U.S. Department of Justice

Criminal Division

051

MMR:CLGittens:be
Typed: 8/29/85

Exec Sec 5080809467

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

SEP 9 1985

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SEP 10 1985

OFFICE OF
SPECIAL INVESTIGATIONS

Honorable Thomas M. Foglietta
House of Representatives
Washington, D.C. 20515

Dear Congressman Foglietta:

This is in further response to your letter of August 1, 1985, on behalf of Helena Kozak who wrote expressing concern regarding the use of Soviet-source evidence by this Department's Office of Special Investigations (OSI). Ms. Kozak further urged that the Judiciary Committee conduct oversight hearings on the activities of OSI.

We are very much aware that many American citizens have concerns based upon their perception of OSI's investigations and prosecutions. This issue, especially for those who have been touched by the ruthless oppression of Soviet communism, is not an easy one.

However, we firmly stand by our contention that OSI's procedures are proper and correct and that OSI officials are exercising great care with respect to evidence formulated by the Soviet Union.

OSI continues to be mindful of the sensitivities and potential problems which might flow from the use of Soviet evidence. Indeed, defendants have many times relied heavily, and in some instances exclusively, on the Soviet-evidence issue in challenging our proof during litigation. OSI has gone to great lengths to ensure the legitimacy of all of its evidence, including that received from the Soviet Union. For example, the Soviets have provided original wartime documents and have allowed them to be subjected to scientific testing to determine authenticity. Expert handwriting and document examiners scrutinize the evidence looking for any signs of fabrications or inauthenticity. In not one instance has an expert concluded that any such document has been forged nor has any court made such a finding.

Soviet evidence used by OSI is, in fact, closely scrutinized and evaluated by both the government and the courts. American procedures and laws provide ample opportunity to uncover fabricated or tainted evidence. Our rules of evidence and procedure provide the safeguards to prevent miscarriages of

Records (146-2-47-P.5)
Exec Sec (2), 4416 Main
OLIGA, 1603 Main
Richard, 2113 Main
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OSI Chron, 200 HAM

justice. The overwhelming majority of courts which have faced these issues have confirmed that OSI's reliance on Soviet evidence is proper.

Congress has consistently exhibited a keen interest in the activities of OSI since its inception and we have always been cooperative with regard to any and all Congressional inquiries relative to OSI's operations. Additionally, the Department constantly reviews the procedures and methods of OSI to assure strict adherence to due process and the exercise of great care with respect to the gathering and use of evidence from whatever source. We are absolutely confident that OSI is carrying out its mission with sound prosecutorial practices scrupulously protecting the civil rights of those who might be charged.

I appreciate your bringing Ms. Kozak's letter to our attention and hope that this information will be of help to you. If you should obtain any evidence which indicates a problem with the prosecutions conducted by OSI, please be sure to let me know and we will look into it.

Sincerely,

/s/ MMR

Mark M Richard
Deputy Assistant Attorney General
Criminal Division

U.S. Department of Justice

Criminal Division

MMR:CLG:MWolf:be
Typed: 9/6/85

Exec Sec 5080709302

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

SEP 12 1985

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SEP 13 1985

OFFICE OF
SPECIAL INVESTIGATIONS

Honorable Marge Roukema
House of Representatives
Washington, D.C. 20515

Dear Congresswoman Roukema:

This is in further response to your letter of August 2, 1985, to the Attorney General regarding a petition you received from a number of your constituents concerning the deportation of suspected war criminals by the United States with particular reference to deportation to the Soviet Union.

At the present time, no person has been ordered deported to the Soviet Union based solely on testimony provided by that country. The only person deported to the Soviet Union because of activities during World War II was ordered denaturalized and deported based on evidence provided by Western sources.

In all deportation cases brought by the Department of Justice, the Department offers to the court all evidence which it believes is authentic and probative, regardless of its source. All such evidence is rigorously checked for authenticity. Accordingly, documentary and testimonial evidence from the Soviet Union has been offered into evidence, along with evidence from many other countries. Each individual judge is then free to determine which evidence is credible and whether the evidence is sufficient to justify deportation. Over the past several years, many judges have considered evidence from the Soviet Union. In no case has a court found the documentary evidence from the Soviet Union was inauthentic. As to the testimony of Soviet witnesses, many courts have credited such testimony, while some judges have declined to credit the testimony of individual witnesses. Our experience in these cases satisfies us that the American judicial system is perfectly capable of considering evidence of this sort and has performed its functions admirably.

It is possible that in a future case a deportation court could decide to deport someone to the Soviet Union based on evidence derived solely from that country. That decision would be made by an independent judge, whose decision is subject to three levels of appellate review. As I have stated, however, the Department has not yet confronted such a situation.

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Wolf, 200 HAM
OSI Chron, 200 HAM

I trust that this letter is sufficiently responsive to the information you need to address the concerns of your constituents. If I can be of further assistance to you, please do not hesitate to call or write.

Sincerely,

Mark M Richard
Deputy Assistant Attorney General
Criminal Division

U.S. Department of Justice

Criminal Division

MMR:CLGittens:be
Typed: 9/4/85

Exec Sec 5082910624

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

SEP 12 1985

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SEP 13 1985
OFFICE OF
SPECIAL INVESTIGATIONS

Honorable Carl D. Pursell
House of Representatives
Washington, D.C. 20515

Dear Congressman Pursell:

This is in further response to your letter of August 22, 1985, on behalf of Lesia A. Melnyk concerning the activities of this Department's Office of Special Investigations (OSI).

As you know, in 1978, Congress enacted Public Law 95-549, which renders deportable any alien in the United States who took part in persecution in collaboration with the Nazi regimes of Europe from 1933 to 1945. The Department of Justice has the primary responsibility for enforcing that law. OSI was established in 1979 to detect, investigate, and, where appropriate, to take legal action to deport, denaturalize, or prosecute any individuals who assisted the Nazis by persecuting any persons because of race, religion, or political opinion, and who later entered the country illegally.

Let me say most emphatically that there is no "KGB-OSI collaboration" as implied in Ms. Melnyk's letter. In carrying out its mission, whether in Soviet territory or any other country in the world, OSI contacts with officials from other countries are made through established State Department channels. Requests for judicial assistance by OSI - to whatever country - are approved and transmitted through the State Department in Washington, D.C., to the cognizant United States Embassy where, through established diplomatic procedures, the request is forwarded on to the host country. Response to the request is returned to OSI through the same established diplomatic channels.

Congress has consistently exhibited a keen interest in the activities of OSI since its inception and we have always been cooperative with regard to any and all Congressional inquiries relative to OSI's operations. Additionally, the Department constantly reviews the procedures and methods of OSI to assure strict adherence to due process and the exercise of great care with respect to the gathering and use of evidence from whatever

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source. We are absolutely confident that OSI is carrying out its mission with sound prosecutorial practices scrupulously protecting the civil rights of those who might be charged.

I trust that the foregoing adequately addresses your concerns and those of your constituent. Please do not hesitate to write if I can be of further assistance to you.

Sincerely,

Mark M Richard
Deputy Assistant Attorney General
Criminal Division

051

Nos. 85-1314 and 85-1397

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee
and Cross-Appellant

v.

LIUDAS KAIRYS,

Defendant-Appellant
and Cross-Appellee

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 85-1314 and 85-1397

UNITED STATES OF AMERICA,

Plaintiff-Appellee
and Cross-Appellant

v.

LIUDAS KAIRYS,

Defendant-Appellant
and Cross-Appellee

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

STATEMENT OF THE CASE

In August 1980, the United States brought this action to revoke the naturalized citizenship of defendant Liudas Kairys. The action is based on Section 340(a) of the Immigration and Nationality Act of 1952, as amended ("INA"), 8 U.S.C. 1451(a). The government alleged that defendant's wartime service as a guard with the Nazi SS-Wachmannschaft rendered him ineligible for a visa under the Displaced Persons Act of 1948 ("DP Act"); because defendant's visa under the DP Act was unlawfully obtained, his subsequent naturalization was "illegally procured." The government also alleged that, in obtaining his visa and his citizenship, defendant concealed or misrepresented material facts as to his date and place of birth and his whereabouts and activities during World War II.

The non-jury trial was held in 1982. In December 1984, the district court issued its decision revoking defendant's citizenship on the ground of illegal procurement.[1] The court found that defendant had been a guard platoon leader at the Treblinka forced labor camp in Poland and that, in this position, he assisted in the persecution of Treblinka's inmates.[2] Because the DP Act barred the issuance of visas to persons who assisted

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1 The decision of the district court is reported at 600 F. Supp. 1254. Citations in this brief are to the memorandum opinion and order ("Op."), which is attached to Kairys' Opening Brief.

2 Treblinka had two camps approximately one mile apart: an extermination camp and a forced labor camp. Unless otherwise noted, references to "Treblinka" in this brief refer only to the forced labor camp, where defendant served.

in the persecution of civilians, the court held that defendant's visa and, hence, his citizenship were illegally procured. The court held, however, that the government failed to establish its claims based on concealment and misrepresenation of material facts.

Defendant appealed the order revoking his citizenship. The government filed a cross-appeal from the denial of claims alleging concealment and misrepresentation (Counts I and III of the complaint).

QUESTIONS PRESENTED

Defendant's appeal raises the following questions:

1. Whether the district court's finding that defendant was a guard at Treblinka is clearly erroneous.

2. Whether discovery rulings by the district court deprived defendant of due process.

3. Whether the district court erred in holding that defendant's citizenship should be revoked under the illegal procurement provision of Section 340(a) of the Immigration and Nationality Act, as amended.

4. Whether the district court erred in holding that laches is not a bar to this action.

5. Whether the district court erred in denying defendant's request for a jury trial.

The issues presented by the government's cross-appeal are:

1. Whether the district court erred in holding that the government failed to prove that defendant obtained his visa by willfully misrepresenting material facts.

2. Whether the district court erred in holding that the government failed to prove that defendant obtained his citizenship by willful misrepresentation or concealment of material facts, within the meaning of Section 340(a) of the INA.

STATEMENT OF FACTS

The critical facts in this case are virtually all set forth in the district court opinion. The following is an abbreviated summary.

A. Defendant's pre-war background

Defendant was born in Svilionys, a small village in eastern Lithuania, on December 24, 1920 (Op. 17).[3] In 1920, Svilionys was under Polish sovereignty (Op. 2). Defendant remained in Svilionys until late 1939 or early 1940, when he moved to Vilnius, Lithuania's capital (Op. 17). In the spring of 1940, defendant obtained Lithuanian citizenship and entered the Lithuanian army (Op. 7, 17). In June 1940, the Soviet Union occupied all of Lithuania and absorbed the Lithuanian army into the Soviet army (Op. 2-3, 7).

---

[3] Defendant's name at birth was Liudvikas Kairys. Luidas is a short form of Liudvikas; the German version is Ludwig (Op. 10).

B. Defendant's capture by the German army and entry into an SS guard unit

In June 1941, Germany invaded the Soviet Union (Op. 3). Sometime thereafter, defendant, along with other members of his Soviet army unit, was captured by the Germans and was sent to a prisoner-of-war camp in Hammerstein, Pomerania (Op. 7).

In 1942, Germany began "Aktion Reinhard," a plan for the systematic extermination of all Jews in Europe (Op. 3). A Nazi party organization, the Schutzstaffel or SS, was largely responsible for implementation of this plan (Op. 3). The extermination process utilized a variety of methods, including the operation of concentration camps, extermination camps, and forced labor camps (Op. 3).

