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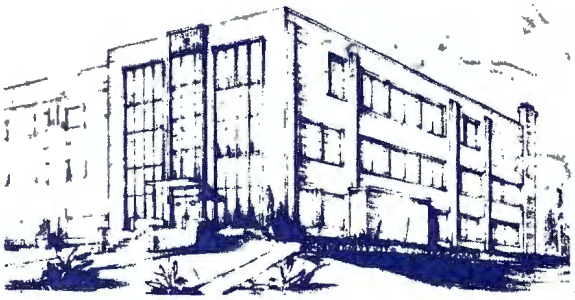
Young Israel of Kew Gardens Hills



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November 17, 1986

Miss Mari Maseng, Director
Office of Public Liaison
The White House
Washington, D. C.

Dear Miss Mageng:

It was indeed a pleasure to meet with you the other day at the breakfast arranged by our mutual friend, Mr. George Klein. I must say that the meeting was not only informative and instructive but it helped to strengthen the ties which already exist between the Jewish community and the White House.

We were impressed by your presentation and by the sincerity with which you spoke to us.

Again may I point out to you the need to clarify the position of Pat Buchanan with regard to the prosecution of Nazi criminals.

Speaking for myself and many of my friends I want you to know that we believe Ronald Reagan to be a great President and support his position vis-a-vis the SDI.

We hope and pray that the Almighty will grant him good health to continue his duties.

Again accept our good wishes for success in your new office.

With kindest regards,

Sincerely yours,

FS:ph

Rabbi Fabian Schonfeld

Delegates to National Council: Albert Amin — Herbert Amster — Jacob Applebaum — Stanley Berger — Eli Berkowitz — Rabbi Reuven Bernstein — Stuart Friedman — Robert Fuchs — Dr. Aaron Glatt — Norman Gittler — Jacob Holzer — Sidney Katzoff — Judah Mansbach — Maishe Orlanski — Milton Nordlicht — Ludwig Rapp — Arthur Reich — Dr. Bernard Rimler — Jack Segall — Alvin Silver — Stuart Smolar — Marvin Teicher — Dr. Bernard Zazula

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UNITED STATES of America, Plaintiff-Appellee,

v.

Bohdan KOZIY, a/k/a Bogdanus Kosij, a/k/a Bohdan Jozij, Defendant-Appellant.

No. 82-5749.

United States Court of Appeals, Eleventh Circuit.

Feb. 27, 1984.

Rehearing Denied April 2, 1984.

Action was brought to revoke citizenship. The United States District Court for the Southern District of Florida, James C. Paine, J., 540 F.Supp. 25, revoked citizenship, and defendant appealed. The Court of Appeals, Hatchett, Circuit Judge, held that: (1) District Court's factual findings concerning defendant's affiliation with Ukrainian police and organization hostile to the United States were not clearly erroneous; (2) facts concealed by defendant in applying for naturalization were material; (3) though statutory provisions for denaturalization did not include illegal procurement at time defendant obtained citizenship, utilization of illegal procurement as basis for denaturalization did not violate ex post facto clause; (4) defendant's witnesses were properly prohibited from testifying, given failure of defendant to comply with pretrial order requiring listing of witnesses by deadline; and (5) Ukrainian police employment forms and Displaced Persons Commission inimical list were properly admitted into evidence.

Affirmed.

1. Aliens ⇐62(1)

Lawful admittance to the United States is statutory condition precedent to naturalization. Immigration and Nationality Act, § 318, 8 U.S.C.A. § 1429.

2. Aliens ⇐71(18)

To prevail in denaturalization proceeding, government must prove its case by clear, convincing, and unequivocal evidence, leaving no issue in doubt. Immigration and Nationality Act, § 340(a), 8 U.S.C.A. § 1451(a).

3. Aliens ⇐71(20)

Factual findings of the district court in denaturalization proceeding were reviewable under the "clearly erroneous" standard. Immigration and Nationality Act, § 340(a), 8 U.S.C.A. § 1451(a); Fed.Rules Civ.Proc. Rule 52(a), 28 U.S.C.A.

4. Aliens ⇐71(18)

Evidence in denaturalization proceeding established that defendant had been member in Ukrainian police force and had participated in killing unarmed civilians, which activities rendered him ineligible for visa under the Displaced Persons Act and, hence, defendant was thereafter unlawfully admitted to the United States and, accordingly, illegally procured his citizenship. Displaced Persons Act of 1948, §§ 2(b), 8, 10, 13, 62 Stat. 1009; Immigration and Nationality Act, § 318, 8 U.S.C.A. § 1429.

5. Aliens ⇐71(18)

Government's evidence adduced in denaturalization proceeding established that defendant had been involved with organization recognized by the Displaced Persons Commission as hostile to the United States, which affiliation rendered defendant ineligible for visa under the Displaced Persons Act and, accordingly, his admission thereafter to the United States was unlawful and his citizenship illegally procured. Displaced Persons Act of 1948, § 13, 62 Stat. 1009; Immigration and Nationality Act, § 318, 8 U.S.C.A. § 1429.

6. Aliens ⇐71(18)

Evidence in denaturalization proceeding established that defendant had failed to reveal his wartime activities in his visa and naturalization applications, and, therefore, that defendant lacked good-moral character, a statutory condition precedent to naturalization. Immigration and Nationality Act, §§ 101(f)(6), 316(a)(3), 340(a), 8 U.S.C.A. §§ 1101(f)(6), 1427(a)(3), 1451(a).

7. Aliens ⇐71(7)

For purposes of determining in denaturalization proceeding whether naturalization was procured by concealment of material fact or by willful misrepresentation, concealed facts are material if either they would have warranted denial of citizenship if known, of if disclosure might have led to investigation into other facts warranting denial of citizenship. Immigration and Nationality Act, § 340(a), 8 U.S.C.A. § 1451(a).

8. Aliens ⇐71(18)

Evidence established that facts concealed by applicant for naturalization, namely, wartime activities in organization hostile to the United States and as member of the Ukrainian police force, were material, thus warranting revocation of naturalization. Immigration and Nationality Act, § 340(a), 8 U.S.C.A. § 1451(a).

9. Constitutional Law ⇐199

Although statutory provisions for denaturalization did not include illegal procurement of citizenship at time that defendant obtained citizenship, utilization of illegal procurement as basis for denaturalization was not violative of ex post facto clause, inasmuch as defendant was not punished under the subsequently enacted provisions but only deprived of privilege that was never rightfully his. Immigration and Nationality Act, § 340(a), 8 U.S.C.A. § 1451(a); U.S.C.A. Const.Art. 1, § 10, cl. 2.

10. Federal Courts ⇐824

District court order concerning exclusion of witnesses will be upheld unless there has been clear abuse of discretion.

11. Federal Courts ⇐824

In determining whether district court abused its discretion in excluding witnesses, reviewing court should take following factors into account: bad faith on part of the parties seeking to call witness not listed in pretrial memorandum, ability of party to have discovered witnesses early, validity of excuse offered by party, willfulness of party's failure to comply with court's order, party's intent to mislead or confuse adversary, and importance of excluded testimony.

12. Federal Civil Procedure ⇐1941

In denaturalization proceeding, trial court did not abuse its discretion in precluding two of defendant's witnesses from testifying by reason of defendant's failure to list those witnesses in accordance with deadline set in pretrial order.

13. Federal Courts ⇐870

District court's determination that article of evidence has been properly authenticated will not be overturned unless there is no competent evidence in the record to support it. Fed.Rules Evid.Rule 901(a), 28 U.S.C.A.

14. Evidence ⇐366(5)

Ukrainian police employment forms were properly authenticated for purposes of admission in denaturalization proceeding. Fed.Rules Evid.Rules 901(a), 902(3), 28 U.S.C.A.

15. Evidence ⇐366(5)

Whether or not Ukrainian police employment forms were forgeries did not go to their admissibility in denaturalization proceeding, but, rather, to weight of the evidence. Immigration and Nationality Act, § 340(a), 8 U.S.C.A. § 1451(a)

16. Evidence ⇐372(1)

Ukrainian police employment forms, offered by Government in denaturalization proceedings, were not inadmissible hearsay, coming within ancient document exception to the hearsay rule. Fed.Rules Evid.Rule 803(17), 28 U.S.C.A.

17. Aliens ⇐71(17)

So-called "inimical list," containing organizations hostile to the United States, was properly admitted in denaturalization proceedings, inasmuch as it had at least some probative value on issue whether certain organization with which defendant was affiliated was hostile to the United States; amount of probative value went to weight of the evidence, not to its admissibility. Displaced Persons Act of 1948, § 13, 62 Stat. 1009.

Philip Carlton, Jr., Thomas A. Wills, Miami, Fla., for defendant-appellant.

Kathleen Coleman, Trial Atty., Allan A. Ryan, Jr., Jovi Tenev, Dept. of Justice, Washington, D.C., Stanley Marcus, U.S. Atty., Miami, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before HENDERSON and HATCHETT, Circuit Judges, and JONES, Senior Circuit Judge.

HATCHETT, Circuit Judge:

The appellant, Bohdan Koziy, appeals an order of the United States District Court, 540 F.Supp. 25, for the Southern District of Florida, revoking his citizenship pursuant to 8 U.S.C.A. § 1451(a) which provides that citizenship must be revoked if it was illegally procured, or procured by concealment of a material fact or by willful misrepresentation.[1] After a review of the record, we find the district court committed no error and therefore, we affirm.

FACTS

Before the outbreak of World War II, the Stanislau region was part of Poland. In 1939, Germany and Russia invaded the region and agreed to divide the territory; the Russians gained control of the Stanislau area. On June 22, 1941, Germany invaded Russia and the Germans occupied the region. The towns of Lisets and Stanislau lie within the Stanislau region.

From 1941 until its surrender in 1945, Germany attempted to annihilate the Jewish people residing within its occupied territories. The task of killing millions of Jewish people was so enormous it required the aid of the indigenous population. In the Stanislau region, the Ukranian Police aided the Germans in their task by guarding the Jewish ghetto in Stanislau and killing Jewish residents. They also aided the Germans in deporting the Jewish people to extermination camps.

Bohdan Koziy was born on February 23, 1923, in the town of Pukasiwci, located in the Stanislau region. From 1936 through 1939, Koziy attended various schools in the Stanislau region. In 1939, Koziy became involved in the Organization of Ukranian Nationalists (OUN) which was dedicated to the establishment of an independent Ukranian state. He remained active in the organization until 1944. In 1944, fleeing the Russian advance, Koziy and his family moved to Heide, Germany, where he worked as a farmer. After the Germans surrendered in 1945, the Koziys lived in various displaced persons camps. The Displaced Persons Commission (DPC) operated these camps to establish an orderly method of resettling World War II refugees. After the DPC interviewed Koziy, he entered the United States on December 17, 1949, under the Displaced Persons Act of 1948. On April 25, 1955, Koziy filed his application to file a petition for naturalization. On July 25, 1955, he filed a petition for naturalization and on February 9, 1956, Bohdan Koziy became a United States citizen.

On November 20, 1979, the United States brought this action pursuant to 8 U.S.C.A. § 1451(a), to revoke and set aside the order of the Supreme Court of New York, Oneida County, on February 9, 1956, admitting Koziy to United States citizenship. The United States also requested the cancellation of Koziy's certificate of naturalization. The United States alleged that Koziy had illegally procured his citizenship by conceal-

1. Title 8 U.S.C.A. § 1451(a) provides in pertinent part:

> § 1451. Revocation of naturalization—Concealment of material evidence; refusal to testify.
>
> (a) It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation ....

ment of a material fact or by willful misrepresentation by failing to disclose his involvement in the Ukranian police and the OUN. Koziy denied involvement in the Ukranian police and contended his actions in the OUN were insufficient to support revocation of his citizenship.

The district court agreed with the United States. It held Koziy's failure to reveal his activities in the Ukranian Police and the OUN made him ineligible to receive a visa under the Displaced Person's Act of 1948 (Act). Therefore, Koziy was unlawfully admitted to the United States and his citizenship was illegally procured. The failure to disclose his activities in the Ukranian Police and the OUN also provided the basis for the district court's ruling that Koziy had procured his citizenship by concealment of a material fact.

The district court found that the Ukranian Police and the OUN were organizations hostile to the United States. Koziy's affiliation with those organizations resulted in his ineligibility for a visa under section 13 of the Act which prohibits the issuance of a visa to anyone who was a "member of, or participated in, any movement hostile to the United States or the form of government of the United States."

The district court also found that Koziy assisted enemy forces and persecuted civilians thereby making him ineligible for a visa under section 2(b) of the Act. The Act declares that anyone who has "assisted the enemy in persecuting civil populations of countries ... or voluntarily assisted the enemy since the outbreak of the second world war in their operations against the United Nations" is of no concern to the Displaced Persons Commission. If the DPC was unconcerned with Koziy, he was ineligible for a visa under section 2(b).

The district court ruled that Koziy's failure to disclose his connections with the Ukranian Police and the OUN on his immigration forms made him ineligible for a visa under section 10 of the Act which precludes the issuance of a visa to any person "who shall willfully make a misrepresentation for the purpose of gaining admission into the United States." The district court also ruled Koziy lacked good moral character which is a prerequisite for admission into the United States under 8 U.S.C.A. § 1427(a)(3) by failing to reveal his wartime activities. Additionally, the district court revoked Koziy's citizenship pursuant to 8 U.S.C.A. § 1451(a) because his failure to disclose his connections with the Ukranian Police and the OUN resulted in his procuring citizenship by concealment of a material fact.

Koziy raises four issues on appeal. (1) Koziy contends the district court erred in finding he was a member of the Organization of Ukranian Nationalists (OUN) and the Ukranian Police. (2) Koziy argues the district court erred in excluding two defense witnesses whose names were not disclosed by his attorney within the time set in the court's pretrial order. (3) Koziy claims the district court violated the ex post facto clause and the due process clause by revoking his citizenship on the ground of illegal procurement. Koziy contends that at the time he obtained citizenship, the statutory provisions for denaturalization did not include illegal procurement, and therefore, the district court's reliance on illegal procurement as a basis for denaturalization violated the due process clause and the ex post facto clause. (4) Koziy argues the district court erred in admitting into evidence an anmeldung, an abmeldung, and an inimical list.[2]

I. The Trial Court's Revocation of Koziy's Citizenship Pursuant to 8 U.S.C.A. § 1451(a).

Title 8 U.S.C.A. § 1451(a) provides two methods for revocation of an individual's

2. An anmeldung was a document the Ukranian police utilized to apply for various types of insurance when beginning their job. An abmeldung is a form the Ukranian police used when leaving their job. The inimical list was a list the Displaced Persons Commission (the Commission which regulated the immigration of World War II refugees to the United States) compiled listing all organizations hostile to the United States. If a person seeking admission to the United States under the Displaced Persons Act was a member of any of the listed organizations, the Commission prohibited his admittance.

citizenship: (1) If the individual illegally procured his citizenship, or (2) if citizenship were procured by concealment of a material fact or wilful misrepresentation.

a. Illegal Procurement of Citizenship

[1] Citizenship is illegally procured if "some statutory requirement which is a condition precedent to naturalization is absent at the time the petition is granted." H.R.Rep. 1086, 87 Cong., 1st Sess. 39, reprinted in [1961] U.S.Code Cong. & Admn. News, 2950, 2983. *See also, Fedorenko v. United States,* 449 U.S. 490, 515, 101 S.Ct. 737, 751, 66 L.Ed.2d 686 (1981). Lawful admittance to the United States is a statutory condition precedent to naturalization. 8 U.S.C.A. § 1429. If Koziy were ineligible for a visa, he would be unlawfully admitted to the United States. The United States produced various witnesses to testify to Koziy's affiliations with the Ukranian Police and the OUN. Involvement with the Ukranian Police or the OUN would preclude Koziy from receiving a visa under the Displaced Persons Act of 1948.

