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Collection: Roberts, John G.: Files
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c. Distorted printing.

On the reverse side of GX 32, in the area behind the photograph, the printing has been seriously distorted. This is evident even from looking at a copy of the document. This distortion was caused when the original picture was removed from GX 32. (Tr. 873). On close scrutiny Purtell discovered a mysterious print character that could not be aligned with any of the typeset on that page. (Tr. 873). A blow-up of this character (DX 527) demonstrated that:

> A. This area has been torn. The letters and the tearing of it has distorted the printing.
>
> Also on it, I noticed down here is one little piece attached to the paper and then some printing. The design of that does not correspond to any of the printing appearing upon this document.
>
> * * *
>
> Q. Did you make an effort to find out whether that little piece of type was part of any of these other words that are torn up?
>
> A. Yes, I did.
>
> Q. What did you conclude?
>
> A. I could not tie that in with any of the other printing above it.

(Tr. 873-74).

There is no explanation for how a print character that must have come from another piece of paper could have appeared on such a "critical" document. The Government's experts totally overlooked this character in their study.

d. Erasures.

At trial, both document experts testified that GX 32 has many erasures and interlineations. Purtell documented fifteen deletions; Epstein, after first reporting none, eventually discovered eleven. The number of erasures and the nature of the material erased both undercut the Personalbogen's authenticity.

The erasures excised much important material, including: date (Tr. 853; DX 491); name (Tr. 854-56; DX 492-93); address (Tr. 856; DX 494); nationality (Tr. 856; DX 494); citizenship (Tr. 858-59; DX 495-96); dates at camps (Tr. 861; DX 498); length of service at camp (Tr. 863; DX 500-01); languages spoken (Tr. 867; DX 505); physical description (Tr. 868-70; DX 506-08); and the important "comments" ("Bemerkungen") section (Tr. 865-66; DX 502-04).

Fragments of what may or may not have been a few original responses were deciphered by Purtell, but few are more than a stray pencil stroke. No complete responses can be deciphered. The original responses to these entries will never be known.

The Government has failed to offer credible explanations for all the erasures. The primary argument is that the pencil remnants and numerous erasures indicate the form was filled out in pencil, erased, and then typed over. (Gov't Br. 62). This story has several flaws. First, there are pencil remnants that cannot be explained by either side's document expert. Epstein, the Government's expert, testified:

Q. It is true, isn't it, that when you went back, you found what you called pencil remnants that you couldn't decipher or explain?

A. Yes. . . . I found pencil remnants that I couldn't explain when I first conducted the examination in the Soviet Embassy in November of 1981.

(Tr. 488).

Secondly, erasures appear on the document areas devoid of typing. As Epstein testified:

Q. It is also true, isn't it, that you found erasures in places on the personalbogen, GX-32, where there wasn't any typing over, isn't that true?

A. That's correct.

(Tr. 488-89). Contrary to the Government's theory, Purtell also discovered areas of erasures without corresponding typing. Most important was the response to the "Bemerkungen" or "comments" section:

Q. What is the next part of the personalbogen you examined?

A. The next part would be in the line starting with Bemerkungen.

* * *

[DX] 503, I found the remains of just a little graphite stroke in the one part of the line. There was just some slight disturbance of fibers across the area. . . . There are some remains of graphite here, here, there are five little spots of the remains of pencil graphite.

(Tr. 863-866). These unexplained erasures contradict the Government's "typing over" theory. Plainly, some important data was not typed over; rather, it was permanently erased.

The Government's explanation for over a dozen deletions was not supported by the Government's expert on military procedure at concentration camps: Dr. Wolfgang Scheffler. Dr. Scheffler, claimed to be among a handful of elite scholars who might have knowledge to substantiate the Government's theory, was silent on this issue.

e. Erasures of the signature line.

Erasures around the signature of the Government's Personalbogen further undercut the genuineness of the document. Purtell's final report states: "The disturbance of fibers that indicate an erasure in the area of the signatures on Exhibit Q4 [GX 32] and Q5 [GX 36] makes it a possibility that the signatures are forgeries." (DX 463, pp. 4-5). Purtell candidly stated that he could not conclude definitely that the signatures were forgeries or inauthentic, but at trial he reiterated that fiber disturbances, indicating an erasure, permeate the signature line. This finding exposes an additional problem with the Government's "typed over" hypothesis: A military clerk would have no reason to erase a signature line if he was simply typing over the information that was originally placed on the document. The existence of an erasure on the signature line of the Government's "critical" document raises a grave doubt about the documents's authenticity.

Purtell also identified, and DX 514 demonstrated, an unexplainable erasure and pencil remnant on GX 37, the "Erklarung" signature. (Tr. 889). Once again the Government offers the unsupported supposition that this erasure was also part of

military procedure. No documentary or testimonial evidence was offered to buttress this speculation. The Government's historical expert, Wolfgang Scheffler, was again silent on the issue.

The Government's repeated efforts to rationalize inconsistencies, erasures, and pencil remnants do not resolve these doubts. For example, the Government argues that the erased pencil markings on GX 37 were checkmarks that indicated where an individual was to sign. This is a possibility albeit one with no evidentiary support. It is equally possible that the Personalbogen and Erklarung erasures indicate tampering with the signature. This possiblity is supported by the record. The testimony of Lesinskis demonstrates that the Soviets -- possessors of the documents for over 30 years -- have forged signatures frequently in the past. (DX 537, p. 28).

f. Age of paper.

Al Lyter, defendant's expert in the chemical analysis of paper and ink detected the possible presence of dialdehyde starches. Since these starches were not introduced into paper until 1947 (Tr. 1130), their potential presence in "captured German records" dated in the early 1940's raises further suspicion as to their genuineness. Lyter's conclusions are not dispositive because other known materials are known to interfere with the test performed. However, Lyter concluded that the existence of dialdehyde starches could not be eliminated. (Tr. 1130). This factor weighs against the authenticity of the Government's documents.

g. Thumbprint on Personalbogen.

The Government experts cannot eliminate the possibility that the single Personalbogen thumbprint was placed on the document by mechanical means. Nor can they explain why the print's ink is inconsistent with normal fingerprint ink.

As discussed above, the document on which the thumbprint is affixed has erasures, interlineations, and inconsistencies. For these reasons, the Personalbogen is not trustworthy. The fingerprint evidence does not remove this doubt; it compounds it.

One of the Government's Soviet witnesses, Semen Kharkovskii, testified that when he arrived at Trawniki all of his fingerprints were taken, not simply the right thumb. As he stated:

> Q. You testified that when you were at Trawniki they took your fingerprints?
>
> A. Yes.
>
> Q. Did the Germans take each of your fingers and take the print?
>
> A. The Germans did, yes, each of the fingers.