The SS recruited war prisoners, including Baltic and Ukrainian members of the Red Army, to be guards at the camps (Op. 3-4). Such persons were inducted into guard units known as the SS-Wachmannschaft (Op. 4).

In June 1942, defendant and other prisoners at Hammerstein were recruited into the SS-Wachmannschaft and were sent to Trawniki, Poland for training (Op. 8, 14, 17). Defendant thereafter served with the SS Kommando Lublin, a unit of Trawniki guards in Lublin, Poland. In August 1942, he was promoted to the rank of Oberwachmann and in March 1943 was transferred to Treblinka (Op. 14, 17). The labor camp had four platoons of guards, all of whom were armed (Op. 6); each platoon contained ten to twenty-five guards (Op. 6). Defendant was the leader of one of the platoons (Op. 15-17).

The district court found "beyond any reasonable doubt" that defendant served as an Oberwachmann at the Treblinka labor camp (Op. 17).

C. Conditions at the Treblinka labor camp

The prisoners at Treblinka were Jews and Poles (Op. 4), whose existence in the camp was described as follows (Op. 4-6):

> The Treblinka labor camp was under the administration of German SS officers. Food rations for prisoners at the labor camp were inadequate and medical care for prisoners was virtually non-existent. Much of the labor performed by prisoners was exceedingly strenuous . . . . Prisoners at the labor camp were forced to work year-round, regardless of the weather. . . . As a result of these conditions the death of prisoners by disease or exhaustion was a weekly, and sometimes a daily, occurrence. Prisoners who became too weak to continue working were killed by members of the guard unit and the German SS. In addition to those deaths, prisoners of the Treblinka labor camp were shot, hanged, beaten or stabbed to death with and without apparent reason by the German SS and the camp's guards. During the course of its operation several thousand Jewish prisoners died at the labor camp . . . .
>
> While the camp was not a death camp as such, unlike the nearby Treblinka extermination camp, it was anticipated that the prisoners at the Treblinka labor camp would, in due course, die from disease, malnutrition or overwork.

Fifteen German SS officers served at the labor camp (A.47-48).[4] Thus, most of the staff members were the SS-Wachmannschaft guards (Op. 6).

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[4] The pages of the Appendix for the United States are cited, e.g., as "A.47."

Defendant's appendix (Kairys' Opening Brief Appendix) uses tab numbers. Citations to defendant's appendix are in the form "Tab 7."

In July 1944, as the Soviet army approached Treblinka, the Germans abandoned the labor camp (Op. 6).[5] Prior to leaving, the SS and guards shot to death in one day virtually all of the Jewish prisoners -- approximately 300 people (Op. 6). "Members of the guard unit participated in that massacre" (Op. 6).

D. Defendant's actions after leaving Treblinka

After Treblinka was closed, the guards retreated into Germany (Op. 6). In February 1945, they assisted in the clearing of rubble after the firebombing of Dresden (Op. 6). Defendant admitted that he was in Dresden at that time (Op. 9).

At the end of the war, the guard unit was in Czechoslovakia (Op. 6). Defendant admitted that he was in Prague when the war ended (Op. 9).

From the end of the war until February 1947, defendant lived and worked on farms in Germany (Op. 10). In 1947, he commenced work as a civilian for the United States Army (Op. 10).

E. Defendant's visa misrepresentations

In 1949, defendant commenced the application process for a visa under the DP Act (Op. 10). The DP Commission and then the State Department screened all visa applicants under that Act (Op. 25-26, citing the procedures described in Fedorenko v. United States, 449 U.S. 490 (1981)). The DP Commission would first issue an eligibility report (Tab 48). If found eligible, the

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5 The extermination camp was closed in the fall of 1943 (Op. 6).

applicant would thereafter file a written visa application with the State Department (Op. 29).

Defendant's DP Commission eligibility report stated that he was born on December 20, 1924, in Kaunas, Lithuania, and that he had worked on his father's farm from 1940 until 1945; it also stated that defendant had never been a member of a movement hostile to the United States (Tab 48). Defendant's visa application, signed under oath, repeated the above date and place of birth and stated that his wartime residence was in Radviliskis, Lithuania, as well as other places in Lithuania (Tab 49). The district court found that the visa application contained "false birth date, false place of birth and false residences" and that these misrepresentations were "willful" (Op. 30).

The district court found, however, that, because defendant had not necessarily been asked about his wartime activities by immigration officials, he had not misrepresented or concealed his service in the SS-Wachmannschaft (Op. 28-29).

F. Defendant's naturalization misrepresentation

In 1957, defendant applied for U.S. citizenship, which was granted that same year (Op. 10). In his naturalization application, he again swore under oath that he was born on December 20, 1924, in Kaunas (Tab 50). The district court found that this information was willfully misrepresented (Op. 30).

In response to a question requiring him to list all organizational memberships (including during the war), defendant failed to list the SS-Wachmannschaft (Op. 30). The district court

found, however, that defendant did not necessarily understand that this information was required by the question (Op. 30).

DEFENDANT'S FACTUAL CONTENTIONS

From the outset of this lawsuit, defendant has claimed that all of the allegations regarding his wartime activities were fabricated by the Soviet Union. More specifically, defendant claimed in his original pro se response to the complaint (Tab 21, p. 2):

> [A]nyone who left the Soviet Union . . . are all enemies of Russia and the return of these enemies is worth payment of any price. To their aid came the Zionists. The Russians provide the falsified documents and the Zionists finish the job through those who have connections with immigration and naturalization departments.

Defendant claims that the documentary evidence obtained from the Soviet Union is forged. He has also contended that the testimony of Soviet witnesses should not be credited.

Defendant additionally argues that numerous inconsistencies appear in the government's evidence and that the district court failed to accord sufficient weight to these inconsistencies. Defendant contends that these alleged inconsistencies resulted in the government's failure to meet its burden of proof.

In addition to attacks on the government's proof, defendant offered several differing versions of his whereabouts during the war. His visa application states that, from 1938-1944, he resided in "Radviliskis and other places in Lithuania" (Tab. 49).[6]

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6 Defendant testified at trial that the information on the application is wrong, but that he provided correct information to the consular officials (T. 720).

In October 1980, in his pro se response to the complaint, defendant stated that "[d]uring the war, my time was spent in East Prussia" (Tab 21, p. 3).[7]

At his deposition in April 1981, defendant stated that, in 1942 to 1944, he worked on farms in Lithuania, was taken to the Hammerstein prisoner-of-war camp, and then worked as a forced laborer in Poland and Germany (Op. 9; Kairys' Dep. pp. 194-263). However, defendant's brief states that, after leaving the Hammerstein POW camp, he was a forced laborer "in Lithuania and Poland" for the remainder of the war (p. 5).

Finally, defendant relies on DX-1, a purported Lithuania identity card dated August 1, 1941. The card states that defendant was born in Kaunas in 1924 and that his permanent residence was Radviliskis; a stamp on the back purports to show that defendant resided in Vainutas in May 1942. Defendant argues that this document should have been credited and that, if credited, it would have proved that he had not served at Treblinka.

SUMMARY OF ARGUMENT

A. The district court's finding that defendant served as a guard platoon leader at Treblinka is supported by eyewitness testimony and documentary evidence from countries in the West, as well as the Soviet Union. The statements of the six former SS guards who testified corroborated one another and were entirely

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7 During World War II, East Prussia was part of Germany. Kinder, The Anchor Atlas of World History (1978), vol. II, p. 204.

consistent with SS personnel files and with the record in West Germany's 1971 prosecution of another Treblinka guard platoon leader.

Defendant's SS personnel record (GX-32) and related documents were examined by eight experts, including two defense experts. Their findings ruled out the possibility of forgery. The fingerprint and signature on GX-32 were found conclusively to be defendant's.

Defendant's general contentions as to Soviet disinformation are contradicted by the experience of West German and American courts that have relied on evidence from the Soviet Union. Defendant's witness on KGB practices knew of no instance in which the Soviet Union had provided a western court with fabricated documents.

Defendant relies on DX-1, the purported Lithuanian identification card. However, as the district court found, that document was forged as part of defendant's post-war effort to change his identity. Unlike DX-1, which has no corroboration other than defendant's self-serving statements, the government's proof that defendant served at Treblinka is extensively corroborated and "conclusive" (Op. 17-18).

B. Defendant's United States citizenship was "illegally procured" within the meaning of Section 340(a) of the INA. As a guard platoon leader at a slave labor camp, defendant assisted the Nazi government in persecuting civilians. Fedorenko v. United States, 449 U.S. 490 (1981). Accordingly, defendant was

not eligible for a DP Act visa and his naturalization was illegally procured.

The 1961 amendment to Section 340(a), which added illegal procurement as a ground for denaturalization, applies to defendant. Congress' intent to cover persons who were naturalized before 1961 is shown by the terms of Section 340(i). The latter provision states that Section 340 applies to "any naturalization" granted under title III of the INA; that provision emcompasses defendant's naturalization.

Contrary to defendant's argument, retroactive application of Section 340(a) is not prohibited by the Ex Post Facto Clause. Denaturalization suits are not punitive, but are intended to remedy noncompliance with the statutory requirements for naturalization. United States v. Koziy, 728 F.2d 1314 (11th Cir.), cert. denied, ___ U.S. ___, 105 S.Ct. 130 (1984).

The illegal procurement provision of Section 340(a), which allows for denaturalization for unintentional acts, does not violate the equal protection requirements of the Fifth Amendment. Defendant's argument to the contrary relies solely on expatriation cases having no applicability to denaturalization. The latter process seeks solely to redress non-compliance with the prerequisites for naturalized citizenship. No precedent holds that denaturalization of defendant on the fact found is unconstitutional. Cf. United States v. Ginsberg, 243 U.S. 472 (1917); United States v. Ness, 245 U.S. 319 (1917).

C. Laches is no bar to this action. As a general matter, laches is not applicable to denaturalization suits. Costello v.

United States, 365 U.S. 265 (1961). In addition, defendant failed to prove the elements of laches, e.g., that the government delayed in the commencement of this litigation.

D. As this Court held in United States v. Schellong, 717 F.2d 329 (7th Cir. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 1002 (1984), there is no right to a jury trial in a denaturalization suit.

E. Defendant willfully misrepresented his wartime activities to immigration officials. The government proved, through expert testimony, that all applicants for DP Act visas were questioned about wartime activities. Under Fedorenko v. United States, defendant's concealment of his service at Treblinka was material.

Also, defendant's misrepresentations of his wartime residences were material. If defendant had revealed to immigration officials that he resided in Treblinka, the site of notorious extermination and forced labor camps, the result would have been an investigation and denial of a visa. The district court erred in failing to consider the materiality of this misrepresentation as to residences.

Finally, defendant willfully misrepresented his date and place of birth and his first name. Such misrepresentations in a visa application are per se material.