The United States produced witnesses who testified they saw Bohdan Koziy in a Ukranian police uniform killing unarmed civilians in the town of Lisets. Josef-Waclaw Jablonski testified he saw Koziy at least once a week in a Ukranian police uniform. He also saw Koziy kill the Singer girl and members of the Kandler family. Jablonski stated that he was 100 percent positive that Koziy committed both acts. Anton Vatseb corroborated Jablonski's story. Vatseb testified he saw Koziy kill the Kandlers and the Singer girl. Vatseb also testified he was with Jablonski when Koziy shot the Singer girl. Vatseb stated that the Kandler family was shot in the same fashion as Jablonski had stated. Three witnesses, Anna Snigur, Maria Antoniva Il'kovs'ka, and Yosif Frankovich Il'kovs'kii, testified that they saw Koziy kill the Bredgolts's family while wearing a Ukranian police uniform.

The United States also produced two exhibits which corroborated the witnesses' testimony declaring that Koziy was a member of the Ukranian police force. The anmeldung and the abmeldung, Ukranian police employment forms, both contained Koziy's signature. Each document represented Koziy's affiliation with the Ukranian police. Koziy, however, claims he was never employed in the Ukranian police force.

Koziy presented his testimony and the testimony of three witnesses to refute the government's contention that he was a member of the Ukranian police force. First, his wife testified and contended that Koziy was never a member of the Ukranian police force. Second, Wasyl Ostapiak, Koziy's father-in-law, and a resident of the town of Lisets during World War II, testified he never saw Koziy in a Ukranian police uniform. Mykola Ostatiak testified that he never saw Koziy in a Ukrainian police uniform. Koziy himself took the stand and declared he was never involved in the Ukranian police force. Koziy, however, did state that he wore the uniform of the Ukranian police force on a few occasions as a disguise to conceal his membership in the OUN. Koziy contends this evidence displays his non-affiliation with the Ukranian police force.

[2] To prevail in a denaturalization proceeding, the government must prove its case by clear, convincing, and unequivocal evidence, and leave no issue in doubt. *Fedorenko v. United States,* 449 U.S. 490, 505, 101 S.Ct. 737, 746, 66 L.Ed.2d 686 (1981); *United States v. Chaunt,* 364 U.S. 350, 353, 81 S.Ct. 147, 149, 5 L.Ed.2d 120 (1966); *Schneiderman v. United States,* 320 U.S. 118, 125, 63 S.Ct. 1333, 1336, 87 L.Ed. 1796 (1943). The district court held that the government fulfilled its burden of showing Koziy's membership in the Ukranian police. It found that Koziy was ineligible for a visa under the Displaced Persons Act and was never lawfully admitted into the United States. The district court, therefore, held that Koziy had illegally procured his citizenship because he had failed to fulfill a statutory condition precedent to naturalization.

[3, 4] In reviewing factual findings of the district court, we are bound by the clearly erroneous standard of Fed.R.Civ.P.

52(a). *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 855, 102 S.Ct. 2182, 2188, 72 L.Ed.2d 606 (1982); *United States v. United States Gypsum Co.*, 333 U.S. 364, 394–95, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948); *Wilson v. Thompson*, 638 F.2d 799, 801 (5th Cir.1981). The district court's factual findings concerning Koziy's affiliation with the Ukranian police are not clearly erroneous.

[5] The only issue concerning Koziy's affiliation with the OUN is whether the OUN was, at the time under consideration, hostile to the United States. Koziy testified that he was extensively involved with the OUN's activities during World War II. The United States presented the same witnesses who testified about Koziy's shooting innocent civilians to report about the OUN's hostility towards the United States. These witnesses testified that the OUN committed atrocities against Polish civilians who were United States allies. The United States also introduced a document which the Displaced Persons Commission formulated exhibiting all organizations considered hostile to the United States. The OUN was listed on it. The United States produced the resolution of the Second Congress of the OUN which exhibited the OUN's anti-semitic ideology. The government also displayed various applications for admission to the United States which the DPC denied because of the individuals' affiliations with the OUN.

To rebut the government's contention that the OUN was hostile to the United States, Koziy presented an expert witness on the OUN, Dr. Petro Murchuk. He testified that the OUN was never hostile to the United States.[3] Koziy also testified declaring that the OUN was never hostile to the United States. Koziy, however, stated that the OUN killed Russian partisans during World War II. The United States and Russia were allies during World War II.

The district court found that the government had fulfilled its burden of proof with respect to Koziy's involvement with the OUN and held that Koziy was ineligible for a visa, and therefore was never lawfully admitted into the United States. It ruled Koziy had illegally procured his citizenship. We fail to find the district court's factual findings regarding Koziy's affiliations with the OUN clearly erroneous. *Hamm v. Members of Board of Regents of the State of Florida*, 708 F.2d 647, 650 (11th Cir.1983); *Lincoln v. Board of Regents of the University System of Georgia*, 697 F.2d 928, 939 (11th Cir.1983).

[6] Being of good moral character is another statutory condition precedent to naturalization. 8 U.S.C.A. § 1427(a)(3). A person who has given false testimony for the purpose of obtaining benefits under the immigration laws lacks good moral character. 8 U.S.C.A. § 1101(f)(6). The district court found Koziy had failed to reveal his wartime activities in his visa and naturalization applications, and therefore, lacked good moral character. The district court held Koziy had illegally procured his citizenship because he had failed to satisfy a statutory condition precedent to naturalization.

Unless the district court's factual findings are clearly erroneous, we are compelled to abide by them. *Hamm*, at 650; *Lincoln*, at 939. The district court's factual findings are not clearly erroneous.

b. Procurement of Citizenship by Concealment of a Material Fact or by Willful Misrepresentation

[7, 8] Under 8 U.S.C.A. § 1451(a), if naturalization is procured by concealment of a material fact or by willful misrepresentation, it must be revoked. In a denaturalization proceeding, concealed facts are material if either they would have warranted denial of citizenship if known, or if the disclosure might have led to an investigation into other facts warranting denial of citizenship. *United States v. Fedorenko,*

3. Murchuk's credibility as a witness must be analyzed in light of two letters he sent to the office of special investigations in the Department of Justice. In those letters, he claimed that the Department of Justice's investigation into Koziy's past was a KGB-Jewish plot to destroy Ukranian Nationalists.

597 F.2d 946, 949–52 (5th Cir.1979), *aff'd Fedorenko v. United States*, 449 U.S. 490, 101 S.Ct. 737, 66 L.Ed.2d 686 (1981). The district court found that Koziy had failed to disclose his affiliation with the OUN in his application to file a petition for naturalization. It held that if he had disclosed his affiliation with the organization, it would have led to an investigation into other facts which might have warranted a denial of citizenship. The district court, therefore, held Koziy's naturalization was procured by a concealment of a material fact. The district court found that Koziy never disclosed his membership in the Ukranian Police force. It ruled that if he had disclosed his connection with the police force in his visa application, his application would have been rejected outright, or at the least, an investigation would have commenced which might have led to a denial of citizenship. His failure to disclose his affiliation with the police force, therefore, was a concealment of a material fact, and his naturalization was procured by concealment of a material fact. These findings are not clearly erroneous.

II. Koziy's Constitutional Claims

[9] Koziy contends that at the time he obtained citizenship, the statutory provisions for denaturalization failed to include illegal procurement. Koziy argues, therefore, that the district court's reliance on illegal procurement as a basis of denaturalization violated the due process clause of the fifth amendment and the ex post facto clause. Although Koziy is correct in contending that the statutory provisions for denaturalization did not include illegal procurement at the time he obtained citizenship, we find that the district court's utilization of illegal procurement as a basis for denaturalization did not violate Koziy's constitutional rights.

In *Johannessen v. United States*, 225 U.S. 227, 32 S.Ct. 613, 56 L.Ed. 1066 (1912), the Supreme Court was faced with a similar challenge in a denaturalization proceeding. When Johannessen was admitted to the United States, the statute did not include illegal procurement as a basis for denaturalization. Johannessen contended that the utilization of illegal procurement as a basis for denaturalizing him violated the ex post facto clause. The Court disagreed and declared the usage of illegal procurement did not violate Johannessen's constitutional rights. *Johannessen*, at 242–43, 32 S.Ct. at 617. The Court stated: "The act imposes no punishment upon an alien who has previously procured a certificate of citizenship by fraud or other illegal conduct. It simply deprives him of his ill-gotten privileges." *Johannessen*, at 242–43, 32 S.Ct. at 617.

In the present dispute, the government's utilization of illegal procurement as a basis for revoking Koziy's citizenship did not violate Koziy's constitutional rights. It only deprived Koziy of his ill gotten gains. The utilization of illegal procurement deprived Koziy of a privilege that was never rightfully his. *See Johannessen*, at 241–43, 32 S.Ct. at 616–617.

III. The Court's Exclusion of Koziy's Witnesses

The district court set August 17, 1981, as a deadline for listing witnesses to be called at trial. Koziy failed to list two witnesses, O'Connor and Martin, by the deadline. The district court, therefore, prohibited the witnesses from testifying. Koziy contends that the district court abused its discretion in excluding his witnesses. The government argues the district court acted properly in excluding Koziy's witnesses.

[10, 11] A district court's order concerning the exclusion of witnesses will be upheld unless there has been a clear abuse of discretion. *Port Terminal and Warehousing v. John S. James Co.*, 695 F.2d 1328, 1334–35 (11th Cir.1983); *Keyes v. Lauga*, 635 F.2d 330, 334–35 (5th Cir.1981); *Calamia v. Spivey*, 632 F.2d 1235, 1237 (5th Cir.1980). In determining whether the district court abused its discretion in excluding witnesses, the reviewing court should take the following factors into account: (1) bad faith on part of the parties seeking to call the witnesses not listed in his pretrial memorandum, (2) ability of the party to have

discovered the witnesses early, (3) validity of the excuse offered by the party, (4) willfulness of the party's failure to comply with the court's order, (5) party's intent to mislead/confuse his adversary, and (6) importance of excluded testimony. *Myers v. Pennypack Woods Home Ownership Association,* 559 F.2d 894, 904–905 (3d Cir.1977).

[12] After reviewing each factor listed in *Pennypack* as it relates to this case, we find that the district court did not abuse its discretion in excluding Koziy's two witnesses. Koziy failed to inform the court that he desired to call O'Connor, a Displaced Persons Commission expert, until September 16, 1981. Koziy, however, knew that the government was claiming that he violated the Displaced Persons Act at the time of the filing of the complaint, 1979. Moreover, when Koziy was deposed on November, 1980, he was questioned about his application to the Displaced Persons Commission. Koziy, therefore, knew as early as 1979 that the Displaced Persons Act was at issue. Koziy had the ability to call O'Connor at any point after the filing of the complaint. Koziy offered no excuse for his failure to call O'Connor prior to the court's deadline and therefore, Koziy willfully failed to comply with the court's order. The government also lacked the opportunity to depose O'Connor. The district court, therefore, did not abuse its discretion in precluding O'Connor from testifying.

Koziy failed to inform the court that he desired to call Rene C. Martin, a handwriting consultant, until September 9, 1981. The trial commenced six days later. In November, 1980, the government notified Koziy of its desire to obtain handwriting exemplars for purposes of conducting an analysis and handwriting comparison of certain Nazi documents. Koziy refused, and the district court compelled him to comply. Koziy, therefore, knew that his handwriting was at issue in the case. His failure to obtain Rene C. Martin before the court's deadline displays bad faith.

Koziy contends that since the government had the opportunity to depose Martin, there was no unfair surprise. While the government did depose Martin, an attorney who was not involved in the dispute took the deposition. The district court, therefore, did not abuse its discretion in excluding Martin as it would have resulted in an unfair surprise to the government. Our holding is supported by the district court's careful consideration of the issue before reaching a decision. It requested memoranda of law concerning the dispute and then precluded Koziy's witnesses from appearing.

IV. The Trial Court's Admission of the Anmeldung, the Abmeldung, and the Inimical list

(a) The anmeldung, the abmeldung

[13] Koziy contends the court erred in admitting certain documents for various reasons. Koziy contends the anmeldung and the abmeldung lack proper authentication, are forgeries, are irrelevant and immaterial, and are hearsay. The government contends that the district court properly admitted the anmeldung and the abmeldung into evidence.

The Federal Rules of Evidence state that the requirement of authentication "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed.R.Evid. 901(a). A district court's determination that an article of evidence has been properly authenticated will not be overturned unless there is no competent evidence in the record to support it. *Bury v. Marietta Dodge,* 692 F.2d 1335, 1338 (11th Cir.1982); *Meadows and Walker Drilling Co. v. Phillips Petroleum Co.,* 417 F.2d 378, 382 (5th Cir.1969). The government produced two expert witnesses to authenticate the anmeldung and the abmeldung. The government produced Dr. Raul Hilberg, a renowned expert on the holocaust, and Dr. Cantu, an expert on written documents. Dr. Hilberg testified he had seen other anmeldungs and abmeldungs and that the ones involved in the present dispute were very similar to the ones he had seen. Dr. Cantu testified that the anmeldung and abmeldung were not executed after its purported date. These

two witnesses alone produced sufficient evidence to support the district court's authentication of the anmeldung and the abmeldung.

[14] The Federal Rules of Evidence, however, add support to the district court's finding that the anmeldung and the abmeldung were properly authenticated. Under Fed.R.Evid. 902(3), a document is self-authenticated if it purports

> to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation.

A Russian official authorized to authenticate such documents attested to the anmeldung and the abmeldung. These documents, therefore, were self authenticated under rule 902(3). Since there was competent evidence in the record to support the district court's finding that the anmeldung and the abmeldung were properly authenticated, the district court did not abuse its discretion by allowing them into evidence.

[15, 16] Whether or not the anmeldung or the abmeldung were forgeries fails to go to their admissibility, but rather to the weight of the evidence. The documents are relevant and material. The documents are not inadmissible hearsay because they come within the ancient document's exception to the hearsay rule. Fed.R.Evid. 803(17). The documents were authenticated, and they have been in existence for twenty years or more.

(b) Inimical list

[17] The district court admitted into evidence a list the DPC compiled containing all organizations hostile to the United States. Koziy contends that the government failed to show that the OUN was hostile to the United States at the time he applied for a visa, and therefore, the inimical list has no probative value. The Fifth Circuit has consistently held that evidence should be admitted rather than excluded if it has any probative value at all. *United States v. Holladay*, 566 F.2d 1018, 1020 (5th Cir.), *cert. denied*, 439 U.S. 831, 99 S.Ct. 108, 58 L.Ed.2d 125 (1978); *Sabatino v. Curtiss National Bank of Miami Springs*, 415 F.2d 632, 635–36 (5th Cir.1969), *cert. denied* 396 U.S. 1057, 90 S.Ct. 750, 24 L.Ed.2d 752 (1970). Doubts must be resolved in favor of admissibility. *Holladay*, at 1020; *Sabatino*, at 636. The inimical list had some probative value. The district court therefore properly allowed it into evidence. The amount of probative value the inimical list contains goes to the weight of the evidence, not to its admissibility.

CONCLUSION

For the reasons stated above, we find that the district court committed no error in the proceedings. Accordingly, we affirm the order of the district court.

AFFIRMED.

Roger COLLINS, Petitioner-Appellant,

v.

Robert O. FRANCIS, Warden, Ga. Diagnostic and Classification Center, Respondent-Appellee.

No. 83-8097.

United States Court of Appeals, Eleventh Circuit.

March 15, 1984.

Rehearing and Rehearing En Banc Denied May 23, 1984.

Petitioner sought habeas corpus relief from state court convictions. The United

Kungys File

In the United States Court of Appeals
for the Third Circuit

051

United States of America,

Appellant,

v.

Juozas Kungys,

Appellee.

