IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,)
Plaintiff,)
vs.) No. 80 C 4302
LIUDA KAIRYS,)
Defendant.)

Before the Honorable JAMES B. MORAN,
Friday, June 25, 1982, at the hour of 10:50 a.m.
The trial resumed pursuant to adjournment.

APPEARANCES:

MR. NEAL M. SHER
MR. NORMAN A. MOSCOWITZ
MS. CLARICE FELDMAN
MR. ELI M. ROSENBAUM
MR. MICHAEL WOLF
appeared on behalf of Plaintiff;

MR. FRED H. BARTLIT, JR.
MR. DAVID E. SPRINGER
MR. THOMAS O. KUHNS
appeared on behalf of Defendant.

- - -

THE COURT: Since we are in all likelihood, with one exception, done with live testimony and down to questions on exhibits, there are a couple of comments I really would like to make; one major comment, rather.

I am aware that this case is related to events in central Europe going back 40 years ago almost and the evidence concerning the case has been widely scattered in western Europe, in central Europe, in the United States, and I am certainly aware that, as I think we all do, that citizenship is a basic status from which a great many other rights derive, certainly from the Government's point of view, and, therefore, its acquisition should not be abused, and from the defense, its removal of status is one which should be done only in the most clear circumstances, and I think the Supreme Court has recognized both of those points of view.

I certainly recognize the Government's resources to prosecute this kind of an action are very considerable and that, as I think this trial has demonstrated, that it has been very ably represented by highly competent counsel. I also know that there is just no legal aid or legal assistance that can be provided from any governmental source for defense of cases of this nature other than the Government picking up a certain amount of the travel expenses of depositions and such abroad, and certainly in these circumstances to remit a defendant to a local neighborhood lawyer would be a travesty

of justice.

Judge John powers Crowley, who has now left the bench, when this case was initiated, called upon Mr. Bartlit and his firm, Kirkland & Ellis, to undertake the defense and he of course, has associated himself with Mr. Springer, Mr. Kuhns, Mr. Beck and others.

I certainly recognize that in a case of this nature, there are emotional overtones which may perhaps cause some hesitation in undertaking that kind of representation. Mr. Bartlit and his colleagues did accept that representation at the request of the Court. It has involved an immense amount of time and a great deal of expense which the firm has absolutely no hope of being compensated for. It has been a tenacious and a thorough defense, as it should have been, and as Judge of this Court I would just like to express my personal gratitude to Mr. Bartlit and to his colleagues and to his firm for stepping in and acting in a most commendable fashion and in a most professional manner.

MR. BARTLIT: I appreciate that more than Your Honor can understand. Thank you.

THE COURT: Shall we break for lunch?

MR. SHER: Yes. Two o'clock?

THE COURT: Two o'clock.

MR. SHER: Fine.

THE COURT: See you then.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No. 80 C 4302
	)	
LIUDAS KAIRYS,	)	Honorable James B. Moran
	)	
Defendant.	)	

DEFENDANT'S POST-TRIAL BRIEF

DATED: October 18, 1982

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DEFENDANT'S POST-TRIAL BRIEF

The Supreme Court held in Schneiderman v. United States, 320 U.S. 118 (1943), that the evidence in a denaturalization case like this must be weighed according to three principles:

First: All inferences from the evidence must be drawn as far as reasonably possible in favor of the citizen. (320 U.S. at 122, 158-59).

Second: With all the inferences drawn favorably to the accused, the Government must prove each element of its case by "clear, unequivocal and convincing" evidence. (320 U.S. at 135).

Third: So viewed, the evidence must "not leave the issue in doubt" on any element of the case. (320 U.S. at 135).1/

1/ The Government's brief attempts to avoid this third requirement. (E.g., Gov't Br. 1-2, 18, 19). The Supreme Court's requirement that the evidence "not leave the issue in doubt" comes verbatim from its Schneiderman decision (320 U.S. at 135) and has been repeatedly reiterated (e.g., Chaunt v. United States, 364 U.S. 350, 353 (1960); Baumgartner v. United States, 322 U.S. 665, 670 (1944)), including in the Supreme Court's most recent discussion of denaturalization. Fedorenko v. United States, 449 U.S. 490, 505 (1981).

The result is to impose on the Government a burden of proof "substantially identical with that required in criminal cases -- proof beyond a reasonable doubt." Klapprott v. United States, 335 U.S. 601, 612 (1949)(opinion of Black and Douglas, JJ.).[2/] This heavy burden of proof follows by reason of the serious consequences of losing American citizenship, by the disparity in resources of the parties, by the Government's refusal to accede to a jury trial, and by the difficulty of proving facts after the passage of forty years.

Defendant respectfully urges that the Court apply these standards consistently and stringently to every single factual and legal element of this matter. Cf. In re Winship, 397 U.S. 358 (1970) (due process in a criminal case requires proof beyond a reasonable doubt on every element of the case). This is a burden of proof case. The issue is not what happened, or even what probably happened. The only issue facing this Court is whether there are reasonable inferences that create doubt.

Section I discusses the numerous unanswered questions raised by the identification evidence. Resolving these questions favorably to defendant produces substantial doubt that he was the "Kairys" who served at Treblinka. These many substantial doubts require dismissal of the Government's claims.

2/ This burden of proof is especially appropriate because the evidence shows that Kairys would be criminally prosecuted and probably sentenced to death if deported to the Soviet Union. (DX 537, pp.37-38 (Lesinskis)).

Sections II and III address the applicable denaturalization law. The Government Complaint is based on four counts of "illegal procurement" of citizenship and one count of procurement of citizenship by "willful misrepresentation or concealment of material facts." Section II establishes that the Government failed to pin down Kairys's actual immigration dealings with the International Refugee Organization, the Displaced Persons Commission, American consular officials, American Army officers, or the naturalization personnel handling his case. The misrepresentation count requires actual proof of the questions asked, defendant's understanding of the questions, and his knowingly false answers. E.g., United States v. Profaci, 274 F.2d 289 (2d Cir. 1960). The confusion, lack of clarity, and vacuums in proof left by the Government's evidence requires dismissal of the misrepresentation count.