F. Defendant's application for a naturalization petition asked him to list his organizational memberships during the years of World War II. His answer concealed his membership in the SS-Wachmannschaft. The district court's finding that defendant

did not understand the question to cover such organizations is erroneous, as shown by expert testimony. As this Court held in Schellong, the misrepresentation was material and a proper basis for denaturalization.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND, ON THE BASIS OF CLEAR, UNEQUIVOCAL AND CONVINCING EVIDENCE, THAT DEFENDANT WAS A GUARD PLATOON LEADER AT TREBLINKA

A. Documentary And Testimonial Evidence Overwhelmingly Established Defendant's Service At Treblinka[8]

Defendant understandably would prefer to have this Court believe that the sole evidence of defendant's service in the SS-Wachmannschaft is a single SS personnel record.[9] That simply is not the case. The government's evidence consisted of

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8 Review of the district court's factual findings is governed by the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure. United States v. Koziy, 728 F.2d 1314, 1318-1319 (11th Cir. 1984), cert. denied, 103 S.Ct. 130 (1984), and cases cited therein; United States v. Demjanjuk, 680 F.2d 32, 33 (6th Cir.) (per curiam), cert. denied, 459 U.S. 1036 (1982).

There is no doubt that the district court applied the correct burden of proof standard to this case:

> all inferences in the evidence must be drawn as far as reasonably possible in favor of the citizen; and . . . with those inferences drawn favorably to the accused the government must prove each element of its case by clear, unequivocal and convincing evidence, with the government's proof not leaving the issue in doubt on any element of the case (Op. 1).

See Schneiderman v. United States, 320 U.S. 118, 125 (1943), and Fedorenko v. United States, 449 U.S. 490, 505 (1981).

9 Defendant's Brief (p. 13): "Something is terribly wrong here. Defendant was stripped of his citizenship based on a single suspect document . . ." The rhetoric may be appealing, but, as explained herein, it is not supported by the record.

the testimony of eyewitnesses, including other members of the SS-Wachmannschaft; SS personnel records obtained from Soviet archives; Lithuanian citizenship documents from United States and Soviet archives; and corroborating evidence from a 1968-1971 West German criminal proceeding. As the district court found, the government proved conclusively --"beyond any reasonable doubt" -- that "defendant is Liudvikas Kairys, born in Svilionys on December 24, 1920, who later became . . . a Lithuanian citizen and ultimately an oberwachmann at Treblinka labor camp" (Op. 17). This evidence is summarized below.[10]

1. The 1971 judgment of a West German court identified "Kairys" as a platoon leader at Treblinka

In 1971, a West German court convicted Franz Swidersky, a Ukrainian member of the SS-Wachmannschaft, of aiding and abetting murder while serving as a platoon leader at the Treblinka forced labor camp (A.44, 46). Swidersky conceded that he had been a guard and platoon leader at Treblinka and conceded the authenticity of Nazi personnel records captured by the Soviet Union and entered into evidence against him (DX-535, p. 118). His defense was premised on a denial that he committed murder. In the course of his trial, Swidersky testified that one of the four platoon leaders at Treblinka was named Kairys (A.43).[11] The West German

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10 A more detailed analysis of the government's evidence is contained in the Government's Post-Trial Brief pp. 19-64 (Tab 57).

11 At the time of the trial in this case, Swidersky was deceased. His testimony from 1968-1971 was admitted into evidence here (GX-59, 83-85).

judgment, based on this testimony and other corroborating evidence, referred to "Kairys" as one of the platoon leaders at the camp (A.51, 55-56). Several witness testimonies and documents entered into evidence in the West German proceeding are also in evidence in the instant proceeding -- including witnesses and documents from the Soviet Union.[12]

2. The testimony of other former guards established defendant's service in the SS guard unit

Six former guards at Treblinka testified in this case; they reside in the United States, West Germany, Belgium and the Soviet Union. Five of these guards also testified in the Swidersky case (A.53).

Vladas Amanaviczius, a Lithuanian living in Belgium (A.134, 138), was recruited into the SS-Wachmannschaft from the Hammerstein POW camp (A.175). He knew defendant at both Hammerstein and Trawniki (A.140). He also identified Liudas Kairys as having been his unit commander at Treblinka (A.140). This testimony was consistent with Amanaviczius' testimony in 1970 in the Swidersky proceeding (GX-90T, p. 4; GX-91T, pp. 2-3).

At his deposition taken in Belgium in 1981, Amanaviczius selected defendant's photograph from a spread of eight photographs prepared by the government (A.141-142).[13] Prior to his deposition, Amanaviczius had not discussed his testimony with any

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12 See the judgment in Swidersky (A.50-51, 54) and DX-535, pp. 120-121.

13 The photospread is GX-88 (A.79). The photograph of defendant was a copy of the photograph on GX-32, a 1942 Trawniki personnel record (A.11).

governmental officials (A.145). He was not even made aware of the reason his testimony was requested (A.145).

Vladas Zajanckauskas was born in Lithuania and now resides in Massachusetts (A.147, T.198).[14] He was a prisoner of war at Hammerstein and an SS Wachmann at Trawniki (A.148). He knew Liudas Kairys at both Hammerstein and Trawniki (A.148). Zajanckauskas was not able to identify defendant's 1942 photograph (T.258).

Paul Fessler, a resident of West Germany, served for several months as a guard at Treblinka (T.309). He recalled an Oberwachmann named "Ludwig Kairys" at Treblinka (T.310), whom he described as tall, with a "crooked nose" (T.310). Defendant testified that he broke his nose in 1940 (T.378-379); it is a characteristic evident in defendant's photographs and still apparent today.

Four videotaped depositions were taken in Riga, Latvia in 1981. Three of these witnesses had previously given deposition testimony -- which was admitted into evidence -- in the Swidersky trial (A.53). Ivan Zvezdun testified that he had been a guard at Treblinka and was in the unit commanded by defendant (GX-80, p. 8).[15] Zvezdun stated here and in Swidersky that defendant was on duty at the labor camp on the day of the

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[14] Citations such as "T.198" refer to pages of the trial transcript. Some parts of the transcript are included in the Appendix for the United States.

[15] The videotape of this deposition is GX-80(a).

liquidation.[16] Zvezdun selected defendant's photograph from a photospread.[17] Two other former Treblinka guards, Kharkovskii and Vilshun, remembered that there was a guard leader named "Kairys" at the labor camp. Neither was able to identify defendant's 1942 photograph.[18]

The final Soviet witness was Juozas Latakas. He had grown up with defendant in Svilionys and had known his family well (A.66-68). Latakas stated that he was born in 1920 and that defendant was the same age (GX-82, pp. 9, 12-13). During the war, Latakas saw defendant when the latter was on leave in Lithuania (A.71-74);[19] defendant was wearing a German uniform at the time and admitted being stationed in Poland (A.722-75). Latakas correctly identified defendant from a photospread (GX-63; Stip. 37, T.521).

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16 GX-80, p. 40; A.55-56. Amanaviczius also stated that defendant was on guard duty at Treblinka on the final day (Tab 54, p. 17).

17 GX-80, pp. 42-46; T.332-333. The protocol of Zvezdun's 1980 photo identification is GX-29.

18 Kharkovskii was unable to identify Kairys' photograph, while Vilshun selected a photograph other than defendant's (GX-81, p. 49; DX-94, p. 44).

The inability of Kharkovskii and Vilshun to identify Kairys' photograph is a strong indication that Soviet officials do not suborn perjury, as defendant has contended. Soviet prosecutors obviously knew which photograph was Kairys; they also know that, in cases of this sort, the more photographic identifications made the stronger the government's case becomes. Nevertheless, the witnesses in Riga were obviously not "coached" into selecting the correct photograph.

19 Defendant's Trawniki personnel record, GX-32, records a furlough in late 1942 (A.16).

The final significant testimonial evidence against defendant is a 1944 statement made by Treblinka guard Nikita Rekalo to Soviet military intelligence (GX-31). That statement was entered into evidence in the Swidersky case. Rekalo discussed two separate incidents where guards had murdered inmates for sport. Several guards were identified as participants, including Swidersky and Kairys.

3. Documentary evidence proved defendant's service at Treblinka

In the Swidersky trial, the West German court admitted into evidence, inter alia, two personnel records from Trawniki which had been captured by the Soviet Army and maintained in a Soviet archive.[20] One was a list of guards transferred from Trawniki to Treblinka; both Swidersky and Kairys (including date and place of birth) are named on the list. That list is also in evidence in this case (GX-39, A.21).[21] The second document was an SS personnel record ("Personalbogen") which contained Swidersky's fingerprint, photograph, signature and personal data (A.39). Swidersky conceded its authenticity (DX-535, p. 118).

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20 See A.50; DX-535, pp. 120-121.

Defendant raises the issue of how the Soviet Union obtained defendant's Personalbogen (Brf. p. 16). That issue did not trouble the court in Swidersky (A.53). As the district court herein found, Soviet archives are the repository of documents on SS activities in Poland, as a result of the Soviet army's overrunning Poland at the end of the war (Op. 14). See, e.g., A.98-99 (Scheffler). See also T.213 (Zajanckauskas).

21 GX-51 is a German certified copy of the identical list from the Swidersky trial record (A.36).

The same Personalbogen form for defendant is in evidence in this case as GX-32 (A.11).[22] The remainder of defendant's personnel file from Trawniki is also in evidence, showing his transfer to Treblinka (GX-39, A.21, 24) and his promotion to Oberwachmann (Tab 53). The originals of these and other documents (e.g., defendant's baptismal certificate) were all made available seven months before trial for analysis by defense and government experts.

4. Defendant's Personalbogen is authentic

Defendant's Personalbogen (GX-32) is dated June 23, 1942; the front side includes defendant's name, date and place of birth, as well as other personal information (A.11, 15). The front also has defendant's photograph, fingerprint, and signature. The back contains information on subsequent assignments, i.e., the Lublin Kommando (July 20, 1942) and Treblinka labor camp (March 22, 1943) (A.13, 16).

The district court found the Personalbogen (GX-32) to be authentic and admissible, having observed that "no expert testified to the conclusion that the document was not authentic or that it was a forgery" (Op. 14). In fact, the expert testimony -- from both government and defense witnesses -- was overwhelmingly in favor of its authenticity.

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22 Also in the record of this case are the Personalbogen for several other Trawniki guards, including witness Vladas Zajanckauskas (GX-14, A.2). Zajanckauskas conceded the authenticity of his Personalbogen (GX-79, p. 44; T.219-221).

Foremost, was the expert testimony demonstrating conclusively that the thumbprint on GX-32 is defendant's.[23] The size of the thumbprint was adequate to permit positive identification (A.158); the fact that only the top portion of the thumb was imprinted was of no consequence. Curtis Oakes of the FBI testified with absolute certainty that the print was placed on the document by defendant (A.154).

Defendant hypothesizes that some mechanical means, i.e., laser scanning and retrieval, could have been used to transfer defendant's thumbprint from another source to the Personalbogen. No expert supported this hypothesis. Michael Noblett of the FBI testified to the known methods of transferring fingerprints. He explained that laser scanning was a means of storing fingerprints for later retrieval (A.171), but that it could not be used in the actual process of printing (A.174). Noblett stated, as the court found, that the thumbprint on GX-32 was not made by any known means of mechanical transfer (A.162-169).[24] It was made by defendant's thumb (A.162, 167-168).[25]

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23 See A.153-155 (Oakes).

24 According to Noblett (A.169), the chance that any other mechanical method of transfer exists is "extremely remote." He knew of none (A.168-169).