Court of Appeals No. 83-5884

Appeal from the United States District Court
for the District of New Jersey at Newark

Appellant's Brief

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March 6, 1984

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I. STATEMENT OF JURISDICTION

The United States of America appeals the final judgment of the United States District Court for the District of New Jersey at Newark, dismissing the complaint seeking revocation of the naturalized citizenship of appellee Juozas Kungys, pursuant to 8 U.S.C. §1451(a). The United States filed a timely notice of appeal on December 7, 1983.[1] Jurisdiction is conferred on this Court by 8 U.S.C. §1291.

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the district court err when it held that 8 U.S.C. §1101(f)(6) implicitly requires that "false testimony" be material before it can give rise to a finding of lack of good moral character?

2. Did the district court err when it found that defendant's misrepresentations on his visa application were not material?

3. Did the district court clearly err when it found that defendant's misrepresentations on his naturalization application were not material?

4. Did the district court clearly err in finding that defendant had not participated in persecution and murder of civilians during World War II?

III. STATEMENT OF THE CASE

The United States brought this action under 8 U.S.C. §1451(a) to revoke the citizenship of Juozas Kungys, a native of Lithuania, who was naturalized in 1954. The complaint was filed on July 22, 1981. An amended complaint was filed on July 16, 1982. The United States alleged that defendant, together with local residents and Nazi German forces, had participated in the persecution and murder of over 2,000 men, women and children (mostly Jews) in Kedainiai, Lithuania during July and August 1941.

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1. Page citations to the Appendix volumes are preceded by the letter "A." Page citations to the Trial Exhibit volumes are preceded by the letter "X."

The United States further alleged that, in applying for a visa under the Immigration Act of 1924 (Pub.L. No. 68-139, 43 Stat. 153), defendant concealed from American officials facts relating to his identity, viz., his residence in Kedainiai, his wartime occupation and his true date and place of birth. Finally, the government alleged that defendant, in his sworn naturalization application, concealed his date and place of birth and the fact that he had given false testimony to obtain a visa to this country. The gravamen of the complaint was that defendant's citizenship was both (1) illegally procured and (2) procured by willful concealment and material misrepresentation.

Following a non-jury trial, the district court entered judgment for defendant on all claims. 571 F.Supp. 1104.

IV. STATEMENT OF THE FACTS

A. Implementing the 'Final Solution' in Lithuania

Lithuania was under the control of the Soviet Union prior to June 1941. On June 22, 1941, Nazi Germany invaded the Soviet Union, including Lithuania. A333, 340, 1502-504.

Immediately after the Nazi invasion, groups of armed, local men (so-called partisans) were formed throughout Lithuania to take control of the communities where they lived. A362, 393. The entering German troops were welcomed as liberators by many Lithuanians and succeeded in enlisting their active assistance. A1504.

It was Nazi policy to kill persons identified as communists and to annihilate all Jewish men, women and children throughout the occupied territories. This policy of killing all Jews was designated "the final solution to the Jewish question." A295-6, 1504-508. The killing of Jews in Lithuania was assigned to a special German mobile unit called SS Einsatzgruppe

A, which was subdivided into groups called SS Einstazkommandos. A357. Moving as close to the frontlines as possible, the Einsatzkommandos entered the newly-occupied territories, enlisted the assistance of indigenous, non-Jewish Lithuanians and speedily carried out the tasks of identifying, confining and killing their victims; most of the killings were carried out in the towns and hamlets throughout the country where the victims resided. A340-42, 358-64, 374-81. X218, 230, 259, 270, 277. By December 1941, approximately 137,000 Jews had been killed by the SS Einsatzkommandos and their indigenous collaborators. A1508; X247; see also The Nurnberg Trial, 6 F.R.D. 69, 128, 142 (1946).[2]

B. Kungys and the Kedainiai Killings

1. Kungys' Background

Juozas Kungys was born on September 21, 1915 at Reistru village, Silales County in the Taurage region of Lithuania. A805-6. X117, 125, 163, 477-99, 536. In 1938, Kungys entered military service, received infantry training, and was graduated from cadet school. X121-27. On December 1, 1939, after having attained the rank of junior lieutenant, he left military service and began work with the Bank of Lithuania in Kedainiai. X128-163. He remained in that employment until mid-October 1941, when he moved to Kaunas, Lithuania's capital. X155, 167, 501. A1527-528.[3]

---

2. The Germans' heavy reliance upon local Lithuanians in exterminating Jews was necessitated by the relatively small numbers of men in the SS Einsatzkommandos and the speed with which the kommandos were to carry out their tasks. Assistance was also necessitated by the fact that Lithuania's Jewish residents were to be found in towns and villages throughout the country -- not only in the major cities. The use of Lithuanians also served German propaganda in demonstrating the desire of the Lithuanian populace to rid itself of its own Jews. A363, 378-82.

3. The district court mistakenly believed that "both sides agree" that defendant entered the Telsiai Seminary in mid-October 1941. A1528. In fact, the government claimed that after leaving Kedainiai in mid-October 1941, the defendant was employed in Kaunas as the senior bookkeeper of an industrial trust and the manager of an industrial concern. X495, 524, 536, 543, 547. See also Pre-trial order.

In Kedainiai, defendant joined the Sauliai (riflemen association) which, inter alia, provided military training. He also practiced at the rifle range. X90-1. Throughout the period of his bank employment in Kedainiai, Kungys resided as a boarder at 3 Radvilu Street, a house owned by the parents of his wife-to-be, Sofia Kungys nee Anuskeviciute. Id.; X167, 500, 1067-068. During his tenure at the bank, he came to know Juozas Kriunas, who was then chief accountant of a local cooperative known as Dirva. A1003-004. X568-69, 992-93. Kungys also became acquainted with another boarder at the house, Jonas Dailide. X921, 1063-068. Both Dailide and Kriunas testifed by videotaped deposition.

2. The Kedainiai Killings

The town of Kedainiai is located approximately 25 miles north of Kaunas. In 1941, the town of Kedainiai had a population of well over 8,500, including some 2,500 Jewish men, women and children. A1510. The district of Kedainiai had a population of about 102,000, id., and comprised some 16 villages. A313-14; Janson dep. 30-1; see also X633. Both before and during World War II, Kedainiai had fewer than 10 policemen.

The massacres at Kedainiai fit the pattern characteristic of the general slaughter throughout Lithuania during this time. Shortly after the invasion, local men in the Kedainiai area who had military experience or who were members of the riflemen (Sauliai) association were organized in civilian auxiliary detachments to supplement the regular police. These men continued in their usual employment during the day, but at night patrolled streets and guarded bridges. While on duty, the men wore white arm bands for identification. X1128-31; A797-801. X922-27, 944, 569-72, 679-81, 696, 843-44, 882-83. A1511.

Soon after the German occupation began, restrictions were imposed on Kedainiai's Jewish residents. They were ordered to wear a Star of David and were forbidden to use sidewalks and forbidden to speak with non-Jews. They were later confined behind barbed wire in a small ghetto. X1117-118; A797-801. X575-77, 695-97, 843-44, 940-42, 1079-082. The civilian auxiliary detachments assisted in patrolling the ghetto perimeter at night. A1511. X926-27, 942-43.

The civilian detachments also assisted German soldiers in two separate killing actions. In July 1941, about 125 men and women, who were communists or former Soviet government officials, were arrested and imprisoned in a barracks on Gediminas Street. On July 23, 1941, these persons were taken by trucks in groups from the barracks to the nearby Babeniai forest by armed members of the civilian detachments. Some members of the civilian detachments guarded the area, while other civilians and German soldiers directed the prisoners to a large pit. There, the men and women were shot by the Germans. A1511. X922-38, 997-98, 1007. See also X233, 247, 574-75; 686-90.

Members of the local civilian detachments also assisted in the killing of Kedainiai's Jewish residents. After the Jewish population had been assembled in the ghetto, they were marched to a horse breeding farm (Zirginas) on the outskirts of town and confined there. X697-98, 844. On August 28, 1941, the civilian detachments, as well as organized groups of local workers, were ordered to assemble in Kedainiai. They gathered together with the regular police and German soldiers. X568, 591, 756-57, 763-71, 845-49, 867, 880, 945-47, 990-1000. See also X1122-126. Some of the civilians were taken by trucks to a place near Zirginas. Lime, beer and vodka were also brought. X594-602, 768-78, 777-79. There, a huge pit had been dug. Other armed civilians guarded a perimeter 50 or 60 meters from the ditch to prevent

escapes and to keep people from entering the area. X594-95, 620-21. See also X853, 951-62. Then, a special detachment of German soldiers arrived. A1511.

The Jews were taken in groups from the Zirginas barns to the ditch, a distance of about one kilometer. Germans and Lithuanian civilians assisted in loading those unable to walk into trucks bound for the pit; they also directed the line of march to the ditch. There, the victims were ordered to undress, forced into the pit and shot. A1512. X592-94, 598-99, 622, 782-86, 789-93, 803-04, 952-55, 982-83, 998-99, 1009.

At Zirginas, motors were kept running to mask the victims' screams. X584, 602, 784, 861-67. The shootings continued into the evening, until all the Jews were killed. X600, 622, 963, 974. Nazi records recite the killing of 710 Jewish men, 767 Jewish women and 599 Jewish children in Kedainiai on August 28, 1941. X252. A1511-513.

3. Evidence Presented of Kungys' Role in Persecution and Killings

According to the testimony of witnesses in Lithuania and the United States, about 100 of Kedainiai's men participated in the auxiliary civilian groups which were formed to keep order and assist the authorities in Kedainiai. X569-72, 679-81, 696, 843-44, 882-83, 925-27. X1128-131; A797-801. Many of the auxiliary detachment members had been in the military, had received military training, or had been members of the riflemen (Sauliai) association. A1511. The defendant, a former army junior lieutenant with infantry training, admitted that he had been a member of the riflemen (Sauliai) association in Kedainiai. X90-1. A843-45.

Two witnesses, Kungys' former roommate (Dailide) and the former chief accountant of a local cooperative (Kriunas) testified that the defendant acted

as a leader of one detachment numbering twenty to thirty men. X569-72, 580, 922-27. See also X793, 810-11, 862-63, 994-95, 1014-017.

The headquarters of the German commandant was next to the defendant's residence. A998-99. X681, 924, 1082-083. There, lists of the auxiliary detachment members were maintained. Kungys kept a list of the members of his detachment at his desk in the commandant's office. X633, 645-46. See also X503.

The existence of this list and Kungys' response to it throughout this litigation are significant. The names on the list were derived from the affidavits of persons residing in Lithuania who served with Kungys or other detachments during the Kedainiai killings. When Kungys was interviewed by government attorneys in March 1981, he was read a list of forty-four names taken from these affidavits; at the time, he was not advised of the source of the names. Under oath, Kungys swore that he recognized only two of the forty-four names. X81-9.

However, soon after the complaint was filed, Kungys wrote a letter to a prospective defense witness stating that:

> [T]hey [government counsel] presented before me the longest list of Riflemen's Association members from the commandant's office and kept asking me whom I knew.
>
> I don't know why our people are so unwilling to help one another. Just look at how the descendants of Abraham are doing it. [X503]

In other words, after denying knowledge of most of the names read to him by the government, Kungys admitted that he indeed had recognized many of the names as former riflemen association members (i.e., Sauliaists) and that he knew that the "commandant's office" kept such a list. X633, 645. [This admission was obviously inconsistent with Kungys' professed ignorance of German activities in Kedainiai and his sworn assertion that he recognized

virtually none of the names from the list. Kungys' letter confirmed the substance of testiony given by witnesses in Lithuanian which, at that time, was unknown to him.]

At trial, Kungys admitted the authenticity of the letter. A954-55. He also admitted that the riflemen association members referred to in the letter were the same people about whom he was questioned in the March 1981 interview. A1007-016. To this extent, he thereby corroborated the Soviet witnesses.

Additional evidence of Kungys' collaboration and involvement in the Kedainiai murders was provided by witnesses Kriunas and Dailide. They both described Kungys' participation in the July executions at Babenai forest. Kungys was seen at the barracks where members of the civilian auxiliary detachments had assembled. Later, he was seen riding in the cab of a truck arriving at Babenai with the condemned prisoners. X932-37. One of the members of Kungys' detachment testified that Kungys had later admitted to participation in these killings. X574-75.

These witnesses also described Kungys' role in persecuting and killing Kedainiai's Jewish residents. Kungys ordered his detachment to help force the Jews into the ghetto and to confiscate their property. X583-85. He also supervised his men on guard at the ghetto. X577-79, 926-27, 942-43. Kungys and his men also participated in guarding the ghetto residents en route to the horse farm (Zirginas), where they were housed just before execution. X582-83.

On the day of the execution, Kungys ordered his men, who were armed with rifles, to assemble. X588-90, 947-48. He ordered some of his men to take the Jews from the horse farm barns to the pit where they were to be shot. X588.

He ordered others to stand guard near the execution place or to help the old and disabled victims into trucks. X948-50, 963.

At both the barracks and the pit, Kungys gave commands and interpreted and transmitted German orders to members of the Lithuanian detachments. X588-99, 947-51, 1001-002. See also A1057, X536. He led his unit in bringing the Jewish women and children to the ditch from the barns. He ordered the victims to undress. X591-93. The women were forced into the pit, together with their children, whereupon Kungys participated in shooting them. Id.; see also X865-65, 784-87, 962-63; X594, 618. He and his detachment also brought a group of Jewish men to the pit. Kungys ordered them to undress and participated in their shooting as well. X597-98.

C. Kungys' Subsequent Activities

According to information Kungys provided to German officials, from 1941 onward, he was the manager of an industrial concern in Kaunas. X495, 524, 543, 547. See also X977, 1069-071. In August 1944, as the Red Army advanced on Kaunas, Kungys and his wife fled and eventually settled in the Tuebingen region of Nazi Germany. Id. X524. A1021. Documents in evidence show that Kungys applied for and received permission from Nazi authorities in Tuebingen to reside in Nazi Germany without special restrictions. X476. Kungys' wife applied for permission from Reich authorities to practice dentistry. X1279. A1276-80.

In Tuebingen, Kungys was required to register with local authorities. Nearly all the Tuebingen registry records reflect his true date and place of birth. X475-99. Similarly, in applying for matriculation at Tuebingen University in 1945, Kungys provided a 1938 seminary record listing his true date and place of birth. X536. A1530.

D. Kungys' Concealments to Obtain a Visa

In January 1947, Kungys applied for an immigration visa at Stuttgart, Germany. To obtain his visa, he was required to complete application forms and submit verifying documents, such as birth and police records. The court found, and Kungys conceded, that in his visa application he misrepresented and concealed his date and place of birth, his places of residence during the period 1940-1942, and his war time occupation. The court also found that to support his application, Kungys submitted four documents (X1, 8, 18, 21) each of which contains false information regarding his date and place of birth. A1530-531. He did so despite the fact that he was in possession of or could have obtained supporting documents reflecting the true information (e.g., his Tuebingen registry and seminary records). Id.

Based upon the false information that was furnished by defendant, the United States Consulate issued him a Quota Immigration Visa under the 1924 Immigration Act. X10. Defendant entered the United States on April 29, 1948. X23.

Seymour Maxwell Finger, a professor and former United States ambassador to the United Nations, had served as vice-consul in Stuttgart at the time defendant applied for a visa. He testified, without contradiction, that a visa would routinely be denied to any applicant who lied to the vice-consul concerning any one of the facts Kungys misrepresented. A750-55. Further, an applicant who submitted false documentation or documentation containing false information would not have met the requirements for obtaining a visa. Id.

