U.S. Constitution - Article 1 Section 9

Article 1 - The Legislative Branch
Section 9 - Limits on Congress

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The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

(No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.) **(Section in parentheses clarified by the 16th Amendment.)**

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.

RULE 4-1.7 CONFLICT OF INTEREST; GENERAL RULE

1. **(a) Representing Adverse Interests.** A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client; and

(2) each client consents after consultation.

(b) Duty to Avoid Limitation on Independent Professional Judgment. A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation.

(c) Explanation to Clients. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(d) Lawyers Related by Blood or Marriage. A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

Comment

Loyalty to a client

Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See rule 4-1.16. Where more than 1 client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by rule 4-1.9. See also rule 4-2.2(c). As to whether a client-lawyer relationship exists or, having once been established, is continuing, see comment to rule 4-1.3 and scope.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client's or another client's interests without the affected client's consent.

Subdivision (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Subdivision (a) applies only when the representation of 1 client would be directly adverse to the other and where the lawyer's responsibilities of loyalty and confidentiality of the other client might be compromised.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Subdivision (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and consent

A client may consent to representation notwithstanding a conflict. However, as indicated in subdivision (a)(1) with respect to representation directly adverse to a client and subdivision (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than 1 client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and 1 of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

Lawyer's interests

The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See rules 4-1.1 and 4-1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in litigation

Subdivision (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by subdivisions (b) and (c). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than 1 co-defendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of subdivision (b) are met. Compare rule 4-2.2 involving intermediation between clients.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Interest of person paying for a lawyer's service

A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See rule 4-1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other conflict situations

Conflicts of interest in contexts other than litigation sometimes may be difficult to

assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of some jurisdictions. In Florida, the personal representative is the client rather than the estate or the beneficiaries. The lawyer should make clear the relationship to the parties involved.

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the 2 roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict charged by an opposing party

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See scope.

Family relationships between lawyers

Rule 4-1.7(d) applies to related lawyers who are in different firms. Related lawyers in the same firm are also governed by rules 4-1.9 and 4-1.10. The disqualification stated in rule 4-1.7(d) is personal and is not imputed to members of firms with whom the lawyers are associated.

1 of 13 DOCUMENTS

Norman F. Marsden, Petitioner-Appellant, v. Louie Moore, Sheriff, Chilton Co., Alabama, Respondent-Appellee. Norman F. Marsden, Petitioner-Appellant, v. George Bowen, Warden, Staton Correctional Facility, Elmore, Alabama, Respondent-Appellee

Nos. 87-7174, 87-7708

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

847 F.2d 1536; 1988 U.S. App. LEXIS 8983

June 28, 1988

PRIOR HISTORY: [**1] Appeals from the United States District Court for the Northern District of Alabama.

COUNSEL: Hardwick, Knight & Haddock, Steven E. Haddock, Decatur, Alabama, for Appellant.

Honorable Don Siegelman, Attorney General, Rivard Melson, AAG, The Alabama State House.

JUDGES: Vance and Clark, Circuit Judges, and Garza *, Senior Circuit Judge.

* Honorable Reynaldo G. Garza, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

OPINION BY: CLARK

OPINION

[*1538] CLARK, Circuit Judge:

Norman Marsden, an Alabama prisoner serving a life sentence for murder, appeals the district court's denial of his petition for a writ of habeas corpus. Finding that none of the claims advanced by Marsden warrant habeas relief, we affirm.

I.

Jerry Gillespie was found dead in his Huntsville, Alabama home on Monday, March 3, 1980. Gillespie had been shot once in the chest, struck in the back of the head, and stabbed. According to police, the living room of Gillespie's home "was disarrayed as if there had been a fight within the area." A bullet was found near Gillespie's body.

Marsden was arrested for the murder of Gillespie on August 18, 1980. His trial was continued at the state's request due to the absence of a material witness. Unable [**2] to locate the witness, the state nolle prossed the charges against Marsden on March 13, 1981 because of "insufficient evidence." Marsden was reindicted by the state in February of 1982, and he filed a motion for speedy trial two months later. In June of 1982, Marsden filed a plea of former jeopardy and a motion to dismiss the indictment on the ground that he had been denied a speedy trial. The state trial court denied the motion on June 28, 1982, the first day of Marsden's trial. At that time, the court also denied Marsden's motion for a change of venue due to excessive publicity.

[*1539] The physical evidence from Gillespie's home did not conclusively implicate Marsden. The latent prints found at the home did not match Marsden's prints. Of the fifteen usable blood samples found at the murder scene, eleven were not consistent with Marsden's blood type and grouping, and four were consistent with the blood of both Gillespie and Marsden. In addition, none of the fibers and hairs found at the murder scene belonged to Marsden.

The state's theory of the murder was that Marsden had killed Gillespie after finding out that Gillespie had been seeing his wife. Faced with inconclusive physical evidence [**3] from the murder scene, the state built a circumstantial case against Marsden. Witnesses for the prosecution testified that Gillespie had met Marsden's second wife, Joanne, sometime in 1978, that Joanne

Marsden had accompanied Gillespie to his farm-hunting club in the summer of 1979, that in January of 1980 Gillespie received a bottle of whiskey which contained ethylene glycol (a constituent of antifreeze) and that in February of 1980 Marsden was seen in the parking lot adjacent to the building where Gillespie's business office was located. The state also introduced into evidence a.357 magnum handgun with several parts missing or damaged and the serial number filed off. The gun had been found wrapped in a white plastic bag in a dry lake bed in an adjacent county. The serial number of the gun, which was restored by police through standard acid etching procedures, matched that of a gun purchased by Marsden about three weeks before the murder. A firearms expert testified that he reassembled the gun and that, after conducting some tests, it was his opinion that the gun found in the lake bed fired the bullet found at Gillespie's home. Gene Stuttles, Marsden's twelve-year old stepson (and [**4] Joanne's son by a previous marriage), testified that Marsden told Joanne that if she called the police to have him picked up she herself would be taken in for aiding and abetting the murder.

The state also theorized that Marsden had sustained a hand injury in a scuffle with Gillespie on the night of the murder, and had gone to Vanderbilt Hospital the following day to get medical treatment for the injury. Three witnesses placed Marsden at Vanderbilt Hospital on March 3-4, 1980. Marsden's stepson testified that he accompanied his mother and Marsden to Nashville to have stitches put in Marsden's hand. [1] Dr. James Madden, a surgeon, testified that he had performed surgery for a flexor tendon laceration on the hand of an individual he knew as Edward Nelson on March 3 or 4 of 1980 at Vanderbilt Hospital. After examining a scar on Marsden's left hand outside the presence of the jury, Dr. Madden stated that Marsden's scar was identical to the incision he had made on Nelson's hand. Dorothy Gregory, whose husband shared a room with Nelson on March 3-4, 1980 at Vanderbilt Hospital, testified that Marsden was the patient who was in her husband's room. A week before trial, and twenty-seven months [**5] after her husband had been at Vanderbilt Hospital, Gregory had been unable to identify Marsden as the individual who shared her husband's room from photographs shown to her by police. [2]

1 Prior to testifying, Marsden's stepson had met with prosecutors and had visited Nashville with the district attorney and police detectives.

2 On cross-examination, Marsden's mother testified that she had seen a bandage on her son's hand the weekend after Gillespie's murder.

After the state rested, the defense presented its case. Neither Marsden nor his wife Joanne took the stand. Dudley Powell testified that on March 2, 1980, as he walked his dog near Gillespie's home at about 7:30 p.m., he heard a woman's scream and a gunshot. Marsden's first wife, Yolanda, testified that she had spoken to Marsden when she phoned Marsden's parents' home at around 8:00 p.m. on March 2, 1980. Marsden's son and relatives also placed him at his parents' home on the night of March 2, 1980 until around 9:00 p.m. Marsden's brother testified that neither he nor Marsden knew Gillespie. He also testified that on February 24, 1980 Marsden sold a.357 magnum handgun to [*1540] an unknown individual who had become interested [**6] in it while shooting in a target area near Huntsville.

The jury found Marsden guilty of murder. Marsden appealed, raising a host of issues. The Alabama Court of Criminal Appeals remanded the case to the trial court to resolve a conflict over Marsden's arraignment, but the Alabama Supreme Court reversed, holding that Marsden had waived his right to be arraigned. *See Marsden v. State, 475 So.2d 586 (Ala.Crim. App. 1983), rev'd, 475 So.2d 588 (Ala.1984).* On remand, the Alabama Court of Criminal Appeals affirmed Marsden's conviction without opinion. *See Marsden v. State, 475 So.2d 589 (Ala.Crim.App.1984).*

After pursuing direct appeals, Marsden filed a petition for a writ of habeas corpus in the district court. He argued that (1) excessive publicity made it impossible for him to be tried by a fair and impartial jury, (2) he was improperly required to show a scar to a witness, (3) the testimony of Dorothy Gregory was inadmissible because it was the result of improper identification procedures, (4) the prosecutor improperly commented on his right to remain silent, (5) he was denied his *Sixth Amendment* right to a speedy trial, (6) the trial court failed to instruct the jury on the [**7] lesser included offense of manslaughter, and (7) he was not arraigned prior to trial. The district court, adopting the magistrate's report and recommendation, denied Marsden's petition. On appeal, Marsden raises all of the claims presented to the district court except for the arraignment claim. He also contends that the district court erred in not conducting an evidentiary hearing.

II.

A.

Marsden claims that the state trial court should have granted his motion for a change of venue because of pervasive publicity in the community where he was charged and tried. We disagree.

1.

Gillespie's brother was the county commission chairman of Madison County, Alabama, where Hunts-

ville is located. Consequently, Gillespie's murder generated a good deal of interest in Huntsville. From August of 1980, when Marsden was first arrested, to July of 1984, when the Alabama Supreme Court held that Marsden had waived his right to an arraignment, sixty-one newspaper articles alluding to Marsden's prosecution and trial appeared in Huntsville newspapers. Thirty-five of the articles appeared before Marsden's trial.

The articles described police reports about the murder, Marsden's arrest and indictment, the [**8] district attorney's contentions and his opposition to Marsden's bond, the pretrial and trial procedures, the role that Marsden's wife played in the prosecution's case, and the financial problems faced by Gillespie at the time of his death. Six of the articles were accompanied by Marsden's photograph. Seven of the articles simply mentioned Marsden's indictment or Huntsville (e.g., "Grand Jury Indicts Five in Slaying, 100 Others," Huntsville Times, Oct. 16, 1980). Sixteen of the articles were front-page stories.

One particular newspaper article contained information which was prejudicial to Marsden. On Sunday, June 27, 1982, the day before jury selection in Marsden's case was to begin, the Huntsville Times published a front page article entitled "Marsden Trial Begins Monday." In pertinent part, the article stated:

> At the time of the 1980 arrest, which stemmed from his wife Joanne's cooperation with prosecutors, Marsden was listed in media reports as a Huntsville investment counselor[.]
>
> . . . .
>
> Joanne Marsden agreed to help police and the district court's office after giving a letter to a friend which was to be opened only upon her "death or institutionalization." The friend subsequently [**9] gave the letter to the authorities, who contacted Joanne Marsden.
>
> [*1541] The letter . . . details events which allegedly occurred shortly after Gillespie's death.
>
> The letter said Marsden told his wife if she made a "wrong move" a knife would "go through her son's heart." The letter said Marsden said the knife was just "pulled out of Jerry's back."
>
> Mrs. Marsden said in the letter she feared for her life and her son's life, and that Marsden was a "fantastic actor and can sell himself beautifully. . . . He is attempting to convince everyone that I am crazy[.]" The letter also described how the couple disposed of the gun allegedly used in the Gillespie killing. Police detectives later recovered a gun registered to Marsden at a pond which is on land owned by Joanne Marsden's family in Morgan County.
>
> About a month after the letter was given to police investigators, Mrs. Marsden told District Court Judge Hartwell B. Lutz she wanted to exercise her legal right not to testify against her husband. Lutz granted her request and Mrs. Marsden disappeared from the city shortly thereafter.
>
> . . . .
>
> The letter written by Joanne Marsden was read into evidence at the preliminary hearing on the hindering prosecution [**10] charge [against her] in District Judge Jeri Blankenship's court. The case was then bound over to the . . . grand jury. Joanne Marsden was indicted on that charge in 1981. However, because Mrs. Marsden is not now cooperating with prosecutors, the letter will not be admissible at Marsden's trial, court officials said.

Record, Tab 1 at #34.

In addition to the newspaper reports, Marsden's case received radio and television coverage. For example, on March 27, 1982, three months before Marsden's trial, radio station WAAY, which had the largest audience among persons eighteen years of age and older in the metropolitan Huntsville area, broadcast this story:

> The Madison County Grand Jury . . . has indicted Norman F. Marsden and his wife, Joanne on murder charges involving the death of Jerry Gillespie in March of 1980. Marsden [is] accused of the murder of his business associate, Jerry Gillespie. . . . During the preliminary hearing Mrs. Marsden testified that she feared for the life of herself and son by a previous marriage, if Norman Marsden was released on bond. Judge Hartwell Lutz did release Marsden. And Joanne, who had been cooperating with . . . detectives . . . by supplying them with information and evidence [**11] and is reported to have

> taken them to the location of the murder weapon, she at that time invoked her right to refuse to testify against her husband. At that point, the District Attorney dismissed the charges against Marsden. Later, Joanne was indicated [sic] by the Grand Jury and charged with hindering the prosecution of their case. She was apprehended by F.B.I. agents in California and returned to Huntsville.

State Court Trial Transcript, Vol. I at 9.

At a hearing on Marsden's motion for a change of venue, representatives of the two top radio stations in Huntsville and the news director of a Huntsville television station testified that Marsden's case was considered a leading story and that they had run numerous stories on the case. The trial court denied the motion for a change of venue, but Marsden renewed his motion on the day of jury selection on the ground that the June 27, 1982 article in the Huntsville Times had made it impossible for him to receive a fair trial. The trial court again denied the motion, and refused to allow Marsden's counsel to examine the prospective jurors in small groups about the newspaper article and the effect of the pretrial publicity:

> [COUNSEL]: [**12] Judge, our request was to, say, do it in a group of ten and exclude the other thirty from the question.
>
> THE COURT: I am not going to do that.
>
> [COUNSEL]: And the reason and grounds for that is because of the recent article that appeared in the paper, it is almost impossible to ask them anything about the article other than did you read it? Because if you go [*1542] into about the letter and what the wife said, and she is not . . . available to testify, you clearly get into evidence that will not be at the trial.
>
> THE COURT: . . . I think you can ask them in one group[.]
>
> [COUNSEL]: Does that mean, Your Honor, individually in front of the others?
>
> THE COURT: Sure. I am not going to take Jurors one at a time or in a small panel.

State Court Trial Transcript, Vol. I at 56-57. [3]

> 3 As we have previously stated, where there is a substantial possibility of prejudice, the preferable voir dire procedure is to examine each juror with respect to exposure "'outside the presence of other chosen and prospective jurors.'" *Coleman v. Kemp, 778 F.2d 1487, 1542* (11th Cir.), *cert. denied, 476 U.S. 1164, 106 S. Ct. 2289, 90 L. Ed. 2d 730 (1986)*. The sequestered individual voir dire of jurors "is not unusual, nor viewed with suspicion." *In re Greensboro News Co., 727 F.2d 1320, 1323* (4th Cir. 1984). Indeed, the practice has been endorsed by the Judicial Conference of the United States and the American Bar Association. *See* Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free Press--Fair Trial" *Issue, 87 F.R.D. 519, 532-33 (1980)*; ABA Standards for Criminal Justice, Fair Trial and Free Press, Standard 8-3.5. The trial court's refusal to allow separate questioning in this case is disfavored because the "psychological impact requiring . . . a declaration [of impartiality] before one's fellows is often its father." *Irvin v. Dowd, 366 U.S. 717, 728, 81 S. Ct. 1639, 1645, 6 L. Ed. 2d 751 (1961)*.