25 Another of defendant's contentions relates to the examination of the original fingerprint by Albert Lyter, defendant's analyst of ink and paper (Brf. p. 15). When Lyter examined the document, he requested permission to remove paper fiber from the thumbprint to date it (A.234-236). A government attorney present at the examination denied his request, because of concern that performing the test might harm the integrity of the fingerprint (A.237). Defendant's current argument ignores the fact that defendant's counsel was present at the time, but did not object to the government's refusal of Lyter's request (see A.236, 238). Moreover,

(footnote continued)

That defendant's Personalbogen contains only a single thumbprint is not, as defendant suggests, a source of "doubt" (Brf. p. 15). The form of GX-32, including the space for one thumbprint, is the same as the Personalbogens of other Trawniki guards, including Swidersky and Zajanckauskas (A.39, 2); defendant and Zajanckauskas admitted the authenticity of the latter's form (T.226-228). See also Op. 14.

As the district court found, the fingerprint on GX-32 is strong evidence that the document is genuine and that defendant was a Treblinka guard. This finding was buttressed by the identification of defendant's signature on GX-32 (Op. 13-14, 17). Gideon Epstein, an INS documents examiner, positively identified the signature as defendant's (A.185). Defendant's expert, David Purtell, was not able to render an opinion whether that signature was defendant's (T.211-212). However, Purtell testified that (1) there are many similarities between the GX-32 signature and known signatures of defendant (A.211, 213-218), (2) the GX-32 signature was freely written (A.208), and (3) he could not conclude that

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defendant did not make a later request to the government for permission to re-examine the thumbprint (A.239) and did not file a motion in the district court to compel the fiber analysis. In any event, the government still believes that the integrity of the print was far more important than a fiber test of uncertain and unexplained probity. In addition, defendant ignores the fact that the ink in other portions of GX-32 was already tested for dating purposes (A.192, 234). No evidence of inauthenticity was found.

Defendant believes it significant that, unlike the ink currently used for fingerprints, the fingerprint ink on GX-32 is not carbon based (Brf. p. 15). However, Noblett, whose testimony is cited by defendant, stated that no conclusion could be drawn from the absence of carbon in the ink (A.176).

GX-32 is a forgery (A.230-232).[26] Purtell flatly stated that any claim of forgery of GX-32 could not be supported by his findings (A.220).[27] In fact, on cross-examination, Purtell supported the government's position. When informed of the findings with respect to the fingerprint, ink and paper analysis, he testified that these factors, in addition to his own findings would tip the balance in favor of authenticity (A.230-232).

Further corroboration of the authenticity of GX-32 is provided by the photograph. Three witnesses -- Amanaviczius, Zvezdun and Latakas -- identified the GX-32 photograph as being defendant (see Op. 13, 17). Gerald Richards of the FBI concluded that, more probably than not, the GX-32 photograph is a photograph of defendant (A.180). Richards stated that it is rarely possible on the basis of a photograph to reach a conclusion as to identity that is more definite than the one he reached here (A.181, 183).

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26 Purtell testified on June 22, 1982. The report by Purtell that defendant cites (Tab 28) was written on May 24, 1982.

27 Fiber disturbance on the signature line of GX-32 does not indicate inauthenticity. Purtell testified that he found fiber disturbance in the area of the signature and "figured [the disturbance] might be an erasure there" (A.207-208). However, Purtell's examination did not disclose any remains of graphite or indentation marks in the area of the signature (A.208). See also A.225-227. Epstein pointed out that there was fiber disturbance all over the surface of defendant's Personalbogen, due to the poor quality of the paper (A.186-187); these disturbances did not show inauthenticity.

As to erasures elsewhere on GX-32, Purtell testified that every legible pencil remnant associated with the erasures had been duplicated by typewritten entries (A.222). He stated that a reasonable inference is that the form was first completed in pencil, with the same information later being typed in (A.224).

Defendant does not contend that the photograph on GX-32 is of another person. In his original pro se response to the complaint, defendant included a copy of the Personalbogen and listed alleged errors. He did not assert that the photograph was not of himself (Tab 21). Defendant therefore raises the argument that the original photograph on the Personalbogen may have been removed and "replaced" by the existing photo (Brf. pp. 18-19). However, nothing in the record -- not even defendant's expert -- supports the notion that the photograph was changed or that the original photograph was of someone other than defendant.[28]

In contrast to the government's evidence of authenticity, defendant's attack on GX-32 is reduced to assertions of "doubt" as to various factual entries on the Personalbogen. These include the reference to a scar on defendant's left hip,[29] the

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28 In his deposition and testimony, Purtell mentioned the possibility that the photograph had been "removed and reglued" (A.227-228). See also A.229. He did not express the view that a different photograph had been substituted for the original photograph.

As the district court found, the evidence suggested that "the photograph may at some point have been separated from the document through the failure of adhesive" (Op. 12). Purtell acknowledged that possibility in his deposition (A.228).

As to the "mysterious print character" on the back of the photograph (Brf. p. 19), Purtell referred to an unexplained piece of type in that area, but attributed it to the tearing of the paper (A.209-210).

29 Interestingly, the hip scar actually helps to authenticate the Personalbogen. Defendant admitted that he had a scar since childhood on his lower left back (A.246). A physician who examined defendant (Dr. Herbert Greenlee) testified that defendant had a scar on his left lateral mid-back, one inch or less above the upper border of the left hip bone (A.248).

Defendant makes much of the fact that, in deposition, Greenlee did not actually use the term "hip." Greenlee

absence of an entry for an SS tattoo,[30] and information on hair and eye color.[31] These fact-bound contentions were considered by the district court and found to be insignificant in view of all the other factors that establish conclusively that the Personalbogen refers to defendant (Op. 13-14).

5. Documentary evidence establishes that defendant was born in 1920 in Svilionys

The United States Library of Congress routinely keeps copies of the pre-war Lithuanian Law Gazette, which included reports on the granting of Lithuanian citizenship. The May 4, 1940, Gazette, which defendant concedes is authentic, reports that Liudvikas Kairys, born December 24, 1920, in Svilionys, was granted Lithuanian citizenship (A.32, 35). Defendant admits that he knows of no other person from Svilionys named Liudvikas Kairys (T.1247-1248). This particular Law Gazette has been in the

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explained at trial that "hip" is more of a layman, rather than medical, term (A.248). He was emphatic at trial that the scar in question was an inch or less from what is commonly called the hip bone (A.249).

30 Defendant has no tattoo. Although the presence of a blood group tattoo under the left arm may be evidence of service with the SS, the absence of a tattoo does not prove lack of affiliation. The use of such tattoos was not a universal practice; it varied according to the member's geographic location and initial date of service (A.59; Tab 45).

31 The Personalbogen states that defendant's hair is dark blond and his eyes grey (A.15). According to defendant, his hair is black and his eyes are blue (Brf. p. 20). Defendant ignores the fact that his visa application, petition for naturalization, and Cracker Jack job application all state that his hair is "brown" (Tabs 49, 50; GX-113). These documents state that defendant's eyes are blue. However, the distinction between grey and blue eyes or between dark blond and brown hair is not significant.

Library of Congress since 1946 (A.34). It was published by the independent Lithuanian government prior to the war.

The biographical data contained in the Law Gazette and the other exhibits relating to defendant's Lithuanian citizenship (A.28, 30-31) is correctly restated in defendant's Trawniki personnel file, including his Personalbogen (A.15). It is also consistent with defendant's baptismal certificate (GX-44). In short, defendant's date and place of birth are corroborated by both pre-war and wartime documents.[32]

6. The record refutes defendant's assertion that he is a victim of Soviet disinformation

As previously stated, defendant's attack on the government's case includes the argument that the evidence is a product of Soviet disinformation and forgery. However, he ignores the wealth of western evidence in this case and ignores the absence of evidence in the record to prove his hypothesis that the Soviet Union fabricated the case against him.

Initially, it is important to note that the KGB forgery defense raised by defendant is not novel. The West German courts have used Soviet archival documents and witnesses for decades in their war crimes trials; no forgery of a document has ever been found (A.87-91). The argument that Soviet witnesses are inherently unreliable because of putative KGB pressure has also been rejected. For example, the West German court in Swidersky,

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32 See also the testimony of Latakas, defendant's childhood friend (GX-82, pp. 9, 12-13).

upheld the credibility of Soviet witnesses, three of whom also testified in this case.[33] The court stated (A.54):

> The arguments presented by the defense against the credibility of the witnesses, former members of the Ukrainian Lagermannschaft, of whom five are living in the Soviet Union, are not convincing. There has been no evidence that their statements were influenced. * * *

Other West German courts have expressly rejected the Soviet-disinformation defense. E.g., People v. Kurt Christmann, L.G.E. Munich, F.R.G. (Dec. 19, 1980); People v. Viktors Arajs,[34] L.G.E. Hamburg, F.R.G. (Dec 21, 1979). United States courts in comparable cases have based their decisions on documents and testimony from the Soviet Union. E.g., United States v. Koziy, 540 F. Supp. 25, 29-31 (S.D. Fla. 1982), aff'd, 728 F.2d 1314 (11th Cir.), cert. denied, 105 S.Ct. 130 (1984); United States v.

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33 The witnesses from the Soviet Union who testified in this case and in Swidersky were Zvezdun, Kharkovskii, and Vilshun (see A.53).

34 Arajs was a Latvian police official convicted of murder committed in collaboration with the Nazis:

> The court has based significant findings on the read testimony of the witnesses, who were deposed by Soviet District Attorneys in June 1978 and in January 1979 pursuant to the petition of the court. * * * The court did not agree with the defendant's claim that these testimonies are generally unsuitable for the search for the truth. The repeatedly and emphatically expressed statement of the defendant, that these witnesses were under pressure and that they had to say what they were told to and feared for their lives if they did not incriminate him, is disproved by the manner and content of the testimonies . . . . [Slip op. at 28.]

Linnas, 527 F. Supp. 426 (E.D. N.Y.), aff'd, 685 F.2d (2d Cir.), cert. denied, 459 U.S. 883 (1982):

> 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 fradulent 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 433-434.]

It is interesting that defendant's own expert on Soviet disinformation, Inmants Lesinskis, confirmed the correctness of the above conclusions. He testified that, during the entire time of his KGB employment,[35] he knew of no instance in which the Soviet Union had sent a forged document to a western court (DX-537, pp. 16, 45). He similarly knew of no case in which the Soviet Union had falsely presented allegations of a person's membership in a Nazi-collaborationist organization (DX-537, p. 16). Of course, in this case the world's leading forensic document experts could find no evidence of forgery in the government's exhibits from the Soviet Union.

Finally, defendant's arguments as to the Personalbogen --that it is a Soviet forgery and that it also contains numerous factual inconsistencies -- cannot be logically reconciled. Defendant cannot claim on the one hand that the KGB has tricked

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35 Lesinskis defected to the United States in 1978 (DX-537, p. 8).

the FBI and other forensic experts with a forged fingerprint, while simultaneously arguing that the same forged document contains blantant errors in spelling, locations and dates, when the latter information is readily available to Soviet officials. The Soviet Union knows how to spell Svilionys and defendant's mother's maiden name, just two of the errors which defendant has pointed to as evidence of lack of authenticity.[36] To the contrary, such contradictions evidence the absence of a planned disinformation campaign. See People v. Arajs. If the KGB has fabricated and manipulated the evidence in this case, as defendant claims, it assuredly would not have been simultaneously so cunning as to successfully forge a fingerprint and then so careless with respect to simple spellings errors. The contradiction renders defendant's hypothesis wholly implausible.