(GX 81, p.45). The Government produced no other evidence regarding the fingerprinting procedure actually used at the time.

The actual print itself creates more uncertainty. Oakes testified that the print encompassed only 25% of the top tip of the right thumb. (Tr. 284). As Oakes conceded, the print was not taken by someone -- such as a clerk -- who regularly took fingerprints as part of his job. (Tr. 284).

The unusual ink used in the print fragment is an additional ground for suspicion. Unlike all FBI and most domestic fingerprints, the thumbprint on GX 32 was not a carbon based ink. (Tr. 355). Indeed, while Government expert Noblett testified that the "vast majority" of inks he has examined were "black fingerprint ink," the Personalbogen fragment was "a purplish brown, a non black color." The Government presented no evidence on whether this unusual ink was used at concentration camps. Moreover, this peculiar ink shading made analysis more difficult since carbon based black ink provides greater contrast with the paper for easier identification. (Tr. 355).

In light of the peculiarly-shaded print, it was of paramount importance to test the ink to determine its chemical origins and possibly its date. Government experts conducted no such tests. Defendant's acknowledged ink expert, Al Lyter, wanted to but was prevented from conducting an ink test on the print. Lyter examined the print microscopically to determine if he could sample the print. He observed an ink-soaked fiber standing perpendicularly to the paper and could have removed it without damage. Government counsel barred such a test, citing the risk to the print's integrity.[29/] This concern had no technical basis. No Government expert could point to any risk to the print from the removal of one ink-soaked fiber. Since tests on the print had already been completed, there was no

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29/ The prejudice to defendant is not speculative; Lyter testified that a lone fiber was sufficient for ink analysis. Moreover, a score of other holes were punched in the document for other tests.

risk that removal of one fiber would have made any difference. The chemical test of the ink, admitted by the Government's experts to be non-carbon and atypical, was never performed because the Government would not allow it.

Beyond these problems with the print fragment itself, doubt remains about how the print got on to the document in the first place. Neither Oakes nor Noblett had any prior experience analyzing fingerprints from Soviet documents. Both admitted ignorance as to Soviet printing technology. Noblett, an expert in mechanical printing methods, conceded that laser scanning was one method of storing a fingerprint for later retrieval. (Tr. 356). This method could have been used to transfer a 25% fragment of a right thumbprint onto the Personalbogen. Noblett recognized this possibility when he conceded that he could not say definitely "one way or the other" whether the thumbprint had been placed there by human hand or by mechanical means. (Tr. 361-62).

The Government experts knew nothing about the capabilities of foreign print technologies. They could not say definitely how the print was placed on the paper. This inability, combined with the small size of the fragment and the peculiar untested ink, raise continuing doubts. The law requires resolution of them in Kairys's favor.

h. Promotion order.

GX 38, an untitled order purporting to promote "SS Wachmann Kairis" (note spelling) to "SS Oberwachman" (also

misspelled), is also flawed. The order is dated August 21, 1942, but the official printer's code indicates the document was not printed until January 7, 1943. This evidence of post-dating casts this document, as well as the companion documents with which it is found, into question.

In the lower left-hand corner of GX 38 is a printer's code which states: "St. Dzal 7.1.43. 500." These numerals indicate when the document was printed and by what company.30/ Consequently, the August 21, 1942 promotion, at a minimum five months prior to the printing of the form, raises doubt.

The Government relies on a speculative explanation offered by Dr. Wolfgang Scheffler. Dr. Scheffler stated that such a postdating is explicable under German military procedure. But Dr. Scheffler has no personal knowledge of any fact in issue. His sole "expertise" derives from examination of books, captured documents, and witnesses' testimony in prior cases. Dr. Scheffler's testimony is hearsay evidence of facts the Government must prove directly. If such postdating is a common procedure, the Government is required to provide some evidence,

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30/ On cross-examination Purtell named Ordway Hilton's Scientific Examination of Questioned Documents, as an authoritative work in the area of questioned documents. (Tr. 941). At page 81 of this work, the author presents a photograph of a printer's code similar to that appearing on GX 38 and states:

> "Code numbers appearing on printed forms often give information about the source and date of printing. In this case the third group of digits, 31, indicates a 1931 printing."

A copy of page 81 is attached as Appendix A.

such as a witness personally familiar with these filing procedures, or similar postdated documents that are established as authentic. The testimony of a third-party who was not there is inadmissible hearsay. Dr. Scheffler has no direct knowledge and did not proffer similar examples of postdating. Therefore, serious doubt beclouds the authenticity of GX 38 and prevents its admission into evidence.[31]

i. Signature analysis.

Six questioned signatures were submitted to handwriting experts Purtell and Epstein.[32] One signature, on defendant's

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31/ Of course, even if the Government proved that some postdated documents are authentic, postdating of a particular document would still be cause for suspicion.

32/ The following table details each signature document with its corresponding exhibit number and reference number used by the signature experts in their examination.

QUESTIONED SIGNATURES

Exhibit Number	Reference Number	Description
DX 1	Q1	Defendant's Identity Card (1941)
GX 40	Q2	Vidaus Reikalu Ministrui (1940)
GX 41	Q3	Asmems Zimos (1940)
GX 32	Q4	Personalbogen (1942)
GX 36	Q5	Dienstverpflichtung (1942)
GX 37	Q6	Erklarung (1943)

(Footnote continued on following page)

temporary identity card (DX 1), was positively identified as the known writing of defendant. (See Sec. I,C. infra). Signatures on the two "Lithuanian documents" (GX 40, GX 41) were not positively identified by either expert. The final signatures on the three "Treblinka documents" (GX 32, 36, 37) were not identified by Purtell because they contained too many differences from the defendant's known writing. Epstein's identification of these signatures, in light of all these differences, is questionable. The Government's attempt to authenticate the Lithuanian and Treblinka documents by positive signature identification does not resolve the doubts as required by law.

(Footnote continued from preceding page)

Exhibit Number	Reference Number	Description
	KNOWN SIGNATURES	
GX 5	K1	Application for Immigration Visa (1949)
GX 9	K2	Petition for Naturalization (1957)
GX 8	K3	Application to File Petition for Naturalization (1957)
GX 10	K4	Certificate of Naturalization (1957)
DX 13	K5	Certificate of Discharge (1949)
DX 4	K6	Lithuanian Passport (1948)

The Lithuanian documents, Vidaus Reikalo Ministui (GX 40) and Asmes Zinios (GX 41), were both signed "L. Kairys." Both experts failed to make a positive identification. (Tr. 431 (Epstein); Tr. 892 (Purtell)). As Epstein said:

> I felt that those two signatures had various restrictions in them and I could not reach a definitive conclusion as it involved those two signatures.