Section III shows that two reasons require dismissal of the four remaining "illegal procurement" counts: First, Congress added the "illegal procurement" basis for denaturalization ex post facto to the statute in 1961, four years after Kairys's 1957 naturalization. The language of the statute, principles of statutory construction, and the Constitution bar use of this after-the-fact change of law, particularly in a case where "the law should be construed as far as reasonably possible in favor of the citizen." Schneiderman, 320 U.S. at 122. Finally, even if the subsequent statutory change could be applied retroactively, the Government's evidence on "illegal procurement" does not satisfy the Supreme Court's standards in Fedorenko.

Section IV discusses the two ways in which the Government's unreasonably long delay in bringing this action have so prejudiced Kairys that laches bar this prosecution.

I. THE IDENTIFICATION EVIDENCE RAISES NUMEROUS SUBSTANTIAL DOUBTS.

The Government's identification evidence consisted of "eyewitness" testimony and documents. This section will demonstrate that each type of evidence was rife with unanswerable doubt.

A. The Claimed Eyewitness Testimony -- and Lack Thereof -- Raises Doubts.

1. The survivor testimony.

No survivor identified defendant as a Treblinka guard. The absence of such evidence is telling because concentration camp survivors would recall a guard. (DX 536, pp.31-32, 35, 37 (Niederland)). Survivor identification has proved pivotal in all other "Nazi" denaturalization cases.

The absence of survivor identification did not result from lack of resources or effort. Government counsel contacted sixteen Treblinka survivors in four different countries. No survivor could identify Kairys. (DX 529).

All survivors were shown a photograph alleged to be Kairys. None could make an identification. No survivor has ever identified defendant as being at Treblinka, Trawniki, or Lublin. Neither Simon Friedman nor Fred Kort, the only Treblinka camp survivors to testify, was able to identify defendant's known photograph or the mysterious Personalbogen

photograph. (Tr. 40 (Friedman); Tr. 131 (Kort)). Moreover, neither Friedman nor Kort had heard the name "Kairys" while at the Treblinka camp. (Tr. 40 (Friedman); Tr. 129 (Kort)).

Dr. William Niederland, a psychiatrist previously employed by the Government as an expert witness, testified that hyperamnesia is the "indelible imprint" of a prior traumatic experience that has been "engrained" in the mind of a concentration camp survivor. (DX 536, pp.31-32, 35, 37). Victims can voluntarily recall the precise details of camp guards last seen forty years ago.[3/] (DX 536, pp.30, 51). Survivor memory is vivid, accurate, and exact. As Dr. Niederland testified:

> Q. How detailed would this picture be in your mind as time passed by?
>
> Would it be the same clarification of detail as the time it happened, say, 20 or 30 years later?
>
> A. Yes.
>
> Q. The same identical detail?
>
> A. Yes.
>
> * * *
>
> Q. For example, color of hair?
>
> A. Yes.
>
> Q. Color of eyes?
>
> A. Color of hair, color of eyes.

3/ Hyperamnesia has also been researched by three leading West German psychiatrists at the University of Heidleberg: Walter Ritter Von Baeyer, Heinz Hafner, and Karl Peter Kisker in their work "Psychiatries Der Volgerten," or "Psychiatry of Persecutees." These experts substantiate Dr. Niederland's findings. (DX 536, pp.25-26).

Q. Height, how tall?

A. Configuration of the nose, size of the person. . . .

(DX 536, pp.30-31).

The Government's reliance on survivor testimony in prior denaturalization cases highlights the significance of the failure to produce such evidence here. See United States v. Demjanjuk, 518 F.Supp. 1362, 1369-70 (N.D.Ohio 1981), aff'd, 680 F.2d 32 (6th Cir. 1982) (five survivors testify at trial); United States v. Linnas, 527 F.Supp. 426, 433 (E.D.N.Y. 1981), aff'd, -- F.2d -- (2d Cir.), cert. denied, -- U.S. -- (1982) (survivor testimony relied on at trial).

These facts alone raise strong doubts. The survivors' unanimous failure to identify Kairys raises the reasonable inference that he never served at Treblinka. Under the stringent burden of proof, the Government's failure to remove that doubt requires dismissal of its case.

2. The documentary evidence identifies a different "Kairys"; it does not identify defendant.

Evidence produced at trial indicates that an individual named "Kairys" might have served as a guard at the Treblinka Labor Camp.[4/] The documents themselves demonstrate that they refer to some other "Kairys," not to defendant.

4/ "Kairys" is a common Lithuanian name. (Tr. 1053). The evidence is strongly conflicting on the individual's first name. Most testimony refers to a "Kairys" alone. See table of the Government's conflicting documents at page 8, infra.

The Soviet Personalbogen, GX 32, states that the "Kairys" at Treblinka had a scar on his left hip. Defendant, however, has no such scar.

Dr. Herbert Greenlee physically examined Kairys for the Government to detect any scars. In the memorandum requesting the physical examination, the Government stated:

> Doctor Greenlee has advised that if a hip scar resulted from a serious injury, such as a stab wound or bullet wound, it would be visible today upon medical inspection.

(Govt's Mem. in Support of Motion for Physical Examination of Defendant, p.3 (March 26, 1982)). Dr. Greenlee found that Kairys has no scar on his left hip. At trial, Dr. Greenlee testified that, while defendant has several scars resulting from prior stomach operations, including one in the "lateral mid-back," he does not have a scar on the left hip. (Tr. 1288, 1299). Dr. Greenlee agreed that the lateral mid-back scar "is some distance from . . . the hip in most people's minds." (Tr. 1290).

Dr. Greenlee's admission that Kairys has no scar on his left hip and that the one scar is "some distance" from the left hip in most people's minds raises critical doubt that the "Kairys" of the Personalbogen is defendant.[5/]

5/ The Government argues (Gov't Br. 59-60) that Kairys somehow admitted having a scar on his left hip by failing to circle that area of the Personalbogen in his letter to United States Attorney Sullivan, GX 112. As GX 112 demonstrates, Kairys possessed only the Sun Times reproduction of the Personalbogen when he wrote the letter to Sullivan. The statement that the applicant has a scar on his left hip is written in an almost illegible foreign scrawl. The failure of defendant to assert the falsity of such material, under these circumstances, hardly amounts to an "admission."