The district court correctly discerned the difference between defendant's speculations and the overwhelming documentary and testimonial evidence in the case. It rejected defendant's attack on the authenticity of GX-32 and held that it is admissible and probative as an ancient document and an admission (Op. 14, 17).[37] Accord, United States v. Koziy, 728 F.2d at

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36 Some of the names and places on GX-32 are spelled incorrectly, e.g., "Luilionys" for Svilionys. Dr. Scheffler explained that such errors were due to the ethnic German (and largely uneducated) clerks at Trawniki (A.92-93).

37 Defendant also challenges the authenticity of an order promoting defendant to Oberwachmann (GX-38, Tab 53); that order is back-dated.

Dr. Scheffler, the historical expert on Nazi-era records, explained that the back-dating of such orders was common (A.94). Initially, Purtell questioned GX-38, due to the back-dating. Upon learning of Scheffler's testimony, Purtell

1321-1322. The court rejected the argument that the presence of a Kairys at Treblinka was "a recent fabrication * * * as part of a Soviet disinformation campaign" (Op. 16). In support, the court cited the "1944 statement of Rekalo, the 1968 and 1971 statements of Swidersky and the statements at the Swidersky trial by some of the witnesses in this case" (Op. 16). As its ultimate finding, the court correctly concluded that it was

> persuaded beyond any reasonable doubt that the defendant is Liudvikas Kairys, born in Svilionys on December 24, 1920, who later became a resident of Vilnius, a Lithuanian citizen and ultimately an oberwachmann at Treblinka labor camp (Op. 17).

7. DX-1 is neither authentic nor an alibi

The only reason that defendant relied on DX-1[38] as an identity document is that he claimed to no longer have his birth certificate. The district court correctly disbelieved defendant's assertion that he had used his original birth certificate as cigarette paper and had smoked it while in Dresden (Op 19; T.1227).[39]

The district court also correctly found that DX-1 is not authentic (Op. 18-19 and n.1). The false information that DX-1

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stated that there was no reason to question the authenticity of GX-38 (A.219). One must again ask why it is that the KGB would go to such lengths to fabricate an entire case and then make the elemental error of forging a back-dated document; certainly, if the KGB has the enormous forgery capabilities ascribed to them by defendant, they would have dated the document correctly. Defendant has no satisfactory response.

38 See Tabs 9 and 10 for DX-1 and its translation.

39 Curiously, defendant conceded that he had never previously smoked cigarettes (T.1227).

contains shows that the document is a forgery.[40] For example, DX-1 states that defendant was born in Kaunas in 1924. As the district court found, the government's evidence established conclusively --including by western evidence (A.35) -- that defendant was born in Svilionys (in Poland) in 1920 (Op. 17-18).[41]

In addition to the false information in DX-1, other aspects of the document indicate that it is not genuine.[42] For example, according to defense witness Kviklys, the legal age for obtaining identity papers in Lithuania was 17 (T.1072). If defendant's date of birth were December 20, 1924 (as stated on DX-1), he would have been only 16 in August 1941. Defendant offered no explanation for this inconsistency.

Another example of a defect in DX-1 is the police registration stamp for Vainutas. Kviklys testified that when

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40 Defendant misstates the record when he asserts that both sides' experts agree that "DX-1 is authentic and 'indisputably' bears defendant's known signature and picture" (Brf. p. 22). The bases for the government's position -- and the district court's finding -- that DX-1 is not authentic are summarized in the text. The only photographic expert who testified, Gerald Richards of the FBI, stated that he found neither differences nor "real strong similarities" between the DX-1 photograph and known photographs (T.385-386). This inconclusive finding by Richards should be compared with his much stronger finding as to the photograph on GX-32.

41 Defendant's view that he was born in 1924 has no independent support in the record. Having had the opportunity to consider defendant's demeanor, the district court found that defendant "has consistently not told the truth about his place and date of birth or his whereabouts during the war" (Op. 19).

42 The other evidence that DX-1 is not authentic is set forth in detail in the Government's Post-Trial Brief pp. 66-74 (Tab 57) and Reply Brief pp. 33-36 (Tab 59).

Lithuanian police affixed a registration stamp, a police official would sign his name inside the stamp (T.1093). The Vainutas stamp on DX-1 has the signature, not of an official, but of a farmer with whom defendant allegedly lived for several weeks (T.1249). Again, defendant gave no explanation for this departure from established procedure, as explained by his own witness.

The other stamp on DX-1 purports to show that defendant was in Radviliskis in 1941, but defendant's attempt to corroborate that stay was proven false. He testified that in 1941 he worked for Jonas Petrulionis on a farm in Radviliskis (T.1217-1218). However, Petrulionis' official United States immigration file showed that he never lived in Radviliskis; in 1941, he lived in Utena, over 80 miles away (GX-121).

Even if it were not clear that DX-1 is forged, that document would not provide an alibi. The face of DX-1 states only that it was issued in August 1941 (Tab 10). The period of defendant's SS service was June 1942 until at least July 1944.

Defendant's contention that DX-1 "substantiates . . . his presence in Radviliskis and Vainutas during the war" (Brf. p. 22) rests largely on the police registration stamps appearing on the back of the document (Tab 9 back). The latest date shown there is May 15, 1942 (the purported Vainutas stamp). Even assuming, for the sake of argument, that defendant was in Vainutas in May 1942, that does not preclude his being at Trawniki on June 17, 1942, the date when defendant arrived at Trawniki (see GX-32, A.15).

8. The absence of survivor photo-identifications is not probative

Defendant contends that the government did not present a Treblinka survivor who could identify defendant. According to defendant, camp survivors have "hyperamnesia" that enables them to recall the precise details of camp guards last seen forty years ago" (Brf. p. 22).

Dr. Niederland, the psychiatrist whose discussion of "hyperamnesia" is cited by defendant, stated that he found that condition in the "great majority" -- but not all -- of his patients who were survivors (DX-536, p. 23). He also said that the degree of recall would depend on individual factors, such as the degree of trauma and the nature of the individual (DX-536, p. 40).

Finally, defendant fails to point out that five of the sixteen survivors of Treblinka interviewed by the government did select defendant's photograph from a spread as a face they remembered (see Government's Post-Trial Reply Brief, p. 16, Tab 59). The remaining survivors were either not at Treblinka at the same time as defendant or did not recall his face. As to the witnesses who did identify defendant's photograph, the government did not offer this testimony because of uncertainties expressed by the witnesses and because of the already compelling evidence (documentary and testimonial) of defendant's service at Treblinka. The absence of this identification evidence from the record is therefore not dispositive.

II. THE DISTRICT COURT'S RULINGS ON DISCOVERY IN THE SOVIET UNION WERE PROPER

Defendant states that he was denied access to discovery in the Soviet Union and that such denial, in view of the government's use of evidence from the Soviet Union, violates the Due Process Clause (Brf. pp. 23-24). Defendant's argument ignores the specific facts.

Defendant filed his first request for Soviet discovery on October 23, 1981, less than one month before the long-planned trip by government and defense counsel to Latvia for the taking of depositions.[43] Defendant sought to have the United States transmit to the Soviet government requests for (1) information on any Soviet criminal charges against defendant and (2) production, on November 5, 1981, of certain documents concerning the four persons whose depositions were scheduled for mid-November in Latvia (Tab 3).[44]

The November 5 deadline was obviously unrealistic.[45] Still, pursuant to an order of the district court, the government transmitted defendant's discovery requests to the Soviet

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43 In August 1981, the government noticed the depositions of four witnesses in the Soviet Union. The government had provided defendant the names of three of the witnesses even earlier, in March 1981.

44 The documents requested by defendant included records on any criminal convictions of the four persons or any testimony they had given in a proceeding relating to World War II (Tab 3).

45 See Plaintiff's Objections to Defendant's First Request for Soviet-Block Discovery, pp. 5-7 (A.107-109).

Union.[46] It was understood that the lateness of the request made it extremely unlikely that a complete response could be made by the November 5 deadline demanded by defendant. Nevertheless, the prior statements given by these witnesses, including in the Swidersky litigation, were turned over to defense counsel and used in cross-examination at the depositions.

These circumstances do not constitute a denial of due process. Defendant's counsel was advised at an early point in this litigation that obtaining documents or depositions in the Soviet Union is a time-consuming process requiring translations of the requests and transmittal through diplomatic channels (i.e., from the State Department to the United States Embassy in Moscow to the Soviet Ministry of Foreign Affairs to the Soviet prosecutor's office). A three-week deadline is even shorter than that allowed under the Federal Rules of Civil Procedures. One can only assume that defendant neither expected nor desired a response.[47] Given these circumstances, the district court correctly rejected the claim of a due process violation.[48]

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46 Transcript of April 19, 1982 hearing, p. 7.

47 It must be pointed out that the Soviet Union has responded affirmatively to defense discovery requests in other cases; witnesses requested by defense counsel have been made available in similar cases. See United States v. Trucis, C.A. No. 80-232, E.D. Pa.; Matter of Laipenieks, No. A11 937 435 (Imm. Ct. June 2, 1982), rev'd, 18 I&N Dec. 433 (BIA 1983), rev'd, 750 F.2d 1427 (9th Cir. 1985) (deportation); United States v. Artishenko, Civ. No. 82-3822, D.N.J. (Oct. 23, 1984) (denaturalization). The ability of Soviet officials to respond has been a function of the nature of the request and its timing. In the instant case, only defendant bears the responsibility for the untimeliness of his request.

48 Defendant's notice of appeal includes an appeal from the district's court's April 19, 1982 order denying defendant's

(footnote continued)

III. DEFENDANT'S CITIZENSHIP WAS ILLEGALLY PROCURED

Section 340(a) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. 1451(a), provides, inter alia, for the revocation of naturalized citizenship that was "illegally procured." One condition for naturalization is lawful admission to the United States;[49] lawful admission depends on possession of a valid visa.[50] The district court held that defendant was not entitled to a visa under the Displaced Persons Act and that, therefore, his citizenship was illegally procured (Op. 40-41).

A. Defendant Was Ineligible For A Displaced Persons Act Visa

In Fedorenko v. United States, a denaturalization suit against a former guard at the Treblinka extermination camp, the Supreme Court held that "an individual's service as a concentration camp armed guard -- whether voluntary or involuntary -- made him ineligible for a visa" under the DP Act (449 U.S. at

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second and third requests for Soviet discovery (see Tabs 6 and 4). However, defendant's argument (Brf. pp. 23-24) does not refer specifically to these later requests, each of which was made in April 1982, less than two months before the start of the trial.

Those discovery efforts were untimely and included frivolous requests. They were properly denied by the district court. See the reasons given by the court (A.124-132) and the government's memorandums opposing the requests (A.111-121).

49 See Sections 316(a) and 318 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1427(a) and 1429.

50 In 1949, when defendant entered the United States, the provision requiring a valid visa was Section 13(a) of the Immigration and Nationality Act of 1924, 43 Stat. 153, 161 (repealed in 1952). See Fedorenko v. United States, 490 U.S. at 515.