[**13] During voir dire thirty-two of the forty prospective jurors stated that they had read, seen or heard about the alleged facts in Marsden's case. Sixteen of the forty had read in part or in whole the June 27, 1982 article in the Huntsville Times [4] quoting the incriminating statements made by Marsden's wife. Four members of the jury venire stated that they had formed some type of opinion as to the case. Of these four prospective jurors, three stated that they could put aside their opinions and fairly evaluate the evidence presented at trial. The prospective juror who stated that the Huntsville Times article would sway him was stricken for cause.

> 4 At the time of Marsden's trial, the Huntsville Times had a daily circulation of 45,000-55,000, and a Sunday circulation of 60,000-68,000.

2.

"The constitutional standard of fairness requires that a defendant have 'a panel of impartial, "indifferent" jurors.'" *Murphy v. Florida, 421 U.S. 794, 799, 95 S. Ct. 2031, 2036, 44 L. Ed. 2d 589 (1975)* (citation omitted). If a trial court is "unable to seat an impartial jury because of prejudicial pretrial publicity or an inflamed community atmosphere," it must grant the defendant's motion for a change [**14] of venue or a continuance. *See Sheppard v. Maxwell, 384 U.S. 333, 362-63, 86 S. Ct. 1507, 1522, 16 L. Ed. 2d 600 (1966)*; *Rideau v. Louisiana, 373 U.S. 723, 726, 83 S. Ct. 1417, 1419, 10 L. Ed.*

2d 663 (1963). Claims of prejudicial publicity are analyzed under two different standards, the "presumed prejudice" standard and the "actual prejudice" standard. We discuss each standard separately.

a.

Juror prejudice is presumed from pretrial publicity when such publicity is sufficiently prejudicial and inflammatory and saturated the community where the trial was held. *Coleman v. Kemp, 778 F.2d 1487, 1490* (11th Cir.), *cert. denied, 476 U.S. 1164, 106 S. Ct. 2289, 90 L. Ed. 2d 730 (1986)*. "The presumed prejudice principle is 'rare[ly]' applicable, and is reserved for an 'extreme situation.'" *Id. at 1490* (quoting *Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 554, 96 S. Ct. 2791, 2800, 49 L. Ed. 2d 683 (1976)*, and *Mayola v. Alabama, 623 F.2d 992, 997 (5th Cir.1980), cert. denied, 451 U.S. 913, 101 S. Ct. 1986, 68 L. Ed. 2d 303 (1981)). See, e.g., Rideau, 373 U.S. at 724-27, 83 S. Ct. at 1418-20* (prejudice was presumed where defendant's confession to robbery, kidnapping and murder was videotaped and shown [**15] three times by television stations, and the three broadcasts were seen by 24,000, 53,000, and 29,000 people in a community with a population of 150,000); *Coleman, 778 F.2d at 1491-1543* (excessive pretrial publicity prejudging guilt and sentence of defendants charged with killing a family in a rural [*1543] county with a population of 7,000 was sufficiently prejudicial and inflammatory to warrant a finding of presumed prejudice). In determining whether prejudice can be presumed, we must examine the totality of the circumstances. No single factor is dispositive. *Murphy, 421 U.S. at 799, 95 S. Ct. at 2035*.

Most of the publicity regarding Marsden's case was factual, and not sensational or inflammatory. The only articles or stories which can be labeled prejudicial are the Huntsville Times article which appeared the day before the trial and the WAAY radio broadcast three months before the trial detailing Joanne Marsden's alleged (and inadmissible) [5] incriminating statements to police about Marsden's guilt in Gillespie's murder. Although the publication of the Huntsville Times article on the eve of Marsden's trial makes the question closer, after a careful review of the record we cannot say that [**16] Marsden has met the "extremely heavy" burden, *Coleman, 778 F.2d at 1537*, of demonstrating that the publicity surrounding his trial was sufficiently prejudicial or inflammatory to establish presumed prejudice. *See Dobbert v. Florida, 432 U.S. 282, 302-03, 97 S. Ct. 2290, 2302-03, 53 L. Ed. 2d 344 (1977)* (fact that community was made well aware of defendant's crimes was not sufficient to render trial fundamentally unfair); *Murphy, 421 U.S. at 797-803, 95 S. Ct. at 2034-38* (extensive factual publicity of defendant's former crimes which was "largely factual in nature" and appeared seven to twenty months before defendant's jury was selected did not cause inflamed community atmosphere); *Ross v. Hopper, 716 F.2d 1528, 1540-41 (11th Cir.1983)* (prejudice not presumed where press coverage, although extensive, was not pervasive or inflammatory, all prospective and actual jurors had heard about the case, six prospective jurors indicated that they had preconceived notions about defendant's guilt or innocence based on pretrial publicity, and the three prospective jurors who stated that they could not set aside their preconceived opinions of the case were stricken for cause). [6]

5 The trial court ruled that the contents of the letter described in the article were inadmissible. *See* State Trial Court Transcript, Vol. II at 58-66.

[**17]

6 It is conceivable that an inordinate amount of factual reports or broadcasts by the print and electronic media can be sufficient to establish presumed prejudice, but such is not the case here.

b.

In order to prove that the jury which convicted him was actually prejudiced, Marsden must show that some of the jurors "had a preconceived notion as to [his] guilt or innocence that they [could] not lay aside." *Johnson v. Kemp, 759 F.2d 1503, 1510 (11th Cir.1985)*. A juror's assurances that he can lay aside his impression or opinion and render a verdict based upon the evidence presented in court "cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.'" *Murphy, 421 U.S. at 800, 95 S. Ct. at 2036* (quoting *Irvin v. Dowd, 366 U.S. 717, 723, 81 S. Ct. 1639, 1642, 6 L. Ed. 2d 751 (1961))*.

The voir dire in this case does not indicate a hostility to Marsden by the jurors that would suggest an impartiality that could not be set aside. Thirty-two of the forty prospective jurors had heard or read something about the case and sixteen had read the [**18] previous day's article in the Huntsville Times, but only four of them stated that they had formed some type of an opinion on the case. Of those four, one stated that he could put his opinion aside because "he [knew] how those articles [were]," and another stated that he would not be swayed because the media only presented one side of the case. The one prospective juror who indicated that his previous opinion would affect him was challenged for cause and did not become a member of Marsden's jury.

Because the trial court did not allow Marsden's counsel to question each prospective juror outside the presence of the other members of the jury venire, Marsden's [*1544] claim of actual prejudice cannot be eas-

ily dismissed. Nonetheless, we do not believe that Marsden has proved that the jury which convicted him was actually prejudiced against him. "In a community where most veniremen will admit to a disqualifying prejudice, the reliability of the others' protestations may be drawn into question [because] it is then more probable that they are part of a community deeply hostile to the accused, and more likely that they may unwittingly have been influenced by it." *Murphy, 421 U.S. at 803, 95 S. Ct. at* [**19] *2037*. But such was not the situation in this case. Only four of the forty prospective jurors had formed some type of opinion about the case. Marsden's case is far removed from cases like *Irvin*, where the defendant was denied a fair trial because 90% of the prospective jurors and eight of the twelve actual jurors believed (in varying degrees) that he was guilty. *See 366 U.S. at 727, 81 S. Ct. at 1645.*

B.

Marsden contends that his trial was rendered fundamentally unfair when he was compelled to show his hand to Dr. Madden outside the presence of the jury in violation of the Alabama Constitution. In order for an erroneous state evidentiary ruling to violate fundamental fairness, the prejudicial evidence in question must be material in the sense of a "'crucial, critical significant factor.'" *Corpus v. Estelle, 571 F.2d 1378, 1381* (5th Cir.) (citations omitted), *cert. denied, 439 U.S. 957, 99 S. Ct. 359, 58 L. Ed. 2d 350 (1978).*

It seems clear that compelling Marsden to show his hand to Dr. Madden outside the presence of the jury did not violate the *Fifth Amendment*. "It has long been held that the compelled display of identifiable physical characteristics infringes no interest protected by the [**20] [*Fifth Amendment*] privilege against self-incrimination." *United States v. Dionisio, 410 U.S. 1, 5-6, 93 S. Ct. 764, 767, 35 L. Ed. 2d 67 (1973). See, e.g., United States v. Bay, 762 F.2d 1314, 1315-16 (9th Cir.1984)* (defendant's showing of hands to the jury did not violate *Fifth Amendment*).

The Alabama Constitution provides that "in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself." *Ala. Const. art. I, § 6* (1975). Alabama courts have interpreted the self-incrimination provision of the state constitution to mean that a defendant cannot be compelled to stand for inspection by a witness *before the jury* if he objects and has not testified. *See Smith v. State, 247 Ala. 354, 24 So.2d 546, 549 (1946). See also Harnage v. State, 290 Ala. 142, 274 So.2d 352, 355 (1972)* (court could have allowed defendant's hands to be inspected by the jury only if defendant consented). It is, however, proper "for another person to do an act against the will of the defendant which relates to his person, and thereby cause to be revealed matter material as evidence against him," and "facts ascertained and opinions formed by an examination [performed without the [**21] defendant's] consent or when [the] consent to the examination was improperly obtained are not inadmissible on that account." *Hunt v. State, 248 Ala. 217, 27 So.2d 186, 193-94 (1946).*

In relatively recent cases, the Alabama Supreme Court has indicated that article I, § 6 provides the same degree of protection as the *Fifth Amendment*. For example, in construing article I, § 6, the court has quoted with approval the following language from a United States Supreme Court opinion:

> "We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance."

Hubbard v. State, 283 Ala. 183, 215 So.2d 261, 267 (1968) (quoting *United States v. Wade, 388 U.S. 218, 222, 87 S. Ct. 1926, 1930, 18 L. Ed. 2d 1149 (1967))*. In a case decided after *Hubbard*, the court stated that the "Alabama privilege against self-incrimination offers the same guarantee as that contained in the Federal Constitution," and concluded that article I, § 6 therefore extended "only to evidence of a testimonial [*1545] or communicative nature." *Hill v. State, 366 So.2d 318, 322 (Ala.1979).*

We [**22] disagree with Marsden that requiring him to display his hand to Dr. Madden violated his privilege against self-incrimination under *article I, § 6 of the Alabama Constitution*. First, article I, § 6 does not offer more protection than the *Fifth Amendment*, and the *Fifth Amendment* does not forbid the compelled display of physical characteristics. Second, as far as we can tell, the Alabama courts have not extended cases like *Smith* and *Harnage* to situations where the defendant is examined outside of court by a person who later testifies at the defendant's trial. On the contrary, *Hunt, Hubbard*, and *Hill* imply that such an out-of-court compelled examination would not violate article I, § 6. *See, e.g., Huff v. State, 452 So.2d 1352, 1353-54 (Ala.Crim.App.1984)* (defendant's privilege against self-incrimination was not violated when he was required to open his mouth and show his teeth to a witness at trial). Because we find that Dr. Madden's testimony was properly admitted under the Alabama Constitution, we do not need to address wheth-

er its admission violated Marsden's right to a fundamentally fair trial.

C.

Marsden contends that his due process rights were violated because Dorothy Gregory's [**23] in-court identification of him did not have a reliable basis independent of an impermissibly suggestive pretrial photographic identification procedure. Determining whether an identification is so unreliable as to violate due process requires us to answer two questions: (1) whether the original identification procedure was unduly suggestive; and if so, (2) whether the procedure, given the totality of the circumstances, created a substantial risk of misidentification at trial. *Dobbs v. Kemp, 790 F.2d 1499, 1506 (11th Cir.1986), cert. denied, 481 U.S. 1059, 107 S. Ct. 2203, 95 L. Ed. 2d 858 (1987).*

Gregory's husband was hospitalized at Vanderbilt Hospital from March 3-5, 1980, and shared a room with another patient. A week before trial, and twenty-seven months after her husband had been hospitalized, the police contacted Gregory for the first time and asked her about the man in her husband's room. Gregory told the police that her husband's roommate was a white man in his thirties and had a cast on his left hand. The police then showed Gregory three photographs: one of Marsden alone in a police mug shot, one of Marsden and his wife, and another of Marsden's wife alone. Gregory told [**24] the police that she could not identify her husband's roommate from the photographs.

After sitting through the first day of the trial, Gregory identified Marsden as the man who shared her husband's room. Gregory testified that she had seen Marsden only twice--once while he was lying in his bed, and once as he walked four feet to the bathroom. Although Gregory only saw the profile of her husband's roommate when he went to the bathroom, she testified that she got a better view of him when he went to the bathroom than when he was in bed.

There is no question that the pretrial photographic identification procedure, in which Marsden was the only male in the photographs shown to Gregory, was unduly suggestive. *See, e.g., Dobbs, 790 F.2d at 1506* (procedure unduly suggestive where witness was shown four photographs, all of the defendant); *O'Brien v. Wainwright, 738 F.2d 1139, 1140-41 (11th Cir.1984)* (procedure unduly suggestive where witness was shown all black and white mug shots except for one color photographs of the defendant), *cert. denied, 469 U.S. 1162, 105 S. Ct. 918, 83 L. Ed. 2d 931 (1985); United States v. Cueto, 611 F.2d 1056, 1063 (5th Cir.1980)* (procedure unduly suggestive where [**25] witness was shown one photograph of the defendant); *Hudson v. Blackburn, 601 F.2d 785, 788 (5th Cir. 1979)* (procedure unduly suggestive where the only eyewitness was shown two photographs the day before trial, one of the defendant and one of a codefendant), *cert. denied, 444 U.S. 1086, 100 S. Ct. 1046, 62 L. Ed. 2d 772 (1980).* Even though Gregory was not able to identify Marsden as her husband's roommate from the photographs, [*1546] the procedure was still overly suggestive because it gave Gregory a frame of reference for her later in-court identification of Marsden.

To determine whether Gregory's identification of Marsden had a reliable and sufficient basis independent of the suggestive photographic display, we must analyze several factors: (1) Gregory's opportunity to view Marsden at Vanderbilt Hospital; (2) Gregory's degree of attention at that time; (3) the accuracy of Gregory's prior description of Marsden; (4) the level of certainty demonstrated by Gregory at the trial identification; and (5) the length of time between the time Gregory allegedly saw Marsden at the hospital and the time she identified him. *Cueto, 611 F.2d at 1064* (citing *Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct.* [**26] *2243, 2253, 53 L. Ed. 2d 140 (1977)).* Although Gregory was certain of her identification of Marsden at trial, all the other *Cueto* factors suggest that Gregory's identification did not have a reliable and sufficient independent basis. First, Gregory only saw her husband's roommate twice at the hospital. More importantly, both glimpses were brief, and Gregory never got a full frontal view of the man sharing her husband's room. Second, there is nothing in Gregory's testimony to indicate that her degree of attention was acute at the times she saw her husband's roommate. Unlike a policeman, Gregory was not trained to pay scrupulous attention to detail, and nothing unusual (e.g., aberrant behavior) made her pay special attention while at the hospital. Third, Gregory's description of the man who shared her husband's room--a white man in his thirties with a cast on his left hand--was very general. Fourth, over two years elapsed between the time Gregory's husband was at Vanderbilt Hospital and the time she identified Marsden at trial. Common sense dictates that human memory is bound to lose some degree of recall during such a prolonged period of time. On balance, we find that the pretrial photographic [**27] display was impermissibly suggestive and that Gregory's testimony does not reveal that her identification of Marsden at trial was otherwise reliable. We therefore conclude that Marsden's due process rights were violated when Gregory's identification testimony was admitted.