In the memorandum requesting permission for physical examination, the Government also stated that members of the Waffen SS were given a blood group tattoo under their left armpits. Dr. Scheffler, the Government's expert on German military procedures, confirmed that 1940 German regulations mandated that members of the SS, including concentration camp guards, receive such blood tattoos. (DX 535, pp.36-37). Dr. Greenlee confirmed that defendant has neither a tattoo nor any scar resulting from the removal of a tattoo. (Tr. 1288).

Defendant's name is and always has been Liudas Kairys. Defendant was a Lithuanian citizen and born in Kaunas, Lithuania. Defendant has never waivered on these points. The Government's documents give five different spellings for defendant's name, none of which is correct. Further, all documents record an incorrect birth place and, even among themselves, are inconsistent:

Name	Place of Birth	Document	GX Number
Kayrov	Svilyany	Baptismal Record	GX 44
Kairys, Ludwig	Luilionys	Personalbogen	GX 32
Kairis	--	Promotion Order	GX 38
Kairys, Ludwig	Luiliones	Transfer List	GX 39
Kairys, Liudvig	--	Dienstverpflichtung	GX 36
Kairys, Liudwig	--	Erklarung	GX 37
Kairys, Liudvikas	Svilioniu	Vidaus Reikalu Ministrui	GX 40
Kairys, Liudvikas	Svilioniu	Asmens Zinios	GX 41
Kairys, Liudvikas	Svilioniu	Pazymejimas	GX 42

Name	Place of Birth	Document	GX Number
Kairys, Liudvikas	--	Untitled Document	GX 43
Kairys, Liudvikas	Svilioniu	Vyriausybes Ziniu No. 702	GX 50
Kairis, Ludwig	--	Treblinka Guard List	GX 60

The Personalbogen contains other errors of physical description besides the scar. The Personalbogen lists "Kairys's" hair color as dark blond ("dunkelblond"). Defendant's hair is black and has always been black. Photographs taken during defendant's service in the United States Army (1946-49) and his Lithuanian identity card (1942) prove this. (DX 10, DX 11, DX 12, DX 1). Moreover, as defendant's presence in the courtroom revealed, his eyes are blue, not gray as the Personalbogen asserts. The number and significance of these errors in physical description raises further unanswered doubt.

3. Amanaviczius, Zvezdun, and Latakas did not identify a photo of defendant.

The "identifications" of "Kairys" relied on by the Government refer to the photograph on the Personalbogen, GX 32. This is not defendant's photograph. The Government's own forensic photographer could not positively identify this picture as defendant's. (Tr. 384). Moreover, experts for the Government and defense agree that the Personalbogen picture may have been removed. This uncertainty, along with the inherent inconsistencies in the picture itself, undermine these attempted identifications.

The Government used the Personalbogen picture in every identification in question.[6/] The Government's forensic photographer, Gerald Richards, could only state that the known photo and the Personalbogen picture were "more probably than not" of the same individual. (Tr. 381). He was "unable to say with any degree of scientific certainty that those are the same man." (Tr. 386, 388). Richard's equivocal conclusion does not meet the burden of proof applicable here, for "the facts and law should be construed as far as is reasonably possible in favor of the citizen." Schneiderman, 320 U.S. at 122.

Another explanation of the alleged similarity of photographs is equally probable. Richards explained that individuals of the same ethnic background share many of the same class characteristics, such as hairline, cheek structure and ear indentations. (Tr. 384). Indeed, the closer the ethnic relationship between individuals, the likelier they would share common class characteristics. Richards expected that ethnically-related individuals would share such characteristics. (Tr. 384). Consequently, the evidence creates the

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6/ Other ex-guards Zajanckauskas, Kharkovskii, Vilshun and Fessler, who were contacted by the Government but not called to trial, could not identify even the Personalbogen photograph. Zajanckauskas's failure is significant because he testified that he was friendly with the "Kairys" at Trawniki and spent hours talking with his fellow Lithuanians. (Tr. 234). Moreover, former guard Vilshun identified someone else as resembling "Kairys" (DX 94, p.47), even though "Kairys" was in the same platoon. (GX 80, p.65 (Zvezdun)). In fact, Vilshun testified that the "Kairys" Personalbogen photograph was of someone he had never even seen before. (DX 94, p.49).

distinct possibility that the Personalbogen depicts a different, although ethnically-related individual, than defendant.

The Government could have used a known photo in the photospread. Its failure to do so is not Kairys's fault. The Government possesses several known pictures of defendant, including one from his 1957 Naturalization application, GX 8. Nonetheless, it chose to use the Personalbogen picture in its photospreads. The poor quality of the photograph and the fact that it depicts only the individual's face seriously undermines any "identification" based on it. See United States v. Walus, 616 F.2d 283, 292-293 (7th Cir. 1980).

Questions about the integrity of the Personalbogen photograph further impeach the Government's "identifications." The photograph was, in fact, probably removed from the original Personalbogen. Richards testified that in examining the photograph, he noted an "alteration" and some "scarring" to the Personalbogen in the exact area of the picture. (Tr. 383). Government witness Cantu admitted the possibility that the picture was removed. (Tr. 558). David Purtell's opinion went even further. In his view, the photograph was "most likely" taken off the original document. (Tr. 987).

Each photospread in issue presented this suspect photograph. Each "identification" is thus inherently unreliable and consequently inadmissible. As will next be shown, the questionable procedures the Government followed in the individual identifications reinforce this conclusion.

a. Each of the identification photospreads used is impermissibly suggestive.

The array of photographs used in each photospread renders each resulting "identification" suspect.

The Latakas photospread, GX 63, contains only four pictures. In this Circuit, a permissible photospread must have, at a minimum, at least five photographs of individuals not of the same race, age, and body type. United States v. Bowie, 515 F.2d 3, 7 (7th Cir. 1975). Cf. United States v. Washington, 292 F.Supp. 284, 288 (D.D.C. 1968) (spread containing only four suspect pictures labelled a "suggestive practice"). In the Latakas spread, the remaining three individuals are heavy set and distinctly younger in appearance than the Personalbogen photograph.

As the Seventh Circuit recognized in Israel v. Odom, 521 F.2d 1370, 1374 (7th Cir. 1975), the risk of misidentification increases substantially when the suspect is the only individual wearing distinctive clothing. In Israel, the Court held a line-up procedure illegally suggestive because the accused was the only one of five individuals wearing glasses. Similarly, in the Latakas spread only the claimed "Kairys" photograph presents an individual garbed in the classic closed collar military tunic. By constrast, the two other individuals have white shirts and one even wears a tie. The third individual is much more heavy set, with glasses and an open collar. As such, the claimed Kairys picture stands out "like the proverbial sore thumb." Passman v. Blackburn, 652 F.2d 559, 570

(5th Cir. 1981), cert. denied, 102 S.Ct. 1722 (1982) (twelve-picture photospread found impermissively suggestive).