Ambassador Finger also testified -- without rebuttal -- that any factual inconsistencies between information contained in the visa application forms and the supporting documents always called into question the authenticity of

the supporting documents. Therefore, an investigation would have been undertaken, including a check of available records in each of the applicant's prior places of residence, especially those in Germany (e.g., the documents Kungys filed with German officials listing his true date and place of birth). A749-50. If the investigation confirmed that the applicant had misstated facts to the vice-consul, the visa would have been denied. A751-54.

E. Kungys' Concealments to Obtain Citizenship

In October 1953, Kungys executed an Application to File Petition for Naturalization and an attached Statement of Facts for Preparation of Petition (Form N-400), X28, and a Petition for Naturalization (Form N-405), X33. At a naturalization examination, he reviewed the Form N-400, X28, and swore to the truth of the contents; he also executed under oath a Petition for Naturalization. In each of these documents, Kungys swore to a false date and place of birth. In addition, the sworn N-400 was "false * * * in that [it] stated that defendant had not previously given false testimony to obtain benefits under the immigration and naturalization laws." A1532.

Julius Goldberg, now a retired immigration judge, was the naturalization examiner who processed Kungys' application. Judge Goldberg testified, without rebuttal, to the procedures and standards he followed in processing defendant's application. He testified that applicants who gave false testimony to obtain benefits under the immigration and naturalization laws were denied naturalization. X1173-176, 1183-86, 1200-203, 1223. A521-34. Further, he testified that where an applicant gave information (e.g., date and place of birth) in his naturalization papers which was inconsistent with that contained in his visa papers, the naturalization application would either be

denied outright or, at a minimum, suspended and referred to the Immigration and Naturalization Service for further inquiry. Id. 1200-202, 1223.

At the naturalization examination, Kungys was steadfast in his misrepresentations and concealments. He did not reveal the true facts regarding his prior false testimony and his false date and place of birth. A1532. X1173-176, 1183-86. His certificate of naturalization was issued on February 3, 1954 by the United States District Court for the District of New Jersey.

V. THE DISTRICT COURT'S OPINION

The district court found that Kungys gave false testimony to United States immigration officials regarding his date and place of birth, the place of his wartime residence and his wartime occupation. A1531, 1533. To support his visa application, Kungys submitted documentation which contained false data relating to his personal background. Id. Thus, the court rejected Kungys' alibi that he was employed in a printing house far removed from Kedainiai during the time of the slaughter of thousands of its Jewish residents; the court found, to the contrary, that defendant had resided in Kedainiai throughout the period of the killings. A1528.[4]

The court further found that Kungys falsely stated, under oath, his date and place of birth to a naturalization examiner at the time he petitioned for citizenship. In addition, Kungys lied in his naturalization application when he claimed that he had not previously given false testimony to obtain benefits

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4. The court was unpersuaded by an employment document, X36, which defendant first gave INS investigators in 1977 to support this alibi. A885-89.

under the immigration and naturalization laws (i.e., that he had not misrepresented facts requested in his visa application). A1532-533.

However, despite these findings, the court held that the misrepresentations were not "material" and therefore could not result in denaturalization.[5] A1527, 1538.

As to the allegations that Kungys had assisted in the killing and persecution of civilians during the war, the court observed that the videotaped deposition testimony of witnesses in Lithuania would have provided a factual predicate for granting judgment for the government. However, the court refused to admit into evidence any inculpatory testimony by these witnesses. Although the court admitted and credited these witnesses' descriptions of the killings in Kedainiai in the summer of 1941, it refused to consider the testimony of these same witnesses that they personally observed Kungys participate in the murders. A1511, 1513, 1520, 1526.[6]

The government believes that the district court's holding with respect to defendant's misrepresentations and his wartime involvement in murder is erroneous and should be reversed. The court's exclusion of the Lithuanian testimony lacks an adequate supporting record and is based solely on supposition and hearsay. Further, Kungys' proven misrepresentations, standing alone, mandate his denaturalization.

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5. The court also found an insufficiency of evidence to support defendant's claim that he had served in the underground during the war, which purportedly led him to conceal his true date and place of birth. A1528-529. See also A1409-411.

6. The court's reasons for excluding this testimony are discussed in detail beginning on p. 28, infra.

VI. STATEMENT OF RELATED CASES

This case has not been before this court previously. Counsel are unaware of any related cases or proceedings.

VII. STATEMENT OF THE STANDARD OF REVIEW

The standard of review governing issues (1) and (2) is whether the district court erred in applying the law. The standard of review governing issues (3) and (4) is whether those findings of fact are clearly erroneous under Rule 52(a).

VIII. ARGUMENT

A. The District Court Erred in Refusing to Hold That Kungys' False Testimony to Obtain Benefits Under the Immigration and Naturalization Laws Rendered his Citizenship Illegally Procured - 8 U.S.C. §1101(f)(6)

Citizenship which has been illegally procured must be revoked. 8 U.S.C. §1451(a). Citizenship is illegally procured if "some statutory requirement which is a condition precedent to naturalization is absent at the time the petition [for naturalization] is granted." H.R. Rep. No. 1086, 87 Cong., 1st Sess. 39 (1961). As the Supreme Court recently held:

> [T]here must be strict compliance with all the congressionally-imposed prerequisites to the acquisition of citizenship. Failure to comply with any of those conditions renders the certificate of citizenship "illegally procured," and naturalization that is unlawfully procured can be set aside. 8 U.S.C. §1451(a); Afroyim v. Rusk, 387 U.S. 253, 267 n. 23 (1967). See Maney v. United States, 278 U.S. 17 (1928). United States v. Ness, 245 U.S. 319 (1917); United States v. Ginsberg, 243 U.S. 472 (1917). [Fedorenko v. United States, 449 U.S. 490, 506 (1981)]

One of the most significant conditions precedent to naturalization is that the applicant must be of a "good moral character." 8 U.S.C. §1427(a). However,

no applicant may be deemed to be of good moral character if he/she "has given false testimony for the purpose of obtaining any benefits under [the Immigration and Nationality] Act." 8 U.S.C. §1101(f)(6).

When Kungys applied for a visa, he lied about his date and place of birth, his residence at Kedainiai and his wartime occupation. He also submitted supporting documents with false identity information, while concealing documents with true information. The information in Kungys' visa application was verified under oath at an interview with a United States vice-consul. A734-45. 22 C.F.R. §§320, 321, 325, 11 Fed.Reg. 8928-929 (1946).

In Kungys' Application to File Petition for Naturalization and the attached Statement of Facts for Preparation of Petition (Form N-400), he provided a false date and place of birth. He also swore that he had never given false testimony for the purpose of obtaining benefits under the immigration laws. X30. Form N-400, p. 2 item (17)(e). Kungys thereafter was interviewed by a naturalization examiner to review the above information. At that time, he swore under oath that all of the facts in these documents were true. X1171-182.

The district court agreed with the government's contention that Kungys had provided false information and documentation during the visa application process with regard to his date and place of birth, residence and occupation. A1530-531. The court also found that Kungys falsely stated his date and place of birth in his Petition for Naturalization and that defendant's representations in applying for citizenship were "false . . . in that they stated that defendant had not previously given false testimony to obtain benefits under the immigration and naturalization laws." A1532.

Despite the court's conclusion that Kungys had given false testimony to obtain benefits under the immigration and naturalization laws, it held that he did not lack good moral character within the meaning of 8 U.S.C. §1101 (f)(6) because the falsehoods were not material. In short, the court implied a materiality requirement for false testimony under Section 1101(f)(6), notwithstanding the absence of such language in the statute and the lack of support for its interpretation in the legislative history.

The court's implication of a materiality requirement for false testimony under Section 1101(f)(6) is clearly contradicted by the Third Circuit's decision in In re Haniatakis, 376 F.2d 728 (3d Cir. 1967). It also ignores the Supreme Court's long-standing rebuke of judicial efforts to imply statutory standards in the immigration laws which do not find explicit textual support. I.N.S v. Phinpathya, 52 U.S.L.W. 4027 (Jan. 10, 1984); Fedorenko v. United States, 449 U.S. 490 (1981).

This Court held In re Haniatakis that the petitioner lacked the good moral character required for citizenship because she had misrepresented her marital status and residence. The Court conceded that these facts were not material to the merits of her petition. However, because she had given false testimony, Haniatakis was statutorily barred from citizenship because she lacked good moral character within the meaning of 8 U.S.C. §1101 (f)(6):

> The federal courts have consistently refused to draw a distinction between materiality and immateriality of false testimony in cases where such a distinction would have had clear application. See Berenyi v. District Director. * * * The statute is not concerned with the significance or materiality of a particular question, but rather, as the Supreme Court has recently indicated in Berenyi v. District Director, intends that naturalization should be denied to

one who gives false testimony to facilitate naturalization. [376 F.2d at 730.][7]

The decision in Haniatakis is consistent with Congress' intent that there be no materiality requirement under 8 U.S.C. §1101(f)(6). Such intent is evident in the legislative history relating to Congress' restoration of "illegal procurement" as a means of effecting denaturalization. Pub.L. 87-301 §18, 75 Stat. 650, 656, 87th Cong., 1st Sess. (1961). Prior to passage of this amendment, the only basis for denaturalization under 8 U.S.C. §1451(a) was proof of concealment of material facts and willful misrepresentation. Congress decided to restore illegal procurement to the denaturalization statute precisely because of the difficulties in proving concealment of material facts and willful misrepresentation. The House of Representatives Report leading to the new legislation leaves no doubt as to Congress' intent:

> Naturalization is illegally procured if some statutory requirement which is a condition precedent to naturalization is absent at the time the petition was granted. In other words, naturalization has been illegally procured if jurisdictional factors are not present at the time the citizenship is granted. (U.S. v. Ginsberg, 243 U.S. 472).
>
> Notwithstanding that the law is, and has been, that "A person may be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this title and not otherwise" (sec. 301(d), Nationality Act of 1940, sec. 310(d) Immigration and

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7. Other courts have similarly refused to read materiality into the requirements of Section 1101(f)(6). In Kovacs v. United States, 476 F.2d 843 (2d Cir. 1973), the Court of Appeals held that "the false testimony relied upon to establish lack of good moral character need not be material to the final merits of naturalization * * *." 476 F.2d at 845. See also United States v. Koziy, 540 F.Supp. 25, 33-36 (S.D.Fla. 1982), aff'd, No. 82-5749 (11th Cir. February 27, 1984) (denaturalization based on defendant's collaboration with the Ukrainian police during World War II and subsequent misrepresentations as to both material and non-material facts).

Although Haniatakis was a naturalization petition case, there is absolutely no support either in the statute's language or in the legislative history to suggest that "false testimony" has a different meaning for denaturalization purposes than it does for obtaining citizenship. The relevant distinction between the two proceedings is the shifting of the burden of proof from the petitioner to the government.

> Nationality Act; emphasis supplied). (sic) Section 340 makes no provision for cancellation of citizenship where the conditions prescribed by Congress did not in fact exist -- unless misrepresentation, etc. is involved.
>
> The congressional mandate that no person shall be naturalized unless possessed of certain qualifications is ineffectual unless there is also statutory provision for revoking citizenship where the prerequisites did not in fact exist. In the majority of such cases it is difficult if not impossible to prove that there was concealment of material facts or willful misrepresentations. Thus, in the absence of such proof, there have been rendered ineffectual important sections of the naturalization laws which spell out absolute bars to naturalization * * *. Similarly, while section 101(f) of the Immigration and Nationality Act spells out in detail the type of conduct which precludes an alien from establishing good moral character (thus barring him from eligibility for naturalization), the principle that willful misrepresentation and so forth must be established renders that section of the law inoperative, notwithstanding its clear and unmistakable purpose and intent.

H.R.Rep. No. 1086, 87th Cong., 1st Sess. (1961) 39.[8]

Congress could have added a materiality requirement to Section 1101(f)(6) to conform it to the existing materiality standard in Section 1451(a). Congress chose not to do so for the obvious reason that the difficulty of proving materiality was one of the primary reasons for the 1961 amendment which restored "illegal procurement" as a basis for denaturalization.

The Supreme Court has held that the courts may not read into the immigration laws a condition for denaturalization which Congress chose not to write into the statute:

> We are not at liberty to imply a condition which is opposed to the explicit terms of the statute . . . to [so] hold . . . is not to to construe the Act but amend it. Detroit Trust Co. v. The Thomas Barlum . . . [Fedorenko v. United States, 449 U.S. at 513.][9]

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8. See also Cong. Rec., 87th Cong. 1st Sess., p. 18281, remarks of Rep. Walker (Sept. 6, 1961).

9. In Fedorenko, the Supreme Court reversed the district court's implication of a voluntariness standard in one of the Nazi collaboration provisions of the Displaced Persons Act, Pub.L. 80-774, 62 Stat. 1009.

Recently, the Supreme Court reiterated its view that the judiciary may not impose conditions on the immigration laws to ameliorate the seeming harshness of the statute's explicit language:

> Congress designs the immigration laws and it is up to Congress to temper the laws' rigidity if it so desires . . .

I.N.S v. Phinpathya, 52 U.S.L.W. at 4031. In Phinpathya, the Court of Appeals had held that a statutory provision requiring "continuous physical presence" as a precondition to certain relief under the immigration laws implicitly provided for absences which were not "meaningfully interruptive." The Supreme Court disagreed, holding that "Congress meant what it said . . ." 52 U.S.L.W. at 4031.[10]

The district court found that Kungys had indeed provided false testimony to obtain benefits under the immigration and nationality laws. That false testimony deprived Kungys of the good moral character which was a prerequisite to citizenship. His citizenship, accordingly, was illegally procured. The lower court had no statutory, Congressional or judicial support for avoiding this conclusion:

> [O]nce a district court determines that the Government has met its burden of proving that a naturalized citizen obtained his citizenship illegally or by willful misrepresentation, it has no discretion to excuse the conduct. * * * In case after case, we have rejected lower court efforts to moderate or otherwise avoid the statutory mandate

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10. We also point out that, in addition to ignoring the decisions in Haniatakis, Kovacs, Fedorenko, etc., the lower court's holding with respect to Section 1101(f)(6) appears also to contravene the law of this case. Judge H. Curtis Meanor, who presided over this case for approximately nineteen months, denied defendant's second motion to dismiss, explaining inter alia:

> [I]f the man lied here and he lied there and lied about a whole bunch of immaterial facts, he still could be denaturalized on the ground there's all these lies even though they were not going to material facts, showing him to be a person of such moral character he should be denaturalized. [A179]

of Congress in denaturalization proceedings. [Fedorenko v. United States, 449 U.S. at 517-18.][11]

Having found that defendant gave false testimony to obtain benefits under the immigration and naturalization laws, the district court should have ordered revocation of citizenship. Its refusal to do so is reversible error.

B. Kungys Made Material Misrepresentations to Obtain a Visa

Relying upon the materiality test set out in Chaunt v. United States, 364 U.S. 350 (1960), the court held that defendant could be denaturalized under 8 U.S.C. §1451(a) only if: (a) the true facts he misrepresented or concealed would have resulted in denial of his naturalization petition or (b) the truth "would have resulted in an investigation and that investigation might have uncovered facts justifying denial of citizenship." (Emphasis in original.) A1538. The court also held that this test governs the materiality of defendant's misrepresentations at the visa stage. Id. Using this standard, the court concluded that the government had not met its burden of proving that Kungys' misrepresentations and concealments were material to securing his visa.

The court's reliance on this formulation of the materiality standard is erroneous in two respects. First, the court erred in not applying a body of

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11. The district court below claimed to derive support for its holding from Berenyi v. District Director, 385 U.S. 630 (1967) and Chaunt v. United States, 364 U.S. 350 (1960). However, neither case stands for the proposition claimed below. This Court held in Haniatakis that it was relying on Berenyi for its conclusion that materiality was not implicit in Section 1101(f)(6). In short, the district court's interpretation of Berenyi directly contradicts this Court's interpretation.