512). Such an individual was barred by the DP Act's exclusion of persons who "assisted the enemy in persecuting civil populations."[51]

Defendant argues that, "even assuming" that the government proved that he was a guard at Treblinka, his conduct did not amount to "persecution" (Brf. pp. 30-31). According to defendant, persecution within the meaning of the DP Act requires proof of personal involvement in a specific atrocity, something which the district court did not find (Op. 20, 2).[52] However, defendant's interpretation of the DP Act was clearly rejected in Fedorenko. The Supreme Court accepted the district court's finding that the government failed to prove that Fedorenko "committed crimes and atrocities against inmates while he was an armed guard at Treblinka" (490 U.S. at 505 n. 24). The Supreme Court nevertheless held that Fedorenko was ineligible "as a matter of law" for a DP Act visa (490 U.S. at 514).[53]

Defendant next argues (Brf. p. 30) that the Supreme Court's decision turned on the fact that Fedorenko had admitted shooting

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51 See Section 2 of the DP Act and Annex I of the IRO Constitution, p. 1a, below.

52 The government's evidence did, however, include statements by Zvezdun, a former guard, that defendant killed a prisoner (GX-80, pp. 37-38; GX-71T, p. 8). See also GX-31 (Rekalo).

53 Fedorenko is directly contrary to defendant's view (Brf. p. 31) that it is pertinent that service at Treblinka was not voluntary. See 449 U.S. at 512. Moreover, defendant does not assert that he was involuntarily promoted to guard platoon leader. Nor is there evidence that his service as a guard was coerced (Op. 27 n.5).

at escaping inmates on one occasion.[54] However, that aspect of Fedorenko's conduct is certainly less significant than defendant's role at the Treblinka labor camp. The guards at the labor camp engaged in atrocities and mass murder, as well as enforcing the enslavement of Poles and Jews (Op. 5-6). Defendant necessarily participated in that system of persecution and, as a platoon leader, directed other guards in these activities. If a mere guard, such as Fedorenko, assisted in persecution, then his superior (i.e., platoon leaders) necessarily assisted in persecution;[55] the same analysis would apply to the forced labor camp. The Swidersky judgment and the survivor witnesses here established that persecution by the guards at the labor camp was a daily occurrence -- the entire camp was devoted to the persecution of the inmates (Op. 4-6).

In these circumstances, the district court was clearly warranted in finding that defendant had assisted the SS in persecuting civilians and in holding that defendant was not eligible for a DP Act visa (Op. 26, 40).[56]

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54 See 449 U.S. at 512-513 n.34. According to the Supreme Court (id. at 500), Fedorenko's admission was that "he had followed orders and shot in the general direction of escaping inmates during . . . [an] uprising."

55 The facts of Laipenieks v. INS, 750 F.2d 1427 (9th Cir. 1985), cited by defendant, are distinguishable. The defendant in that case had never served at a camp; he had been a policeman. In addition, Laipenieks was a deportation case involving a different statute in which intent was an element. In this case intent is irrelevant, since any persecution of a civilian during the war was a disqualifying factor under the DP Act, regardless of intent. See Fedorenko v. United States.

56 The district court's determination is supported not only by Fedorenko, but also by expert testimony here. See, e.g., A.202, William Rhodes, a former consular officer. See also

B. The 1961 Amendment To The Denaturalization Statute Applies To Defendant

In 1961, Congress amended Section 340(a) of the 1952 Act, 8 U.S.C. 1451(a), by adding illegal procurement of naturalized citizenship as a ground for revoking such citizenship.[57] The purpose of the amendment was to authorize revocation of citizenship "where the conditions [for naturalization] prescribed by Congress did not in fact exist."[58]

Defendant asserts that, under the rules of statutory contruction, the 1961 amendment may not be applied retroactively to persons who were naturalized before 1961 (Brf. pp. 33-40). According to defendant, the only possible basis for revoking his

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[A.60: examples of DP Commission rejections of camp guards and "kapos."

The testimony of Anthony Petrone, a former naturalization examiner, is not contrary. First, he did not testify as an expert on the DP Act or on the issuance of visas. His sole expertise was in naturalization law under a different statute. Second, he answered a hypothetical question as to a Baltic national who was forced to be a labor camp guard and who, as a guard, never beat, shot or hurt anyone (T.597-598). The hypothetical does not correspond to the facts of this case. Defendant was a platoon leader, not a mere guard. Also, there is no evidence to support defendant's belated suggestion on appeal that he served at Treblinka involuntarily.]

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57 See Pub. Law 87-301, §18, 75 Stat. 656 (1961). Before this amendment, Section 340(a) of the 1952 Act provided that naturalized citizenship could be revoked if procured "by concealment of a material fact or by willful misrepresentation." Act of June 27, 1952, §340, 66 Stat. 260.

58 H.R. Rep. No. 1086, 87th Cong., 1st Sess. (1961) p. 39. This part of the report was cited in Fedorenko, 490 U.S. at 515-516 n.38.

citizenship is concealment or misrepresentation, the basis that existed in 1957, when defendant was naturalized.

In interpreting a statute, the basic responsibility of a court or an agency is to determine Congress' intent. This principle applies to questions of retroactivity[59] and to issues concerning denaturalization.[60] The terms of a statute are the primary guide to its meaning.

Section 340(i) of the Act, 8 U.S.C. 1451(i), states that:

> The provisions of this section shall apply not only to any naturalization granted . . . under the provisions of this title, but to any naturalization heretofore granted by any court . . . (emphasis added).

Defendant was naturalized in 1957 under the title referred to in Section 340(i) -- title III of the 1952 Act.[61] It follows, in view of Section 340(i), that all of the provisions of section 340 apply to defendant's naturalization. One of those provisions is Section 340(a), which sets forth the bases for revoking naturalization.

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59 See, e.g., Union Pacific R. Co. v. Laramie Stockyards Co., 231 U.S. 190, 199 (1913); United States Fidelity & Guaranty Co. v. Struthers Wells Co., 209 U.S. 306, 314-315 (1908).

South East Chicago Commission v. HUD, 488 F.2d 1119, 1122-1123 (7th Cir. 1973), cited by defendant, discussed rules of statutory interpretation, but did not involve a statutory issue. The question was whether (contrary to HUD's position) a HUD regulation should be given retroactive effect. See id. at 1122.

60 E.g., Fedorenko, 449 U.S. at 512-513 (interpretation based on "plain language of the statute").

61 See defendant's petition for naturalization (Tab 51); Section 310(a), 8 U.S.C. 1421(a).

Section 340(i) was part of the Act in 1961.[62] Thus, when Congress added the provision on illegal procurement, it was clear that that provision would apply to "any naturalization" granted under title III, including naturalizations granted before 1961.

An additional indication that the amendment on illegal procurement (Section 18 of the 1961 statute) was intended to apply retroactively is the contrast between it and two companion provisions. Sections 17 and 19 of the 1961 statute were expressly limited to prospective application.[63] If Congress had intended to restrict the illegal procurement amendment to prospective application, Congress would have followed the pattern of Sections 17 and 19 and enacted a new subsection stating that it covers only future naturalizations.

C. The Ex Post Facto Clause Does Not Apply To The Denaturalization Statute

Defendant contends that applying the 1961 illegal procurement amendment to him violates the Ex Post Facto Clause of the

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62 Provisions like Section 340(i) of the 1952 Act (i.e., provisions covering naturalization issued "heretofore") were included in the pre-1952 statutes. Thus, Congress' practice of retroactive application of denaturalization provisions has a long history. This aspect of the 1906 Act was upheld in Johannessen v. United States, 225 U.S. 227, 242-243 (1912).

63 The text of Sections 17 and 19 is set forth below, p. 2a. Section 17 added to Section 310 of the 1952 Act a new subsection requiring that all future petitions for naturalization be determined on the basis of the 1952 Act. Section 19 added to Section 349 of the act a new subsection on the standard of proof in expatriation suits commenced in the future. See H.R. Rep. No. 1086, 87th Cong., 1st Sess. (1961) pp. 38-41.

Constitution (Brf. pp. 40-44).[64] It is settled, however, that the Ex Post Facto Clause does not apply to denaturalization. In Johannessen v. United States, the Supreme Court so held:

> The [denaturalization] act makes nothing fraudulent or unlawful that was honest and lawful when it was done. It imposes no new penalty upon the wrongdoer. But if * * * it is judicially determined that by wrongful conduct he has obtained a title to citizenship, the act provides that he shall be deprived of a privilege that was never rightfully his. Such a statute is not to be deemed an ex post facto law (225 U.S. at 242-243).

The continuing vitality of this rule is reflected in the Eleventh Circuit's recent decision in United States v. Koziy:

> 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 (728 F.2d at 1320).

Defendant similarly cannot prevail in claiming that Section 340(a) is a penal statute. The Seventh Circuit has squarely rejected this argument in another case involving denaturalization of a Nazi camp guard. United States v. Schellong, 717 F.2d 329, 336 (7th Cir. 1983). Accord: United States v. Koziy. In contrast, the cases relied on by defendant are inapposite. In Trop v. Dulles, 356 U.S. 86 (1958) a native-born American was denaturalized as part of the punishment imposed by a military court martial. The Supreme Court merely held that because revocation of citizenship was used as a punishment, it was barred

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64 Article I, section 9, clause 3 of the Constitution states that Congress shall pass no "ex post facto law."

by the Eighth Amendment. In Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), the Supreme Court held that, when denaturalization is to be inflicted as a punishment, the procedural protections of the Fifth and Sixth Amendments must apply. Neither decision even remotely suggests that the application of Section 340(a) to a person who illegally procures citizenship constitutes a penal sanction.[65]

D. The 1961 Amendment Complies With The Equal Protection Requirements Of The Fifth Amendment

According to defendant, the Constitution forbids denaturalization without proof of intent (Brf. pp. 25-29). Defendant's assertion relies on a misreading of Schneider v. Rusk, 337 U.S. 163 (1964), and Afroyim v. Rusk, 387 U.S. 253 (1967).

In United States v. Ginsberg, 243 U.S. 472 (1917), and United States v. Ness, 245 U.S. 319 (1917), the Supreme Court affirmed the denaturalization of citizens under an earlier illegal procurement statute. In both cases, unintentional acts gave rise to the denaturalizations. Contrary to defendant's claim, these decisions are still valid law. Indeed the Supreme

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65 Schneiderman v. United States, 320 U.S. 118 (1943) and Klapprott v. United States, 335 U.S. 601 (1949) merely held that the government's burden of proof in denaturalization cases is "clear, unequivocal and convincing." The Court did not hold that this was a criminal standard or that Section 340(a) imposed a criminal punishment. Cf. defendant's brief, pp. 41-42.

Cf. INS v. Lopez-Mendoza, 468 U.S. ___, 82 L.Ed.2d 778, 785 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish unlawful entry . . .").

Court approvingly cited Ness and Ginsberg in Fedorenko, 449 U.S. at 517-518.

Neither Schneider nor Afroyim holds to the contrary. In Schneider, the Supreme Court struck down as violative of equal protection a statute that provided for the automatic loss of citizenship by a naturalized citizen who lived for three years in the country of his origin. 377 U.S. at 168-169. The unconstitutional discrimination resulted from the fact that native-born citizens were free to live abroad indefinitely. 377 U.S. at 168. The Court held no more than that the standards for loss of citizenship already acquired must be applied equally to naturalized and native citizens. The Court did not address the issue of a naturalization never perfected because of a failure to meet necessary statutory preconditions.[66] The Court nowhere expressed doubts about the vitality of Ginsberg and Ness.