(Tr. 431). Purtell concluded that if the questioned and known documents had been written contemporaneously, he would have been able to eliminate the writer of the Lithuanian documents as the author of the known. (Tr. 900-01).

There is consequently no connection between the defendant and the Lithuanian documents. Both GX 40 and GX 41 have defendant's place of birth as Svilionys, when his actual birthplace is Kaunas. In addition, the birth date given is over four years earlier than defendant's (DX 1). The conclusion that these documents refer to a different "Kairys" has solid basis.

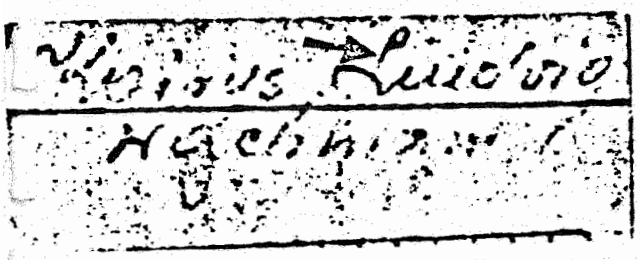
Purtell and Epstein reached opposite conclusions on the GX 32 (Personalbogen), GX 36, and GX 37 signatures. Purtell, a leading handwriting expert retained by the United States House of Representatives Select Committee on Assassinations, was unable to identify these signatures. His conclusion, standing alone, raises sufficient doubt as to preclude the documents' admission at trial. In addition, Epstein's analysis overlooked critical differences in the questioned and known signatures.

As Purtell demonstrated, there were at least six recognizable differences in the questioned signature that precluded any identification of the writer. These are catalogued below.

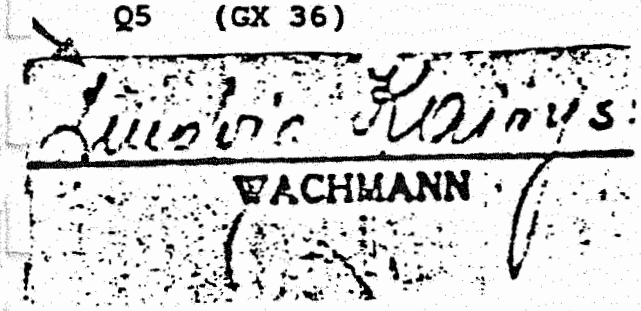
Capital Letter "L". On all three questioned documents the capital letter "L" begins with a slight downstroke before moving up to form a small "o" at the top of the letter. Conversely, on each known the author begins the capital "L" by a straight upward movement. (Tr. 907).

Questioned

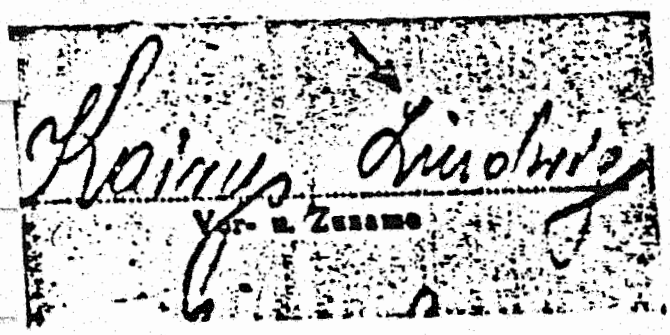
Q4 (GX 32)



Q5 (GX 36)

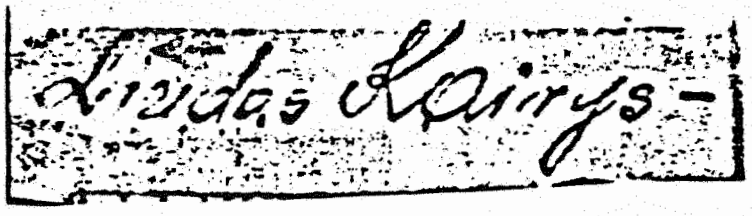


Q6 (GX 37)

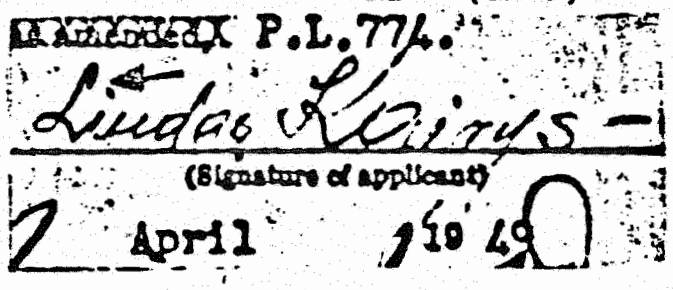


Known

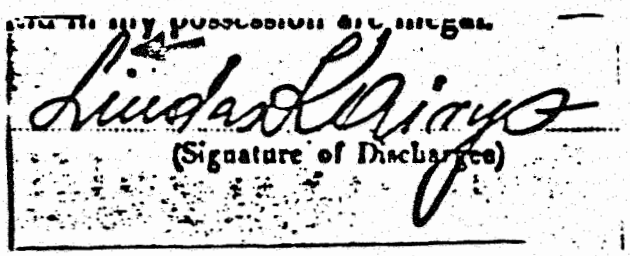
K1 (GX 5)



K1 (GX 5)



K5 (DX 13)

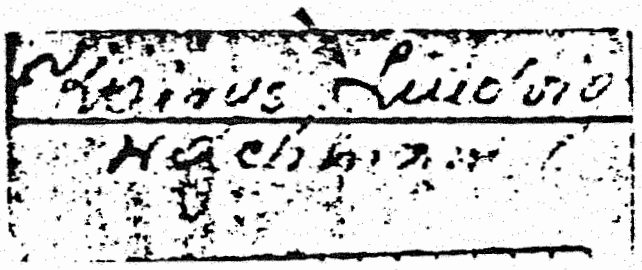


K6 (DX 4)

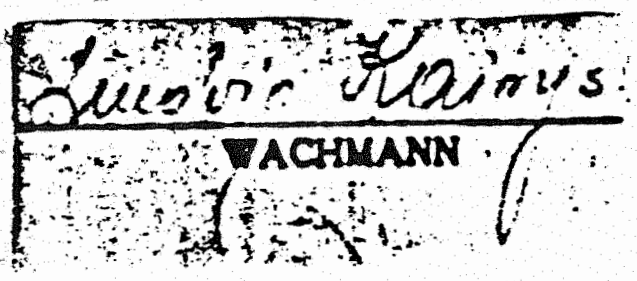
Bowl of the Capital "L." All questioned signatures have a large bowl at the base of the capital "L." These bowls are quite high in relation to the height of the letter. Conversely, in the known writing, the bowl of the capital "L" is small in relation to the letter. (Tr. 908).