This Court similarly held in Haniatakis that Chaunt was totally inapposite to cases under Section 1101(f)(6) because Chaunt was decided under a different statutory provision (8 U.S.C. §1451(a)) which explicitly required materiality as a condition of denaturalization. We also point out that Chaunt was decided prior to the restoration of illegal procurement to the denaturalization statute.

law holding that any visa application misrepresentations relating to identity are per se material. Landon v. Clarke, 239 F.2d 631 (1st Cir. 1956).

Second, even if this Court were to decide that Chaunt, rather than Landon, governs the materiality of Kungys' misrepresentations, the lower court's application of the Chaunt standard to the facts of this case was clearly erroneous.

1. Misrepresentations as to Kungys' Identity Were Per Se Material

To obtain an immigration visa, Kungys was required, inter alia, to provide truthful information about his date and place of birth, places of residence since age sixteen, and occupation(s) and activities for the five years preceding his application. 1924 Immigration Act, §§2(f), 7(b), 13. He was also required to submit all available identity documents to support his application and a police clearance. 1924 Immigration Act, §§2(f), 7(c), 13. A743-49, 1530.

All the information Kungys provided was reviewed and verified orally by him at an interview with the vice-consul. Of particular interest to the vice-consul during this interview was the applicant's relationship to the Nazi occupation forces in his native country. For this reason, special emphasis was given to eliciting specific and detailed information concerning the applicant's residence and occupations during the 1939-1945 period. A1530. After being afforded the opportunity to correct any errors or discrepancies, Kungys swore to the truth of the information in his application form. The burden of proving eligibility for a visa was on Kungys. A733-43. 22 C.F.R. §§61.320, .321, .325, 11 Fed.Reg. 8928-929 (1946).

In any visa application, the central facts which initiate the immigration process are the applicant's own statement of personal "identity" (e.g., name,

date of birth and country of origin). Because the 1924 Act mandated quotas for immigrants based on their country of origin, questions relating to the visa applicant's identity were even more critical. Enforcement of that Act's quota provisions was dependent on an applicant's truthful statement of personal identity.

Because of the importance of identifying a visa applicant, the courts have long held that any misrepresentations going to a visa applicant's identity is per se material. Landon v. Clarke, 239 F.2d 631 (1st Cir. 1956). See also McCandless v. United States ex rel. Murphy, 47 F.2d 1072 (3d Cir. 1931). In Landon, the applicant made misrepresentations as to her name, last permanent residence, marital status and number of children. The truth as to any of these topics would not have disqualified the applicant for a visa. However, the Circuit Court held that:

> We believe that a misrepresentation concerning identity by an incoming alien which results in entry without the proper statutory investigation by immigration authorities is material, justifying deportation, no matter what the outcome of the investigation would have been if it had been made. [239 F.2d at 634.][12]

This rule is an eminently appropriate one in the context of visa fraud. Landon correctly holds that materiality in such situations is dependent upon the importance of the question being asked by the government, rather than on

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12. This rule takes on even greater importance under a statute which has immigration quotas. For example, one can easily envision situations in which visa applicants learn that the quota for one country is higher than for another. An applicant might claim nationality from Germany, rather than Poland, in the belief that the quota for Germany is higher. A visa might then be issued based on the false nationality. However, Polish nationality would not have been a bar to visa eligibility; the true facts would not have precluded issuance of a visa. The applicant's efforts at fraud to enhance the likelihood of receiving a visa may have been unnecessary. Under Landon, however, the misrepresentations would nevertheless be deemed material, because they related to the critical questions of "identity."

the result which might follow from a truthful answer. Any lie in response to questions relating to identity are material because of the central importance of identity to the visa-issuing process.

The Landon rule is consistent with unrebutted testimony in this case of Ambassador Finger:

> Q: What routine actions, if any, would be taken with respect to an applicant who lied under oath to the consul concerning his date and place of birth?
>
> A: We would deny the visa . . .
>
> * * *
>
> Q: If an applicant submitted false documentation or documentation containing false information, would he have established his country of birth for purposes of obtaining a quota visa?
>
> A: No. [A751, 755]

In short, the State Department officials who were responsible for enforcing the 1924 Immigration Act considered misrepresentations as to date and place of birth alone as grounds for denial of a visa. Such interpretative polices and procedures by an administrative agency responsible for enforcing a statute is entitled to great deference. Udall v. Tallman, 380 U.S. 1 (1965).[13] That deference is heightened by the fact that the State Department's decisions to reject visa applications are not judicially reviewable. Ventura-Escamilla v. I.N.S., 647 F.2d 28, 30-31 (9th Cir. 1981); United States v. Kellog, 30 F.2d 984 (D.C. Cir. 1929), cert. denied, 279 U.S. 868; United States v. Phelps, 22 F.2d 288 (2d Cir. 1927).

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13. Cf. Fedorenko v. United States, 449 U.S. 490 (1981). In that case, the Supreme Court relied on another State Department official's testimony to determine the proper interpretation of the Displaced Persons Act. 449 U.S. at 499.

In Fedorenko, the Supreme Court ruled that it was not yet prepared to hold that the Chaunt test of materiality should govern cases of visa fraud. 449 U.S. at 508. The lower court herein erroneously assumed, however, that Chaunt was the sole test of materiality in this case. Utilizing the test in Landon, Kungys should have been denaturalized.

2. Kungys' Misrepresentations in his Visa Application Were Material Under the Standard of Chaunt

Even if this Court were to hold that the standard of materiality in Chaunt (as interpreted by the district court) should govern this case, the facts herein satisfy that standard of materiality. Specifically, the record clearly establishes that truthful answers on his visa application "would have resulted in an investigation [which] might have uncovered facts justifying denial" of a visa to defendant.[14] A1538. Clearly, had Kungys' participation in persecution or murder been known to the vice-consul no visa would have been issued. X12, item 14; 550-52; 566. See also A1533.

In addition to personal identity information, defendant's visa application required him to list all places of residence since age sixteen. X11. He truthfully provided this information except for one significant concealment: defendant omitted his twenty-three month residence at Kedainiai (December 1939 to October 1941); instead, he swore that during the 1940 to 1942 period he resided at Telsiai. Kungys swore he was a student, laborer and dental technician from 1942 to 1947. X16. He concealed his wartime occupation as an accountant and bookkeeper and he lied about his date and place of birth. A1531.

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14. Although the government believes that Chaunt is not the sole authority governing visa misrepresentations in this case, it concurs in the district court's formulation of the two prongs of the materiality standard in that decision.

To support his application, Kungys submitted a Lithuanian identity card (X1), which the court found he had obtained from the Kaunas burgomeister (mayor) in 1944, and three other documents he obtained in Germany after the war by giving false information. X8, 18, 21. Each of these documents contains the false date and place of birth defendant used in applying to United States immigration officials. A1531.

Regulations in effect at the time defendant applied for a visa required the vice-consul to conduct an investigation whenever there was "reason to doubt" the authenticity of an applicant's supporting documents. 22 C.F.R. §61.329, 11 Fed.Reg. 8904 (1946). Ambassador Finger testified that an investigation was required whenever an applicant gave information about himself which conflicted with that contained in his supporting documents. Such investigation included a check of all available records at the applicant's prior places of residence, especially those in Germany. A749-50. If the investigation proved that any of the applicant's supporting documentation was false or contained false information, the application would have automatically been denied. A750-56.

In this case, if Kungys had truthfully stated on his visa application his date and place of birth, his wartime occupation and his wartime residence, a glaring discrepancy would have appeared between the application itself and his supporting documentation. That inconsistency would automatically have triggered an investigation. The investigation would have led to the records from Tuebingen, Germany, all of which are undisputed in the record, (PX J, N). They show defendant's true date and place of birth. They also show that Kungys received permission from Nazi authorities to reside in Germany without special restrictions (X476) and that his wife petitioned, and apparently

received, permission to practice dentistry in the Nazi Reich (X1279). The fact that defendant, using true identity information, obtained benefits from Nazi authorities would have raised serious questions as to his claim to the visa officer that he had been "persecuted by the Gestapo." X9. It would also have cast serious doubts on defendant's claims that he had been "hunted by the Germans" while living in Lithuania and, for that reason, had had to adopt a false date and place of birth. X106-09. Plainly, had Kungys in fact been "persecuted by the Gestapo" or "hunted by the Germans," as claimed, he would not have openly applied for and received from Nazi authorities the benefits of living and working freely in the German Reich.

If defendant had filed a truthful visa application, an investigation would have resulted. It would have disclosed several material misrepresentations. First, the supporting documentation submitted by defendant to the State Department would have been proven false, just as the district court found them to be. That fact alone would have caused rejection of his visa application. Second, Kungys' claims of having been a victim of Nazi persecution would have been dispelled by his open application for and receipt of favored treatment by the Nazis during the war. These facts would have led to further investigation which might have caused rejection of Kungys' visa application.

These misrepresentations, therefore, were material under the district court's own formulation of the Chaunt rule. The court's contrary finding was clearly erroneous and justifies reversal.

C. Kungys Made Material Misrepresentations In His Application to Obtain Citizenship

In addition to the material misrepresentations made at the visa stage, Kungys also misrepresented material facts to obtain citizenship. Clearly,

Kungys' participation in persecution or in killing, if known, would have resulted in denial of citizenship. X30, item (16)(g); 1173-176. United States v. Linnas, 527 F.Supp. 426, 539-40 (E.D.N.Y. 1981), aff'd, 685 F.2d 427 (2d Cir. 1982), cert. denied, ____ U.S.____, 103 S.Ct. 179 (1982); United States v. Koziy, 540 F.Supp. 25, 35 (S.D.Fla. 198), aff'd, No. 82-5749 (11th Cir. February 27, 1984); United States v. Osidach, 513 F.Supp. 51, 103 (E.D.Pa. 1981), appeal dismissed, No. 81-1956 (3d Cir. July 22, 1981).

The court found that defendant's sworn application for citizenship was false in that (1) Kungys claimed he had not given false testimony to obtain benefits under the immigration and naturalization laws and (2) he gave a false date and place of birth. A1532. Yet, the court ignored the unrebutted testimony of the former naturalization examiner, Judge Goldberg, showing that these misrepresentations were material.

Goldberg testified, without contradiction, that if an applicant gave false testimony to obtain benefits under the immigration and naturalization laws, he was "bound to find that [the petitioner] was not of good moral character and recommend adversely on his petition for naturalization." X1201-202. A709-22. This testimony alone demonstrates the materiality of the undisputed misrepresentations found by the court below. Further, Judge Goldberg testified that one of his principal tasks in reviewing a citizenship application was to determine whether there were any discrepancies between the documentation in the applicant's immigration file and his sworn statements in support of naturalization. Goldberg further testified that if he found a discrepancy between information in the naturalization petition and information provided in the visa application, further inquiry would be made, leading to one of three possible results:

1. disqualification from citizenship if the applicant had given false statements, thereby depriving him of the requisite good moral character;

2. referral to the Immigration and Naturalization Service for their determination whether to initiate "appropriate steps under the immigration laws"; and

3. amendment of the petitioner's testimony, if timely and a satisfactory explanation was given to account for the discrepancy.

[X1189-190, 1199-209, 1223]

Goldberg further explained that in his experience, many applicants for naturalization presented a date and place of birth inconsistent with the information contained in the visa. In all such cases, the petition process was stopped and the petitioner was referred back to the INS for consideration of appropriate action. X1223-224.

The unchallenged testimony of Judge Goldberg demonstrates that if Kungys had truthfully stated his date and place of birth in his naturalization petition, the processing of his petition would have been suspended and further inquiry would have immediately followed. The reason for such action is that a truthful statement in Kungys' naturalization petition necessarily would have revealed inconsistencies between the petition and his sworn visa application. Goldberg left no doubt that such an inconsistency, even as to date and place of birth alone, would cause suspension of the naturalization process or an outright denial of citizenship for lack of good moral character.

Given the facts found in this case, Kungys' misrepresentations to obtain citizenship were material under the very standard of materiality set forth in Chaunt and adopted by the district court. Having made material misrepresentations, Kungys should have been denaturalized. The district court's failure to do so on this ground was reversible error.

D. The District Court Clearly Erred in Not Finding that Kungys Had Assisted in the Persecution and Murder of Innocent Civilians During World War II

The direct evidence of Kungys' role in the killings and persecutions is found in the testimonies of Dailide and Kriunas. General corroborative testimony was given by three others involved in the events: Silvestravicius, Devidonis, and Narusevicius. All of this deposition testimony was videotaped in Lithuania and played in open court.

The court relied on this testimony exclusively for its detailed and lengthy findings of the exact manner in which the persecutions and killings at Kedainiai were carried out. A1510-512, 1526. The court found that the charges against the defendant "find strong support in three of the depositions taken in Lithuania," viz. Dailide, Kriunas and Silvestravicius. A1513.

The only evidence presented that Kungys did not participate in the killings was his own denial. Accordingly, the "most critical issue of this case [was] whether the Lithuanian depositions were admissible against defendant." A1512. The court concluded, however, that the depositions would "not be admitted as evidence that defendant participated in the killings." A1526.[15] The court gave the following reasons for this ruling:

> (i) The Soviet Union, which cooperated with the United States government by making these witnesses available, has a strong state interest in a finding that defendant participated in the Kedainiai killings; (ii) The Soviet legal system on occasion distorts or fabricates evidence in cases such as this involving an important state interest; (iii) These depositions were conducted in a manner which made it impossible to determine if the testimony had been influenced improperly by Soviet authorities in that a Soviet procurator presided over the depositions, a Soviet

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15. The district court apparently ignored the line of authority in this Circuit (as well as other circuits) that it is error to withhold a witness' testimony from the trier of fact based solely on speculation that the witness belongs to a class disposed to lack of credibility (e.g., fugitives, confessed perjurers). United States v. Wilson, 601 F.2d 95, 98 (3d Cir. 1979); United States v. Scott, 558 F.2d 394, 388 (9th Cir. 1981). The trier of fact must assess such witness' credibility by resort to the traditional factors utilized for any other witness (e.g., inconsistencies, demeanor, etc.). Id. The lower court's exclusion of all inculpatory Soviet testimony violates this rule.

> employee served as translator, evidencing actual bias in the manner of translation, and the procurator limited cross-examination into the witnesses' prior statements and dealings with Soviet authorities; (iv) The content of the deposition testimony suggests that the Soviet interrogators distorted the witnesses' testimony when they prepared the 1977 protocols; and (v) The United States government failed to obtain and the Soviet government refused or failed to turn over earlier transcripts and protocols of the witnesses which most likely would have disclosed whether the testimony in this case was the subject of improper influence. [A1526-527]

Each of these reasons is based on an erroneous interpretation of the law or an inadequate factual record. In large measure, the conclusions are pure speculation. The Supreme Court long ago held that "our relations with [Soviet] Russia, as well as our views regarding its government and the merits of Communism are immaterial" to denaturalization actions. United States v. Schneiderman, 320 U.S. 118, 119 (1943). The district court failed to heed that admonition and repeatedly made conclusions which are unsupported by the evidence in this case. It is most respectfully submitted that a fair reading of the court's opinion reasonably suggests that political bias colored the court's analyses of the issues.

The court itself found that "no defense evidence establishes that any document supplied by the Soviet Union in any denaturalization case was false or that any witness whose testimony was taken in the Soviet Union was subjected to improper pressure or other influences." A1520. The district court's unfounded speculation about undue Soviet influence on the Lithuanian witnesses was exacerbated by the fact that the court also ignored or refused to admit evidence offered by the government which corroborated these witnesses. These evidentiary rulings contributed to the court's erroneous refusal to credit the Lithuanian witnesses.

Each of the aforementioned issues is addressed separately below. Together, the legal and evidentiary rulings resulted in a clearly erroneous

finding that defendant had not participated in persecution and murder. That error requires reversal of the judgment below.