Afroyim held unconstitutional a statute providing for loss of citizenship by any citizen, whether naturalized or native-born, who voted in a foreign political election (387 U.S. at 267-268). The majority held that, under the Fourteenth Amendment, a citizen may not be expatriated unless he "voluntarily relinquishes" his citizenship (id. at 268). Again, the Court did not purport to speak to the issue of citizenship which

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66 In Schneider, the Court said that the citizenship rights of naturalized citizens "derive from satisfying, free of fraud, the requirements set by Congress" (377 U.S. at 166). The statement "free of fraud" clearly does not purport to place limits on Congress' power to define the standards for denaturalization, including by illegal procurement. See Afroyim v. Rusk, 387 U.S. at 267 n. 23.

never should have been granted. To the contrary, the majority made clear that "naturalization unlawfully procured can be set aside" (id. at 267 n. 23). Again, Ness and Ginsberg were never questioned.

Finally, implicit in defendant's argument is the notion that his activities during World War II were involuntary. However, defendant offered no evidence at trial to show that his service at Treblinka was involuntary. Having denied any presence at Treblinka whatsoever, he should not be allowed on appeal to characterize his service as involuntary in order to benefit from a legal theory which he now finds appealing. In fact, the district court noted that defendant did not attempt to show that he was coerced into the SS (Op. 27 n.5). Nor did the district court find that Kairys' obviously satisfactory service to the SS, resulting in his promotion to Oberwachmann and platoon leader, was anything other than an intentional desire on his part to succeed in the system in which he served.

In sum, no decision of the Supreme Court and no facts in the record stand for the proposition defendant asserts. The 1961 amendment to Section 340(a) is a proper exercise of Congress' power. Congress is empowered to prescribe the requirements for naturalization and to authorize denaturalization in the event of noncompliance, whether or not the result of intentional conduct. One requisite for naturalization is possession of a valid visa. Because defendant failed to meet that requirement, his citizenship was illegally procured and subject to revocation.

IV. THIS SUIT IS NOT BARRED BY LACHES

Contrary to defendant's argument (Brf. pp. 44-45), the Supreme Court held in Costello v. United States, 365 U.S. 265, 281-282 (1961), that laches is not a defense in a denaturalization suit. The Court stated that all lower courts considering the matter had held that laches is not a bar to denaturalization proceedings (id. at 281). Pointing out that the lower courts "applied the principle that laches is not a defense against the sovereign," the Supreme Court stated: "This Court has consistently adhered to this principle" (ibid). Subsequent appellate decisions have construed Costello as precluding the defense of laches. E.g., United States v. Weintraub, 613 F.2d 612, 618-619 (6th Cir. 1979). This rule is entirely consistent with the rule in Fedorenko that "district courts lack equitable discretion to refrain from entering a judgment of denaturalization against naturalized citizen whose citizenship was procured illegally" (490 U.S. at 517).

Moreover, defendant has not satisfied the elements of a laches defense. One such element is lack of diligence on the part of the government. The district court pointed out that this is not a case in which "the government slept on its rights" (Op. 22 n. 3). The government did not learn of defendant's alleged wartime activities until 1977. This suit was filed in August 1980, after an extensive investigation.

Further, defendant cannot assert the equitable defense of laches, since he comes into this litigation with "unclean hands." Specifically, defendant consistently lied about the place and

date of his birth and his whereabouts during the war, making investigation of his case more difficult (Op. 19).

V. DEFENDANT HAD NO RIGHT TO A TRIAL BY JURY

Defendant requests reconsideration of the holdings of this Court in United States v. Walus, 616 F.2d 283, 304 n. 53 (7th Cir. 1980), and United States v. Schellong, 717 F.2d 329, 336 (7th Cir. 1983), that a defendant in a denaturalization suit has no right to trial by jury (Brf. pp. 47-49).

In Schellong, 717 F.2d at 336, this Court stated that Luria v. United States, 231 U.S. 9, 34 (1913),[67] is binding as to the Seventh Amendment issue. In addition, this Court discussed and rejected the other constitutional arguments now advanced by defendant. Defendant adds no new argument for reaching a result different from that in Schellong. See Government's Memorandum on Defendant's Jury Demand (Tab 62).

VI. DEFENDANT ILLEGALLY PROCURED HIS CITIZENSHIP BY MISREPRESENTING HIS WARTIME SERVICE AND ACTIVITIES TO IMMIGRATION OFFICIALS

A. The Government Proved By Clear, Unequivocal And Convincing Evidence That Kairys Was Asked About His Wartime Activities And That He Misrepresented Those Activities

Section 2 of the Displaced Persons Act prohibited the granting of visas to war criminals, quislings, traitors and any other persons who assisted the Nazis in persecuting civil

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67 In Fedorenko, 449 U.S. at 516, the Supreme Court reaffirmed the holding in Luria that "a denaturalization action is a suit in equity."

populations. Fedorenko, 449 U.S. at 495 n. 3-4. Section 13 of the DP Act barred issuance of visas to "any person who is or has been a member of . . . any movement which is or has been hostile to the United States." The SS and its concentration camp guards were so designated by the DP Commission (GX-69). Section 10 of the DP Act required a "thorough investigation and written report . . . regarding such persons's character, history, and eligibility." The Army Counter Intelligence Corps (CIC) was delegated authority to conduct these investigations on behalf of the DP Commission. 8 C.F.C. §700.7(b) (1949).[68]

It is therefore clear that the Displaced Persons Act could not be enforced without an inquiry into an applicant's wartime activities. Unrebutted evidence proved that defendant was asked about his wartime service and provided false information in response.

Kairys admitted that he was interviewed by the Army CIC (T.1156-1158, 1172). After the CIC interview, a DP Commission report was prepared (GX4), which stated that he was born December 20, 1924 in Kaunas, that he had worked on his father's farm in

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68 8 C.F.R. §700.7(b) (1949) provided:

> In order to facilitate the conduct of such investigation by the [Displaced Persons] Commission, and to enable the Commission to determine admissiblity under the act . . . the Commission will arrange with the Department of the Army to provide the necessary investigative and administrative assistance, and to submit in writing to a duly authorized representative of the Commission a statement of the evidence found by it relative to (1) his character and history, and (2) whether he is or has been a member of, or participated in, any movement which is or has been hostile to the United States or the form of government of the United States. [Emphasis added.]

Lithuania during 1940-1945, and that he had not been a participant in a movement hostile to the United States. Kairys has never argued and has presented no evidence to prove that this information came from any source other than defendant. This report conclusively proves that defendant was asked about his wartime whereabouts and activities and that he falsely answered these questions.[69]

These misrepresentations were repeated to a State Department vice consul at the time of Kairys' visa interview. The Government's State Department expert witness (William Rhodes) testified without rebuttal that all visa applicants were interviewed by a vice consul and that the DP Commission report was reviewed with each applicant to verify its accuracy. He testified that it was "[c]ompletely improbable" that an applicant would not have been asked what he did during World War II (A.201-205). He further testified that camp guards were not eligible for visas under the DP Act (A.202-203; see also A.60-61).

This testimony was consistent with the record in Fedorenko v. United States. In that case, Fedorenko admitted that he had been asked about his World War II service during the visa application process. In addition, a State Department vice consul testified to the "elaborate system that was used to screen

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69 Other courts have held that false information in a DP report evidences misrepresentation by a visa applicant. United States v. Linnas, 527 F. Supp. 426, 437 (E.D. N.Y. 1981), aff'd 685 F.2d 427 (2d Cir. 1982), cert. denied 103 S.Ct. 179 (1982); United States v. Demjanjuk, 518 F. Supp. 1362, 1379 (N.D. Ohio 1981), aff'd 680 F.2d 32 (6th Cir.), cert. denied 459 U.S. 1036 (1982).

visa applicants" under the DP Act and the practice of the State Department to suspend all visa applications "if there had been any suggestion that an applicant 'had served or been involved in' a concentration camp . . . ." (449 U.S. at 499-500). The Supreme Court reversed the District Court because it failed to "give conclusive weight" to this State Department witness' testimony. 449 U.S. at 513 n.35.

The testimony of William Rhodes was also consistent with the findings of other courts that a vice consul regularly required a visa applicant to review and verify his DP Commision report. United States v. Palciauskas, 734 F.2d 625, 627 (11th Cir. 1984); United States v. Koziy, 540 F. Supp. 25, 33 (W.D. Fla. 1982), aff'd, 728 F.2d 1314 (11th Cir. 1984), cert. denied, 105 S.Ct. 130 (1984); United States v. Dercacz, 530 F. Supp. 1348, 1352 (E.D.N.Y. 1982).

In short, even if Kairys' DP Commission report was not deemed conclusive evidence of his misrepresentations, it was error by the trial court to have rejected Rhodes' testimony that all visa applicants were questioned regarding their DPC report:

> The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their duties.

United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926). That presumption applies with equal force to the processing of visa applications. Daskaloff v. Zurbrick, 103 F.2d 579, 580 (6th Cir. 1939).[70]

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70 The Sixth Circuit rejected the argument that the presumption does not apply to visa applications because of the appli-

(footnote continued)

The district court's conclusion that "it is . . . quite likely that the inquiries were perfunctory and confined to the application" (Op. 29) has no evidentiary support.[71] All of the testimony of the officials involved in DP processing was to the contrary. Clearly, the DP Act could not have been enforced without inquiry into wartime activities.

Further, if the district court were correct that specific proof of what took place at each visa applicant's interview were required, then visa fraud would virtually never be proved under the DP Act or any other immigration statute. The numbers of applicants and the time span between entry and litigation would bring enforcement to a halt. See United States v. Linnas, 527 F.Supp. at 437; United States v. Demjanjuk, 518 F.Supp. at 1379.

B. Misrepresentation of Defendant's Wartime Activities Was Material

The uncontroverted evidence in this case was that persons who served as guards at slave labor camps like Treblinka were ineligible for visas under the DP Act. That testimony was

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cant's lack of facility in the language of the interview.

71 The district court also relied on the fact that the government did not introduce any written policy stating that each applicant should be questioned about his wartime service. However, the presumption of regularity of government officials does not depend on proof of a written policy beyond the clear mandate of the statute itself. Testimony of officials in the same position as the official who acted in a particular case can establish the regular procedure. United States v. Rossi, 319 F.2d 701, 702 (2d Cir. 1963); United States v. Oddo, 314 F.2d 115, 117 (2d Cir. 1963), cert. denied, 375 U.S. 833 (1963). Here, where Kairys' own documents establish that the normal procedure was followed, a written policy certainly is not necessary.

consistent with the record and decision in Fedorenko. Cf. United States v. Schellong.

Kairys' misrepresentations to visa-issuing officials that he had been a farmer in Lithuania during the war concealed his service at Treblinka, Lublin, etc. Because the latter service was automatically disqualifying under the DP Act, Kairys' misrepresentations were material under Fedorenko.

VII. KAIRYS ILLEGALLY PROCURED HIS CITIZENSHIP BY MISREPRESENTING HIS WARTIME RESIDENCES AND DATE AND PLACE OF BIRTH ON HIS VISA

A. Misrepresentations As To An Applicant's Identity Are Per Se Material

The trial court found that defendant's visa application (signed under oath) willfully misrepresented his date and place of birth, changed the spelling of his first name and misrepresented his places of residence during the War (Op. 30). His visa contained no references to his residences in Trawniki, Treblinka and Lublin (GX-5). Kairys thereby presented himself to immigration officials as a completely fictitious person who would have been too young during the period 1941-1943 (16-18 years old) to have been a likely participant in atrocities.