The Zvezdun photospread, GX 29, is even worse. Of the eight individuals depicted, five are young businessmen in jackets, white shirts, and ties. Obviously, these individuals are not credible suspects as "criminals" of the Second World War. Zvezdun admitted as much:

> Q. During the time that you were in the custody of the Germans, did the Germans ever issue a white shirt and necktie?
>
> A. No. We never saw any ties. We were wearing civilian shirts.
>
> * * *
>
> Q. None of the Wachmann in Treblinka wore white shirts and neckties, did they?
>
> A. No.

(GX 80, pp.52-53). Similarly, a sixth is depicted in a spotted sportshirt and sweater. None of the Wachmann wore this type of garb either.

> Q. And none of the wachmann in Treblinka wore sportshirts and sweaters, did they?
>
> A. No.

(GX 80, p.53). Finally, the seventh individual, Vladas Zajanckauskas, is extremely heavy set and much older in appearance than the Personalbogen photo.[7/]

Thus the Zvezdun photospread impermissibly suggests the GX 32 picture by emphasizing a single photo, a tactic

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7/ At the time of the deposition Zajanckauskas had been publicly identified and accused by the Soviets as a Nazi "war criminal." (DX 19; DX 50; Gov't Br. 36).

condemned by the Supreme Court. In Simmons v. United States, 390 U.S. 377, 384 (1968), the Supreme Court emphasized the inherent problems in any photospread identification:

> Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized.

(390 U.S. at 384).[8] Consequently, photospreads should be developed with care and reflection, especially when time does not necessitate a hurriedly prepared display. See United States ex rel. John v. Casscles, 358 F.Supp. 517, 523 (E.D.N.Y.), rev'd on other grounds, 489 F.2d 20 (2d Cir. 1973), cert. denied, 416 U.S. 959 (1974) (prosecution had "no excuse" for suggestive procedure since there was no urgent need for prompt identification). The Government ignored these principles here.[9]

8/ Emphasis has been added to all citations to the record and authorities unless otherwise indicated.

9/ See also, Styers v. Smith, 659 F.2d 293, 297-98 (2d Cir. 1981) ("[N]one of the other men pictured in the photographic display remotely resembled either [defendants], or answered the broad general descriptions given earlier. . . ."); United States v. Gidley, 527 F.2d 1345, 1350-51 (5th Cir.), cert. denied, 429 U.S. 841 (1976) (five picture photo array ruled suggestive because other photographs emphasized the distinctive characteristics of defendant); United States v. Keller, 512 F.2d 182, 184-85 (3d Cir. 1975) (suspect's picture emphasized by overwhelming youth of all other individuals depicted -- photospread ruled "blatantly suggestive").

The Amanaviczius spread, GX 88, suffers from the same fatal deficiencies present in Zvezdun's. Again, as with the other displays, no known photo was used.

Moreover, five of the eight Amanaviczius individuals are again wearing jackets, white shirts, and neckties.[10/] This reduces the number of pictures to three, with the remaining two unlike the Personalbogen picture in body type and age. As outlined above, such emphasis on a single photograph is impermissible and, when effectively reduced to three possible pictures, "impermissibly suggestive." Haberstroh v. Montanye, 362 F.Supp. 838, 840 (W.D.N.Y. 1973), aff'd, 493 F.2d 983 (2d Cir. 1974).

b. Other evidence casts further doubt on the photo identifications.

In cases involving impermissibly suggestive photo spreads "reliability is the linchpin in determining the admissibility of identification testimony." Manson v. Brathwaite, 432 U.S. 98, 114 (1977).[11/]

10/ The photos in the Amanaviczius spread only depict the neck and face. The Seventh Circuit stressed this limited view as an additional factor undermining reliability. United States v. Walus, 616 F.2d at 293-94.

11/ Although the photospread case law developed in criminal cases, the reliability standards are equally applicable to civil denaturalization. United States v. Walus, 616 F.2d at 292 n.15. Further, the Government has judicially conceded the appropriateness of criminal procedural safeguards in denaturalization proceedings. In discussing the appropriate restriction on the use of photospreads in a denaturalization case, the Government argued to the Fifth Circuit:

(Footnote continued on following page)

Guided by this Supreme Court precedent, the Seventh Circuit has developed the following standard to determine the admissibility of an out-of-court identification:

> The most recent decision of Neil v. Biggers, incorporates both the guidelines of Stovall and Simmons and directs us to ask "whether under the 'totality of circumstances' the identification was reliable even though the confrontation procedure was suggestive." The key element is the reliability of the identification, whether made by a single photo or a photo spread, a line up of five persons, or a show up of one person.

United States v. Kimbrough, 528 F.2d 1242, 1245 (7th Cir. 1976)(citations omitted). Defendant challenges the admission of the Zvezdun, Latakas, and Amanaviczius identifications as unreliable and the use of any such identification as a violation of due process of law.

The passage of forty years renders any subsequent identification inherently suspect.[12/] The Supreme Court has

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(Footnote continued from preceding page)

> "[W]e agree with the district court that, although this is not a criminal action, the [criminal law] standards announced in Simmons v. United States . . . and its progeny for use of photo spreads should apply here. . . . Any lesser standard has no place where a defendant's citizenship is at stake."

Brief for the United States at 51, United States v. Fedorenko, 597 F.2d 946 (5th Cir. 1979) (citations omitted), quoted in, Nesselson & Lubet, Eyewitness Identification in War Crimes Trials, 2 Cardozo L.Rev. 71, 76 n.28 (1980).