1. There is No Record Evidence to Support the Finding That the Soviet Union has an Interest in Defendant's Denaturalization

The court stated that "we are faced with a situation where the Soviet Union has a continuing, strong interest in a finding that defendant was guilty of atrocious conduct while collaborating with German occupation forces." 571 F.Supp. at 1126. Although there is no question that the Soviet Union publicizes war crimes trials and apparently derives propaganda value from allegations of Nazi collaborators living in the West, there is no evidence in this record that the Soviet Union has any specific interest whatsoever in defendant. The testimony and documents produced by the Soviet Union in this litigation were forwarded at the request of American agencies; the Soviet Union did not volunteer evidence. Moreover, the Soviet Union provided evidence which clearly inured to Kungys' benefit. For example, the government's allegation that defendant misrepresented his marriage date was withdrawn because of a document Soviet authorities forwarded which tended to corroborate Kungys' claims. A171-93.

Nor is there evidence that defendant has been a Lithuanian nationalist activist. He is not now and has never been involved in anti-Soviet political activities. He was regularly promoted at the Lithuanian state bank throughout the period of Soviet occupation. X157. He did not take part in fighting against the Red Army. A995. Recently (in 1980), defendant's wife was given a visa by the Soviet Union to visit Lithuania. A1290. His sister-in-law, who lives in Lithuania, has visited the United States twice for extended periods (in 1972 and 1978). X99-100, 1084-086, 1090-091. No evidence establishes that

defendant was in fact the target of a so-called disinformation campaign. The court's finding of Soviet interest in Juozas Kungys being found guilty of Nazi collaboration, therefore, is mere surmise.

2. The Record Contains No Evidence that the Soviet Union has Ever Presented Fabricated Evidence to an American Court

Although the court found that "[n]o defense evidence establishes that any document supplied by the Soviet Union in any denaturalization case was false or that any witness whose testimony was taken in the Soviet Union was subjected to improper pressure or other influences," it held that the Soviet legal system "on occasion distorts or fabricates evidence in cases such as this . . ." A1520, 1536. This latter finding is based solely on a selective reading of the deposition testimony (taken in other cases) of several emigres/defectors from the Soviet Union. However, the court did not acknowledge that none of these witnesses had any personal knowledge of the Kungys case and none had personal knowledge regarding Soviet conduct in American legal proceedings. These witnesses testified solely to Soviet internal legal proceedings.

The testimony of defense witness Imants Lesinskas is instructive, especially since the district court, over objection, relied heavily on his testimony. A1370, 1373-382. He is a "defector" from the Latvian KGB who testified that he had no "personal knowledge about any of the Lithuanian people living in the United States who have been accused of criminal activity during the Second World War." (X1366.) He further admitted that he was unaware of any case where the Soviet Union had sent falsified evidence to be used in a United States court:

> Q: Do you have any personal knowledge of any instance where the Soviet Union sent a forged document to a United States court for use in a judicial proceeding?

A: I have no such knowledge.

* * *

Q: Do you have any knowledge of a case where the Soviet Union sent an allegation to United States officials at the Justice Department or a court alleging that someone was a member of the SS when that person was not, in fact, a member of the SS?

A: I have no knowledge of such a case.

* * *

Q: And you know of no case where the Soviet Union sent evidence to the United States for use in an American judicial proceeding alleging that someone was in a particular unit or group during the war when, in fact, that was totally untrue?

A: I have no knowledge. [X1332, 1362]

Consistent with this lack of knowledge, Lesinskis never watched the videotaped Soviet depositions in this case or in any other American "war crimes" trial. X1362-363. He conceded that in the two internal Soviet war-crimes trials he most criticized, the basic allegations made by the Soviet Union were true. X1358-361.

Finally, Lesinskis' own bias was called into question when asked his reaction to the use of Soviet evidence in an American court:

A: I would deplore, very much, usage of Soviet material.

Q: Why?

A: Because first of all, the United States doesn't recognize the Soviet regimes in the three Baltic states, so I would deplore judicial assistance given by an illegal regime and used by the United States courts. [X1346.]

In other words, Lesinskis' primary objection to the use of Soviet evidence did not go to the intrinsic worth of such evidence but, rather, the political appearance of such utilization.

The court's treatment of defense witness Fredrich Neznansky was similarly selective. The transcripts of his testimony in two prior cases were admitted,

over objection. A1370, 1373-382. The court accordingly had no opportunity to assess Neznansky's demeanor.[16] However, when Neznansky testified in an earlier case, United States v. Linnas, 527 F.Supp. 426 (E.D.N.Y. 1981), aff'd, 685 F.2d 427 (2d Cir. 1982), cert. denied, _____ U.S._____, 102 S.Ct. 179 (1982), that court had such an opportunity and rejected his testimony: Linnas was found to have engaged in the collaborationist activities alleged by the United States, based in part on the testimony of Soviet witnesses.[17] It is incongruous that the court below credited Neznansky's transcript when his "live" identical testimony was not credited by the trial judge who did evaluate his demeanor in court.

3. The Lack of Evidence of Fabrication by the Soviet Union is Consistent with the Findings of Numerous American and West German Courts

The district court's reliance on the defense "experts" is especially objectionable in light of the fact that this is the first United States or foreign court in the government's knowledge which has adopted a rule that inculpatory testimony by Soviet witnesses is per se untrustworthy.

In United States v. Koziy, 540 F.Supp. 25 (S.D.Fla. 1982), aff'd, No. 82-5749 (11th Cir. February 27, 1984), the court denaturalized defendant, in part, because of his murder of Jewish civilians in the Ukraine during World

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16. Neznansky was reported by defense counsel to reside in Edgewater, New Jersey, within the trial court's jurisdiction. Pre-trial order.

17. Neznansky also proved to be an untruthful witness. Contrary to his testimony in Linnas that he had "performed the function of a prosecutor" for many years, Neznansky admitted under cross-examination in a later case that he had worked in the procuracy for 14 years as an investigator "always at the lowest echelon" investigating criminal cases, that he was "never promoted" and that he "never performed the function of a prosecutor." Compare X1676 with 1629-632, 1634, 1638. Clearly, Neznansky was not and is not a credible witness.

War II. The sole evidence of the murders came from the testimony of witnesses videotaped in the Soviet Union and Poland. Both the court of appeals and the district court found these witneses to be fully credible and defendant's claim of KGB coercion and fabrication to be wholly without merit. See also United States v. Osidach, 513 F.Supp. 51 (E.D.Pa. 1981), appeal dismissed, N. 81-1956 (3d Cir. July 22, 1981). United States v. Palciauskas, 559 F.Supp. 1294 (M.D.Fla. 1983) appeal docketed, No. 83-3339 (11th Cir. July 20, 1983).

Even in a case where a court expressed concern about Soviet judicial procedures, the testimony of Soviet witnesses was credited either fully or in part with respect to their inculpatory testimony. In United States v. Linnas, the court relied upon the pre-trial photographic identifications made by three Soviet witnesses. The court also fully credited a fourth witness who described Linnas by name as having been involved in the concentration camp's operation. As to three of the witnesses, the court was concerned that the Soviet procurator may have influenced them by his introductory remarks referring to Linnas as a "war criminal;" accordingly, the court credited their testimony to the extent it was corroborated by documentary evidence supplied by the Soviet Union. However, the court rejected emphatically defendant's argument that it should "adopt a per se rule excluding all evidence deriving from Soviet sources:"

> We simply note one of the fatal flaws in defendant's broadbrush attack on Soviet-source evidence. In the context of this case, the defense witnesses were unable to cite any instance in a western court in which falsified, forged, or otherwise fraudulent evidence had been supplied by the Soviet Union to a court or other governmental authority.
>
> The defense was unable to come forward with any proof that any of the Government's evidence offered at trial, either testimonial or documentary, was incredible or inauthentic in any respect. We find that defendant's defense by innuendo is without any merit. [527 F.Supp. at 433-34.]

Significantly, the same defense witnesses, whose transcript testimonies were relied on by the court in this case, testified in Linnas (Lesinskis, Neznansky, Parming, Hartman) and were not credited by that court.

Courts in West Germany have also repeatedly rejected arguments that Soviet witnesses cannot be credible because of KGB coercion. Again and again, the German courts have convicted defendants of war crimes based on the testimony of Soviet witnesses. See, e.g., People v. Kurt Christmann, L.G.E. Munich, F.R.G. (Dec. 19, 1980); People v. Viktors Arajs, L.G.E. Hamburg, F.R.G. (Dec. 21, 1979).[18] As stated in Christmann:

> The Court could not accept the assertion by the defendant that all Russian witnesses, including those already deceased, were not credible because, in the course of their testimony, they had been influenced, guided and coerced by the Soviet secret service, the 'KGB' to unjustly incriminate him. [Slip op.]

The reasoning employed by these courts is equally applicable to the instant case:

a. Was the testimony of the Soviet witnesses corroborated in some respects by the defendant or by non-Soviet witnesses and documents?

As previously explained, in the course of investigation, government attorneys derived from Soviet witnesses' affidavits an extensive list of former Sauliai (riflemen association) members. When asked about the names on the list by government attorneys in a sworn (pre-complaint) interview, defendant denied any knowledge of all but two people on the list. X80-90. Subsequently, while awaiting trial, Kungys admitted to a prospective defense witness that he had indeed recognized many of the names read to him at the interview as belonging to former Saulists whose names had been kept on a "list

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18. Arajs is a Latvian national convicted of war crimes committed in Latvia.

from the commandant's office." X503. A1007-016. Significantly, this admission was made before Kungys was shown the protocols and prior to the depositions of the Soviet witnesses. Kungys' letter to the defense witness not only highlights his lack of credibility, but also corroborates the Soviet witnesses' recollections as to the critical issue of the identities of the Saulists, who had participated in the Kedainiai massacres. The letter was also corroborated by Kriunas' testimony during cross-examination that Kungys kept a "list" of his detachment members at his desk in "the commandant's office." X633, 645-46.

The government also offered the sworn statement of an elderly Israeli man who related a 1945 conversation in Kedainiai wherein Kungys was named as a participant in the 1941 killings. That statement corroborated the Soviet witnesses[19], but the district court erroneously refused to even consider this corroborative evidence under Rule 104, Fed.R.Evid. (see discussion at pp. 59-61, infra.).

Finally, the district court itself conceded that the Lithuanian witnesses' testimony was reliable and consistent with the available Western evidence concerning Nazi killings in Lithuania. A1511, 1513, 1520, 1526.

Ironically, the converse was also true in one significant example: the Soviet evidence corroborated defendant's defense. The government had claimed in its amended complaint that defendant had misrepresented facts relating to his marriage. However, the Soviet Union provided documentary evidence which

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19. As of this writing, the appellant's motion to supplement the record to include these statements, which were pre-marked as plaintiff's proposed trial exhibits, is before the merits panel. It is our understanding that, should the motion be denied, these statements will not be considered by the Court in passing on this appeal. Of necessity, we are obliged to characterize these statements for the purposes of argument.

corroborated defendant's allegations as to his marriage and, thus, contradicted the government's claim. As a result, the government was forced to dismiss this claim voluntarily. A171-93. If the Soviet Union were truly intent on manipulating the evidence to its own end, it certainly would have withheld this evidence. Its failure to do so proves either its unwillingness to fabricate inculpatory evidence or its inability to second guess western evidence.

b. Did the witnesses and Soviet authorities have advance knowledge of the evidence already available in the West or of the questions which would be asked by the American lawyers?

The witnesses in this case were not seen nor spoken to nor "prepared" by United States government attorneys prior to the commencement of depositions. They were totally ignorant of the questions to be asked by either government or defense counsel. Nor were the Soviet procurators apprised of either the government's or defense counsel's line of questioning. Without knowing the questions to be asked in advance and without knowing what documentary and testimonial evidence is already available in the West, it is impossible for Soviet authorities to prepare the numerous witnesses (especially elderly and uneducated ones) to concoct a consistent and coherent fraud incapable of detection.

While the Soviet Union may act with impunity in legal proceedings confined to its own borders, it cannot do so in cases under the scrutiny of foreign judges, lawyers and witnesses. The West German courts have correctly pointed out that success in such fraud by the Soviets Union, as many defendants have hypothesized, is beyond its capabilities.

If the propaganda value of these cases is so great to the Soviet Union, as defendant contends, then it would not risk discrediting its effort by

submitting fabricated evidence to a western court which is inevitably doomed to exposure. Many "real" Nazi collaborators fled to the West and now reside in the United States or West Germany, a fact already revealed by Congress and by numerous war crimes trials in West German and American courts. Given the availability of people who actually collaborated, it is illogical to think that the Soviet Union would risk exposure of a crude fraud against Kungys, thereby risking an end to the very propaganda which he claims motivates the Soviet Union.

c. Did the witnesses' testimony vary with regard to factual details, indicating that they were not rehearsed?

The West German courts have repeatedly found that deviations between different witnesses' testimonies and between the same witnesses' earlier and later testimonies evidenced a lack of KGB manipulation. Although deviations in testimony in some instances were grounds for questioning a witness' recollection, it confirmed the unrehearsed nature of the testimony.

The district court below, however, was critical of the lack of consistency in the Soviet witnesses' testimony. At the same time, in contradiction, the court suspected that the Soviet procurators or KGB had influenced or coerced the witnesses into giving perjured testimony.

If Soviet authorities had truly rehearsed the witnesses or used coercive tactics, then there should have been no inconsistencies between the witnesses' 1977 protocols and their deposition testimony. Presumably, the first step in "rehearsal" of perjurious testimony would have been a review of each witness' prior protocol. In view of the existence of several discrepancies between the protocols and the deposition testimony, this clearly was not done. In fact, the witnesses believably testified that they had not seen their protocols since signing them in 1977.

d. Did the witnesses exhibit independence of or disagreement with the Soviet procurator or government counsel?

The witnesses in the instant case clearly refused to make statements about which they no longer had a recollection, even when confronted with apparent prior inconsistencies. One witness defiantly refused to make a photographic identification. Another "exhibited a rather major degree of independence" in identifying Kungys' photograph (see extended discussion of these testimonies at pp. 44, 48, 50-54, infra and supra).

4. There is No Probative or Admissible Evidence in This Record Showing That Soviet Authorities Improperly Influenced the Deposition Witnesses

The district court made the finding that "it was impossible to determine whether the Lithuanian deposition testimony had been improperly influenced by Soviet authorities." A1526. The government agrees that there is no evidence showing improper Soviet influence.

Because there was no such evidence, the credibility of the Soviet witnesses should have been judged on its own merits. This the district court erroneously failed to do, having instead engaged in the unjustified expedient of striking all inculpatory testimony from the record. Factors which were of concern to the trial court prove to have been either legally or factually in error.

a. The Lithuanian Depositions Were Taken in Accordance With the Federal Rules of Civil Procedure

The depositions videotaped in Lithuania were taken in accordance with Rule 28(b), Fed.R.Civ.P. and Judge Meanor's October 14, 1984 order, as modified. The deposition procedures used have been found acceptable by federal district courts in denaturalization cases involving similar

charges.[20]

The participation of a foreign official, such as the Soviet procurator, in the depositions does not, in itself, constitute a fatal departure from acceptable procedures. Rule 28(b) specifically permits the taking of depositions in accordance with the provisions of foreign law, despite deviation from deposition procedures in this country.

In virtually all civil law countries, depositions as we know them are not allowed. Whenever a witness' testimony is taken, a foreign government official must preside.[21] The Advisory Committee notes to Rule 28(b) sanctioned the procedure "in many non-common law countries [whereby] the judge questions the witness * * * [and] the attorneys put any supplemental questions either to the witness or through the judge * * *." Note to 1963 Amendment, Rule 28, Fed.R.Civ.P.