The state argues, however, that any errors in Gregory's identification are harmless in light of other evidence adduced at trial. Unreliable identifications resulting from unduly suggestive photographic displays are subject to harmless error analysis. *See United States v.*

DeSimone, 660 F.2d 532, 543 (5th Cir. Unit B Nov. 1981), cert. denied, 455 U.S. 1027, 102 S. Ct. 1732, 72 L. Ed. 2d 149 (1982); Cueto, 611 F.2d at 1064-65. The question of whether a constitutional error is harmless cannot be answered by considering the error in isolation. It is necessary to review the facts of the case and the evidence presented at trial to determine the effect of the unlawfully admitted evidence upon the other evidence at trial. A constitutional error in the admission of evidence cannot be harmless if there is a "reasonable probability that the evidence complained of might have contributed to the conviction." *Fahy v. Connecticut,* [**28] *375 U.S. 85, 86-87, 84 S. Ct. 229, 230, 11 L. Ed. 2d 171 (1963).*

Under this standard, we find that Gregory's improper identification of Marsden as the man who shared her husband's room at Vanderbilt Hospital following Gillespie's murder was harmless error. We come to this conclusion for several reasons. First, Gregory was only one of three witnesses who placed Marsden at Vanderbilt Hospital the day after the murder. Marsden's stepson testified that Marsden went to the hospital because his hand was cut, and Dr. Madden, a Vanderbilt Hospital surgeon, testified that the scar on Marsden's hand was identical to the one he had made on a patient named Edward Nelson on March 3-4, 1980. Second, police recovered a gun which Marsden had purchased before the murder, and a firearms expert testified that the bullet found at Gillespie's home was fired from that gun. Third, there was testimony that Marsden's wife had been seen with Gillespie, thereby providing a motive for the murder. Fourth, Marsden's stepson testified that Marsden told his wife, Joanne, that if she called the police to [*1547] have him picked up, she would also be picked up for aiding and abetting the murder.

D.

Marsden alleges that on three [**29] occasions the prosecutor improperly commented on his right not to testify. According to Marsden, one of the three comments was a direct reference, and the two others were indirect references.

A statement by a prosecutor is improper if it was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. *United States v. Betancourt, 734 F.2d 750, 758* (11th Cir.), *cert. denied, 469 U.S. 1021, 105 S. Ct. 440, 83 L. Ed. 2d 365 (1984).* Comments "on the failure of the defense, as opposed to that of the defendant, to counter or explain the testimony presented or evidence introduced is not an infringement on the [defendant's] *Fifth Amendment* privilege." *Duncan v. Stynchcombe, 704 F.2d 1213, 1215-16 (11th Cir.1983).* In determining the propriety of a prosecutorial remark, we must look at the context in which the statement was made. *Betancourt, 734 F.2d at 758.* Our task in evaluating the comments in this case is more difficult than usual because in Alabama the opening and closing arguments of counsel are not transcribed--the court reporter records only the objections of counsel during those arguments. [**30] Consequently, the only statements that we have before us are the statements of the prosecutor as paraphrased by Marsden's counsel in his objections. Under Alabama law, a defendant objecting to a prosecutorial comment must quote, fully or substantially, the improper remarks when objecting in order to preserve the objection for appellate review. *Jones v. State, 460 So.2d 1382, 1383 (Ala.1984).* Because Marsden's counsel substantially restated the allegedly improper statements in his objections, we proceed to review Marsden's claims. [7]

7 Despite the state's suggestions to the contrary, Alabama law does not require defense counsel to act as court reporter (by restating most of the prosecutor's argument) when objecting. Even if the state is correct in asserting that defense counsel must restate most of the prosecutor's closing remarks from memory in order to preserve an objection to an improper comment, we doubt that failure to adhere to that requirement would procedurally bar a defendant from raising a claim of improper comment on direct or collateral review. Such a requirement might well violate constitutional requirements of due process--"a reasonable opportunity to have the issue as to the claimed right heard and determined by the state court." *Michel v. Louisiana, 350 U.S. 91, 93, 76 S. Ct. 158, 160, 100 L. Ed. 83 (1955). See generally Spencer v. Kemp, 781 F.2d 1458, 1469-71 (11th Cir. 1986)* (discussing when state procedural rules will not bar federal review of federal claims).

[**31] 1.

During closing argument, the prosecutor made a direct comment on Marsden's failure to testify. Marsden's counsel objected: "We except. We object to that portion of the State's remark that the Defendant is not here today denying that he wasn't at the scene because his hair wasn't there at the scene. Thank you, Judge." The trial court overruled the objection by Marsden's counsel. State Court Trial Transcript, Vol. V at 902-03.

In his habeas petition, Marsden alleged only that his constitutional rights were violated when the prosecutor made "inadmissible comments about [his] election not to testify." Marsden's amended petition did not elaborate on the claim of improper prosecutorial comment made in the original habeas petition. In addition, Marsden's brief

in support of his petition did not set forth the direct comment. Rather, it only set forth the two indirect comments. Moreover, Marsden's supplemental brief did not touch upon the issue of prosecutorial comment. Simply stated, Marsden never specified, quoted, or cited the direct comment in his petitions and briefs before the district court.

The magistrate, not being apprised that the direct comment was at issue (or that a direct [**32] comment even existed), only ruled on the two indirect comments, which Marsden had set forth in his brief, and never addressed the direct comment Marsden now [*1548] complains about. In objecting to the magistrate's report and recommendation that his habeas petition be denied, Marsden stated:

> The Magistrate is incorrect regarding his reasoning pertaining to Petitioner's failure to testify. This Magistrate failed to consider the record regarding the fact that the state trial court, when considering the prosecution's direct comment about Petitioner not testifying, stated "overruled. The jury knows the defendant has already plead [sic] not guilty." This statement clearly falls within the parameters of *Duncan v. Stynchcombe, 704 F.2d 1213, 1215 (11th Cir.1983).*

Record, Tab 20 at 7.

Where an issue raised on appeal by a habeas petitioner has not been advanced in the district court, it is not properly before the court of appeals. *See Campbell v. Wainwright, 738 F.2d 1573, 1575-76 (11th Cir.1984), cert. denied, 475 U.S. 1126, 106 S. Ct. 1652, 90 L. Ed. 2d 195 (1986).* Marsden did not bring to the magistrate's attention either in his petitions or his brief that the prosecutor had made [**33] a direct comment on his failure to testify. In addition, his objection to the magistrate's report was not as clear as it could have been. Although Marsden alluded to the "direct comment," he did not quote the remark or give a record cite to it in his objection. Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to. Frivolous, conclusive, or general objections need not be considered by the district court. *Nettles v. Wainwright, 677 F.2d 404, 410 n. 8 (5th Cir. Unit B 1982).* Marsden's objection was not frivolous or conclusive, but it was inadequate under the circumstances. Because he did not specifically set out the direct comment in his petitions or accompanying briefs, it was incumbent upon Marsden to ensure that the district court was apprised of the direct comment by specifically mentioning it in his objections to the magistrate's report.

Marsden's failure to fulfill this obligation would ordinarily preclude us from addressing the constitutionality of the prosecutor's direct comment on his failure to testify. If we do not address this issue at this time, however, it will likely result in a new petition for a writ [**34] of habeas corpus, a new hearing, and a new appeal. [8] In order to avoid this situation, which would further expend scarce judicial resources, and because the constitutionality of the direct comment is a question of law, we reach the merits of Marsden's claim. *See Long v. McCotter, 792 F.2d 1338, 1345 (5th Cir. 1986)* (court of appeals would consider claim of habeas petitioner not raised in the district court where claim was question of law that could be considered on the face of the record established, and failure to address claim would likely result in a new petition, a new hearing, and a new appeal).

> 8 As a matter of fact, such a sequence of events has already taken place. While this appeal was pending, Marsden filed a second habeas corpus petition in the district court, raising only the impropriety of the direct comment. The district court dismissed the petition, holding that it no longer had jurisdiction over the case. Marsden appealed the district court's ruling, and we consolidated that appeal with the original appeal. We affirm the district court's dismissal of Marsden's second petition. The general rule is that an appeal to a circuit court divests the district court of jurisdiction as to any matters involved in the appeal. *Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 379, 105 S. Ct. 1327, 1331, 84 L. Ed. 2d 274 (1985).* Although the rule is not a statutory one and is not absolute, *Jago v. U.S. District Court, 570 F.2d 618, 622 (6th Cir.1978)*, we see no reason to deviate from it in these circumstances. If Marsden wanted to present the direct comment issue to the district court while the appeal was pending, he should have asked the panel for leave to do so.

[**35] Under circuit precedent, the prosecutor's direct comment was improper. *See United States v. Griggs, 735 F.2d 1318, 1324 (11th Cir.1984)* (prosecutor's comment that the defendant's attorney had asked the jury to assume that the defendant was afraid of an unjustified conviction "even though the defendant ha[d] not testified about it" was an impermissible comment on the defendant's failure to testify). Such an improper comment, however, does not necessarily warrant reversal of Marsden's conviction. *See Chapman v. California, 386 U.S. 18, 24-26,* [*1549] *87 S. Ct. 824, 828-29, 17 L. Ed. 2d 705 (1967)* (unconstitutional prosecutorial com-

ment on defendant's failure to testify is subject to the harmless error rule). For the reasons stated in Part II.C., specially the fact that the gun which fired the bullet found at the murder scene was traced to Marsden, we find that the improper comment on Marsden's failure to testify, though constitutional error, was harmless beyond a reasonable doubt.

2.

During closing argument, the prosecutor made two references to evidence or lack thereof in the case. Marsden's counsel objected both times. After the first comment, he stated: "I object to that portion of his argument [**36] with regard to what Norman Marsden told Joanne just after this happened, he is alluding to the fact that the Defendant did not take the stand." After the second, he said: "We object to that portion of his argument where he says you have not heard from anyone in this case as to where that bottle came from. We think there is an inference there that he is commenting that the Defendant failed to take the stand, and we object and move to strike that statement." The trial court sustained both objections. State Court Trial Transcript, Vol. V at 900-02.

We conclude that the two indirect comments by the prosecutor were references to the failure of the defense to counter or explain the prosecution's theory or evidence (Who placed the poisoned whiskey on Gillespie's porch? What did Marsden supposedly tell his wife after Gillespie's death?), and not comments upon Marsden's failure to take the stand. *See Stynchcombe, 704 F.2d at 1215* (prosecutor's comment that "there has been no evidence from the defense at all that [the defendant] was not in that house" was a proper reference to the failure of the defense to offer any alibi evidence as to defendant's whereabouts at the time of the crime). They [**37] therefore did not violate Marsden's *Fifth Amendment* right to remain silent.

E.

Marsden also claims that his right to a speedy trial was violated, that the state trial court erred in not instructing the jury on the lesser included offense of manslaughter, and that the district court erred in not holding an evidentiary hearing. We agree with the magistrate and the district court that Marsden is procedurally barred from raising the speedy trial issue and that the state trial court did not err in refusing to instruct the jury on manslaughter. Our disposition of Marsden's other claims makes it clear that the district court did not err in refusing to conduct an evidentiary hearing.

III.

We find that none of the claims advanced by Marsden warrant granting his petition for a writ of habeas corpus. Accordingly, the decision of the district court is affirmed.

AFFIRMED.

LEXSEE 195 F.2D 583, 608

UNITED STATES v. ROSENBERG et al.

Nos. 137-138, Docket 22201, 22202

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

195 F.2d 583*; *1952 U.S. App. LEXIS 2991

January 10, 1952, Argued
February 25, 1952, Decided

SYLLABUS

[**1] On January 31, 1951, the grand jury indicted Julius and Ethel Rosenberg, David Greenglass, Anatoli Yakolev and Morton Sobell for conspiring between 1944 and 1950 to violate *50 U.S.C. § 32* [1] by combining to communicate to the Union of Soviet Socialist Republics documents, writings, sketches, notes and information relating to the national defense of the United States, with intent and reason to believe that they would be used to the advantage of the Soviet Union. Harry Gold and Ruth Greenglass were named in the indictment as conspirators but not as defendants, and a severance for trial purposes was granted as to David Greenglass, who pleaded guilty, and as to Anatoli Yakolev. The indictment listed ten overt acts done in furtherance of the conspiracy, including the receipt by Julius Rosenberg from Ruth Greenglass of a paper containing written information after a trip by Ruth to New Mexico, and the additional receipt by Julius from David Greenglass of a paper containing sketches of experiments conducted at the Los Alamos Project. Defendant Sobell made a motion for a bill of particulars. The government's answering affidavit charged Sobell with five [**2] overt acts made in furtherance of the conspiracy, all consisting of 'conversations' with Julius Rosenberg on various dates. The trial of the defendants, Julius and Ethel Rosenberg and Morton Sobell, in the United States District Court for the Southern District of New York, lasted fourteen days.

At the trial, witnesses for the government testified to the following: In November 1944, Ruth Greenglass planned a visit to her husband, David, stationed as a soldier in the Los Alamos atomic experimental station. Before her visit, Ethel and Julius Rosenberg, sister and brother-in-law of David Greenglass, urged Ruth to obtain from David specific information concerning the location, personnel, physical description, security measures, camouflage and experiments at Los Alamos. Ruth was to commit this information to memory and tell it to Julius upon her return to New York, for ultimate transmittal to the Soviet Union. David, reluctant at first, agreed to give Ruth the information Julius had requested. He told her the location and security measures of the station, and the names of leading scientists working there. When David returned to New York in 1945 on furlough, he wrote out a [**3] fuller report on the project for Julius, and sketched a lens mold used in the atomic experiment. A few nights later, at the Rosenberg home, the Greenglasses were introduced to Mrs. Sidorovich whom Julius explained might be sent as an emissary to collect information from David in New Mexico. It was agreed that whoever was sent would bear a torn half of the top of a Jello box which would match the half retained in Ruth's possession. Ethel Rosenberg, at this time, admitted her active part in the espionage work Julius was carrying on, and her regular typing of information for him. Julius introduced David to a Russian, who questioned David about the atomic-bomb operation and formula. In June 1945, Harry Gold arrived in Albuquerque with the torn half of the Jello box and the salutation, 'I come from Julius.' He had been assigned to the mission by Yakolev, his Soviet superior, and had, the day before his trip, met, pursuant to Yakolev's command, with Emil Fuchs, British scientist and Russian spy working at Los Alamos. David delivered to Gold information about personnel in the project who might be recruited for espionage, and another sketch of the lens mold, showing the basic [**4] principles of implosion used in the bomb construction. Gold relayed the information to Yakolev. On a revisit of the Greenglasses to New York, David turned over a sketch of the cross-section and a ten-page exposition of the bomb to Rosenberg. Ethel typed up the report, and, during this meeting, Julius admitted he had stolen a proximity fuse from a factory, and had given it to Russia.

After the war, David went into business- a small machine-shop- with Julius, and Julius several times offered to send David to college on Russian money. Julius confided to David that he was helping the Russians subsidize American students, that he had contacts in New York and Ohio, and supplied information for siphoning to Russia, that he transmitted information to Russia on microfilm equipment, and that he received rewards for his services from the Russians in money and gifts. In 1950, Julius came to David and told him to leave the country immediately, since Dr. Fuchs, one of Gold's collaborators, had been arrested; he, Julius, would supply the money and the plan to get to Russia. A month later, after Gold's arrest, Julius repeated the warning to flee, adding that he and his family intended [**5] to do likewise, and giving David $ 1,000. Julius said his own flight was necessitated by the fact that Jacob Golos, already exposed as a Soviet agent, and Elizabeth Bentley, probably knew him. Julius said he had made several phone calls to her and that she had acted as a go-between for him and Golos. Julius gave David an additional $ 4,000 for the trip Julius had passport photos taken, telling the photographer that he and his family planned to leave for France. After David's arrest for espionage, Ethel asked Ruth to make David keep quiet about Julius and take the blame alone, since Julius had been released after admitting nothing to the F.U.I. In 1944, Julius several times solicited Max Elitcher, a Navy Department engineer, to obtain anti-aircraft and fire-control secrets for Russia, and in 1948 asked him not to leave his Navy Department job because he could be of use there in espionage. A month or so later Elitcher accompanied Sobell to deliver 'valuable information' in a 35-millimeter can to Julius.

According to the government's witnesses, Sobell, a college classmate of Rosenberg's suggested to Rosenberg that Elitcher would be a good source of espionage information, [**6] and he, Sobell, later joined Julius, in urging Elitcher not to leave the Navy Department. According to Julius, Sobell regularly delivered information for transmittal to Russia. Sobell (as noted above) delivered 'valuable information' to Julius on an emergency midnight ride after learning that Elitcher was being followed by the F.B.I. He asked Elitcher for a fire-ordinance pamphlet and for the names of young engineers who might supply military information to the Russians. In 1950, Sobell fled to Mexico, used various aliases there, and made inquiries about leaving Mexico for other countries. He was, however, deported from Mexico to the United States.