12/ An exception to this principle is the small group of persons who suffer from hyperamnesia, see Section I.A.1, supra. Unlike concentration camp victims, there is no reason to assume that guards suffered a similar trauma which would enable them to recall a face forty years after the fact.

stressed repeatedly that the passage of time between the incident and the identification is a critical factor in gauging reliability. See, e.g., Manson v. Brathwaite, 432 U.S. at 115-16. Even delays of two months raise doubts,[13/] and a seven-month delay is a "seriously negative factor in most cases." Neil v. Biggers, 409 U.S. at 201. Obviously, a forty-year lapse geometrically compounds the prejudice. As the Seventh Circuit emphasized in Walus, the passage of four decades brings into question even the most positive identifications:

> The long time span between the incidents and the viewings of this exhibit in the mid 1970's would itself require scrutiny of identifications, even if they were made under laboratory conditions." Cf. Neil v. Biggers, 409 U.S. 188, 201 (1972) (lapse of seven months between incident and confrontation would be "seriously negative factor in most cases"). Generally, the circumstances surrounding the showing of Government Exhibit 1, however, can hardly be described as "laboratory" in nature.

(616 F.2d at 293).

13/ See, e.g., Passman v. Blackburn, 652 F.2d 559, 572 (5th Cir. 1981), cert. denied, 102 S.Ct. 1722 (1982) (pre-identification delay of nine days, two year delay prior to trial held to be a "serious negative factor"); United States v. Baykowski, 583 F.2d 1046, 1047-48 (8th Cir. 1978) (two month delay after incident cited as factor draining reliability); United States v. Look, 464 F.2d 251, 253 (8th Cir.) (four and one-half months delay before identification undermines identification), cert. denied, 409 U.S. 1011 (1972); Kimbrough v. Cox, 444 F.2d 8, 10 (4th Cir. 1971) (two week delay created a "very substantial likelihood of misidentification"); United States v. Washington, 292 F.Supp. 284, 288 (D.D.C. 1968) ("[P]hotographs were shown to the witnesses approximately two months after the event, when memories would obviously have faded."). Cf. Manson v. Brathwaite, 432 U.S. at 116 (Court cites delay of weeks or months from time of incident as a factor that undermines reliability of identification).

Similarly, the Government's procedures in this case can hardly be described as "laboratory conditions." Each photospread used was suggestive. Moreover, the uncertainty of the witnesses' identification, inconsistencies in their testimony, pre-identification publicity of defendant's name and the suspect photograph, and the preclusion of cross-examination into the identification procedure remove the remaining props from under the Government's "identifications."

Thus, for example, Zvezdun's identification of the Personalbogen was far from certain:

> I cannot fully guarantee that the person seen here in this photograph is Kairys for sure. I cannot do this as many other -- many of the rest of his features, trace of his outer appearance have already disappeared from my memory.

(GX 80, p. 46). Zvezdun later admitted that his recollection of a "Kairys" from a concentration camp was sketchy at best:

> I cannot remember his outer appearance. I only remember that he was a strong guy, tall, but I do not remember the color of his eyes and the color of his hair.14/

(GX 80, p.67).

The total absence of an in-court identification further cripples the reliability of each "identification" of the Personalbogen picture. In United States v. Cueto, 611 F.2d

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14/ Zvezdun's identification of a "Kairys" striking persons at the camp has no credibility. Zvezdun stated he recognized "Kairys" from 100 to 150 meters (more than the length of a football field), but was unable to describe the features of the other Wachmann present. (GX 80, pp.60-61). This concession, combined with Zvezdun's admitted inability to describe Kairys's "outer appearance," renders Zvezdun's testimony valueless.

1056 (2d Cir. 1980), the Court emphasized the necessity of a substantiating in-court identification when the initial photospread procedure is suspect. In Cueto, as with Zvezdun, the witness was unable to provide a positive identification. This highlighted the importance of corroborating in-court identification:

> The reliability of the photographic identification in this case is very weak, especially with regard to the level of certainty demonstrated by the witness, Kosiba. Kosiba never made an in court identification of Cueto. In cases such as Manson and Hudson, courts have relied upon clear and positive in court identifications by the witnesses as an important factor to show the reliability of suggestive photographic displays. In those cases the witnesses were exposed to suggestive displays only before the trial as a means of preparing for a later in-court identification. In this case the improper photographic display constituted the witness' only identification of the defendant at the trial itself.

(611 F.2d at 1064). The absense of a single in-court identification assumes paramount importance when the photograph chosen is not a known photo of defendant. Without such an in-court procedure, substantiation of a forty-year-old recollection is lacking.

Latakas's identification is rendered suspect by, among other things, factual inconsistencies between his testimony and the Personalbogen. Latakas states he knew a Kairys while growing up in Svylionys and last saw him "the end of 1943, beginning [of] 1944." (GX 82, p.39). At this time, Latakas testified, the Kairys he knew returned to Svylionys for a weekend. Yet, the timing of this meeting is totally inconsistent with the Personalbogen, which states that a Kairys received furlough from October 1 to October 14, 1942 -- over a

year earlier than when Latakas allegedly met the "Kairys" he knew from Svylionys.[15/]

In addition, Latakas admitted that he first saw the Personalbogen photograph in an article attacking Kairys as a "bourgeois nationalist war criminal" in Tiesa, the local Communist Party newspaper. (DX 50). Such pre-identification exposure to the photograph and accompanying accusations fatally taints the Latakas identification. As the Supreme Court emphasized in Simmons, such tactics plant the suspect in the witness' mind and thereby greatly enhance the potential for misidentification:

> The chance of misidentification is also heightened if the police indicate to the witnesses that they have evidence that one of the persons pictured committed the crimes.

(390 U.S. at 383). See generally, P. Wall, Eye-Witness Identification in Criminal Cases 74-77 (1965). The Latakas identification and supporting testimony must, therefore, be excluded.

Amanaviczius similarly made no in-court identification to corroborate his initial recognition of the Personalbogen photograph. In Amanaviczius's case the Government has no excuse for the absence of affirmative, reliable in-court identification. He lives in Belgium, not Russia. The Government has routinely brought witnesses from overseas to provide in-court identifications in these cases. E.g., United States

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15/ This evidence thus again indicates the strong likelihood of two different individuals named "Kairys."

v. Fedorenko, 455 F.Supp. 843, 901-09 (S.D.Fla. 1978), rev'd, 597 F.2d 946 (5th Cir. 1979), aff'd, 449 U.S. 490 (1981). The Government failed to provide this vital, corroborating evidence here.[16/]

c. Soviet bar on cross-examination precludes the Zvezdun photo identification.