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20. United States v. Linnas, 527 F.Supp. 426 (E.D.N.Y., 1981), aff'd, 685 F.2d 427 (2d Cir. 1982), cert. denied, ____ U.S. ____, 103 S.Ct. 179 (1982); United States v. Koziy, 540 F.Supp. 25 (S.D.Fla. 1982), aff'd, No. 82-5749 (11th Cir. February 27, 1984); United States v. Osidach, 513 F.Supp. 51 (E.D.Pa. 1981), appeal dismissed, No. 81-1956 (3d Cir. July 22, 1981); United States v. Kowalchuk, 571 F.Supp. 72 (E.D.Pa. 1983), appeal docketed, No. 83-1571 (3d Cir. July 29, 1984); United States v. Kairys, No. 80-C-4302 (N.D.Ill.), pending, United States v. Palciauskas, 559 F.Supp. 1294 (M.D.Fla. 1983), appeal docketed, No. 83-3339 (11th Cir. July 20, 1983); United States v. Sprogis, 82 CIV 1804 (E.D.N.Y.), pending.

Outside of the context of these denaturalization cases, testimony of persons behind the "Iron Curtain" has also been admitted and weighed by trial courts. See e.g., Danisch v. Guardian Life Insurance Co., 19 F.R.D. 235 (S.D.N.Y. 1956); Bator v. Hungarian Commercial Bank of Pest, 275 A.D. 826, 90 N.Y.S. 2d 35, 37 (1st Dept 1949); Ecco High Frequency Corporation v. Amtorg Trading Corp., 196 Misc. 406, 406, 94 N.Y.S. 2d 400, 402 (S.Ct.N.Y. County 1949), aff'd, 276 A.D. 827, 93 N.Y.S. 2d 178 (1st Dept 1949).

21. See, e.g., Carter, Obtaining Foreign Discovery and Evidence for Use in Litigation in the United States: Existing Rules and Procedures, 13 Int'l Law 5, 6 (1979); Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 Yale L.J. 515 (1953); Smith, International Aspects of Federal Civil Procedure, 61 Colum.L.Rev. 1031 (1961).

Nor is the fact that the depositions began with the procurator's admonition that the witness must tell the truth a disability, as the court complained. It is required in American practice, Rule 30(c), Fed.R.Civ. P.[22] The court's objection that the procurator's examination was conducted only in "broad, general terms," (A1521) also seems misplaced. The procurator's general questions merely underscore that the witnesses were not directed or led by the procurator.[23]

Finally, the court's objection to the presiding Soviet procurator in the Dailide and Kriunas depositions was based entirely on defense summaries of hearsay evidence (an anti-Soviet political/religious Lithuanian language journal -- Chronicle) to the effect that he had been an "agressive prosecutor of persons charged with [religious and political] offenses." A1521. First, none of these defense summaries referred to war crimes trials or suggested that the procurator had suborned perjury; nor did any of the cases discussed in Chronicle involve judicial assistance to a foreign country. Second, as argued at trial, this evidence was inadmissible hearsay, neither tested by cross-examination nor relied upon by experts. A1208, 1211-219. The district

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22. The West German court in People v. Christmann similarly observed that the Soviet admonition to its witness is similar to the West German admonition. (Christmann, p. 76.) The court accordingly held that the Soviet procurator's admonition to the witnesses was not coercive. Id.

23. The court's concern that the government adopted the procurator's phraseology is completly unwarranted. A1522. The very first person to use the term "Soviet activist" was the first witness, Kriunas. X562. In fact, the procurator never used that term during that deposition. Certainly, the government should not be faulted for using the terminology of its own witness. Similarly, the court's own rulings on objections to the form of questions and answers (entered on the deposition transcripts PX Q1-Q6) and trial comments show that the government's examination was "perfectly proper" and "well within the bounds of [U.S.] procedure" and "conducted in a gentlemanly manner." A281-22.

court's reliance on this hearsay evidence to support its innuendo against the Soviet procurator was clear error.[24]

b. No Translation Errors Were Alleged or Found With Respect to Testimony Implicating Kungys in Persecution and Killings

The trial court found that use of interpreters employed by Intourist, a Soviet travel agency, violated "the spirit" of Judge Meanor's October 14, 1981 order. A1523. That finding is based on the trial court's apparent unfamiliarity with the background of the order issued by his predecessor. The transcript of a hearing held prior to the issuance of that order shows that government counsel informed Judge Meanor of their intention to use "official interpreters from the Lithuanian government." A29. Even Judge Meanor's order itself shows that he did not intend to bar use of Lithuanian employees; Judge Meanor crossed out the line in the order, drafted by defense counsel, which required use of United Nations interpreters. A52. Clearly, the record shows Judge Meanor's order countenanced use of Lithuanian government interpreters.

The district court also objected that the interpreters omitted or shaded some of the testimony. However, at trial, no evidence of mistranslation was presented regarding the depositions of the two witnesses who described Kungys' role in the Kedainiai killings and persecutions: Dailide and Kriunas.

The court conceded that the Soviet-supplied interpreters "appeared to be highly qualified [and that] there is no evidence of any complete misinterpretations." A1523. This latter conclusion is not surprising in view of the fact that the same two interpreters served as interpreters in the depositions in the Palciauskas case.

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24. In the Palciauskas case, this same procurator presided over depositions taken in Lithuania at about the same time as those taken in this case. A1370-373. The court in Palciauskas received those depositions into evidence, over objection, and credited them. 559 F.Supp. at 1297.

The court's doubts rested solely on the testimony of defense witness Daiva Kezys, a radio personality. She testified about interpreting errors in the depositions of Silvestravicius, Devidonis and Narusevicius, who gave no first-hand testimony about the defendant's personal role in the killings. Kezys was not a trained interpreter. In the words of defense counsel, she is "not an expert, just a person who speaks two languages."[25] A1197.

While we do not contest that some errors appear in the translations of these three depositions, such errors were inconsequential and in no way impeded the questioning. The most egregious example identified by the court was the interpreter's ommission of Narusevicius' statement, "You can chop my head off -- I don't know," when he denied recognizing anyone in a photospread shown by government counsel. A1523. The Lithuanian translator interpreted his answer as, "No. I can't recognize. They all look so different. No I can't." X869. During the playing of the deposition at trial, the court commented that this was nothing more than a "colorful way in which [the witness] expressed himself." A616, 618-19. Indeed, the phrase appears to be a Lithuanian colloquialism nearly identical to one Kungys himself used at his deposition.[26] At another point during the trial, the court observed that "I think it is apparent the . . . interpreter was struggling on occasion to get a translation. I don't think it was willful." A624.

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25. Kezys admitted that her only training in Lithuanian had been at a "Saturday school" she attended in New York when she was 12 to 17 years old. Kezys admitted, further, that there were numerous Lithuanian dialects and that she was thoroughly unfamiliar with them. A1332-333.

26. Q: Well, is it your handwriting or isn't it?
A: I can't give my head for it. Resembles.
Q: "I can't give my head for it." Is that a colloquialism, Mr. Kungys?
A: It resembles my writing. [J. Kungys dep., May 28, 1982, 40.]

To conclude that this omission implies something nefarious is illogical and ignores the most significant implication of the witness' statement. The procurator obviously understood perfectly well what the witness had said: he would not lie for anyone and would not deviate from his testimony that he could not recognize anyone in the photospread. The true import of this rather defiant response to government counsel was that the witness was not amenable to coercion.

As to other supposed translation problems, Kezys could point to only a few insignificant errors.[27] The government reiterates that there is no evidence of any mistranslation whatsoever with respect to testimony which implicated defendant in persecutions and killings. Plainly, minor translation errors which may appear in the testimony of witnesses who have no personal

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27. For example, she suggested the following corrections to the Devidonis deposition:

(a) Kezys states that Devidonis said he was driving a car and that 16 prisoners and 4 guards were put into this vehicle. The Lithuanian interpreter stated that Devidonis said he was driving a truck. A1108.

(b) Kezys states that Devidonis said he was interrogated. The Lithuanian deposition interpreter stated that Devidonis said he was examined. A1307-309.

(c) Kezys states that Devidonis said his memory was better in 1977 but "now I have Sclerosis and I can't remember anything." The Lithuanian interpreter stated that Devidonis said his memory was better in 1977 but "now I am an invalid, I have wounds in my leg, I keep forgetting everthing." A1309-310.

Similar inconsequential change was suggested by Kezys in the Silvestravicius deposition:

> She states that the witness said he was also examined in Vilnius and that he was "brought face to face with Gylys and Gylys denied the charges." A1329. The Lithuanian interpreter did not translate "Gylys denied the charges." Defendant ignores the fact that the witness testified that he saw Gylys shooting Jews, and that he testified against Gylys, who was convicted and sentenced. X790-91, 801.

knowledge of Kungys is an inadequate record upon which to exclude the unchallenged testimony of eyewitnesses who knew Kungys well and who described his role in the massacres.

c. The Soviet Procurator Did Not Improperly Impede Cross-Examination

Contrary to the district court's assertion, the record of the depositions shows that cross-examination was unhindered by the procurator's questions. In fact, the witnesses gave full testimony regarding their own participation in the killings in Kedainiai and their knowledge of others' participation in the killings. They also responded to questions regarding their trials and convictions, if any.

During the many hours of deposition, defense counsel was rarely interrupted by the procurator. The instances cited by the court are few and misleading. The court's criticism of the Devidonis deposition, A1522, ignores the fact that defense counsel's question was answered by the witness notwithstanding the procurator's invitation "to give questions in the matter of the depositions." X720. Moreover, defense counsel later rephrased his question and elicited the same response without any comment by the procurator. X721-22. In fact, after cross-examination was completed, the procurator herself questioned the witness about his prior examinations and then invited defense counsel to ask more questions. X726. Counsel declined, since the witness did not know the defendant and had already testified fully regarding those people he could identify as participants in the killings. In short, the "critical question," A1522, had already been answered.

The court's criticism of the Kriunas deposition evidences a selective reading of that testimony. The court complained that the procurator cut short

defense questions on the subject of this witness' relation "with Soviet authorities." Id. However, a reading of the entire deposition proves the contrary. The record shows that counsel's question on this subject was answered in full before the procurator's comments about which the court complained. Immediately after the procurator spoke, defense counsel asked whether he might ask the witness how many prior statements he had signed; the procurator instructed the witness to answer the question. X610-11. In short, cross-examination was not limited or foreclosed with respect to the witness' "relations with the Soviet authorities." A1522-523. Questions of this sort were asked — at other times in the deposition -- and were answered.

The court also misinterpreted the procurator's comments about defense questions concerning the clothing of the dead persons who had been shot in Kedainiai. Id. In fact, the procurator was instructing a tired and agitated witness, Kriunas, to answer defense counsel's question. In response to the question posed, the witness replied that he had already answered it. At this point, counsel for the government -- who did not hear defense counsel — asked that the question be repeated. The procurator then repeated the witness' answer, whereas government's counsel had asked for repetition of the question. In short, there was a misunderstanding. The witness' agitation was quite understandable, since it was then about 9 p.m. (commencement of the deposition had been delayed from 10 a.m. to 5 p.m. because defense counsel had arrived late). The procurator's remarks were no more than an attempt to calm the witness and elicit a response for defense counsel. The witness then complied and fully answered follow-up questions as well — without any interruption. X631-34.

The depositions demonstrate the independence of the witnesses and the fact that they were not susceptible to pressure from counsel — or from the

procurator. They also reflect the wide-ranging questions which were asked and answered. The government suggests that this Court view the critical videotapes so that it may confirm the extent to which the district court's conclusions were clearly erroneous.

5. There is No Evidence that Soviet Authorities "Distorted" the Witnesses' 1977 Protocols

The court expressed concern that inconsistencies between two witnesses' depositions and their 1977 protocols suggested that Soviet authorities incorporated statements in the protocols which had not in fact been made by the witnesses. The court hypothesized only that this "may" have occurred, but did not make a concrete finding that such witness tampering had in fact taken place. However, we submit, a review of the entire testimonies and 1977 protocols[28] of these witnesses reveals that the court's concerns are pure speculation and that the inconsistencies reflect either normal loss of recollection, or the witnesses' own efforts to protect defendant. Further, the district court refused to allow into evidence the 1977 protocols when the government proffered them. The court put itself in the untenable position of conjecturing about the distortion of earlier testimonies which are not even part of the record of this case.[29] A435, 593-600, 614-22, 674-84, see also 1439-441, and 1461-464.

The court apparently found no significant inconsistencies between the 1977 protocol and the deposition testimony of witness Kriunas. The court's criticism focused solely on the prior statements of the witnesses Rudzeviciene

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28. See footnote 19, supra.

29. See discussion beginning at page 56.

and Dailide. However, the depositions of these two witnesses best illustrated the independence of the witnesses in the Soviet Union and the fact that their testimony was neither distorted nor suborned by Soviet authorities. Indeed, both of these witnesses made it quite clear that, because of their close personal associations with defendant, they were prepared to mitigate wherever possible the most damaging testimony against Kungys.

Mrs. Rudzeviciene, defendant's sister-in-law, has visited Kungys in the United States for a substantial period of time in recent years. Throughout much of her testimony, she was completely unresponsive to questions which she believed might hurt her brother-in-law. Rather than answer such questions directly, she was evasive or simply stated whatever she thought would help the defendant. The court focused on the fact that Mrs. Rudzeviciene refused to acknowledge knowing defendant's birth place; even after the procurator read her a portion of her 1977 protocol in which she identified defendant's birth place, she still refused to admit that she had such knowledge. X1066, 1041, 1074, 1076, 1078,1079, 1081-2; compare 1089 with 1101-102, 1034-035, 1039-040. A1524.

The district court assumed that Mrs. Rudzeviciene testified truthfully at deposition and that, accordingly, the Soviet officials who prepared her 1977 protocol must have inserted that information without her consent. That supposition reaches far beyond the record evidence in this case and ignores other evidence pointing to the likelihood that Rudzeviciene was, quite simply, lying. For example she admitted that she had attended medical school with defendant's sister. X1032,1066. Rudzeviciene, therefore, was well acquainted with Kungys' family for many years through his sister and her own sister. Moreover, she visited Kungys at his home after the commencement of the I.N.S.

investigation into his alleged activities at Kedainiai, and they discussed those charges. X50, 1047, 1084-5; but see 99-100.

While the record points quite fairly to the conclusion that Rudzeviciene resisted giving testimony which she believed was harmful to defendant, the court went beyond the record to assume that the inconsistencies were the consequence of nefarious activities by the the KGB in 1977. That conclusion assumes that in 1977 Soviet officials had the perspicacity to foresee that in 1982 a lawsuit would be filed against Kungys and that misrepresentation of his birthplace would be charged. That conclusion concomitantly undermines one of the court's other primary assumptions: that the KGB unduly pressured the witnesses to provide testimony incriminating Kungys. If such pressure had indeed been used, Rudzeviciene would not have contradicted her prior statement.

The court's comments with respect to Jonas Dailide ignore the record and reach for unsubstantiated conclusions. The only aspect of Dailide's 1977 protocol which the court criticized "with certainty" related to the language used in the affidavit. The court commented that "it is inconceivable that [Dailide] would have used the words attributed to him such as 'the bourgeois nationalist gang members' and 'Hitlerite Soldiers.'" The court concluded that this language was the "invention of the Soviet interrogators." A1524.

A search of the record in this case, however, fails to produce any evidence whatsoever to support the conclusion that this language is attributable solely to the Soviet interrogators and not to Soviet citizens generally. In fact, terms such as "Hitlerite" were commonly used during the period of the Second World War and have been used continuously since then in

the Soviet Union as that country's analog to "Nazi."[30] The terminology "Hitlerite" or "bourgeois" is common to present-day Soviet society; there is nothing at all incredible about the fact that such language would have been incorporated into Dailide's 1977 protocol. The fact that at his deposition his testimony was translated to refer to Nazis, as opposed to Hitlerites, hardly proves the point that this witness was a victim of manipulation.