The Rosenbergs took the stand and testified as follows: They had never solicited the Greenglasses for atomic information or participated in any kind of espionage work for Russia. Julius denied stealing a proximity fuse. He did not, he said, ever know Harry Gold or call Elizabeth Bentley. He admitted that he and David went into business together after the war, but said they did not enjoy good business relations. In 1950, David, according to Julius, excited, asked Julius to get a smallpox vaccination certificate from his doctor [**7] and to find out what kind of injections were necessary for entrance into Mexico. Ruth had told Julius that David stole things while in the Army, and Julius thought David was in trouble on this account. David asked for a few thousand in cash and, when Julius refused, told Julius he would be sorry. Julius denied that he gave David any money to flee, or had any passport pictures of his own family taken preparatory to flight. He never discussed anything pertaining to espionage with either Sobell or Elitcher although he saw both socially. In short, the Rosenbergs denied any and every part of the evidence which the government introduced in so far as it connected them with Soviet espionage. Sobell did not take the stand but he pleaded not guilty. At the end of the trial, the jury found the three defendants guilty as charged. The trial judge sentenced the Rosenbergs to death, and Sobell to thirty years' imprisonment.

COUNSEL: Myles J. Lane, New York City (Roy M. Cohn, James B. Kilsheimer 3d and Stanley D. Robinson, all of New York City, of counsel), for United States of America.

Emanuel H. Bloch, New York City, for Julius Rosenberg and Ethel Rosenberg.

Harold M. Phillips [**8] and Edward Kuntz, New York City (Howard N. Meyer, New York City of counsel), for Morton Sobell.

JUDGES: Before SWAN, Chief Judge, and CHASE and FRANK, Circuit Judges.

OPINION BY: FRANK

OPINION

[*590] Since two of the defendants must be put to death if the judgments stand, it goes without saying that we have scrutinized the record with extraordinary care to see whether it contains any of the errors asserted on this appeal.

1. The Supreme Court has held that the Espionage Act of 1917 makes criminal, and subject to the prescribed penalties, the communication of the prohibited information to the advantage of 'any foreign nation,' even if such communication does not injure this country. See *Gorin v. United States, 312 U.S. 19, 29-30, 61 S.Ct. 429, 435, 85 L.Ed. 488*, where the Court said: 'Nor do we think it necessary to prove that the information obtained

was to be used to the injury of the United States. The statute is explicit in phrasing the crime of espionage as an act of obtaining information relating to the national defense 'to be used * * * to the advantage of any foreign nation.' No distinction is made between friend or enemy. Unhappily the status [**9] of a foreign government may change. The evil which the statute punishes is the obtaining or furnishing of this guarded information, either to our hurt or another's gain.' [1] Accordingly, the trial judge, in the case at bar, properly instructed the jury as follows: 'I charge you that whether the Union of Soviet Socialist Republics was an ally or friendly nation during the period of the alleged conspiracy is immaterial, and you are [*591] not to consider that at all in your deliberations.'

In *United States v. Heine, 2 Cir., 151 F.2d 813*, we so interpreted the statute as to make it inapplicable to information which our armed forces had consented to have made public. The defendants now assert that the indictment, which followed the language of the statute, was fatally defective since it did not allege that the matter there described was not public. But the statutory language necessarily imported its correct judicial interpretation. Consequently the indictment was sufficient under *Rule 7(c) of the Federal Rules of Criminal Procedure*, 18 U.S.C.A., which provides: 'The indictment or the information shall be a plain, concise and definite written statement [**10] of the essential facts constituting the offense charged. * * * The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.' [2]

In the Gorin case, the Supreme Court rejected the contention of the unconstitutionality of the statute on the ground of its vagueness under the *due process clause of the Fifth Amendment*. By implication, it sustained the validity of the statute against any identical argument of vagueness, such as the one urged here, under the *Sixth Amendment*, since the Court's decision was primarily concerned with whether the statute set up definite enough standards of guilt to advise a citizen of what exactly was forbidden and ipso facto a potential defendant of what exactly he was charged with doing. The Court said (*312 U.S. 19, 61 S.Ct. 433*): 'But we find no uncertainty in this statute which deprives a person of the ability to predetermine whether a contemplated action is criminal under the provisions of this law. The obvious delimiting words in the statute are those requiring 'intent or reason to [**11] believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation.' This requires those prosecuted to have acted in bad faith. The sanctions apply only when scienter is established. * * * Finally, we are of the view that the use of the words 'national defense' has given them, as here employed, a well understood connotation. * * * National defense, the Government maintains, 'is a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness.' We agree that the words 'national defense' in the Espionage Act carry that meaning. * * * The language employed appears sufficiently definite to apprise the public of prohibited activities and is consonant with due process.' [3]

We think the statute valid under the *First Amendment* as well. The communication to a foreign government of secret material connected with the national defense can by no far-fetched reasoning be included within the area of First-Amendment protected free speech. As interpreted in the Gorin case, the statute forbids nothing except such communication. The Court's [**12] decision that the statute [*592] was definite enough to tell citizens what was prohibited satisfies appellants' contention that many legitimate exercises of First-Amendment rights will fall within the language of the statute. The Court said, 'This requires those prosecuted to have acted in bad faith. The sanctions apply only when scienter is established.' Stripped down, defendants' First-Amendment argument is the same as their argument under the Fifth and Sixth- i.e., vagueness- and we think the Supreme Court has answered that argument. 'A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation. But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that [**13] one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.' *Boyce Motor Lines v. United States, 342 U.S. 327, 72 S.Ct. 329, 330.* [4]

2. The defendants in their briefs and oral arguments in this court, have attacked the reliability of the damaging testimony given against them by the government's chief witnesses who are all self-confessed spies, and particularly the credibility of the testimony of the Greenglasses, one of whom the government has not prosecuted and the other of whom received a relatively mild sentence. Doubtless, if that testimony were disregarded, the conviction could not stand. But where trial is by jury, this court is not allowed to consider the credibility of

witnesses or the reliability of testimony. Particularly in the federal judicial system, that is the jury's province.

The jury here were warned by the trial judge as follows: 'As to the testimony of David Greenglass, Ruth Greenglass and Harry Gold, you must consider it carefully and act upon it with caution, for they are accused of being accomplices. An accomplice in this case is anybody that the prosecution charges [**14] agreed or confederated with any or all of the defendants in the commission of the crime charged, as alleged in the indictment. I am not saying that, because a person is a co-conspirator or an accomplice, he or she is not to be believed. If this were so, many cases in this court could not be proven. In the Federal Court a defendant can be convicted upon the uncorroborated testimony of an accomplice whose testimony satisfies the jury of the defendant's guilt beyond a reasonable doubt.' So instructed, the jury found defendants guilty. Faced with such a verdict, this court is obligated to assume that the jury believed the evidence unfavorable to the defendants. On that assumption, the evidence to sustain the verdict is more than ample.

3. Defendants, however, tell us that the trial judge behaved himself so improperly as to deprive them of a fair trial. Defendants' counsel first broached this suggestion on a motion for mistrial after all the evidence had been heard, said that [*593] the judge's alleged fault had been 'inadvertent,' and added that the judge had 'been extremely courteous to us and afforded us lawyers every privilege that a lawyer should expect in a criminal [**15] case.' Soon after the denial of this motion, counsel for the Rosenbergs, summing up for the jury, stated that 'we feel that the trial has been conducted * * * with that dignity and that decorum that befits an American trial.' Still later, the same counsel said that 'the court conducted itself as an American judge.' These remarks, by a highly competent and experienced lawyer, are not compatible with the complaints now made. Nor are those complaints deserved. We think the judge stayed well inside the discretion allowed him.

He is charged mainly with taking too active a part in the trial process by his questioning of witnesses. By this questioning he is alleged to have (1) emphasized key points of the government's case; (2) protected and rehabilitated government witnesses; (3) commented on evidence as immaterial or dismissed contradictions brought out by defense attorney as not very important or convincing; (4) examined the defendants with hostility. We have carefully examined each of the hundred or so incidents cited by defendants. Several representative incidents are set out in the footnote. [5] In general, we [*594] can find no purpose in the judge's questioning [**16] except that of clarification. If, with that purpose, he gave witnesses who had contradicted themselves a chance to resolve that conflict, and took away defendants' temporary advantage with the jury, it was an unavoidable incident of his unchallenged power to bring out the facts of the case. See, e.g., *Simon v. United States, 4 Cir., 123 F.2d 80, 83*, certiorari denied *314 U.S. 694, 62 S.Ct. 412, 86 L.Ed. 555*: 'It cannot be too often repeated, or too strongly emphasized, that the function of a federal trial judge is not that of an umpire or of a moderator at a town meeting. He sits to see that justice is done in the cases heard before him; and it is his duty to see that a case on trial is presented in such way as to be understood by the jury, as well as by himself. He should not hesitate to ask questions for the purpose of developing the facts; and it is no ground of complaint that the facts so developed may hurt or help one side or the other. In no case is the exercise of this power of the judge more important than in one like this, involving, as it does, lengthy circumstantial testimony, the force of which may be lost upon the jury if it is [**17] not properly presented or if its salient features are not called to the jury's attention at the time. The judge is the only disinterested lawyer connected with the proceeding. He has no interest except to see that justice is done, and he has no more important duty than to see that the facts are properly developed and that their bearing upon the question at issue are clearly understood by the jury.' If some of his questions and comments indicated his opinion of the merits of counsel's attack or of the witnesses' testimony, it cannot be said that he committed reversible error, since, unlike judges in many of our state courts, a federal judge may comment outright on any portion of the evidence, telling the jury how it struck him, whom he believed, or disbelieved, and the like, provided only that he advises the jury that they are in no way bound by his expressions of such views. *United States v. Aaron, 2 Cir., 190 F.2d 144, 146-147*; *United States v. Chiarella, 2 Cir., 184 F.2d 903, 908*; reversed on government's confession of error *341 U.S. 946, 71 S.Ct. 1004, 95 L.Ed. 1370*; *Pfaff v. United States, 7 Cir. 85 F.2d 309, 311*; [**18] *United States v. Warren, 2 Cir., 120 F.2d 211, 212*; *Ochoa v. United States, 9 Cir., 167 F.2d 341, 344*; *Herron v. Southern Pacific Co., 283 U.S. 91, 95, 51 S.Ct. 383, 75 L.Ed. 857*; *Glasser v. United States, 315 U.S. 60, 82, 62 S.Ct. 457, 86 L.Ed. 680.*

Here the trial judge said in his charge: 'No matter how careful a judge may be to avoid it, there is always the possibility that the jury or some particular juror may get an impression that the judge has some [*595] opinion with reference to the guilt or innocence of the defendants, or that he thinks that some particular phase of the case is more important than another, or that some particular witness is more credible than another, or that a certain inference of fact should not be made and so on. If you have formed any such impression you must put it out of your mind and utterly disregard it. Nothing I have said

during the trial nor in these instructions was intended to give any such impression; nor were any remarks or questions addressed to any of the witnesses or to counsel so intended. On the contrary, I have been scrupulously careful to avoid any comment which [**19] might even remotely suggest that I considered the subjects of the weight of testimony, the credibility of witnesses, the inferences to be drawn or the relative importance of one segment of the evidence as against another, of the determination of the guilt or innocence of the defendants, as coming within the orbit of any of my functions as the presiding Judge in this trial. And so I tell you again, you are the sole and exclusive judges of the facts of this case; you, and you alone, will pass upon the credibility of all the witnesses, all in accordance with the instructions on that subject, which I shall give you later. Despite anything said by me or by counsel, your recollection of the testimony must prevail whenever your recollection differs from what I have said or what counsel for either side have said in argument or otherwise; it is for you to determine what the proofs adduced by both sides disclose, regardless of anything said by me in the brief and necessarily incomplete summaries which I have given you of the contentions of the parties; and it is for you and you alone to weigh the proofs, draw such inferences of fact therefrom as you determine should be drawn and [**20] to decide each and every one of the issues of fact in the case.'

4. Evidence was introduced to the effect (1) that the defendants expressed a preference for the Russian social and economic organization over ours, and (2) that the defendants were members of the Communist Party. The defendants say this evidence was incompetent to show they would commit espionage for Russia, and that it improperly inflamed the jury against them. We think the evidence possessed relevance. An American's devotion to another country's welfare cannot of course constitute proof that he has spied for that other country. But the jurors may reasonably infer that he is more likely to spy for it than other Americans not similarly devoted. Hence this attitude bears on a possible motive for his spying, or on a possible intent to do so when there is other evidence in the case that he did such spying. We have held such testimony admissible in a similar case involving espionage for *Nazi Germany. United States v. Molzahn, 2 Cir., 135 F.2d 92, 97*, certiorari denied *319 U.S. 774, 63 S.Ct. 1440, 87 L.Ed. 1721*. See also *Haupt v. United States, 330 U.S. 631, 642, 67 S.Ct. 874, 91 L.Ed. 1145*. [**21]

Communist Party membership presents a somewhat more complicated problem than pro-Soviet statements. The government had to prove that the Communist Party was tied to Soviet causes in order to make membership in it meaningful as evidence of motive or intent to aid Russia. Early in the trial, the trial judge so cautioned the jury: 'I want you to understand right at the outset that the fact that they were members of the Communist Party does not establish the elements necessary to prove them guilty of the crime charged in this indictment which is conspiracy to commit espionage. * * * The government will have to establish that there is some connection between communism and committing the offense charged in the indictment.' To that end, the government put Elizabeth Bentley on the stand. She testified that the American Communist Party was part of, and subject to, the Communist International; that the Party received orders from Russia to propagandize, spy, and sabotage; and that Party members were bound to go along with those orders under threat of expulsion. If the jury believed her, she supplied the missing link connecting the Communist Party with the Soviet Union, and [*596] [**22] making Communist Party membership probative of motive or intent to aid Russia. [6]

Of course, 'such evidence can be highly inflammatory in a jury trial. This court and others have recognized that the Communist label yields marked ill-will for its American wearer. See, e.g., *Grant v. Readers Digest Association, 2 Cir., 151 F.2d 733*; *Mencher v. Chesley, 297 N.Y. 94, 100, 75 N.E.2d 257*. Whether and how much of that kind of evidence should come into a trial like this is a matter for carefully-exercised judicial discretion. We think the trial judge here did not abuse that discretion. Each time Party membership was alluded to, and again in his final charge, the judge cautioned the jurors 'not to determine the guilt or innocence of a defendant on whether or not he is a Communist.' It may be that such warnings are no more than an empty ritual without any practical effect on the jurors; see Mr. Justice Jackson in *Krulewitch v. United States, 336 U.S. 440, 453, 69 S.Ct. 716, 93 L.Ed. 790*. [7] If so, this danger is one of the risks run in a trial by jury; and the defendants made no effort to procure a trial by a judge alone, under Criminal [**23] Rule 23(a).

5. Early in the trial Elitcher testified that he had accompanied Sobell on a hurried ride to the Rosenbergs to deliver 'valuable' information to Julius. This ride was precipitated by Elitcher's suspicion, recounted to Sobell, that he, Elitcher, has being followed. Elitcher testified about Sobell as follows: 'I turned to him and said, 'Well, what does Julie think about this, my being followed?' He said 'It is all right; don't be concerned about it; it is O.K.' He then said Rosenberg had told him that he once talked to Elizabeth Bentley on the phone but he was pretty sure she didn't know who he was and therefore everything was all right.'