The Soviet Procurator's preclusion of defense cross-examination violated due process of law and requires the exclusion of the Soviet witnesses' testimony. Defense counsel sought to determine the Soviet witnesses' reliability by probing the circumstances surrounding photospread procedures including the identities of the individuals who had talked to the witnesses about the matter.

Zvezdun and Latakas first selected the Personalbogen photo before their depositions at a meeting with Soviet officials. Neither a representative of the United States Government nor the defendant was present. (GX 80, p.71; GX 63(t)). Zvezdun testified that at this earlier meeting, Soviet officials questioned him for two days prior to showing the photospread.

Q. Do you recall that you were shown the photographs at the end of two days of questions about Mr. Kairys?

A. Yes.

16/ Moreover, it is fair to assume that Amanaviczius, like Latakas, was also exposed to the accusations against Kairys spread by the Soviets in Gimtasis Krastas (DX 19), a propaganda publication sent to Lithuanian emigres. (DX 537, pp.11, 13, 19, 21).

(GX 80, p.68). This Soviet woodshedding alone renders any subsequent identification unreliable and inadmissible.[17/]

The Soviet Procurators prohibited questioning about the circumstances surrounding this two-day preparation session that resulted in Zvezdun's identification:

17/ Preidentification discussions with authorities are routinely condemned as a suggestive practice. See, e.g., Foster v. California. 394 U.S. 440, 443 (1969) (police statements that "this is the man" to witness made identification all but inevitable); United States v. Mann. 557 F.2d 1211, 1215 (5th Cir. 1977) (FBI suggestion to witness held to be impermissibly suggestive); Rudd v. Florida, 343 F.Supp. 212, 221 (M.D.Fla. 1972) (police suggestively managed to transfer the recollection of witness to suspect photograph). The Soviets regularly prostitute their own laws to achieve the results they want in "political" cases such as this. (DX 16, "[1981] Country Report on Human Rights Practices," p.898; T. Taylor, Courts of Terror (1976)).

Latakas was also subjected to just such suggestive practices. When asked about the circumstances surrounding his identification of the Personalbogen photograph, the transcript indicates that Latakas stated:

"The Procurator called and there was a talk."

(GX 82, p.53). This sentence was an example of the Soviet's selective translation, as defendant's motion to correct the record and the Affidavit of Ester Igolnikov reveals. The videotape at 18:01:56 demonstrates that Latakas' actual answer to the question about the identification procedures was:

"The Procurator called and there was a talk about some Kairys from the village."

The failure fully to translate Latakas's statement derailed further questioning about the Procurator's discussions. Moreover, standing alone, the presence of a Soviet Procurator prior to the identification taints the substance of the witnesses' identification and causes exclusion of the evidence. See Foster, 394 U.S. at 443; Mann, 557 F.2d at 1215; Rudd, 343 F.Supp. at 221.

Q. Plaintiff's Exhibit 2 [Soviet protocol accompanying the photospread] shows that the photographs attached thereto were presented in Irkutsk, 14 November 1980. Who asked Mr. Zvezdun to go to the meeting?

A. A Procurator. I think Malayev by name. It seems to me so.

Q. Did he visit you personally in your residence?

A. I lived at a distance of 700 kilometers from Irkutsk. I was called. They sent me a paper. Subpoena.

Q. Who delivered the paper to you?

THE INTERPRETER: Sorry.

Mr. Baccuchonis' question: Is this question of any relevance to Kairys' case, how the witness got the paper and whether he came by train or somehow? I think this question doesn't refer to the substance of the matter.

Other questions, please.

MR. BARTLIT: Under our law the circumstances under which a meeting like this was set up and what was said are relevant. That is why I pursue it, respectfully.

THE PROCURATOR: Under our law these questions are of no relevance and that is why we came to the conclusion to be guided by the Soviet law.

(GX 80, pp. 74-75).[18/]

18/ In Zvezdun's deposition, cross examination was tailored to the circumstances and discussions surrounding the Zvezdun identifications. As defense counsel stated:

> "I desire to pursue the facts surrounding the arranging of these meetings and what was said. If the decision is that I may not, then I will make my record and go to another subject."

(GX 80, p.76). The Soviet Procurator responded: "Another theme that would be closer to Kairys' case?" In American courts cross-examination about the circumstances of an alleged photo identification is central to any case. Manson v. Brathwaite, 432 U.S. at 113-14 n. 14; United States v. Cassles, 489 F.2d at 26.

The right of cross-examination is the cornerstone of a fair trial. The Supreme Court has emphasized that this principle is especially applicable where the governmental action may seriously injure an individual citizen:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination.

(Green v. McElroy, 360 U.S. 474, 496 (1959)).[19/] This principle applies to both criminal and civil proceedings. Green v. McElroy, 360 U.S. at 497. See Morgan v. United States, 304 U.S. 1, 18-19 (1938) (right of cross-examination implicit even in an administrative hearing).

The Soviet Procurator's bar to cross-examination into the "totality of the circumstances" surrounding the Zvezdun identification violated defendant's basic rights. Cross-examination into these precise areas was held the "essence of a fair trial" by the Supreme Court in Alford v. United States, 282 U.S. 687, 692 (1931):

> It is the essence of a fair trial that reasonable latitude be given to the cross-examiner, even

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19/ See also Davis v. Alaska, 415 U.S. 308, 316 (1974) ("Cross-examination is the principle means by which the believability of a witness and the truth of his testimony are tested.").

> though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and credibility to the test, without which the jury cannot fairly appraise them.

The Government's effort to condone the Soviet behavior offends these basic precepts.

A Soviet Procurator has no right to restrict defense cross-examination. Defense freedom to attack the direct testimony, search out crucial inconsistencies, and highlight factors of unreliability is vital to due process of law. Further, the denial of what Wigmore termed "beyond doubt the greatest legal engine ever invented for the discovery of truth," cannot be cured by the Government's elicitation of self-serving statements from the witness. 5 J.H. Wigmore, Evidence §1367 at 32 (Chadborn ed. 1974), cited in California v. Green, 399 U.S. 149, 158 (1970). As the Supreme Court stated in Alford:

> To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. In this respect a summary denial of the right of cross-examination is distinguishable from the erroneous admission of harmless testimony.