Questioned

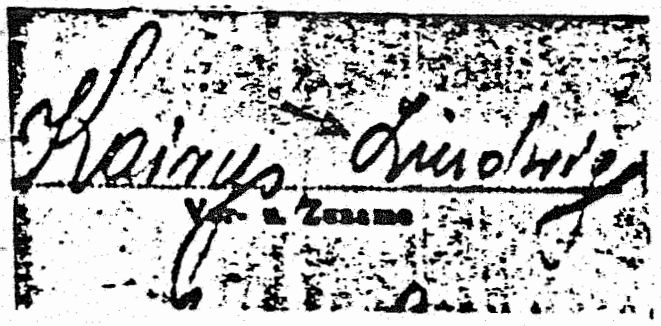
Q4 (GX 32)



Q5 (GX 36)

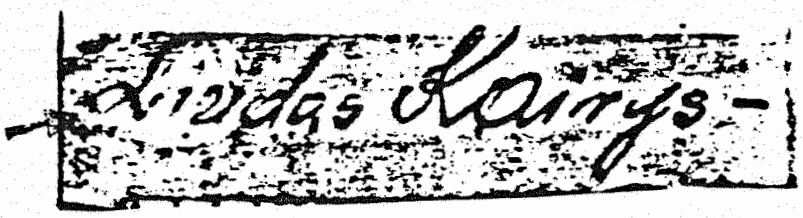


Q6 (GX 37)

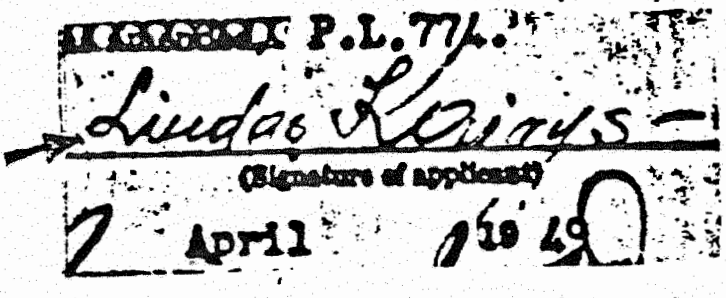


Known

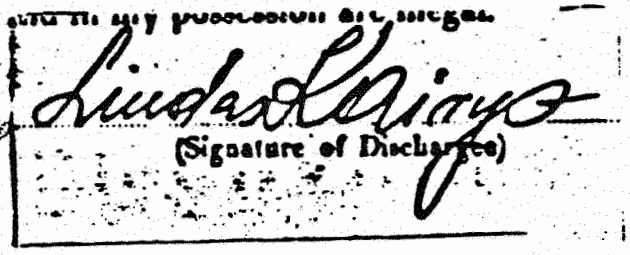
K1 (GX 5)



K1 (GX 5)



K5 (DX 13)

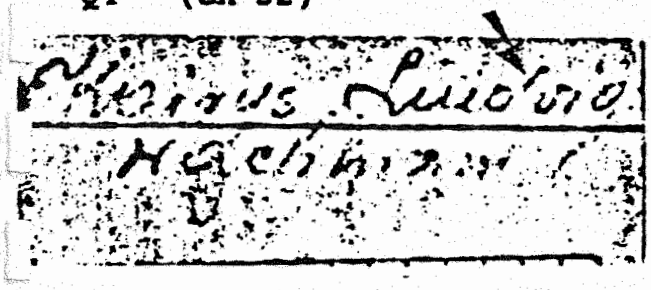


K6 (DX 4)

Small letter "d." In all questioned documents, the staff of the small letter "d" is disconnected with the bowl of the "d." Purtell concluded that after making the bowl of the letter, the writer picks up the pen and applies a staff to the right of the bowl. This peculiar style is absent in the known signatures. The bowl and staff of the "d" are touching in all four samples. (Tr. 908-09).

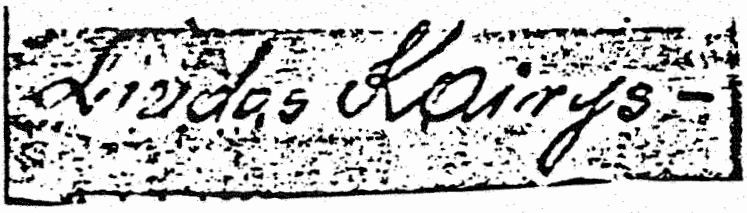
Questioned

Q4 (GX 32)

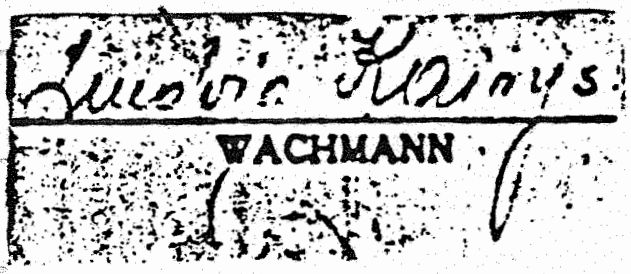


Known

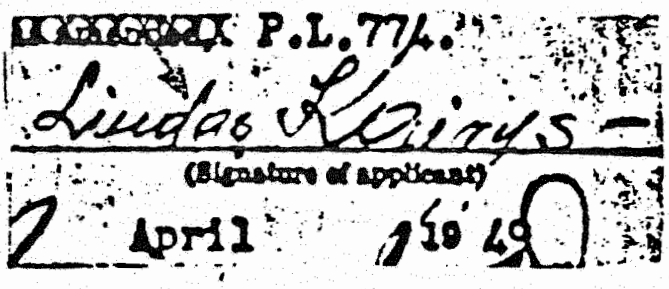
K1 (GX 5)



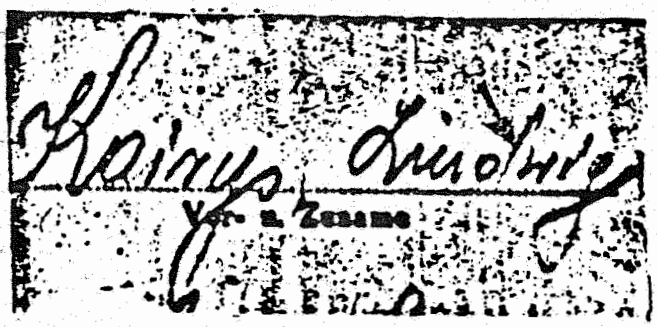
Q5 (GX 36)