Defendants at the trial neither objected to this testimony nor moved to strike it. They now contend that it was inadmissible hearsay. The government contends that it was not hearsay since it was a report of a statement by

Sobell, one of the Rosenbergs' fellow-conspirators, about something Rosenberg said in furtherance of the conspiracy. If we assume that this contention is not sound, [8] nevertheless the jury was properly allowed to consider this testimony. For, as the Supreme Court has held as to hearsay testimony: 'If [**24] evidence of this kind is admitted without objection, it is to be considered, and accorded its natural probative effect, as if it were in law admissible.' *Spiller v. Atchison, T. & S.F. Ry. Co., 253 U.S. 117, 130, 40 S.Ct. 466, 472, 64 L.Ed. 810*; *Diaz v. United States, 223 U.S. 442, 450, 32 S.Ct. 250, 56 L.Ed. 500*; *Schlemmer v. Buffalo, Rochester & P. Ry. Co., 205 U.S. 1, 8, 9, 27 S.Ct. 407, 51 L.Ed. 681*; *Dowling v. Jones, 2 Cir., 67 F.2d 537, 539*. The federal authorities are unanimous on this point. [9]

[*597] Greenglass also testified that Julius Rosenberg had said Miss Bentley probably knew him. The jury was therefore entitled to believe, on the basis of Elitcher's and Greenglass' testimony that Julius had spoken on the phone to Miss Bentley. In those circumstances, we see no error in permitting Miss Bentley to testify, over defendants' objections, as follows: She received several phone calls in 1943 from a man who called himself 'Julius'- whose voice she did not recognize. She would then call Golos, a top Russian spy,, and give him Julius' messages- acting as a go-between for 'Julius' and Golos. From her [**25] talks with 'Julius' and Golos, she learned lived.

The testimony of Elitcher and Greenglass supplied sufficient circumstantial evidence to make it proper to allow the jury to infer that it was Julius Rosenberg, the defendant who, by phone, gave Miss Bentley the information she passed on to *Golos. Jarvis v. United States, 1 Cir., 90 F.2d 243*, certiorari denied *301 U.S. 705, 58 S.Ct. 25, 82 L.Ed. 544*; 7 Wigmore, Evidence, sec. 2155. Moreover, according to Greenglass' testimony, Julius Rosenberg told the Grenglasses that an emissary would contact them in New Mexico bearing greetings from himself, Julius; Harry Gold testified that, by command of Yakolev, another spy, he, Harry Gold, bore the greeting, 'I come from Julius,' then he met up with the Greenglasses, per arrangement, in Albuquerque. The trial judge, of course, told the jury that they were free to accept or reject the inference that it was Rosenberg who called Miss Bentley.

6. The trial judge instructed the jury: 'Because of the development of highly destructive weapons and their highly guarded possession by nations existing in a state of tension with one another, the enforcement of [**26] the espionage laws takes on a new significance. Our national wellbeing requires that we guard against spying on the secrets of our defense.' Concerning this statement defendants argue: 'The mandate to the jury to correlate the tensions of the times with the 'new significance' to enforce the espionage laws was not only an irrelevance, but licensed the triers of the facts to yield to their emotional bias and insinuated that it would be a reflection on their responsibility as patriotic citizens if they returned a verdict other than 'guilty." We do not agree. For the judge also said that he did 'not mean that the mere allegation or use of the word 'espionage' should justify convicting innocent persons'; and he cautioned the jurors that it was their duty 'to approach (the) task of determining the issues with * * * minds completely barren of prejudice or sympathy,' to 'weigh the evidence in this case calmly and dispassionately * * * .' It can hardly be seriously contended that commenting on the 'new significance' of espionage law enforcement gave the jury a green light to convict on emotions rather than evidence.

7. In summing up, Rosenberg's counsel argued to the jury that [**27] the Greenglasses' testimony should not be credited because they testified as part of an understanding with the prosecutor that Ruth Greenglass would not be prosecuted and that David Greenglass would receive a relatively light sentence. When, soon after the jury heard this argument, the judge instructed the jury, he said they should consider whether the Greenglasses testified as a result of business difficulties, [10] 'or for some other unknown reason.' It is urged that, as this statement inaccurately characterized defendants' argument, it constitutes error. We think not. The judge had no duty to repeat all the lawyers' arguments which the jury had heard a short time before. He explicitly told the jury that he could not cover all of the arguments made by both sides in their summations, and that his reference to some portions of evidence and not others 'should [*598] not be taken as * * * any indication as to (his) opinion of the comparative importance or weight of that particular evidence.' In addition, he explained (as we have already noted) that the Greenglasses were accomplices, and that their testimony must be carefully examined for that reason.

8. David Greenglass [**28] testified that Julius admitted 'stealing' a proximity fuse from the Emerson Radio Company where he worked, and giving the fuse to Russia. On objection by defendants to the word 'stealing,' the court ordered it stricken. Defendants complain of the denial of their motions to strike all this testimony. They urge it was irrelevant since it was not shown that the proximity fuse was either secret or connected with national defense. The proximity fuse, be it noted, was an important World War II development which vastly increased the potential damage range of exploding shells. The nature of the device itself strongly suggests that it was secret, and unequivocally shows that it was connected with the national defense. At any rate, the testimony was admissible to show an intent on Julius' part to aid Russia.

9. The Rosenbergs contend that four Government exhibits (2, 6, 7 and 8), consisting of sketches made by David Greenglass of lens molds and an atom bomb were improperly admitted in evidence. Exhibits 2 and 8 are diagrams of a clover-leaf type high explosive lens mold used in atomic bomb experiments and a cross-section of an atom bomb, respectively. David Greenglass testified [**29] that these diagrams, which he reproduced for use at the trial, were accurate replicas of sketches given by him to Julius Rosenberg in 1945, and last seen by him at that time. Greenglass further testified that Exhibits 6 and 7 were accurate representations of lens mold sketches which he turned over to Harry Gold, in conjunction with a report on atomic experimentation, in June, 1945. The original sketches were allegedly delivered to Yakolev by Gold and transmitted to the Soviet Union. Greenglass explained all four exhibits to the jury and used them to illustrate his testimonial description of the information he imparted to Rosenberg and Gold. Such sketches would ordinarily be admissible under the 'map, diagram, and chart' rule which permits a witness to clarify his testimony by written illustration, so as to communicate complicated or confusing information more easily to the jury. *Golden Eagle Farm Products v. Approved Dehydrating Co., 2 Cir., 147 F.2d 359.* Defendants also object because David's superiors at Los Alamos were allowed to examine these sketches and to testify that they were reasonably accurate portrayals of the lens mold and atomic mechanisms [**30] used in the experimental station. We see no error here. A witness may always comment upon the substance or import of another witness' testimony; there is no reason to differentiate between verbal and nonverbal testimony in this respect. At no time were the sketches held out as those actually transmitted by Greenglass to Russia or exact replicas or copies thereof. They represented only Greenglass' recollection of what he had given the foreign agents. Hence there was no infraction of the secondary evidence rule.

10. The jury, during its deliberations, asked for a reading of that part of Ruth Greenglass' testimony covering the period from the time Rosenberg first approached her for espionage to the return of her husband to New York in 1945. Out of the jury's presence, defense counsel then asked the judge to have read to the jury the cross-examination covering the same period. The judge said he would not, without an express request from the jury. After the direct had been read to the jury, the judge asked them if they had what they wanted, and they said yes. Defense counsel, then, in the jurors' presence, again requested that the cross-examination be read. The judge at [**31] once replied that he would read only what the jury asked for. The jurors remained silent. Defense counsel objected. They now argue that the failure to comply with their request was prejudicial error. We think not. We think that the jury understood from the colloquy that the cross would be read if the jurors so desired, and that their [*599] silence meant they had no such desire. Indeed, defendants' own argument bears this out: They do not assert that the failure to read the cross was harmful because the cross contradicted or markedly differed from the direct, but, on the contrary, because it repeated the direct almost word for word, so that (say defendants) the jury, had it heard the cross, might have concluded that the testimony was a rehearsed falsehood. However, but a short time previously, Rosenberg's counsel, in summation to the jury, had made precisely that point (i.e., that the cross parroted the direct). If the jurors had been impressed by this argument and, on that account, wanted Ruth's cross to check this very point, they would almost certainly have asked especially that the cross be read, particularly after defense counsel, in their presence, made this [**32] request. Accordingly, we hold that the refusal to have the cross read was within the trial judge's discretion.

11. As part of its case in chief, the government introduced testimony that, in 1950, after the arrest of the British atomic physicist, Dr. Klaus Fuchs, for espionage on behalf of Russia, Julius Rosenberg warned Greenglass to leave this country by way of Mexico; that Rosenberg repeated this warning after Gold's arrest; that Julius said he and his wife also intended to flee to Mexico. When the government rested, the Rosenbergs took the stand; on direct, among other things, they contradicted the foregoing testimony. On March 26, 1951, during Julius Rosenberg's cross-examination, he denied having had passport pictures taken in May of June 1950; on March 27, 1951, after the defendants had rested their case, the government called one Schneider, a professional photographer, as a rebuttal witness. Defense counsel at once objected to any testimony by Schneider, on the ground that his name was not on the list of witnesses submitted before the trial to the defendants in accordance with *18 U.S.C. § 3432.* [11] Thereupon, in answer to questions put [**33] by the prosecutor, Schneider testified that, on March 26, 1951, two F.B.I. agents came to see him, and that then for the first time had anyone communicated with him about the subject for which he was called as a witness. Over objection by the defense on the ground that Schneider's testimony was 'not proper rebuttal,' he was then allowed to testify that, in May or June 1950, at his photography shop, he had taken the photographs of the Rosenbergs and their children, and that at that time Julius Rosenberg had said the pictures were needed to enable the Rosenberg family to go abroad. [12]

The statutory requirement concerning the list of witnesses to be supplied before trial has been held inapplicable to a rebuttal witness. [13] Defendants argue that Schneider's testimony was inadmissible, since it served

merely to corroborate evidence introduced by the government on its case-in-chief and was thus not rebuttal of new matter arising on defendants' case. A majority of this court rejects this argument. [14] But, even if this argument is sound, the reception of this testimony was not erroneous. As it was a reasonable inference from Schneider's testimony that the government did [**34] not know of Schneider until the day before he was called as a witness, it could not have included his name in the witness-list handed defendants before the trial, which began some three weeks earlier. Consequently, the statute, properly interpreted, did not exclude Schneider's testimony altogether. See United States v. Schneider, 21 D.C. 381, 413: 'The statute was never intended to preclude the United [*600] States from making use of any material testimony discovered during the progress of the trial, and all that it exacts of the prosecuting officer is that he shall in good faith furnish to the prisoner, before the trial, the names of all witnesses then known to him and intended to be used at the trial.' It might well have been error to refuse a reasonable request for adjournment coupled with some showing of surprise. But defendants made no such request. [15]

12. Sobell raises several questions affecting his conviction. The most important of these is whether or not he was proved to be a member of the Rosenberg-Greenglass-Gold conspiracy to ship information to Russia. Even accepting all of Elitcher's testimony as true, says Sobell, it showed only that [**35] he, Sobell, conspired with Julius Rosenberg to solicit Elitcher's aid in espionage activities along with that of other young engineers, and to send abroad certain kinds of military engineering and fire control information, [16] but no evidence connected him in any way with the Greenglass-gold-rosenberg plan to ship atomic information from Los Alamos to the Soviet Union. At the end of the government's case, Sobell's counsel moved to dismiss the indictment on the ground that not one but two separate conspiracies had been proved by the government, [17] one involving Rosenberg, Greenglass and Gold, whose purpose was the transmission of atomic information, and the other involving Rosenberg and Sobell, aimed solely at the sending of various types of military information abroad. The motion was denied, the trial judge committing himself to the theory that the government's witnesses, if believed, proved one giant conspiracy, to send defense information abroad, of which the atomic espionage was only one 'branch.' Despite objection by Sobell's counsel, the judge charged the jury, on the one-conspiracy theory, as follows: 'Again I want to emphasize that the conspiracy in this case [**36] is a conspiracy to obtain secret information pertaining to the national defense and then to transmit it to the Union of Soviet Socialist Republics. It is not a conspiracy to obtain information only about the atom bomb. I point that out because the Government contends that Sobell was in the general conspiracy to obtain information of a secret nature. To determine whether Morton Sobell was a member of the conspiracy you are only to consider the testimony of Max Elitcher, William Danziger and the testimony relating to the defendant Sobell's alleged attempt to flee the country. If you do not believe the testimony of Max Elitcher as it pertains to Sobell, then you must acquit the defendant Sobell. If you find that there was a conspiracy and that Morton Sobell was a member of the conspiracy, any statements or acts of any co-conspirators are binding upon him because the law is that once you have joined a conspiracy attempting to accomplish an unlawful objective, the acts of the co-conspirators done in furtherance of the same objective, even though the co = conspirators are unknown to you, are binding upon you.'

If in fact, Sobell is right that two conspiracies were proved, [**37] then prejudicial error has been committed, for Sobell was jointly tried with major atomic energy spies whose acts and declarations were held binding upon him. What distinguishes a single conspiracy from several related ones is a single unified purpose, a 'common end.' This 'common end' is in contradistinction to the 'separate ends similar in character' [*601] which characterize multiple conspiracies. *United States v. McConnell, D.C.E.D. Pa., 285 F. 164, 166.* Thus the Supreme Court has said that defendants who separately secure fraudulent loans through banking institutions from a single governmental agency, by means of a single broker, have separate albeit similar ends, and lack the single unified purpose of co-conspirators. *Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557.* On the other hand, salesmen who make illegal sales above ceiling price of a particular brand of whisky obtained from a particular wholesaler have a single unified purpose- to raise illegally the price of that whisky: 'The whiskey was the same. The agreements related alike to its disposition. They comprehended illegal sales in the guise of legal [**38] ones. * * * The scheme was in fact the same scheme; the salesmen knew or must have known that others unknown to them were sharing in so large a project'. *Blumenthal v. United States, 332 U.S. 539, 557-558, 68 S.Ct. 248, 256, 92 L.Ed. 154.*

A majority of this court have concluded, on the following grounds, that here there was a single unified purpose: The 'common end' consisted of the transmission to the Soviet Union of any and all information relating to the national defense; such a single aim distinguishes this conspiracy from that in Kotteakos, where each defendant was interested in obtaining his own fraudulent loan only and not in the success of his fellow-borrowers. The case is closer to the Blumenthal situation, where all the salesmen had a united purpose to sell the shipment of

whisky at an illegally high price. Sobell is confusing the particular part each conspirator played in the espionage activities with the end-all purpose of all the conspirators-the aiding of Russia by sending to it any and all kinds of secret information. It did not matter that Sobell knew nothing of the atomic episodes; he is nevertheless charged with the acts done by Greenglass, [**39] Gold and Rosenberg, in furtherance of the over-all conspiracy. The jury could and did reasonably find that Sobell consented to the dominant aim, and so became a member of the Rosenberg-Greenglass-Gold conspiracy.

The writer of this opinion disagrees. He thinks that there was error, in this respect, which requires that Sobell be given a new trial. The balance of this paragraph sets out the writer's reasons for dissenting on this issue. Even if Sobell, on Elitcher's testimony, could reasonably be held as a member of the Rosenberg-Gold-Greenglass conspiracy, the question of his membership should have been submitted to the jury. Elitcher's testimony would have supported either of two inferences i.e., that Sobell agreed only (1) to transmit certain kinds of military information to Russia or (2) that he agreed with the other conspirators to transmit 'any military information of all kinds.' The jury should have had the opportunity to choose between the inferences and to decide whether he actually joined the larger conspiracy. See *Lefco v. United States, 3 Cir., 74 F.2d 66, 69*. 'Nobody is liable in conspiracy except for the fair import of the concerted purpose [**40] or agreement as he understands it; if later comers change that, he is not liable for the change; his liability is limited to the common purposes while he remains in it.' *United States v. Peoni, 2 Cir., 100 F.2d 401, 403*, per Learned Hand, C.J. The judge's instructions (quoted above) do not, I think, make it clear to the jury that Sobell, in order to become a member of the larger conspiracy, had to agree to transmit all kinds of secret information, and not just certain kinds which he knew about. [18] In effect, he charged that if [*602] the jury believed Elitcher's testimony, Sobell was a member of the larger conspiracy charged in the indictment.