(282 U.S. at 692) (citations omitted). The denial of cross-examination is prejudical error and mandates the exclusion of the entire Zvezdun testimony. Davis v. Alaska, 415 U.S. 308, 321 (1974) (cross-examination denied improperly -- new trial granted); Brookhart v. Janis, 384 U.S. 1, 3 (1966) (denial of

cross-examination is "constitutional error of first magnitude and no amount of showing of want of prejudice would cure it.").

Kairys suffered tangible prejudice by reason of the improper restriction of cross-examination into the identification procedure. Zvezdun admitted that Soviet officials -- almost certainly the KGB -- had questioned him for two days before showing the photospread. The Soviet translator failed to translate Zvezdun's response to a question about this topic. As defendant's Motion to Correct the Record and the supporting Affidavit of Ester Igolnikov (certified Russian translator) indicates, when asked who contacted him about testifying, Zvezdun responded "KGB, KGB."[20/] After Zvezdun gave his truthful response, Soviet Procurator Baccuchonis interrupted with a flurry of objections. The failure to translate this response and the Soviet Procurator's attempt to obscure the topic further erodes the reliability of Zvezdun's testimony.[21/]

20/ This passage is clearly visible and audible at 13:32:35 of the Zvezdun videotape.

21/ These tactics seriously prejudiced defendant. Not only were the witnesses not brought into the United States to testify and attempt an in-court identification, but defense counsel had but a single opportunity for questioning in the Soviet Union. Translator omissions, along with closely circumscribed cross-examination, fettered defendant's opportunity for fair preparation of his defense. As defense counsel emphasized during the proceedings:

> I have to make one more point for the U.S. lawyers, and that is this, that the reason that I want them to know that if I am precluded from pursuing this point and have no opportunity to return and pursue it at another date I will consider it highly prejudicial.

(GX 80, p. 72).

Wholly apart from the fair trial issue, cross-examination into the "totality of the circumstances" surrounding the identification, including who said what to the witness, plays a vital role in determining the reliability of an indentification. Manson v. Brathwaite, 432 U.S. at 113-14 n.14; United States v. Bowie, 515 F.2d 3, 8 (7th Cir. 1975).[22/] The Seventh Circuit made this point forcefully in Walus:

> It is obvious that one of the major goals of defense cross-examination of eyewitnesses was to show that their memories of the man who committed the crimes had blurred over thirty five years . . . . The questioning would also have been helpful in probing the suggestiveness of identification procedures.

(616 F.2d at 290). The Court found the trial judge's restriction of cross-examination on these subjects "most disturbing," especially in light of the questionable photographs and identification procedures. 616 F.2d at 292-93. Accord, United States ex rel. John v. Casscles, 489 F.2d 20, 26 (2d Cir. 1973) (extent of defense counsel's cross-examination held an "important factor" in identification reliability). The same applies to the Soviet Procurator's behavior here.

22/ See also, e.g., Passman v. Blackburn, 652 F.2d 559, 571 (5th Cir. 1981) (defense cross-examination cited as factor in establishing reliability of identification); United States v. Bowie, 515 F.2d 3, 8 (7th Cir. 1975) (defense cross-examination "explored all of the circumstances surrounding the prior photographic identification"); Haberstroh v. Montanye, 362 F.Supp. 838, 841 (W.D.N.Y. 1973) ("cross examination lessens the possibility of misidentification, especially when there is a long period between the crime and the trial"); United States ex rel. John v. Casscles, 489 F.2d at 26 ("an important factor to consider is cross-examination by defense counsel").

4. Prior consistent statements of the Government's witnesses are not admissible.

a. Testimony of individuals who testified in 1982 and 1969-71.

The Government has offered the prior statements of Zvezdun (GX 30), Kharkovskii (GX 62), Fessler (GX 27, GX 28) and Amanaviczious (GX 90, GX 91) into evidence. Each of these individuals testifed at trial. Their prior statements were made in conjunction with the 1969 West German proceeding in Swidersky. Under Rule 801(d)(1)(B), these prior statements are admissible only to rehabilitate the credibility of existing testimony; otherwise such testimony is excluded as cummulative and hearsay.[23/] Since the defendant does not contest that a Kairys may have been present at the camp, the Swidersky witnesses' statements corroborating this are not impeached. Hence, their prior consistent statements are cummulative and excluded as hearsay under 801(d)(1)(B).

23/ The text of Rule 801(d)(1)(B) provides:

> "(d) Statements which are not Hearsay. A statement is not hearsay if:
>
> (1) Prior statement by witness. The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement and the statement is . . . (B) consistent with his testimony and is offered to rebut an expressed or implied charge against him of recent fabrication or improper influence or motive."

The Seventh Circuit recently emphasized that admissibility of prior consistent testimony under Rule 801(d)(1)(B) requires satisfaction of four elements:

> (1) the out-of-court declarant must testify at trial; (2) the declarant must be subject to cross examination concerning the out-of-court declarant; (3) the out-of-court declaration must be consistent with declarant's trial testimony; and (4) the evidence must be offered to rebut a charge of recent fabrication.

United States v. West, 670 F.2d 675, 686 (7th Cir.), cert. denied, 102 S.Ct. 2944 (1982). See also, United States v. Guevara, 598 F.2d 1094, 1100 (7th Cir. 1979). The Swidersky testimony is inadmissible because defendant does not contest that a "Kairys" may have been at the Treblinka camp. Hence, the fourth element outlined in West -- a charge of recent fabrication -- does not exist.[24/]

b. Testimony of individuals who did not testify in 1982.

The Government has offered the August 26, 1944 statement of Nikita Rekalo (GX 31)[25/] and the 1968 and 1971 statements of Franz Swidersky (GX 59, GX 83, GX 84, GX 85) into evidence. Such prior statements are clearly inadmissible hearsay under Federal Rule of Evidence 804(b)(1), which states:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

24/ Additionally, the denial of cross-exmaination in Zvezdun's deposition precludes the prior statement under the third element of the West requirements.

25/ Rekalo's "statement" was given to SMERSH, Soviet military counter-intelligence during the war. (DX 537, pp. 8-9 (Lesinskis)). That the United States Government would sponsor "evidence" from this notorious organization against an American citizen is astounding.

> (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, . . . if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination.