The balance of the court's commentary on Dailide is significant for its equivocal tone. The court relies heavily on the fact that Dailide testified in 1982 that he could no longer recall some of the facts set forth in his 1977 protocol. The court then concludes that:

> one is left to speculate whether Dailide had forgotten what he told the Soviet investigators in 1977 or whether the Soviet investigators had written a protocol which departed marketedly from what Dailide actually said. One is also left to speculate whether what is stated in the protocol is true, whether what Dailide first testified to is true or whether both the protocol and the original testimony are false in so far as it [sic] relates to defendant. A1524.

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30. Indeed, on behalf of the three allied powers -- the United States, United Kingdom and the Soviet Union -- Franklin D. Roosevelt, Winston Churchill and Joseph Stalin jointly signed an agreement in 1943 on the subject of German atrocities in which they stated:

> The United Kingdom, the United States and Soviet Union have received from many quarters evidence of atrocities, massacre and cold blooded mass executions which are being perpetrated by the Hitlerite forces in the many countries they have overrun and from which they are now being steadily expelled. The brutality of Hitlerite dominations are no new thing and all the peoples or territories in their grip have suffered from the worst form of government by terror . . .

History of the United Nations War Crimes Commission and the Development of the Laws of War, compiled by the United Nations War Crimes Commission (London): His Majesty's Stationary Office, 1948) 107. (Emphasis supplied.) See also, the remarks of British Foreign Secretary Anthony Eden in the House of Commons, (17 Dec. 1942):

> "* * * [S]uch events can only strengthen the resolve of all freedom-loving peoples to overthrow the barbarous Hitlerite tyranny." Id. 106. (Emphasis supplied.)

The court conceded that its comments are nothing more than speculation. The record reveals that even the speculation is unjustified.

Jonas Dailide was a very cautious witness whose attempts to help the defendant are evident throughout his testimony. Dailide has had long standing ties to the defendant and to Mrs. Kungys' family. He had been a roommate of Mrs. Kungys' brother while both of them were studying in Kaunas, Lithuania. X1083. In Kedainiai, Dailide and Kungys lived together as boarders in the house owned by Mrs. Kungys' parents. X921. Dailide continued living there for a total of 10 years, until 1950. X978. He has also kept in touch with the family since that time. Indeed he discussed Kungys' role in the killings with Mrs. Rudzeviciene sometime in 1981. X918, 995, 1099.

Most importantly, Kungys literally saved Dailide's life in 1941. At the time of the murder of the Jews in Kedainiai, Dailide was present when a Jewish victim (Slapoberskis) ran from the killing ground; Dailide did nothing to prevent the escape. Seeing this, an enraged German officer ordered Dailide shot for his refusal to carry out orders. Kungys saw his friend's plight, and apparently saved Dailide, who was then ordered to the barns to load the old and disabled Jewish victims into trucks. X949-50, 960, 1001-2.

Thus, at his deposition, Dailide was very careful to mitigate Kungys' culpability in the killings. He emphasized that most of the Lithuanian participants were required to help collect the victims and guard them under threat of deportation to Germany for forced labor, and that Kungys did nothing more than act as a leader of one small detachment. X852, 947-49, 997-98. He was also steadfast in maintaining that he did not see Kungys fire a weapon during either the killings of the Soviet activists or of the Jews. Id.

Similarly, Dailide insisted that, in signing the photospread, X197, he note on defendant's photograph that it only "resembles Kungys." X984-87.

The court ignores Dailide's inclination to assist defendant and assumes, instead, that inconsistencies between Dailide's 1977 protocol and his 1982 testimony were the product of Soviet misconduct. These inconsistencies revolve about two questions, viz. whether, as written in his 1977 statement, (1) Dailide saw Kungys at Babences forest "with a pistol in his hand directing the shootings" and (2) whether he saw a wardrobe of Jewish clothing "at Kungys' home" after the shootings.[31] A1516-517. X984-87.

At his deposition, Dailide -- then 75 years old -- stated that he had no present recollection of some of these matters, even after parts of his 1977 statement were read to him.[32] Although Dailide did not recall some details of his 1977 testimony (X969), he did recall other details (X972-73). Moreover, he stated that his prior testimony was truthfully given and properly recorded in the protocol, but that "there are things which I don't remember now." Id.

Plainly, there was an inadequate record to support the court's written opinion that Dailide was "reduced" to acknowledging the truth of his 1977 statement. At trial the court observed that Dailide gave the appearance of testifying "forthrightly and honestly" and that his testimony had a "ring of authenticity." A677-684. The court's complete reversal on this point in its decision is inexplicable.

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31. Significantly, defendant's sister-in-law testified that her family was suspected of having Jewish furniture. X1081-082.

32. The deposition testimony established that, prior to testifying, none of the witnesses had been shown their earlier sworn statements. The government reiterates that this fact refutes the court's supposition that Soviet authorities "orchestrat[ed]" the depositions. The starting point for such orchestration would undoubtedly have been a careful review of the prior affidavits.

5. No Adverse Inference May be Drawn Against the Government on the Basis of Unavailable Testimony Not in its Possession Custody or Control

One of the principal reasons the court barred use of the Lithuanian depositions was the unavailability of certain prior testimony given by the deponents and other persons. A1526-527. This prior testimony was never requested by the defense during discovery, despite ample notice of its existence. At the trial, however, the court ordered the government to ask Soviet authorities for this testimony; the government complied, but no statements were transmitted prior to judgment. A1473-474. The court speculated that the statements were withheld deliberately by Soviet authorities because their contents might "reflect adversely" on the deposition testimony. That assumption is unwarranted, especially since some of the statements in question date to 1946.

At the outset, it should be noted that, as a matter of law, the court erred in drawing this adverse inference against the government. The government cannot be charged with wrongdoing or suffer an adverse inference because of the unavailability of records in the sole possession, custody and control of foreign officials. United States v. Cotoroni, 527 F.2d 708 (2d Cir. 1975), cert. denied, 426 U.S. 906 (1976). See also Savard v. Marine Contracting Inc., 471 F.2d 536 (2d Cir. 1972), cert. denied, 412 U.S. 943 (1973); Slan v. A/S Det. Danske-Franske, 479 F.2d 288 (5th Cir. 1973).

Four months prior to the taking of the Lithuanian depositions, the government furnished defense counsel with published excerpts of 1964 testimony given in Lithuania by two witnesses whose depositions were noticed. In addition, 16 sworn statements given by other persons in Lithuania, including all

deponents, were produced; all the statements were taken commencing in late 1976 in response to a United States judicial assistance request. Some of that testimony implicated the defendant; some did not.

Prior to the taking of the Lithuanian depositions, the defense brought an unsuccessful motion for sanctions for failure to provide adequate responses to defendant's second set of interrogatories; the defendant did not seek production of prior testimony at that time. Judge Meanor ruled that the government had no obligation to obtain any more information concerning the witnesses because the defendant had already been given all that the government had. A66; see also 275.

During four of the depositions in Lithuania (in 1982) the witnesses stated that they had given statements even prior to 1977. Kriunas and Dailide had been interviewed in 1946, for example; government counsel had been totally unaware of these latter two statements and had no knowledge whether they still existed. At the conclusion of these four depositions, defense counsel stated that he could not complete cross-examination because he had not been provided with copies of these pre-1977 testimonies. The government advised defense counsel that they were not in possession of the statements. Defense counsel did not ask government counsel nor the procurator at the depositions for the prior testimony; nor did defense counsel subsequently ask the government to obtain this prior testimony. A274-91. At trial, the court chastised defense counsel for his "neglect" in failing to have requested the material; the judge also stated that he was "not criticizing" the government for not having asked for the prior testimony. A443-46. In its decision, however, the court held that the government "was remiss" in not having obtained the prior testimony because that testimony might "reflect adversely" on the depositions. A1526.

The court erred by drawing an adverse inference from the fact that the government did not provide information which was not in its possession and which the defendant -- despite notice -- never requested.[33]

6. The Court Erred in Excluding the Deponents' 1977 Statements

The court stated that the "accuracy" of the 1977 protocols is a "critical issue" because disavowel of any part of those statements by a witness would have been tantamount to criticism of the Soviet regime. A1525. As demonstrated above, the depositions show that the witnesses did not in fact feel bound by the 1977 statements: where their present memory of those events differed, they freely said so. They were not at all disposed to change their deposition testimony when conflicts with their earlier statements were pointed out to them by counsel or the procurator.

The court concluded that such discrepancies as do exist between the 1982 deposition testimony and the 1977 sworn statements, are the result of sinister "invention [by] the Soviet interrogators." A1524. However, when the government offered the 1977 protocols into evidence as prior consistent statements, pursuant to Rule 801(d)(1)(B), Fed.R.Evid., the court refused to

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33. The court has created a burden on the government in this civil proceeding which does not exist even in a criminal case. In a criminal case, the government may not be penalized for failing to disclose requested information upon "the mere possibility that [it] might have helped the defense, or might have affected the outcome of the trial * * *." United States v. Agurs, 427 U.S. 97, 109 (1976). Since the prior testimony in the case was unavailable to both plaintiff and defendant, and because there is no basis in the record for concluding that defendant might have been assisted by these statements, there has been no prejudice to either side. Compare United States v. Greco, 298 F.2d 247 (2d Cir. 1962), cert. denied, 369 U.S. 820 (1962); Calley v. Callaway, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911 (1976).

admit them and, later in the trial, threatened the government with dismissal for prosecutorial misconduct if it insisted on proferring other similar statments of non-deponents. A674, 598-9, 435, 614-22. See also A1451-454. The court's position with respect to the prior testimony is contradictory. On the one hand, the court criticized the testimony of witnesses because of inconcistencies between their 1982 depositions and selected portions of their 1977 protocols, which had been read into the record during the depositions. The court concluded therefrom that Soviet officials must have been the "authors" of the inconcistent statements in the 1977 protocols.

On the other hand, if the court truly believed that these witnesses may have been unduly influenced by Soviet authorities, it was obligated pursuant to Rule 801(d)(1)(B) to accept into evidence the entirety of the 1977 protocols so that it could also examine the extent to which they reflected agreement with the witnesses' deposition testimony. Rule 801(d)(1)(B) provides that a witness' prior statement is admissible as non-hearsay if it is:

> consistent with [the witness'] testimony and if offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive * * *.

Given the court's suspicions about Soviet influence, it was clearly error to exclude from the record the prior protocols, which would have placed in context both the consistencies and inconsistencies between the 1977 statements and 1982 testimony. The government believes that the court's exclusion of the prior protocols as non-hearsay evidence under Rule 801(d)(1)(B) erroneously excluded from the record testimony which was both relevant and admissible. That error is ground for reversal. Garcia v. Watkins, 604 F.2d 1297 (10th Cir. 1979). See also United States v. Provenzano, 620 F.2d 985 (3rd Cir. 1980), cert. denied, 449 U.S. 899 (1980).

7. The Court Erred in Refusing to Admit Corroborating Documents and to Consider Non-Witness Affidavits in Aid of its Decision Whether to Admit Soviet Witness Testimony for Use Against Kungys

In addition to the prior consistent statements of the deponents, the government also offered into evidence corroborating Lithuanian documents and the affidavits of Soviet witnesses who were either deceased or too ill to attend the depositions. The government also offered the affidavit of an elderly Israeli witness who was not brought to the trial. The trial court, however, refused to consider a proffer of this evidence and stated that, if a proffer were made, a motion to dismiss the case for prosecutorial misconduct might be entertained.[34] A1461-464.

Although these prior statements were hearsay, they were properly offered to support the government's arguments in favor of the admissibility of the Soviet depositions. Pursuant to Rule 104, Fed.R.Evid., they should have been admitted for that limited purpose, especially in view of the fact that the court relied on the clearly hearsay articles in Izvestia and the Chronicle as a basis for deciding that the Soviet depositions were not admissible. Rule 104 provides:

> (a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

A. Israeli Witness (Kurlandcik)

In 1976, the Israeli police, at the request of the INS, took a statement from an Israeli citizen named Kurlandcik. Kurlandcik had been a resident of Kedainiai who fled the town and thus survived the war. When he returned to

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34. See footnote 19, supra.

Kedainiai in the summer of 1945, he inquired about the remainder of his family. He was told at that time that they had been murdered, along with the rest of Kedainiai's Jews. Townspeople of Kedainiai -- including a now-deceased Jewish survivor of the killings -- identified Kungys as a participant in those killings.

This statement clearly was hearsay. However, pursuant to Rule 104(a), that statement should have been considered by the court to aid it in deciding the admissibility of the testimony of Kriunas and Dailide. See also A284-91. The Kurlandcik statement indicates that Kungys' involvement in the Kedainiai murders was a subject of discussion (whether rightly or wrongly) as long ago as 1945. This means that defendant's argument that the KGB orchestrated the accusations against him requires a belief that the Soviet secret police commenced this putative disinformation campaign in 1945. Alternatively, the court would have had to assume that Kurlandcik, who was an Israeli emigre from the Soviet Union, was himself coerced or suborned by the KGB. Both assumptions are unsupported by the record.

B. Soviet Non-Witness Protocols

At the close of trial, the government offered into evidence the protocols of persons who could not testify at deposition because of illness or death. The government's purpose, again, was not to offer this hearsay to prove the truth of defendant's involvement in murder, but to support its argument that the Kriunas and Dailide depositions were reliable and should be admitted. The protocols could have served this purpose because, when read as a group, they show a normal pattern of consistencies and inconsistencies which would be found among any group of witnesses presenting a synoptic view of history. The breadth and style of these recollections are sufficiently varied as to dispel

the notion that an omniscient KGB was the author of all of these testimonies. To this end, the protocols should have been considered by the court pursuant to Rule 104(a).

We believe that the court's refusal to consider the Soviet and Israeli affidavits for the limited purpose for which they were offered, especially after the court considered other hearsay evidence submitted by defendant, was reversible error.

C. Lithuanian 1941 Reports Regarding Jews and Kedainiai

To corroborate the witnesses' testimony regarding the participation of local men in the persecutions and killings at Kedainiai, the government offered contemporaneous Lithuanian police and army reports. X504, 508, 512, 516. The documents record a formation of about 400 men in the county and 120 local men in Kedainiai city itself who "maintain order." X520. This document helps corroborate testimony that about 100 Kedainiai men participated in these groups, X569-72; 679-81; 696; 843-5; 922-5, including testimony that Kungys was a leader of one such detachment numbering 20 to 30 men. X569-72, 580; 922-27; see also X793, 810-1; 862-3. Similarly, the remaining documents report the rounding up of the Jewish residents of Kedainiai county in early August 1941, prior to the massacre. The records were duly certified under Rule 902(3), Fed.R.Evid., by Lithuanian archivists and by Soviet Embassy officials in Washington, D.C., and were offered as exceptions to the hearsay rule under 803(b) (business records), 803(8) (public records and reports) and 803(16) (ancient documents). A1439-50. The court rejected the documents in evidence as cumulative and insufficiently identified, A1450; but see the testimony of Dr. Raul Hilberg, an historical expert, A487, 536, 541, 571-8.

Plainly, the documents were properly certified and should have been admitted because they corroborated the Lithuanian deposition testimony. Documents bearing such Soviet Embassy certifications have been held admissible under Fed.R.Evid. 902(3) by the Eleventh Circuit Court of Appeals. United States v. Koziy, No. 82-5749 (11th Cir. February 27, 1984) slip op. at 1780. Despite the court's concern that all information on Kedainiai be obtained, it refused in evidence the available materials which were offered. That refusal was error.

VIII. CONCLUSION

For each of the reasons stated above, the government respectfully asks this Court to reverse the judgment of the district court and to enter judgment for the appellant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of Appellant's brief and one copy of the appendix (three volumes) and trial exhibits (four volumes) were sent express mail, postage prepaid, return receipt requested, to:

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