. 890). We have as yet no newly discovered evidence on how Chambers got those notes, any more than we have on

how he got the microfilms, or the documents reproduced on them.

But we have produced evidence that Chambers's story—if not of how he got them originally, at least of how and where he kept them and "re-found" them in 1948—is false. We have produced evidence that the typewritten Baltimore Documents are forgeries. We have produced evidence that the typewriter in the case—Woodstock #230,099—is a faked machine, made to look like and type like the Hiss-Fansler machine, but not in fact that machine; and we have produced evidence, if not of how it was made, at least of how it could have been made. No jury, presented with proof that the typewriter was faked and the typed documents were forgeries, could conceivably retain any belief whatsoever in the rest of Chambers's fantastic tale.

We are aware of the reluctance of the appellate courts to disturb findings of trial courts on motions such as this. We have demonstrated that the findings of the court below are so clearly based upon misapprehension of the nature of the evidence offered that in this case we hope that proper reluctance may be overcome. But on this, at least, we are clear: proper practice on motions such as this plainly calls for a hearing of the witnesses themselves when they are reputable and competent, and by their affidavits tender relevant factual evidence which is put in issue by counter-affidavits from the Government.

In *Hamilton* v. *United States,* 140 F. 2d 679, 681 (C. A. D. C., 1944), in an opinion reversing a denial of a motion for a new trial on the ground of newly discovered evidence, it was said:

> "An affidavit of newly discovered evidence in a criminal case should be construed fairly to the accused. Ambiguities should not be resolved in favor of the prosecution without inquiry of the proposed witnesses." *

* While it is true that *United States* v. *Johnson,* 149 F. 2d 31 (C. A. 7th, 1945), a decision citing the *Hamilton* case with approval, was in turn reversed by the Supreme Court in *United States* v. *Johnson,* 327 U. S. 106, we do not suppose the Supreme Court intended to disapprove the principle stated in the text, nor to deny the appellate courts the right and the duty to supervise its conscientious application.

As illustrations of the wide spread of the practice of hearing the witnesses in such cases as this, we cite the following: *United States* v. *Hefler,* 159 F. 2d 831 (C. A. 2d, 1947); *Ewing* v. *United States,* 135 F. 2d 633 (C. A. D. C., 1942); *United States* v. *Miller,* 61 F. Supp. 919 (S. D. N. Y., 1945); *Coates* v. *United States,* 174 F. 2d 959 (C. A. D. C., 1949); *cf. United States* v. *Krulewitch,* 167 F. 2d 943 (C. A. 2d, 1948).

For the foregoing reasons, the order below should be reversed.

Respectfully submitted,

BEER, RICHARDS, LANE & HALLER,
Attorneys for Appellant.

CHESTER T. LANE,
ROBERT M. BENJAMIN,
HELEN L. BUTTENWIESER,
of Counsel.

November, 1952.