No one but SMERSH cross-examined Rekalo. Defendant, moreover, was obviously not present for cross-examination at the Swidersky proceedings. Nor did any prior party have the "similar interest or motive to develop" the same testimony as defendant. As the Third Circuit emphasized in Lloyd v. American Export Lines, 580 F.2d 1179, 1187 (3d Cir.), cert. denied, 439 U.S. 969 (1978), for a party to constitute a successor in interest it must appear: "that in the former suit a party having a like motive to cross-examine about the same matters as the present party would have, was accorded an adequate opportunity for cross-examination." Accord, In re Johns Manville/Asbestosis Cases, 93 F.R.D. 853, 856 (N.D.Ill. 1982) (prior party must have "same motive"); Zenith Radio Corp. v. Matsushita Electric Industrial Co., 505 F.Supp. 1190, 1255 (E.D.Pa. 1980) (prior party must have "like motive to develop the testimony about the same material facts as the other defendant.")

Counsel in Swidersky did not have similar motives in the cross-examination as defendant's counsel. Quite simply, at the European trial, Kairys was not a defendant. To admit the Swidersky and Rekalo statements unfairly saddles defendant with

direct testimony without an opportunity to cross-examine. As the court in Zenith Radio noted:

> [I]t is generally unfair to impose upon the present party the responsibility for the manner in which the witness was previously handled by another party.

(505 F.Supp. at 1255). Such unfairness precludes admission of the prior Swidersky testimony.[26/]

B. The Soviet Union's Documents are not Admissible.

1. The documents delivered to the Department of Justice contain numerous unexplainable erasures, inconsistencies, and interlineations.

The Government has conceded, on several occasions, that the documents supplied by the Soviet Union are "important," even "critical," to their case. (Tr. 482, 998; Remarks at Pre-trial Conference, May 13, 1982, p.8). The Governement's failure to produce reliable eyewitness testimony further heightens these admissions. Without these papers the Government has no case. Both the Government and the defendant, therefore, retained

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26/ Similarly, the 1971 judgment of the West German Court in Swidersky is inadmissible. The opinion of a judicial panel is not the type of "factual findings" excluded from the hearsay rule by Rule 803(8)(c). As the Court in Zenith Radio emphasized:

> "First, a reading of the text of § 803(8)(c) makes it plain that the drafters were not talking about judicial findings; rather, the rule speaks of factual findings resulting from "an investigation made pursuant to authority granted by law." Surely Judge Higgenbotham was not engaged in that pursuit."

(505 F.Supp. at 1185).

expert document examiners to determine their authenticity.[27/] These tests establish that the Soviet documents are replete with unexplained erasures, interlineations, unknown typewritten characters, a torn-off picture, and unexplained fiber disturbances around several of the signatures.

A complete list of all erasures, interlineations and inconsistencies is catalogued below. In no instance has the Government offered credible testimonial or documentary evidence to resolve these doubts.

a. Removal of the photograph on GX 32.

The Government's most important document is GX 32: an alleged Personalbogen for one "Kairys, Ludwig." The picture on this document is claimed to be that of the defendant. It serves as the foundation for every photospread identification made by Government witnesses. (See Sec. I,A,3 supra). As pointed out earlier, this is not a photograph of defendant. Experts for both sides also agree that a photograph was possibly torn off the Personalbogen and replaced. David Purtell, defendant's document examiner, concluded that the photograph appeared to have been removed and reglued. (Tr. 986-87). In his final

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27/ Government counsel initiated this action against defendant without first having these admittedly "critical" Soviet documents analyzed by experts. The suit was filed against defendant on August 30, 1980 (Complaint) and Government counsel waited until November 1981 -- over 14 months -- before Epstein and Cantu viewed the documents. (Tr. 545, 556). Even then, their examination totaled 1 hour and 15 minutes. The propriety of basing this case on their after-the-fact justification is questionable.

report, Purtell noted: "behind the photograph [on GX 32] the paper has been torn and the printing has been distorted." (DX 463, p.3). This finding was substantiated by Dr. Cantu, a Government expert, who affirmed that it was possible the GX 32 picture was removed and reglued. (Tr. 559).

It is not the defendant's burden to explain the removal of the only identifying picture on this "critical" document. That task rests with the prosecution. Gideon Epstein, the document expert enlisted by the Government, offered no explanation for the mysterious removal. Indeed, Government counsel never even asked Epstein about it. Cantu, an expert in the chemical properties of ink and paper, was asked to explain the removal but demurred, stating that the question was outside his area of expertise. (Tr. 559).

The probability that someone removed the original photograph and replaced it with the existing picture cannot be discounted. This explanation is supported by Purtell's findings. He stated that the tearing of the paper was not caused by either the heaviness of the glue or the poor quality of the paper, but "[m]ost likely it was from the removal of the photograph tearing the paper that has disturbed the printing on the back." (Tr. 987).

b. Inconsistencies in the GX 32 picture.

Even beyond the "most likely" probability that the original picture on GX 32 was removed, the existing picture has

several inconsistencies that cause suspicion. Purtell's final report stated:

> The placement of the number "1628" on the photograph and the alignment of these numerals are suspicious. There is a darkened area in the picture below the shoulders of the subject that makes the photograph highly suspicious.

(DX 463, p.4). Purtell explained at trial that the numerals "1628" were not properly aligned, and that the "8" was printed upside down. (Tr. 875). Moreover, the "1628" tag apparently was not affixed to the shirt because it overlapped the pocket flap thereby rendering the pocket useless.[28/] (Tr. 875-76).

The Government's document expert did not even notice these characteristics, let alone offer any explanation. The Government's historical expert, Dr. Scheffler, was similarly silent about the photograph's characteristics. Only Government counsel made an attempt at explanation when, in cross-examination of Purtell, he intimated that these peculiarities might have been the normal course of procedures at concentration camps. (Tr. 988). This speculation lacks any support.

28/ On cross-examination Government counsel suggested that these peculiarities might not be suspicious in light of similar characteristics present in other Personalbogen provided by the Soviet Union. Suspicious characteristics of one questioned document cannot be substantiated by copies of other questioned documents. Further, as both Purtell and Epstein stressed, conclusions can only be made after examining the originals, not copies. The originals of the alleged substantiating documents were never available. Moreover, Government counsel's suggestions that these numerals were haphazardly slapped on guards is speculative. No evidence of German uniform procedure or picture-taking methods was presented to the Court. Government "star" witness Ivan Zvezdun could not recall any photographs taken by the Germans. (GX 80, p.53).