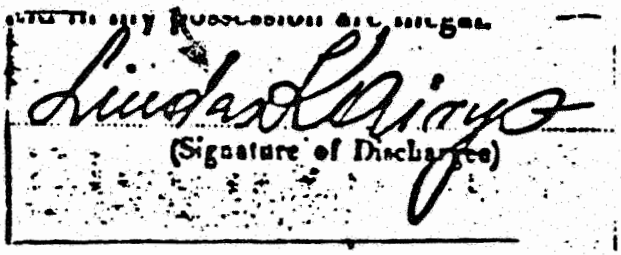
K1 (GX 5)



Q6 (GX 37)



K5 (DX 13)

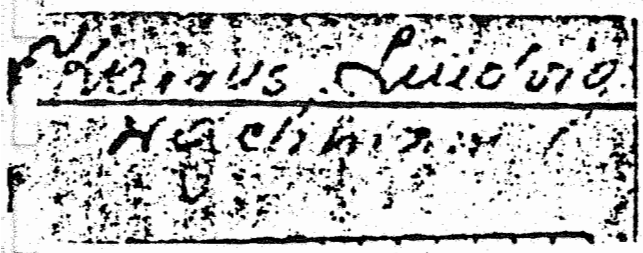


K6 (DX 4)

Capital Letter "K." In all questioned signatures the capital letter "K" begins with an extensive compound curve. Conversely, K5 and the two K1 signatures begin with a small hook at the top of the letter. In natural variation, K6 begins with a small wave that is also unlike the large compound curves of the questioned signature. In addition, in the questioned documents, the arm and leg of the "K" meet above or at the halfway mark of the staff of the letter. Conversely, in the known documents, the arm and leg join well below the halfway point on the staff. (Tr. 909-10).

Questioned

Q4 (GX 32)

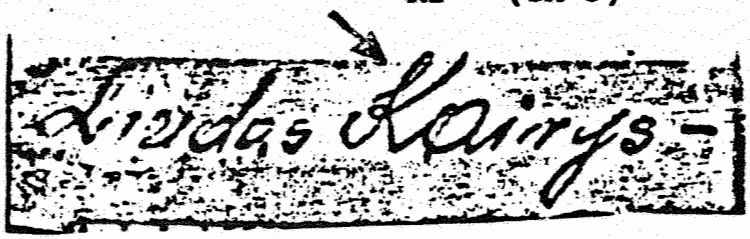


Q5 (GX 36)

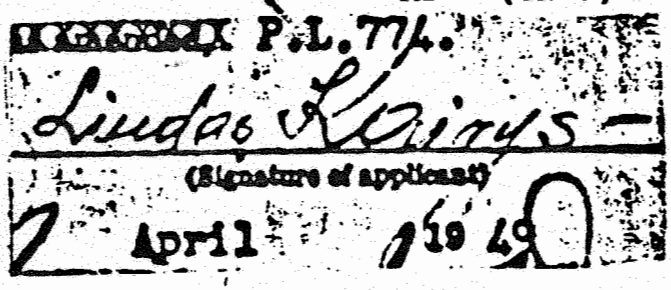
Q6 (GX 37)

Known

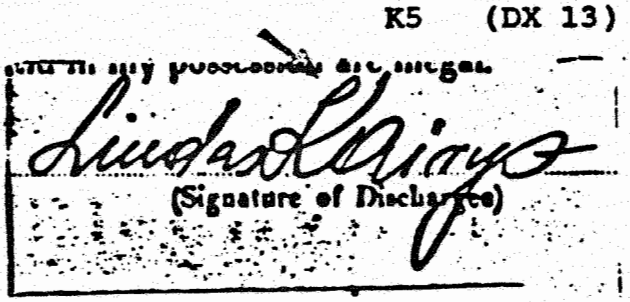
K1 (GX 5)



K1 (GX 5)



K5 (DX 13)

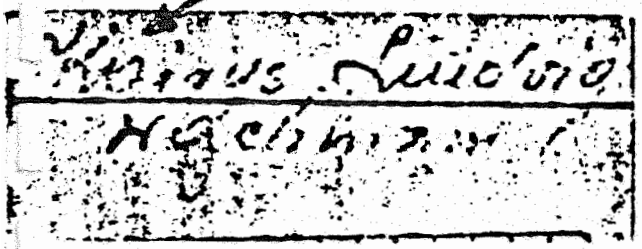


K6 (DX 4)

Bottom Leg of Capital "K." In the questioned signatures the bottom leg of the capital "K" comes straight down to the baseline. Conversely, in the known writing, the bottom leg proceeds at an angle from the staff of the leg to the base of the letter before turning up to begin the "a." (Tr. 910).

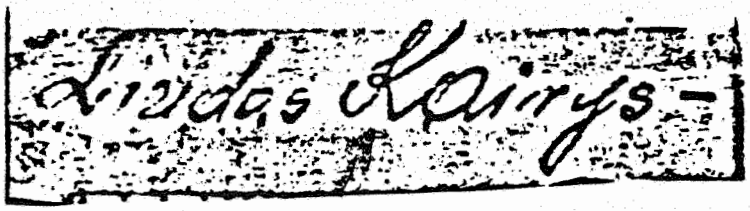
Questioned

Q4 (GX 32)

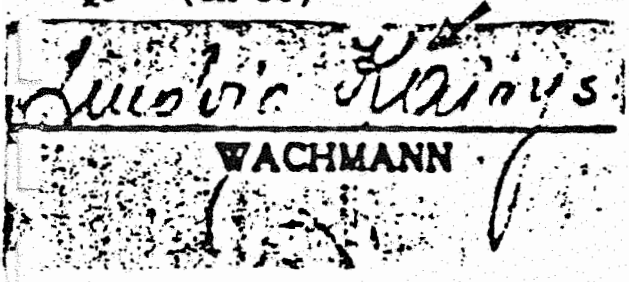


Known

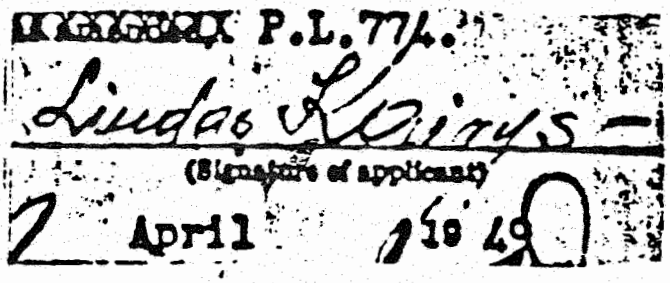
K1 (GX 5)