13. Sobell alleges that the prosecutor's ill attempts at courtroom humor and 'questions' containing inadmissible testimony deprived him of a fair trial. After examining each such incident, we cannot agree that, despite the judge's cautioning instructions to convict or acquit on the evidence alone, they were so important as to effect the jury adversely. Many of the so-called 'loaded' questions were withdrawn before answering; objections to others were sustained and the prosecutor admonished; nothing in his [**41] summation concerning the defendants seems to have exceeded the liberal limits of legitimate partisanship and argumentation our courts customarily allow counsel. It is of some significance that Sobell's counsel himself, at the end of the trial, indicated that he thought the prosecutor had conducted himself fairly: 'I am willing to shake his hand after a job that we both had to do.' Similarly the Rosenbergs' counsel at the end of the trial acknowledged the good behavior of the prosecutor.

14. The prosecution introduced as an entry 'in the regular course of business' a card made by an Immigration Inspector at the time Sobell re-entered the United States, stating that he had been 'Deported from Mexico.' This evidence is attacked as both irrelevant and hearsay. But Sobell's forced return to the United States was certainly relevant to the government's theory that he had fled to Mexico to escape prosecution, for otherwise the jury might had inferred that he had returned voluntarily to stand trial. The hearsay objection is equally without merit. As an entry of this type is required in the case of every deportee from Mexico and was made by the border inspector in the course [**42] of his duties, it qualifies as a business entry under *28 U.S.C. §§ 1732, 1733*. The inspector who made the entry testified at the trial, and was available for cross-examination as to the extent of his observations and his reasons for making the entry.

15. At the end of the trial, after Sobell had been found guilty, his counsel made a motion in arrest of judgment based upon an affidavit by Sobell that he had been illegally abducted by Mexican police from his residence in Mexico City and taken across the border into the United States where he was delivered into the immediate custody of waiting United States agents. Sobell asked the trial judge to conduct a hearing on the question of whether United States officials had participated in, or instigated, his illegal kidnapping. Sobell claims that his conviction would be a nullity if it were proved that the government thus secured jurisdiction over his person in violation of United States law and international agreement.

The government answers that, even if United States officials had participated in Sobell's alleged kidnapping, the court in a criminal case, unlike a civil case, would still have jurisdiction [**43] over his person, as long as he was physically present at the trial. There appears to be authority to support this position. *Ker v. Illinois, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421*; *Mahon v. Justice, 127 U.S. 700, 8 S.Ct. 1204, 32 L.Ed. 283*; *United States ex rel. Voigt v. Toombs, 5 Cir., 67 F.2d 744*; *United States v. Unverzagt, D.C.W.D. Wash., 299 F. 1015*, affirmed 9 Cir., *5 F.2d 492*, certiorari denied *269 U.S. 566, 46 S.Ct. 24, 70 L.Ed. 415*; *United States v. Insull, D.C.N.D. Ill., 8 F.Supp. 310, 311*; *Ex parte Lopez, D.C.S.D. Tex., 6 F.Supp. 342*; *Gillars v. United States, 87 U.S. App. D.C. 16, 182 F.2d 962*; *Chandler v. United States, 1 Cir., 171 F.2d 921*, certiorari denied *336 U.S. 918, 69 S.Ct. 640, 93 L.Ed. 1081*. However, there are contrary arguments. [19] But we need not now decide that [*603] question. For we think that Sobell waived his

right to challenge personal jurisdiction in this trial. *Rule 12(b)(2) of the Federal Rules of Criminal Procedure* says: 'Defenses and objections based on defects in the institution of the prosecution [**44] or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, * * * .' Yet Sobell made no such pre-trial motion challenging jurisdiction over his person, despite the fact that all the information contained in the post-trial affidavit was known to him at that time. When the government introduced evidence to show that Sobell had been legally deported from Mexico (evidence clearly contradictory to Sobell's present assertion), he made no move to bring to light the facts of his alleged illegal abduction. [20] He preferred to take his chances on the verdict, withholding his trump card until the trial was over. The Federal Rules of Criminal Procedure allow no such tactic. Under *Rule 34*, motions in arrest of judgment are allowed only (1) where the indictment charges no offense and (2) where the court had no jurisdiction over the offense charged. This situation, e think, falls into neither category. [**45] See *United States v. Zisblatt, 2 Cir., 172 F.2d 740, 741-742*; *United States v. Bradford, 2 Cir., 1952, 194 F.2d 197*. Personal jurisdiction can be waived in a criminal as well as a civil case. See *Pon v. United States, 1 Cir., 168 F.2d 373, 374. United States v. Rauscher, 119 U.S. 407, 7 S.Ct. 234, 30 L.Ed. 425*, cited by Sobell, allowed a defendant to move in arrest of judgment on the ground that he had been tried and convicted of an offense other than the one for which he had been surrendered to the United States by Great Britain pursuant to an extradition treaty. There, however, the defendant also challenged personal jurisdiction before trial, and no question of the timeliness of his motion was involved.

16. The trial judge sentenced Julius and Ethel Rosenberg to death. The statute under which they were convicted provides that whoever violates the pertinent subsection 'in time of war shall be punished by death or by imprisonment for not more than thirty years.' *18 U.S.C. § 794(b)*. Congress had the power to prescribe the death penalty for wartime espionage. See *Cramer v. United States, 325 U.S. 1, 45, 65 S.Ct. 918, 89 L.Ed. 1441*. [**46] [21] This, these defendants do not deny. They claim, rather, that, even if they were properly convicted, it was unconstitutional and an abuse of discretion for the trial judge to impose the extreme penalty in their particular case, and that we must reduce their sentences. In support of that contention they assert the following: They did not act from venal or [*604] pecuniary motives; except for this conviction, their records as citizens and parents are unblemished; at the most, out of idealistic motives, they gave secret information to Soviet Russia when it was our wartime ally; for this breach, they are sentenced to die, while those who, according to the government, were their confederates, at least equally implicated in wartime espionage- Harry Gold, Emil Fuchs, Elizabeth Bentley and the Grennglasses- get off with far lighter sentences or go free altogether. [22] Finally, they argue, the death sentence is unprecedented in a case like this: No civil court has ever imposed this penalty in an espionage case, and it has been imposed by such a court in two treason cases only. [23]

Unless we are to over-rule sixty years of undeviating federal precedents, we must hold [**47] that an appellate court has no power to modify a sentence. 'If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute.' *Gurera v. United States, 8 Cir., 40 F.2d 338, 340*. See also, e.g., *Beckett v. United States, 6 Cir., 84 F.2d 731, 733*; *Scala v. United States, 7 Cir., 54 F.2d 608, 611-612*; *Peterson v. United States, 4 Cir., 246 F. 118*; *Wallace v. United States, 7 Cir., 243 F. 300, 310*; *Feinberg v. United States, 8 Cir., 2 F.2d 955, 958*; *Carpenter v. United States, 4 Cir., 280 F. 598, 601*; *Smith v. United States, 9 Cir., 3 F.2d 1021*; *Hodgskin v. United States, 2 Cir., 279 F. 85, 94*; *United States v. Cohen, 2 Cir., 177 F.2d 523, 525*; *United States v. Ward, 2 Cir., 173 F.2d 628, 630*; *United States v. Gottfried, 2 Cir., 165 F.2d 360, 368*; *Voege v. United States, 2 Cir., 270 F. 219*. [24] In *Blockburger v. United States, 284 U.S. 299, 305, 52 S.Ct. 180, 182, 76 L.Ed. 306*, [**48] the Supreme Court said: 'Under the circumstances, so far as disclosed, it is true that the imposition of the full penalty of fine and imprisonment upon each count seems unduly severe; but, there may have been other facts and circumstances before the trial court properly influencing the extent of the punishment. In any event, the matter was one for that court, with whose judgment there is no warrant for interference on our part.' [25] Further discussion of this [*605] subject my colleagues think unnecessary. Consequently, the subsequent paragraphs express the views only of the writer of this opinion.

That upper courts have or should have power to reduce harsh sentences has long been urged by some commentators. See, e.g., Hall, Reduction of Criminal Sentences on Appeal, 37 Col.L.Rev. 521, 762 (1937). The existence of such power may seem the more desirable in these days when, in the recent words of the Supreme Court, 'Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.' [26] In England, Canada, and in several of our states, upper courts have [**49] held that they may revise sentences while affirming convictions. But

these rulings were based on statutory authority. *Com. v. Garramone, 307 Pa. 507, 161 A. 733, 89 A.L.R. 295*; cf. A.L.I. Code of Cr. Proc. sec. 459.

Some of these state courts find such authority in statutes conferring power to 'reverse, modify or affirm' judgments on appeal. [27] An identical power- to 'affirm, modify * * * or reverse'- is given to federal courts of appeal and to the Supreme Court by *28 U.S.C.A. § 2106*. That provision dates back to the Judiciary Act of 1789. See *United States, for Use of John Davis Co. v. Illinois Surety Co., 7 Cir., 226 F. 653, 664*. No decision by the Supreme Court or any federal court of appeals seems to have cited or considered this statute in passing on the question of the power to reduce a sentence when a conviction is affirmed. Were this question res nova, this court should give that section serious consideration. [28] Because, however, for six decades federal decisions, including that of the Supreme [*606] Court in *Blockburger v. United States, supra*, have denied the existence of such authority, [**50] it is clear that the Supreme Court alone is in a position to hold that *Sec. 2106* confers authority to reduce a sentence which is not outside the bounds set by [*607] a valid statute. [29] As matters now stand, this court properly regards itself as powerless to exercise its own judgment concerning the alleged severity of the defendants' 'sentences. [30]

The Rosenbergs, however, advance a different argument, i.e., that, although the statute expressly and validly permits death sentences, we do have the power and the duty or order these particular death sentences reduced because they violate the *Eighth Amendment of the Constitution*, which forbids any 'cruel and unusual punishments'. Several courts have ruled that a sentence within the limits of a valid statute cannot amount to 'cruel and unusual punishments', that, when a statute provides for such punishment, the statute only can be thus attacked. *Johnson v. United States, 8 Cir., 126 F.2d 242, 251*; *Beckett v. United States, 6 Cir., 84 F.2d 731*; *Hemans v. United States, 6 Cir., 163 F.2d 228, 237-238*, certiorari denied *332 U.S. 801, 68 S.Ct. 100, 92 L.Ed. 380*; cf. [**51] *Weems v. United States, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793*. No federal decision seems to have held cruel and unusual any sentence imposed under a statute which itself was constitutional. [31] But let it be assumed that, even if the statute authorizing a sentence does not [*608] violate the *Eighth Amendment*, 'till a particular sentence, within the literal terms of that statute, may do so, because of the specific circumstances of the case. [32] No such circumstances exist in this case. The test of a 'cruel and unusual punishment' urged by the defendants- i.e., that 'it shocks the conscience and sense of justice of the people of the United States' [33] - is not met here.

The test (unlike that applied when an upper court has discretion to modify sentences) [34] invites the criticism that it shifts the moral responsibility for a sentence from the consciences of the judges to the 'common conscience.' [35] But that criticism aside, this test counts against the defendants, for it means that this court, before it reduces a sentence as 'cruel and unusual,' must have reasonably good assurances that the sentence offends the 'common conscience.' And, in any context, [**52] such a standard- the community's attitude- is usually an unknowable. [36] It resembles a slithery shadow, since one can seldom learn, at all accurately, hat the community, or a majority, actually feels. [37] Even a carefully-taken 'public opinion poll' would be inconclusive in a case like this. [38] Cases are conceivable where there would be little doubt of a general public antipathy to a death sentence. But (for reasons noted below) this is not such a case.

In all likelihood, it would be- if the evidence were as the Rosenbergs depict it: They say that they were sentenced to death, not for espionage, but for political unorthodoxy and adherence to the Communist Party, and that (assuming they are guilty) they had only the best of motives in giving information to Russia which, at the time, was an ally of this country, praised as such by leading patriotic Americans. But the trial judge, in sentencing the Rosenbergs, relied on record evidence which (if believed) shows a very different picture. If this evidence be accepted, the conspiracy did not end in 1945, while Russia was still a 'friend,' but, as the trial judge phrased it, continued 'during a period when it was apparent [**53] [*609] to everybody that we were dealing with a hostile nation.' For, according to government witnesses, in 1948 Julius Rosenberg was urging Elitcher to stay with the Navy Department so that he might obtain secret data; in 1948, Rosenberg received 'valuable' information from Sebell; in 1950, Rosenberg gave Greenglass money to flee to Russia. This court cannot rule that the trial judge should have disbelieved those witnesses whom he saw and heard testify. [39] And, although the indictment did not charge, and therefore the jury did not find, that the Rosenbergs intended to harm the United States, the trial judge could properly consider the injury to this country of their conduct, -n exercising his discretion as to the extent of sentences within the statutory limits. Cf. *Williams v. New York, 337 U.S. 241, 251-252, 69 S.Ct. 1079, 1085, 93 L.Ed. 1337*: 'It is urged, however, that we should draw a constitutional distinction as to the procedure for obtaining information where the death sentence is imposed. We cannot accept the contention. Leaving a sentencing judge free to avail himself of out-of-court information in making such a fateful choice of sentences [**54] does secure to him a broad discretionary power, one susceptible of abuse. But in considering whether a rigid constitutional barrier should be created, it must be remembered that there is possibility of abuse wherever a

judge must choose between life imprisonment and death. And it is conceded that no federal constitutional objection would have been possible if the judge here had sentenced appellant to death because appellant's trial manner impressed the judge that appellant was a bad risk for society, or if the judge had sentenced him to death giving no reason at all. We cannot say that the due-process clause renders a sentence void merely because a judge gets additional our-of-court information to assist him in the exercise of this awesome power of imposing the death sentence.'

We must, then, consider the case as one in which death sentences have been imposed on Americans who conspired to pass important secret information to Russia, not only during 1944-1945, but also during the 'cold war.' Assuming the applicability of the community-attitude test proposed by these defendants, it is impossible to say that the community is shocked and outraged by such sentences resting [**55] on such facts. In applying that test, it is necessary to treat as immaterial the sentences given (or not given) to the other conspirators, and also to disregard what sentences this court would have imposed or what other trial judges have done in other espionage or in treason cases. [40] For such matters do not adequately reflect the prevailing mood of the public. In short, it cannot be held that these sentences are unconstitutional. [41]

Affirmed.

Petition for Rehearing in No. 22201.

In their petition for rehearing, the defendants, for the first time, urge as pertinent that portion of Article III, Section 3 of the Constitution, which provides: 'Treason against the United States, shall consist only in levying War against them, or in adhering [*610] to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.' The Rosenbergs, as we understand them, rest two arguments on this provision.

(1) The first runs thus: (a) Had the defendants been indicted and tried for giving aid to an 'enemy,' the crime charged would have been treason, and they could [**56] not have been convicted unless the trial judge instructed the jury as to the two-witness rule and told the jury specifically the overt act or acts which a jury must find in order to justify a verdict of guilty. [1] (b) Here the defendants were indicted and tried for giving aid to a country which was not an 'enemy.' (c) Consequently, the crime of which they were accused was of the same kind as treason- but of a lesser degree. (d) The constitutional safeguards applicable to a trial of the greater crime of this kind must be applied to the lesser. (e) But here there were no such safeguards, since the trial judge did not give the instructions constitutionally required in a treason trial.