It has long been the law that visa misrepresentations which conceal an applicant's true identity are per se material. Landon v. Clarke, 239 F.2d 631 (1st Cir. 1956). See also In re Zycholc, 43 F.2d 438 (E.D. Mich. 1930); Matter of B-- and P--, 2 I&N Dec. 638 (BIA 1946), aff'd, Atty. Gen. (1947). The reason for this rule is that the presentation of a false identity effectively precludes all investigation of an applicant. Neither

requests for foreign countries' assistance (e.g., records checks) nor interviews of witnesses are likely to produce useful results if the wrong identity is the subject of inquiry.

In Kairys' case, his wilful assumption of a false date and place of birth, in conjunction with a change in his first name and a listing of false residences, was clearly intended to thwart investigation into his true background. That deliberate effort to avoid compliance with the immigration laws is per se material.

B. Kairys' Visa Misrepresentations As To His Wartime Residences And Age Were Material Under Chaunt v. United States

The officials who interviewed and investigated Kairys at the time he applied to immigrate to the United States believed he had been born on December 20, 1924 (making him 17-18 years old in 1942-43) and that he had lived in various cities in Lithuania during this part of the war. There can be no question that if Kairys had truthfully revealed his birth in 1920 and his two years of residence in Trawniki, Lublin and Treblinka, Poland, the questions asked at the interviews and the investigation conducted would have been different.

In 1949, Treblinka was already notorious as the cite of a Nazi extermination camp. Evidence concerning Treblinka was presented at the Nuremberg trials. Trial of the Major War Criminals, Vol. XXXII, pp. 153-158. If immigration officials had known that a draft-age Lithuanian had lived in Treblinka, Poland, in 1943, there can be no doubt that inquiry would have been made. Kairys would have been asked about any connection with the camps

at Treblinka. If he had answered truthfully, he would have had to reveal his SS service as a camp guard.

Misrepresentations of wartime residences were recognized as important areas of inquiry by immigration officials. As the government's DP Commission witness testified:

> Q. Could a misstatement of wartime residence have constituted material misrepresentations under Section 10 of the Displaced Persons Act? * * *
>
> A. Yes, if it was suspected that it was for the purpose of hiding a fact which could be detrimental to his eligibility under Section 10. [Tr. at 627-628.]

Kairys' misrepresentation of his wartime residences (especially Treblinka) therefore, meets the standard of materiality set forth in Chaunt v. United States, 364 U.S. 350, 355 (1960):[72] either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) the facts suppressed might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship.[73] Kairys' concealment of Treblinka as a

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72 Although Chaunt addressed misrepresentations in a naturalization application, all circuit courts have applied the Chaunt test of materiality to visa misrepresentations as well. United States v. Palciauskas, 734 F.2d 625, 628 (11th Cir. 1984); United States v. Fedorenko, 597 F.2d 946 (5th Cir. 1979), aff'd on other grounds, 449 U.S. 490 (1981); Kassab v. Immigration and Naturalization Service, 364 F.2d 806 (6th Cir. 1966); United States v. Rossi, 299 F.2d 650 (9th Cir. 1962); Langhammer v. Hamilton, 295 F.2d 642 (1st Cir. 1961). Accord Matter of S-- and B--C--, 9 I&N Dec. 436 (A.G. 1961). In Fedorenko, the Supreme Court reserved decision on whether Chaunt would be applied to visa misrepresentations.

73 There has been some dispute between the circuits as to the meaning of the second prong of the Chaunt test -- whether it requires that the government prove at trial actual disqualifying facts, or whether it is sufficient to prove that an investigation might have led to disqualifying facts. See the

(footnote continued)

wartime residence, especially in conjunction with concealment of his age, clearly satisfied the second standard. An investigation would have resulted from truthful answers as to residence and that investigation would "possibly" have led to discovery of Kairys' disqualifying SS service at Treblinka.

Several courts have specifically held that a misrepresentation of residences on a visa application, by a concentration camp guard, constitutes a material misrepresentation. United States v. Fedorenko, 597 F.2d 946, 948, 953 (5th Cir. 1979), aff'd on other grounds, 449 U.S. 490 (1981); United States v. Schellong, 547 F.Supp. 569, 573-75 (N.D. Ill. 1982), aff'd on other grounds, 717 F.2d 329 (7th Cir. 1983),[74] cert. denied, 104 S.Ct. 1002 (1984); United States v. Demjanjuk, 518 F.Supp. 1362,

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concurring and dissenting opinions in Fedorenko v. United States, 449 U.S. 490, 523-525, 528, 537 (1980).

In this case, however, the misrepresentation of residence is material no matter which standard is applied, since the government proved actual disqualifying facts at trial (i.e., that Kairys served as a concentration camp guard).

74 Schellong, in response to the question on the visa application requesting places of previous residence, answered "1934-1939, German Waffen SS." 547 F.Supp. at 572. As noted by the district court, "[n]o mention was made on Schellong's application of his two years of residence at the Sachsenburg Concentration Camp, or of his three years of residence at Dachau." 547 F.Supp. at 572. The court found that these misrepresentations were material, Id. at 575.

The Court of Appeals did not affirm on this ground, because it was not certain that this constituted a willful concealment or misrepresentation. The Court reasoned that Schellong "might have entered 'Waffen SS' as a form of shorthand for his residences, fully intending to clarify the answer if given the opportunity to do so." 717 F.2d at 333. There is no such possibility in Kairys' case -- he gave completely false information about his residences and never revealed his SS service.

1379, 1381-82 (N.D. Ohio 1981), aff'd per curiam, 680 F.2d (6th Cir.), cert. denied, 459 U.S. 1036 (1982).

The district court's failure to even address defendant's misrepresentations of his wartime residence is legal error subject to plenary review by this court. United States v. Demopoulos, 506 F.2d 1171, 1176 (7th Cir. 1974), cert. denied, 420 U.S. 991 (1975); United States v. Giacalone, 587 F.2d 5, 6 (6th Cir. 1979), cert. denied, 442 U.S. 940 1979)

VIII. KAIRYS OBTAINED HIS CITIZENSHIP BY WILLFULLY CONCEALING HIS MEMBERSHIP IN THE SS

Question 9 on Kairys' Application to File Petition for Naturalization (Tab 50), required him to list all organizational memberships during the war, including in other countries. Kairys answered "None," concealing his membership in the SS. That the SS should have been listed is consistent with the testimony of Immigration Judge Anthony Petrone, who testified in response to the question whether an applicant for naturalization would have been required to reveal wartime service:

> A. Well, with regard to item 9, it asks persons to list any clubs, organizations, societies in the United States or any other country you have been a member of before the last 10 years. Based on a written memorandum from the central office in Washington, it was the policy of the naturalization examiners to require any person who had lived in any country that was occupied by the Nazi forces during World War II whether they had ever served in the armed forces or in the SS or had ever served in any capacity in any concentration camp in any of those countries.
>
> Q. On the face of that form, is there any indication that that question was asked of Liudas Kairys?
>
> A. Well, by checking off the item where it was written "None," I would assume that that question was asked and the response was negative. [Tr. at 584-85.]

This testimony was unrebutted.

Once again, the cases clearly hold that, unless presented with evidence to the contrary, the courts must presume that government officials have properly discharged their duties. However, the district court ignored this testimony and precedent.

In United States v. Schellong, 717 F.2d 329, 333-334 (7th Cir. 1983), this Court held that failure to list membership in SS concentration camp guard units, in response to a question almost identical to that on Kairys' application, was a willful, material misrepresentation. The district court below attempted to distinguish Schellong by noting that Schellong must have understood the question on his naturalization application to refer to wartime service because Schellong listed some service (Waffen-SS), but omitted other service (Totenkopf-SS). (Op. 30). Such a distinction should be unavailing. The unrebutted testimony in this case was that it was standard procedure to ask about wartime service when reviewing Question 9 with the applicant. Further, this distinction would reward a defendant who conceals everything (such as Kairys), in contrast to another defendant who at least reveals some of his past history (as did Schellong).

There can be no question that failure to reveal SS membership on the naturalization application was material. Just as in Schellong, revelation of SS service would have led to additional questions concerning activities carried out on behalf of the SS (i.e., concentration camp service). Truthful responses to these questions would have led to discovery of defendant's service at Treblinka, which, in turn, deprived him of any entitlement to

naturalization (A.196-199). Therefore, under Chaunt and Schellong, the misrepresentation in defendant's naturalization application was material and, hence, a proper basis for denaturalization.

CONCLUSION

The judgment of the district court revoking defendant's certificate of naturalization on the ground of illegal procurement should be affirmed.

The district court's denial of relief under Counts I and III of the complaint should be reversed or vacated and remanded.

Respectfully submitted,

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ADDENDUM

Statutes

1. Displaced Persons Act, 62 Stat. 1009 (1948)

Section 2. When used in this Act the term --

* * *

(b) "Displaced person" means any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization and who is the concern of the International Refugee Organization.

Section 10. No eligible displaced person shall be admitted into the United States unless there shall have first been a thorough investigation and written report made and prepared by such agency of the Government of the United States as the President shall designate, regarding such person's character, history, and eligibility under this Act. The burden of proof shall be upon the person who seeks to establish his eligibility under this Act. Any person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States.

2. Annex I of the Constitution of the International Refugee Organization, 62 Stat. 3051-3052

Under Annex I, the following persons were not eligible for status as a displaced person or a refugee:

1. War criminals, quislings and traitors.

2. any other persons who can be shown:

(a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or

(b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.

3. Immigration and Nationality Act of 1952, as amended

Section 340, as amended, 8 U.S.C. 1451:

(a) It shall be the duty of the United States attorneys . . . to institute proceedings . . . in the judicial district in which the naturalized citizen may reside . . . 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, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively . . .

* * *

(i) The provisions of this section shall apply not only to any naturalization granted and to certificates of naturalization and citizenship issued under the provisions of this title, but to any naturalization heretofore granted by any court, and to all certificates of naturalization and citizenship which may have been issued heretofore by any court or by a designated representative of the Commissioner under the provisions of section 702 of the Nationality Act of 1940, as amended, or by such designated representative under any other Act.

4. Immigration and Nationality Act amendments of 1961, Pub. Law 87-301, 75 Stat. 656

Sec. 17. Section 310 of the Immigration and Nationality Act (8 U.S.C. 1421) is hereby amended by adding the following additional subsection:

"(e) Notwithstanding the provisions of section 405(a), any petition for naturalization filed on or after the enactment of this subsection shall be heard and determined in accordance with the requirements of this title."

Sec. 18. (a) Section 340(a) of the Immigration and Nationality Act (66 Stat. 260; 8 U.S.C. 1451(a)) is hereby amended by inserting, following the language "that such order and certificate of naturalization" the language "were illegally procured or"

(b) Section 340(b) of the Immigration and Nationality Act (66 Stat. 260; 8 U.S.C. 1451(b)) is hereby amended by inserting, immediately preceding the word "procured", the language "illegally procured or".

Sec. 19. Section 349 of the Immigration and Nationality Act (8 U.S.C. 1481) is hereby amended by adding the following subsection:

"(c) Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after the enactment of this subsection under, or by virtue of, the provisions of this or any other Act, the burden shall be upon the

person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence. Except as otherwise provided in subsection (b), any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily."

CERTIFICATE OF SERVICE

I certify that I served this brief on May 15, 1985, by mailing two copies to counsel for defendant, addressed as follows:

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