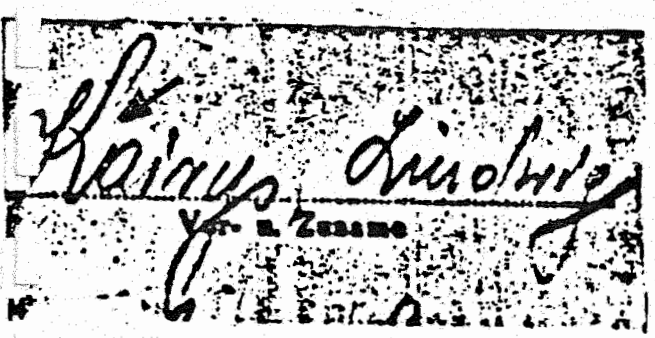
Q5 (GX 36)



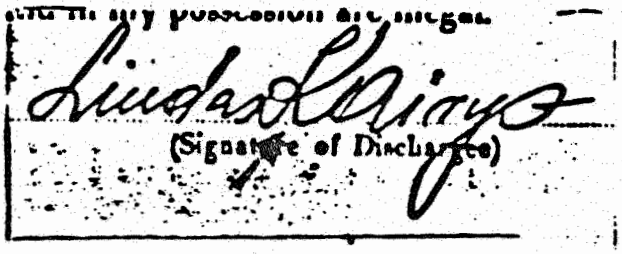
K1 (GX 5)



Q6 (GX 37)



K5 (DX 13)



K6 (DX 4)

> Slope of Writing. Finally, the slopes of the questioned writing vary widely. The questioned signatures were: Q-4 68°; Q-5 67°; Q-6 64°. All known samples were 60° or below: K1 57°; K1 58°; K5 58°; K6 60°.

(Tr 911-12).

Purtell stressed that any one unexplained difference in two writings is enough to eliminate a questioned signature. (DX 463, p.4; Tr. 890). Accord, A.S. Osborn Questioned Documents 245 (2d. ed. 1929). The above differences, combined with the other numerous erasures and tangible flaws, raise substantial doubt which the law requires be resolved favorably to defendant.

In contrast to Purtell's methodical analysis, Epstein asserted from the outset, without qualification, that the Treblinka documents were signed by the defendant. His testimony reveals that he made a hasty initial decision which had to be subsequently defended in the light of facts he had overlooked. The result was a collection of inconsistencies.

When asked to identify the "particularly significant" factors which supported his identification of the "Treblinka signatures", Epstein labeled the similarity between capital K's. As detailed above, however, Purtell stressed the same letter in illustrating the differences between the known and questioned signatures. Purtell focused on the compound curve at the beginning of the "K," the joining of arm and leg of the "K" on the staff, and the angle of the bottom leg of the "K" as indications that the signatures were different, not similar.

Epstein then made a sweeping conclusion that cannot be substantiated:

> The overall letter construction in all of the signatures is exactly the same as the signatures appearing on lines 1 through 3 in Government Exhibit 46.

(Tr. 430). One need only look at the actual letters being compared to see that Epstein was wrong. At the least, the beginning of the capital letter "L," the small letter "d," and the capital letter "K" are quite different in the questioned signatures when contrasted with the known. Epstein's broad brush statement that all letter construction is exactly the same undercuts the credibility of his overall testimony.

Epstein's conclusion that the Lithuanian and Treblinka signatures were not forgeries is also subject to doubt. In explaining the principles of handwriting analysis, Epstein stressed that all natural writing is rapidly written, without variations created by drawing or tracing:

> The basic principles in handwriting examination are that . . . the writing must be rapidly written, it must have the spontaneity and the careless abandon that we associate with natural writing. It can't be a drawn or a slowly written signature where there may be a possibility of drawing or tracing.

(Tr. 422-23). Later, caught in the difficulty of justifying his unqualified conclusion, Epstein cited the absence of these same characteristics as support for his contention that the signatures were not forged:

> Q. [D]oes that mean you found indications of an attempt to forge his signature?
>
> A. No, there were, I did not feel there were any attempts to forge this signature. . . .

> If someone were to try to forge this signature it would be done in a much more rapid, natural movement and it would not contain some of these slow drawn effects.

(Tr. 434). Epstein is thus caught in a classic contradiction: one signature is genuine because of its free-flowing style and absence of drawn effects; yet another is genuine because a well done forgery would have more rapid free-flowing movement and would not have any slow-drawn effects. Under his approach, no signature could ever be a forgery.

j. Epstein's conclusions of authenticity.

Epstein's entire testimony must be viewed in light of his initial failure to detect the numerous erasures on the Personalbogen. Although he disclaimed such a failure at trial, his notes and preliminary reports reveal that Purtell's second deposition was the first time Epstein learned of any erasures in the Soviet documents. These reports, combined with his trial testimony, disclose that Epstein came to a hasty conclusion concerning the documents' authenticity. When Purtell came on the scene, Epstein had to rationalize his initial erroneous decision and was eventually forced to retreat from it.

Epstein admitted at trial that he has examined similar Soviet documents in five cases for the Office of Special Investigations (OSI). (Tr. 486). In none of those cases did Epstein discover an erasure.[33/] He first examined the documents in this

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33/ This fact itself further undercuts the Government's theory that GX 32 was first filled out in pencil, erased, and then

(Footnote continued on following page)

case at the Soviet Embassy in November, 1981. At that time he reviewed the documents for one hour and fifteen minutes in conjunction with Dr. Cantu, Larry Stewart and Nancy Kramp. On the basis of this short review he formed his opinion of authenticity.

Epstein conceded at trial that a basic foundation for any opinion of authenticity is the presence or absence of erasures. (Tr. 479). Yet, when Epstein drafted his initial conclusions, which he himself termed "critical" to the case, he stated:

> Examination of exhibits Q(2-6) [GX 40, 41, 32, 36, 37] failed to reveal any indications of mechanical or chemical erasures, interlineations or substitution.

(DX 125). This preliminary draft is dated March 26, 1982. Epstein thus reached his opinion without knowledge of what he would later characterize as erasures. (Tr. 453).

This state of mind continued through March 31, 1982 when Epstein's final report to Norman Moscowitz stated:

> Examination of exhibits Q(2-6), failed to reveal any indications of mechanical or chemical erasures, interlineations or substitutions.