The Supreme Court's decision in *Ex parte Quirin, 317 U.S. 1, 38, 63 S.Ct. 2, 16, 87 L.Ed. 3*, disposes of this contention. There the defendants, including Haupt and Burger, United States citizens, were held guilty of violating the article of War which make it a crime, punishable by death, for an enemy belligerent to pass our boundaries without uniform or other insignia signifying belligerent status. *10 U.S.C.A. §§ 1471-1593*. Admittedly, the conduct constituting [**57] this crime would also, in the case of Haupt and Burger, have constituted treason, but this crime of which the defendants were accused was more specific than treason. The Supreme Court (of its own motion) raised, and then rejected, the argument that, on this account, the procedural requirements of a treason trial must be, and had not been satisfied. The Court said: 'The argument leaves out of account the nature of the offense which the Government charges and which the Act of Congress, by incorporating the law of war, punishes. It is that each petitioner, in circumstances which gave him the status of an enemy belligerent, passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose. The offense was complete when with that purpose they entered- or, having so entered, they remained upon- our territory in time of war without uniform or other appropriate means of identification. For that reason, even when committed by a citizen, the offense is distinct from the crime of treason defined in Article III, § 3 of the Constitution, since the absence of uniform essential to one is irrelevant to the other. Cf. *Morgan v. Devine, 237 U.S. 632, 35 S.Ct. 712, 59 L.Ed. 1153*; [**58] *Albrecht v. United States, 273 U.S. 1, 11, 12, 47 S.Ct. 250, 253, 254, 71 L.Ed. 505*.' This ruling has been criticized. See e.g., Hurst, Treason in the United States, 58 Harvard Law Rev. (1945) 395, 421. [2] But [*611] this ruling binds inferior courts such as ours. [3] In the Quirin case, the absence of uniform was an additional element, essential to Haupt's non-treason offense although irrelevant to his treason; in the Rosenbergs' case, an essential element of treason, giving aid to an 'enemy,' is irrelevant to the espionage offense.

(2) The Rosenbergs present a second argument, which is a variant of the first and is as follows: (a) Traditionally, and in this country by statute, the courts have been authorized to impose the death penalty for treason. (b) To authorize such a sentence for a similar but less grave offense, in the trial of which there are omitted the guaranteed safeguards of a treason trial, is to permit 'cruel and unusual' punishment in violation of the Constitution. (c) That part of the Espionage Act which authorizes the death sentence is therefore unconstitutional.

(d) Accordingly, the trial judge should be directed [**59] to reduce the sentence. [4]

This argument, we think, involves an unfounded assumption, e.e., that Congress will always authorize the death sentence for treason. Without that assumption the argument would compel the strange conclusion that, if Congress, in its discretion, authorized a maximum twenty-year penalty for treason, no greater punishment could be given for espionage, sedition or a similar crime without its becoming 'cruel and unusual.' Moreover, as the Quirin case had the unavoidable consequence of permitting death sentences to be imposed upon the citizen-saboteurs for crimes other than treason, the Supreme Court must there have implicitly rejected the 'cruel and unusual' argument. As, however, the Supreme Court did not specifically discuss it, that Court may well think it desirable to review that aspect of our decision in this case.

Petition for rehearing denied.

1 So far as pertinent, it reads as follows: (a) 'Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years: Provided, That whoever shall violate the provisions of subsection (a) of this section in time of war shall be punished by death or by imprisonment for not more than thirty years * * * .' *50 U.S.C. § 32* is now contained in the revised Title 18, *Sec. 794*.

[**60]

1 In *United States v. Heine, 2 Cir., 151 F.2d 813, 815*, after stating that the words 'to the advantage of a foreign nation', inserted while the statute was in process, 'greatly enlarged its scope', we went on to say: ' * * * for while it is true that it is somewhat hard to imagine instances in which anyone would be likely to transmit information 'relating to the national defense,' which would be injurious to the United States, and yet not advantageous to a foreign power, it is possible to think of many cases where information might be advantageous to another power, and yet not injurious to the United States. The section as enacted necessarily implies that there are some kinds of information 'relating to the national defense' which must not be given to a friendly power, not even to an ally, no matter how innocent, or even commendable, the purpose of the sender may be.'

2 *Rule 7(f)* says: 'The court for cause may direct the filing of a bill of particulars.' The Rosenbergs, like Sobell, might have requested such a bill if they were really confused as to whether or not they were charged with transmitting secret information. One of the overt acts charged in the indictment covered the reception of Julius of sketches of the experiment conducted at the Los Alamos project, a good indication that the material involved was secret.

[**61]

3 The defendants argue that the Gorin case is not binding here, even on the due-process argument, because that case 'was decided under a concession of validity of the intent clauses which enabled the court to hold that they cured the unconstitutional vagueness of the criminal standard.' We find nothing in the decision indicating any 'concession of validity of the intent clauses.' The attack was as broad as the concept of Fifth-Amendment due process. Nor do we think the Supreme Court, in sustaining the constitutionality of so important a statute, would rely on clauses valid only by concession, without examining those clauses themselves for constitutional vulnerability.

4 The Supreme Court had in mind free speech considerations in the Gorin case although there the statute had not been attacked on any such specific ground. For the Court said: 'The philosophy behind the insistence that the prohibitions * * * upon which the indictment is based, are limited to the places and things which are specifically set out in section 1(a) relies upon the traditional freedom of discussion of matters connected with national defense which is permitted in this country. It would require, urge petitioners, the clearest sort of declaration by the Congress to bring under the statute the obtaining and delivering to a foreign government for its advantage of reports generally published and available * * * .' Our court said in *United States v. Heine, supra, (151 F.2d. 815)*, 'Obviously, so drastic a repression of the free exchange of information it is wise carefully to scrutinize lest extravagant and absurd consequences result.

[**62]

5 (1) Alleged emphasizing of key points of the Government's case:

Dorothy Abel, Ruth's sister, pas under cross-examination as to specific declarations allegedly made by Julius in her presence with respect to the United States and the Soviet Union. The witness had replied that Julius criticized our Government because it was 'capitalistic * * * that is about all I can remember.' The following occurred:

'Mr. E. H. Bloch: What else?

'The Court: Is that the reason they assigned for preferring the Russian form of government?

'The Witness: Yes.

'The Court: Was there discussion of the relative merits of the capitalistic form of government as against communistic form?'

(2) Alleged protecting and rehabilitating of Government witnesses:

Elitcher had failed to record on his direct examination his presence at Julius' home in the week of Christmas, 1946, although he had been asked, in chronological approach, his meetings with Julius. The cross-examiner:

'Question: You forgot about that?

'The Court: He wasn't asked about it if I remember and it might have been nothing to the Government's case. There is a certain inference in your question that he deliberately withheld it.'

Ruth was being examined on the Jello box side she allegedly obtained from Julius and kept for many months to match with the other side produced by Gold. When pressed to describe the printing or words on this Jello box side, she answered that her lack of knowledge of details 'was not pertinent.' The interlocutor's motion to strike the answer was granted and the witness admitted she had not looked at the object in her possession.

'The Court: Now let me ask you this: what was important to you?'

The witness replied that her interest was confined to the use of the Jello box side as an identification medium to be matched with the expected courier's other side of the box.

'The Court: Excuse me, when the bearer of the other half of that side of the Jello box was to come to you, was it your primary purpose in seeing whether the two sides would fit together like a jig-saw puzzle?

'The Witness: Yes.

'The Court: Very well.'

(3) Alleged improper comments on evidence:

Ruth, on cross-examination, was directed to go over her conversation with the Rosenbergs in November 1944. The cross-examiner, for the purpose of showing the witness was rehearsed, asked whether the witness' recounting of the incident was not a verbatim repetition of her direct testimony. The prosecutor objected; the following was the ruling:

'The Court: Your objection is sustained. I don't know exactly what the point is. If the witness has left out something, Mr. Bloch would say the witness didn't repeat the story accurately, and the witness repeats it accurately and apparently that isn't good.'

(4) Alleged hostile examination of defendants:

By the Court:

'What were your own views about the subject matter of the United States having any weapon that Russia didn't have at that time? That is, in 1944 and 1945. A. I don't recall having any views at all about it.

'Q. Your mind was a blank on the subject. * * * There were never any discussions about it at all? A. Not about that, not about the weapon

'Q. Was there any discussion at all as to any advantages which the United States had to make warfare that the Russians didn't have? A. No, nothing of that sort.

'Q. You never heard any discussions that there should be equalization between Russia and the United States? A. No, sir.'

Julius had expressed to Ethel his belief that David was attempting to 'blackmail' him when David's request to him for money in May or early June, 1950 was rejected and David had warned Julie 'I just got to have that money and if you don't get me the money you are going to be sorry.'

The Court:

'Q. Blackmail you. When did he try to blackmail you? A. Well, he threatened me to get money. I considered it blackmailing me.

'Q. What did he say he would do if you didn't give it to him? You said he said you would be sorry. A. Yes. I consider it blackmail when somebody says that.

'Q. Did he say what he would do to you? A. No, he didn't.

'Q. Did he say he would go to the authorities and tell them you were in a conspiracy with him to steal the atomic bomb secret? A. No.

'Q. Do you think that was what he had in mind? A. How could I know what he had in mind.

'Q. What do you mean by blackmail then? A. Maybe he threatened to punch me in the nose or something like that.'

[**63]

6 Sobell argues that proof of his Communist Party membership in 1941 was too remote to bear on his intent to join the conspiracy in 1944. We think not. In *United States v. Molzahn, supra*, we held admissible statements evidencing defendant's sympathy with the Nazi regime seven years before the alleged conspiracy began.

7 See also *Skidmore v. Baltimore & Ohio R. Co., 2 Cir., 167 F.2d 54, 61.*

8 The Rosenbergs argue that the statement was not made in furtherance of the conspiracy, since Elitcher was not a member of the conspiracy or an active source of information to it. The Government answers, with reason, that Rosenberg considered Elitcher still a good prospect for espionage, and the statement was made to calm him down so that he might be willing in the future to contribute.

9 True, we may, of our own motion, notice egregious errors to which there were no objections below, if they 'seriously affect the fairness, integrity, or public reputation of judicial proceedings.' *Johnson v. United States, 313 U.S. 189, 200-201, 63 S.Ct. 549, 555, 87 L.Ed. 704*; Criminal Rule 52(b). That exception might conceivably govern here if we believed the failure to object to this testimony resulted from the incompetence of defendants' counsel. But the record shows that defendants' counsel were singularly astute and conscientious. We know, too, that an able trial lawyer, for one or more of a variety of reasons, will often withhold an objection to the reception of hearsay. When he has done so, and it turns out that the jury's verdict is adverse to his client, the lawyer may not assert that reception as error.

10 [**64] There was testimony as to such difficulties.

11 It reads: 'A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with * * * a list * * * of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each * * * witness.'

12 No evidence was heard after March 27, 1950. Schneider was the last witness.

13 *Goldsby v. United States, 160 U.S. 70, 76, 16 S.Ct. 216, 40 L.Ed. 343*; *Gordon v. United States, 53 App. D.C. 154, 289 F. 552, 554.*

14 The writer of this opinion has some doubt as to whether it was rebuttal within the meaning of the cases relative to *18 U.S.C. § 3432*. But see State v. McCumber, 202 Iowa 1382, 212 N.H. 137.

15 Cf. *McNabb v. United States, 6 Cir., 123 F.2d 848, 853*, reversed on other grounds *318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819*; A.L.I. Code of Criminal Procedure, §. 194; *State v. Nolan, 31 Idaho 71, 169 P. 295*; *State v. Urban, 117 Kan. 130, 230 P. 77*; *Grandbouche v. People, 104 Colo. 175, 89 P.2d 577*; *State v. Harding, 108 Wash. 606, 185 P. 579.*

16 [**65] There was also evidence that Sobell delivered 'valuable' information to Rosenberg in a 35-millimeter film can in 1950.

17 Sobell's counsel argued that on the basis of the indictment and information obtained from an unsuccessful attempt to get a more enlightening bill of particulars, it was impossible for Sobell to ask for a severance earlier on these grounds. Although Sobell's position seems well taken, it is not necessary to decide any question of waiver involved in his failure to request severance.

18 Sobell's counsel, it is true, did not submit a correct request to charge on the question of whether the jury could infer one or two conspiracies from Elitcher's testimony. He did, however, ask for dismissal of the indictment at the end of the Government's case on the ground that two conspiracies were proved, and, again before the charge, he objected in advance to the judge's theory, already enunciated in denying the motion for dismissal of the indictment, that if the Government's evidence was believed, one conspiracy and not two had been proved. In the circumstances, then, the writer thinks that the judge, on his own motion, should have submitted the question of one or several conspiracies to the jury.

19 [**66] Both Supreme Court cases were decided before the federal anti-kidnapping statute passed in 1932, which would seem to forbid federal or state agents from kidnapping and transporting a defendant in foreign commerce. But see

Collins v. Frisbie, 6 Cir., 189 F.2d 464, certiorari granted *342 U.S. 865, 72 S.Ct. 112*, reversed *342 U.S. 519, 72 S.Ct. 509*. In addition, the two Supreme Court cases involved kidnapping by state agents, and the subsequent exercise of jurisdiction by state courts over the kidnapped defendants. *McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819*, laid down the rule that a defendant in a federal criminal trial, whatever the practice in state courts, could not be convicted on the basis of confessions obtained by federal agents in violation of a federal statute. Whether or not the Court would extend the McNabb policy to cover jurisdiction of the defendant's person obtained by a federal court through the illegal acts of federal officers, ;e do not know.

20 In his reply brief, Sobell says: 'We do not contend, as the Government intimates that its violation of domestic or international law exempts Sobell from trial, but merely that he should be restored the choice * * * of entering the United States voluntarily or involuntarily. * * * What was violated was his right to be free from unlawful molestation or assault by his own Government; and his right not to be convicted by an 'admission' wrested from him by a violent act.' It seems particularly inconsistent, therefore, for Sobell not to have introduced evidence, during the trial, of his kidnapping to contradict the Government's evidence of legal deportation.

21 [**67] Since *Sec. 794(c)* covers communication 'in time of war' to 'the enemy,' it might possibly be urged that *Sec. 794(b)* was not intended to apply to acts, even in war-time, which are to 'the advantage of a foreign nation' when that nation is not the nation with which this country is at war but one which, at the time, is an ally. However, the legislative history contains nothing to support such an interpretation.

22 The information the Rosenbergs passed, they maintain, would have become known to Russia in a matter of a few years, either through disclosures of foreign research scientists who worked at Los Alamos or through research of Russian scientists.

23 *Stephan v. United States, 6 Cir., 133 F.2d 87*, certiorari denied *318 U.S. 781, 63 S.Ct. 858, 87 L.Ed. 1148*; *United States v. Tomoya Kawakita, D.C.S.D. Cal., 96 F.Supp. 824*, affirmed 9 Cir., *190 F.2d 506*.

24 This Court has said that where it considers a sentence unduly harsh, it will be more inclined to regard as harmful an error otherwise probably harmless. See *United States v. Hoffman, 2 Cir., 137 F.2d 416*; *United States v. Trypuc, 2 Cir., 136 F.2d 900, 902*. We have, however, found no such errors affecting the Rosenbergs.

25 [**68] At one time the circuit courts had power to correct harsh sentences on appeal. Act of 1879, 20 Stat. 354; *United States v. Wynn, C.C.E.D. Mo., 11 F.57*; *Bates v. United States, C.C.N.D. Ill., 10 F. 92*. The peculiar wording of the 1879 statute was omitted in conferring appellate power upon the newly created courts of appeal in 1891. 26 Stat. 826. Come courts therefore considered the 1879 law repealed by implication. *Freeman v. United States, 9 Cir., 243 F. 353*. But *Ballew v. United States, 1895, 160 U.S. 187, 16 S.Ct. 263, 40 L.Ed. 388* and *Hanley v. United States, 2 Cir., 123 F. 849*, strongly suggest that the statutory powers given in the 1879 law to circuit courts had been incorporated by reference in the 1891 statute setting up the circuit courts of appeal. The fact is, however, that since 1891, federal upper courts have unswervingly denied themselves power to revise sentences on appeal.

The earliest and still most quoted federal authority rejecting the power to revise sentences on appeal is *Ex parte Watkins, 7 Pet. 568, 574, 8 L.Ed. 786*, where Story, J., said: 'But this court has no appellate jurisdiction to revise the sentences of inferior courts in criminal cases; and cannot, even if the excess of the fine were apparent on the record, reverse the sentence.' At that time, however, the Supreme Court actually had no federal criminal appellate jurisdiction over either judgments or sentences; Story's remark, therefore, has extremely limited value nowadays.

The Supreme Court reduced what it considered an excessive fine imposed on the United Mine Workers for contempt. *United States v. United Mine Workers, 330 U.S. 258, 304, 67 S.Ct. 677, 91 L.Ed. 884*. But there no statute authorizing particular punishment for contempt was involved; the fine was within the discretion of the trial judge, and the Supreme Court held the discretion abused. Cf. White, J., dissenting, in *Weems v. United States, 217 U.S. 349, at pages 409-410, 30 S.Ct. 544, 54 L.Ed. 793*.

26 [**69] *Williams v. New York, 337 U.S. 241, 248, 69 S.Ct. 1079, 1084, 93 L.Ed. 1337*. See also *Morissette v. United States, 342 U.S. 246, 72 S.Ct. 240*, as to the 'substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecutions.'

Radin writes that, in the Middle Ages, 'Justice' popularly meant the gallows. Radin, A

Juster Justice, in Legal Essays in Tribute to McMurray (1935), 537, 556. See London Times, Lit. Supp., January 4, 1952, p. 11: 'It is not generally realized that down to the year 1826 the punishment of every felony in this country was death. * * * '

27 See *Commonwealth v. Garramone, 307 Pa. 507, 161 A. 733, 735, 89 A.L.R. 295*; *State v. Ramirez, 34 Idaho 623, 203 P. 279, 29 A.L.R. 297*; *Fritz v. State, 8 Okl.Cr. 342, 128 P. 170*; Pittman v. State, 84 Ark. 292, 105 S.U. 874; see also *Commonwealth v. Sterling, 314 Pa. 76, 170 A. 258, 259.*

The courts of more than a dozen other states have not so construed identically-worded statutes. See, e.g., *State v. Fowler, 59 Mont. 346, 196 P. 992, 993, 995, 197 P. 847.* See A.L.I. Code of Cr. Proc. sec. 459, Commentary.

28 [**70] The trial judge's determination of a proper sentence- no easy task- should turn on his evaluation of a host of factors, including the unique fact of the particular defendant's life, conduct and character. Where an upper court has authority to review and revise a sentence, its attempt to do so may be thwarted if the trial judge has not made public the bases of his determination (although, in some instances, a sentence may obviously be unduly harsh, no matter what the particulars of the defendant's life, etc.). In the instant case, the trial judge has publicly stated the grounds on which he based the death sentences: 'Citizens of this country who betray their fellow-countrymen can be under none of the delusions about the benignity of Soviet power that they might have been prior to World War II. The nature of Russian terrorism is now self-evident. Idealism as a rationale dissolves.' * * * 'I consider your crime worse than murder. Plain deliberate contemplated murder is dwarfed in magnitude by comparison with the crime you have committed. In committing the act of murder, the criminal kills only his victim. The immediate family is brought to grief and when justice is meted out the chapter is closed. But in your case, I believe your conduct in putting into the hands of the Russians the A-bomb years before our best scientists predicted Russia would perfect the bomb has already caused, in my opinion, the Communist aggression in Korea, with the resultant casualties exceeding 50,000 and who knows but that millions more of innocent people may pay the price of your treason. Indeed, by your betrayal you undoubtedly have altered the course of history to the disadvantage of our country. No one can say that we do not live in a constant state of tension. We have evidence of your treachery all around us every day- for the civilian defense activities throughout the nation are aimed at preparing us for an atom bomb attack. Nor can it be said in mitigation of the offense that the power which set the conspiracy in motion and profited from it was not openly hostile to the United States at the time of the conspiracy. If this was your excuse the error of your ways in setting yourselves above our properly constituted authorities and the decision of those authorities not to share the information with Russia must now be obvious. * * * In the light of this, I can only conclude that the defendants entered into this most serious conspiracy against their country with full realization of its implications. The statute of which the defendants at the bar stand convicted is clear. I have previously stated my view that the verdict of guilty was amply justified by the evidence. In the light of the circumstances, I feel that I must pass such sentence upon the principals in this diabolical conspiracy to destroy a God-fearing nation, which will demonstrate with finality that this nation's security must remain inviolate; that traffic in military secrets, whether promoted by slavish devotion to a foreign ideology or by a desire for monetary gains must cease. The evidence indicated quite clearly that Julius Rosenberg was the prime mover in this conspiracy. However, let no mistake be made about the role which his wife, Ethel Rosenberg, played in this conspiracy. Instead of deterring him from pursuing his ignoble cause, she encouraged and assisted the cause. She was a mature woman- almost three years older than her husband and almost seven years older than her younger brother. She was a full-fledged partner in this crime. Indeed the defendants Julius and Ethel Rosenberg placed their devotion to their cause above their own personal safety and were conscious that they were sacrificing their own children, should their misdeeds be detected- all of which did not deter them from pursuing their course. Love for their cause dominated their lives- it was even greater than their love for their children.'

A few minutes before, during defense counsel's remarks prior to sentencing, the judge said: 'You overlooked one very salient feature, and that is that their activities didn't cease in 1945, but that there was evidence in the case of continued activity in espionage right on down, even during a period dealing with a hostile nation.'

On sentencing Greenglass to fifteen years' imprisonment, the judge said: 'The fact that I am

about to show you some consideration does not mean that I condone your acts or that I minimize them in any respect. They were loathsome; they were contemptible. I must, however, recognize the help given by you in apprehending and bringing to justice the arch criminals in this nefarious scheme, Julius Rosenberg and his wife, Ethel Rosenberg. You have at least not added to your sins by committing the additional crime of perjury. You confessed and told a complete story in this case and it has been of great assistance to the Government. I realize the courage that was required for you to give your testimony, and I must say that you were the recipient of the best kind of legal advice in doing so. It is obvious that the Government gave due consideration to your assistance in their recommendation. I have to be realistic in a situation such as this, and I recognize that despite my own inclination to be more severe on your sentence, due to the revolting nature of this offense, I must subordinate my own feeling. Our national security is more important than any personal feeling that I might have on the subject, and it is indeed more important, I think, than the punishment of any single individual; and by your assistance in this case you have helped us strike a death blow to the trafficking in our military secrets, to the advantage of a foreign nation.'

29 [**71] The reluctance of upper courts to interfere with the sentencing process may perhaps, at least in part, be due to the existence of the executive's pardoning power, and in part to a desire not to engage in a most difficult undertaking. That process calls for training and specialized knowledge of a kind which the education of few judges provides. See Page, The Sentence of the Court (1948), which treats of the English judiciary, but seems substantially applicable to ours. Page points out that among English judges it 'could scarcely be claimed that * * * there is any agreed and commonly accepted principle guiding their selection of punishment,' and quotes Mr. Justice McCardle who said: 'Anyone can try a case. That is as easy as falling off a log. The difficulty comes in knowing what to do with a man once he has been found guilty.' However, as noted above, it is arguable that the difficulty makes it the more desirable that upper courts be able to review and modify sentences.

30 Where an upper court has such power, the criterion used to determine whether a sentence is too harsh would seem to be that court's own judgment- not the 'common conscience.'

It has been held that, in such circumstances, the upper court may consider, for such purposes, the quality of the evidence on which the verdict rests. See *Fritz v. State, 8 Okl.Cr. 342, 128 P. 170*. So here, had this court such power, it might take into consideration the fact that the evidence of the Rosenbergs' activities after Germany's defeat (as well as of their earlier espionage activities) came almost entirely from accomplices.

31 [**72] See, however, *Schultz v. Zerbst, 10 Cir., 73 F.2d 668, 670*; *Moore v. Aderhold, 10 Cir., 108 F.2d 729, 732*; *Dryden v. United States, 8 Cir., 139 F.2d 487, 488*; *United States v. Sorcey, 7 Cir., 151 F.2d 899, 902-903*. These cases say that a sentence authorized by statute usually will not be cruel and unusual punishment, but are not altogether clear as to whether a sentence may be such, even if the statute is not. In this respect, see Mr. Justice Field, dissenting, in *O'Neil v. Vermont, 144 U.S. 323, 340, 12 S.Ct. 693, 700, 36 L.Ed. 450*: 'It is no matter that by cumulative offenses, for each of which imprisonment may be lawfully imposed for a short time, the period prescribed by the sentence was reached, the punishment was greatly beyond anything required by any humane law for the offenses.'

Cf. *In re Kemmler, 136 U.S. 436, 446, 10 S.Ct. 930, 933, 34 L.Ed. 519*, quoted in *State of Louisiana ex rel. Francis v. Resweber, 329 U.S. 459*, footnote 4, *67 S.Ct. 374, 376, 91 L.Ed. 422*: ' * * * but the language in question, as used in the constitution of the State of New York was intended particularly to operate upon the legislature of the state, to whose control the punishment of crime was almost wholly confided.' Cf. Story, Commentaries on the Constitution, S. 1903: ' * * * the provision would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct. * * * ' The inhibition is 'directed * * * against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.' Field, J., in *O'Neil v. Vermont, supra, 144 U.S. 339-340, 12 S.Ct. 699*.

In *State of Louisiana ex rel. Francis v. Resweber, supra*, the Court considered whether an electrocution, after a first attempt to electrocute had failed for mechanical reasons, would be so cruel and unusual as to violate the due process clause, even if authorized by the Louisiana statute. In *Johnson v. Dye, 3 Cir., 175 F.2d 250, 256*, reversed on other grounds, *338 U.S. 864, 70 S.Ct. 146, 94 L.Ed. 530*, the court called the treatment of Georgia chain-gang prisoners 'cruel and unusual punishment' and so a violation of the

due process clause of the Fourteenth Amendment. Perhaps it can be said that that treatment was so common in Georgia as to have become part of the penalties prescribed by the statute. See also *Kenimer v. State ex rel. Webb, 81 Ga.App. 437, 59 S.E.2D 296.*

32 [**73] *United States ex rel. Bongiorno v. Ragen, D.C.N.D. Ill., 54 F.Supp. 973*, affirmed 7 Cir., *146 F.2d 349*. Perhaps this is but an elliptical way of saying that, if the statute permitted such a sentence, the statute would be unconstitutional, and therefore the statute should be so interpreted as to preclude that sort of sentence.

33 Id.

The test may have been derived from the language of some Supreme Court decisions: 'Taking human life by unnecessarily cruel means shocks the most fundamental instincts of civilized man'; *State of Louisiana ex rel. Francis v. Resweber, supra, 329 U.S. at page 473, 67 S.Ct. at page 381*, Burton dissenting: ' * * * a punishment at the severity of which, considering the offenses, it is hard to believe that any man of right feeling and heart can refrain from shuddering'; *O'Neil v. Vermont, 144 U.S. 333, 340, 12 S.Ct. 693, 700, 36 L.Ed. 450.* ' * * * the judgment of mankind would be that the punishment was not only an unusual, but a cruel, one, and a cry of horror would rise from every civilized and Christian community of the country against it.' Id.

34 See note 30, supra.

35 [**74] See Cahn, Authority and Responsibility, 51 Col.L.Rev. (1951) 838. Cahn's thesis suggests that a trial judge, in fixing a sentence, ought- after examining external data, including especially professional judgments in like cases- to rely on his own internal valuation and should not use the 'common conscience' as a 'scape-goat.' See also Gray, The Nature and Sources of Law (2d Ed. 1921), 287ff.

36 Cf. *Schmidt v. United States, 2 Cir., 177 F.2d 450, 451-452.*

37 Cf. *Johnson v. United States, 2 Cir., 186 F.2d 588, 590.*

38 Cf. *Roth v. Goldman, 2 Cir., 172 F.2d 788, 796*, concurring opinion.

39 The situation is not like that which exists when an upper court has authority to modify a sentence which is within the limits of a valid statute. See note 24, supra.

40 *Cr. Howard v. Fleming, 191 U.S. 126, 135-136, 24 S.Ct. 49, 48 L.Ed. 121; Collins v. Johnston, 237 U.S. 502, 510, 35 S.Ct. 649, 59 L.Ed. 1071.*

41 A sentence, although not 'cruel and unusual,' may violate the due process clause. *Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690.* There the Court held invalid a sentence imposed because of the trial judge's mistaken belief that the defendant was guilty of other crimes, and in a case where defendant was not represented by counsel. There is nothing equivalent here.

The Rosenbergs, of course, may ask the Supreme Court, considering *28 U.S.C. 2106*, to over-rule the decisions precluding federal appellate modification of a sentence not exceeding the maximum fixed by a valid statute, and to direct us accordingly to consider whether or not these sentences are excessive; or the Rosenbergs, pursuant to *Federal Rule of Criminal Procedure 35*, may move the trial judge for a reduction of their sentences; or, if those alternatives fail, these defendants may seek relief from the President. See *Biddle v. Perovich, 274 U.S. 480, 47 S.Ct. 664, 71 L.Ed. 1161.*

1 [**75] Cf. our analogous holding in *United States v. Remington, 2 Cir., 191 F.2d 246*, with reference to the similar two-witness (or one corroborated witness) rule applicable to proof of an overt act in a perjury trial.

2 Hurst commented: 'On the other hand, where the defendant is charged with conduct involving all the elements of treason within the constitutional definition, and the gravamen of the accusation against him is an effort to subvert the government, or aid its enemies, it would seem in disregard of the policy of the Constitution to permit him to be tried under another charge than 'treason.' However, the decision in Ex parte Quirin casts considerable doubt on the validity of this analysis.'

After quoting that passage from that opinion which we have quoted above in the text, Hurst continued: 'The decisions cited as analogies by the Court are the now standard authorities holding that the *double jeopardy clause of the Constitution* is not violated by conviction for two or more offenses which are in substance part of the same criminal transaction, but which involve different elements in the allegation. It is not a convincing technique of interpretation to apply to a constitutional guaranty having its own history of policy a formal test developed under a different clause of the Constitution, with no demonstration that the policies behind the respective clauses are so similar as to be fulfilled by the same criterion. The *double jeopardy clause* is historically a gua-

ranty against abuse of the law enforcement machinery as such, without reference to abuses peculiar to any one of the major types of crime. When the Constitution singles out the offense of treason as subject to special abuse, citation of a highly technical rule developed by judicial construction out of the general guaranty is in itself little evidence that the peculiar dangers against which the special guaranty was erected have been avoided. Though the type of offense charged against the American citizen in the saboteur group is a very clear case of treason, it is also within the category of charge the abuse of which was feared by the framers. The 'absence of uniform' noted as the essentially distinct element of the offense under the law of war made the defendant's conduct more dangerous simply because it enabled him to appear as what he was- one of the body of citizens. And it was citizens that the limitations of the treason clause were intended to protect.'

3 [**76] The defendants suggest that the Quirin decision, because it involved an appeal from a military tribunal of a conviction for an offense against the laws of war, 'was based alone on a resolution of the conflict of the jurisdiction of military and civil authority.' We do not read the opinion that way. See Hurst, supra, at 422, note 135.

4 See Hurst, supra, at 423: 'There is the possibility that Congress might be restrained by the constitutional ban on cruel or unusual punishments from imposing the highest penalties for certain conduct, unless it were held to mount to the level of treason.' In a footnote, Hurst adds: 'A penalty may be 'cruel and unusual' because unreasonably disproportionate to the offense. *Weems v. United States, 1910, 217 U.S. 349 (30 S.Ct. 544, 54 L.Ed. 793)*; see *Chambers v. Florida, 1940, 309 U.S. 227, 236 (60 S.Ct. 472, 84 L.Ed. 716)*. The contention that severe penalties possible under sedition acts are so disproportionate as to violate the *Eighth Amendment* has not met with success, and it seems that no legislative excess short of including capital punishment would run afoul of this provision. Cf. *Dunne v. United States, 8 Cir. 1943, 138 F.2d 137, 140*, cert(iorari) den(ied) *320 U.S. 790 (64 S.Ct. 205, 88 L.Ed. 476)*; Chafee, Free Speech in the United States (1941) 480. But cf. *Herndon v. Lowry, 1937, 301 U.S. 242 (57 S.Ct. 732, 81 L.Ed. 1066)*; Chafee, op. cit. 396. See 1 Schofield, Essays on Constitutional Law and Equity (1921) 421.'

[**77]