(DX 126). The identical language is repeated in the Government's Rule 26 report to defendant. (DX 124, p.2). As of May 5, the date of his Rule 26 report, one month prior to the

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typed over. If this procedure was a common practice among military clerks, surely similar documents would exist to substantiate such a claim. The Government has produced none. The inference favorable to defendant is that none exists.

beginning of trial, and twenty-one months after commencing this proceeding, Epstein and the Government had no knowledge of the numerous erasures, interlineations, and inconsistences in the Soviet documents.

David Purtell, the first outside questioned document examiner ever to appear in a case of this kind, examined the documents at the Soviet Embassy. Epstein was present at Purtell's deposition when he testified about the erasures Epstein had overlooked. As a result, the parties agreed to have both experts reexamine the documents at Epstein's office in an attempt to decipher the erasures. (Tr. 979). It was only on this second examination that Epstein saw the problem himself. His subsequent writings and testimony are an after-the-fact attempt to rationalize his initial conclusion. Eventually, Epstein conceded the inaccuracy of his earlier reports. (Tr. 484).

Epstein stated initially that this first examination was simply "to see whether alterations or erasures on the document changed the final product of the document." (Tr. 439). Although his preliminary report, final report, and Rule 26 report all stated categorically that there were no indications of any "mechanical or chemical erasures, interlineations or substitutions," he explained at trial that what he really meant was:

> I found no alterations, substitutions or erasures that I felt were, had anything to do with the final product. . .

(Tr. 439). This rationalization deserves no credit. The language of the preliminary and final reports is clear and

unequivocal. Epstein's strained attempt to avoid his prior unqualified conclusion shows the importance of the erasures.

Rather than admit any error, Epstein tried to rationalize his initial opinions by noting the erasures were "obvious." He went so far as to say:

> I felt that the type of remnants and erasures that were present added to the authenticity of the document rather than to any suspicious nature that might have caused the document to be non genuine.

(Tr. 453). If Epstein really felt that the fifteen erasures, unexplained pencil remnants, and a torn-off picture, added to the authenticity of the document, he would have included those indicia of authenticity in his initial reports. No such reference was made.

His final conclusion is also inconsistent with his prior testimony. As discussed above, Epstein finally concluded that there were no alterations, substitutions, or erasures that had anything to do with the final product of the document. Yet, at trial, Epstein admitted that he found pencil remnants he could not explain (Tr. 488), and erasures on the Personalbogen where there was not any typing over. Epstein admits to both these facts but still persists in his conclusion that there were no alterations that caused the documents to be suspect. His contention that unexplainable pencil strokes and "obvious" erasures that have no corresponding typing do not cause a document to be suspect marks him as an advocate defending a preconceived position, not an independent expert.

Epstein also failed to mention that the picture on GX 32 may have been removed. This possibility was conceded by

Dr. Cantu, and Gerald Richards, the Government's other experts. (Tr. 558 (Cantu); Tr. 383 (Richards)). A thorough, objective report would have at least mentioned this, along with the distorted printing on the reverse side of the Personalbogen, if only to attempt to explain their existence. The unexplained print character and the peculiar characteristics on the Personalbogen photo also went unmentioned by Epstein.

Finally, during cross-examination, Epstein conceded the mistake of his initial reports when he was asked about the blatant inconsistency between his final report and his trial testimony:

> Q. In your carefully selected words, though, you didn't say that your examination, your scientific examination failed to reveal any indications of erasures that affected the document. You just flatly unqualifiedly said failed to reveal any indication of erasures, didn't you.
>
> A. And if I were to write it again, I would be sure that I would qualify that portion, . . .

(Tr. 484). This admission undermines Epstein's conclusions and marks his earlier rationalizations as the arguments of an advocate.

k. Purtell's conclusions.

In contrast to Epstein's unyielding, often incorrect, conclusions, Purtell objectively reported what the documents presented. At trial, Purtell painstakingly explained each document and both identified indicia of inauthenticity and conceded indicia of authenticity. Purtell's analysis revealed the inconsistencies in the Personalbogen and other Soviet documents that are catalogued above. In his signature analysis,

Purtell methodically illustrated the many differences between the questioned and known signatures for the Court. Purtell's expertise in this area is highlighted by the reliance the United States House of Representatives Select Committee on Assassinations placed on him.

Recognizing his neutrality and expertise, the Government emphasizes that Purtell did not conclude the documents were inauthentic. This is correct. But neither did he conclude they were authentic. Purtell's ultimate conclusion on the Government's most critical document, the Personalbogen, is instructive:

> Q. Now, I want to get your final conclusions as to GX 32, because this is a very important document in this case . . . [B]ased on your tests, your analysis, your examinations, it is your expert opinion as an expert for the defense that the probabilities of GX 32 being authentic are the same as the probabilities of it being inauthentic, is that correct?
>
> A. I --
>
> Q. Didn't you testify that way in your deposition?
>
> A. Yes.
>
> Q. So that is your conclusion?
>
> A. Right.

(Tr. 998). Purtell's final conclusion was that he could not say one way or another.[34/] He recognized not only a 50%

34/ Government counsel went on to ask whether Purtell's conclusion was "tipped" toward inauthenticity by the hypothetical results of the fingerprint and pen and ink experts. The hypothetical addressed to Purtell seriously misstated

(Footnote continued on following page)

possibility of authenticity but also a 50% possibility of inauthenticity. This substantial doubt about the most critical documents in the Government's case must be resolved in Kairys's favor.

The testimony of Wolfgang Scheffler contributes nothing to the Government's claim of authenticity for the Soviet documents. The Government argues that Scheffler "concluded, based on his familiarity with German personnel files, that [the documents] appear genuine (Scheffler Dep. [DX 535], pp.169-79)." (Gov't Br. 44). The actual record does not support this Government overstatement:

> Q. [By Mr. Moscowitz:] Doctor Scheffler, based on you examination of the documents . . . do you have an opinion as to whether these documents are authentic?
>
> [objection]
>
> A. I have not found anything which would lead me to hold the opinion that it could be in any way be falsified or manipulated. I named my considerations before that I made when occupying myself with documents. One could, of course, enlarge on that but I am not under the impression that I would come to the conclusion that this were a falsified paper.

(DX 535, pp. 169-70). Dr. Scheffler did not testify that the documents "appear genuine." He simply had not "found" anything

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the facts of this case. (See Section I, B, 1, g, supra (discussion of fingerprint)). Moreover, Dr. Cantu's ink and paper analysis revealed that he could not say the documents were authentic (Tr. 546), nor would he state when the ink was made (Tr. 546). Importantly, Dr. Cantu could not rule out the possibility that the ink was placed on the documents in the early 1970's. (Tr. 547). These conclusions, not presented in the Government's hypothetical to Purtell, hardly "tip the scales" toward inauthenticity.

indicating lack of genuineness.[35] Because Dr. Scheffler's Scheffler's "negative assurance" does not amount to evidence of authenticity, it provides no support for the admission of the Soviet documents.

Serious questions remain about the authenticity of the Government's "critical" Soviet documents. The Government's experts could not put those doubts to rest. As a result, there remains a "troubling doubt" which bars the documents' admission in evidence. Baumgartner, 322 U.S. at 670.

2. The Federal Rules of Evidence bar admission of Soviet documents.

The Soviet documents are not authentic under the requirements of the Federal Rules of Evidence. Even if authentic, they are inadmissible hearsay.

a. The Soviet papers are not "ancient documents" under Federal Rule of Evidence 901(b)(8).

Federal Rule of Evidence 901(a) conditions admissibility of all documents on authenticity.[36] Only a small class of material can be authenticated as ancient documents under Rule 901(b)(8):

35/ As the Government points out, Scheffler examined only "copies" of the documents. (Gov't Br. 44). Perhaps if he had seen the originals, he would have "found" the erasures, interlineations, and fiber disturbances which infect the documents. As it was, he never identified those anomalies. His limited negative assurance of genuineness carries even less weight in light of his cursory examination.

36/ Documents that have been authenticated are still subject to hearsay and other challenges. United States v. One 1968 Piper Navajo Twin Engine Aircraft, 594 F.2d 1040 (5th Cir. 1979). See Section I, B, 2, infra.

> Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

As the preceding discussion (Section I, B, 1) illustrates, the Personalbogen (GX 32), Dienstverpflichtung (GX 36), Erklarung (GX 37), Vidaus Reikalu Ministrui (GX 40), Asmens Zinios (GX 41), Promotion Order (GX 38) all contain suspicious inconsistencies and therefore cannot qualify as ancient documents under 901(b)(8). Likewise, the other Soviet documents proffered by the Government are inadmissible since there is no testimony as to how or when the documents were created, how they fell into the hands of the Soviet Union, or who possessed them from 1940 to 1982.[37/]

37/ Contrary to Government assertion, these documents are not in evidence at this time. The Court made clear repeatedly that questions of admissibility for foreign documents was subject to briefing by the parties. See, e.g., Tr. 177, 195-96. This class of documents consists of: GX 14 (Zajanckauskas Trawniki Personalbogen); GX 15 (Zajanckauskas Dienstverpflichtung); GX 16 (Zajanckauskas Promotion, 10/9/42); GX 17 (Zajanckauskas Promotion, 1/20/43); GX 18 (Zajanckauskas Promotion, 1/19/44); GX 19 (Amanaviczius Trawniki Personalbogen); GX 20 (Amanaviczius Dienstverpflictung); GX 21 (Amanaviczius Erklarung); GX 22 (Amanaviczius Promotion); GX 23 (Baltschys Trawniki Personalbogen); GX 24 (Baltschys Dienstverpflichtung); GX 25 (Baltschys Erklarung); GX 26 (Baltschys Promotion); GX 39 (Ubergabverhandlung); GX 42 (Pazymejimas); GX 43 (Liudvikas Kairys Citizenship Certificate); GX 44 (Baptismal Certificate 1/1/21); GX 52 (Swidersky Trawniki Personalbogen); GX 53 (Swidersky Dienstverpflichtung); GX 54 (Swidersky Erklarung); GX 55 (Swidersky Promotion); GX 56, Reimer Trawniki Personalbogen; GX 57 (Reimer Dienstverpflichtung); GX 58 (Reimer Promotion); GX 65 (Letter of SS Obersturmbannfuehrer Muller); GX 66 (Excerpt of Monthly Report of German Military Government 2/16-3/15/43); GX 67 (SS Report).

Federal Rule 901(b)(8) requires that any ancient document must be "in such condition as to create no suspicion concerning its authenticity."[38/] The Personalbogen cannot satisfy this requirement. Two expert document examiners testified that the document is riddled with erasures and several experts concluded that the picture may have been removed. The Dienstverpflichtung, Erklarung and promotion order are similarly suspicious. The Erklarung and Dienstverpflichtung both have fiber disturbances throughout the signature, while the promotion order is clearly backdated by at least five months. As Judge Weinstein notes, this suspicious condition prevents a finding of authenticity:

> A document is not free of suspicion if it appears that part of the document was written at a time later than that alleged for the whole, or if it appears that the document has been forged, altered or tampered with.

5 Weinstein & Berger, Weinstein's Evidence, ¶901(b)(8)[01] at 901-101-02. See also 7 Wigmore, Evidence § 2140 at 728 (Chadborn Ed. 1974). Cf. McGuire v. Blount, 199 U.S. 142, 145 (1905) (ancient documents admitted because "There is nothing about them to suggest that they have been forged as tampered with.

38/ The emanation of these critical documents from the Soviet Union creates a substantial doubt concerning their authenticity. Imants Lesinskis, a defector from the KGB, testified that the Soviets used forged and falsified documents to attack Baltic emigres inimical to the Soviet regime as Nazi "war criminals." (DX 537, pp.27-28). He further testified that a man in Kairys's position would be a "prime target" of such a Soviet effort. (DX 537, pp.34-35). The Soviet documents against Kairys surfaced in the midst of what Congress termed the Soviet "forgery offensive." (DX 14).

They present an honest as well as ancient appearance and come from official custody.").

Moreover, the Personalbogen contains numerous misspellings and erroneous background data. These alone perclude employment of the ancient document rule. In Apo v. Dillingham Investment Corporation, 440 P.2d 965, 50 Hw. 369 (S.Ct. Hw. 1968), the Court refused to authenticate a 1881 deed because the grantor's name was in parentheses and misspelled. (440 P.2d at 967). Similarly, the information on the Asmens Zinios and Vidaus Reikalu Ministrui is flatly contradicted by the defendant's identity card and consequently suspicious.

The numerous other Soviet documents proffered by the Government cannot satisfy the second requirement of Rule 901(b)(8); namely, that they were in a place where, if authentic, they would likely be. The majority of these documents purport to be German World War II records. Yet, inexplicably they came into Soviet hands and, after a thirty-year hiatus, only surfaced again in the late 1970's.

The Government's story to substantiate Soviet custody is that these documents may have been loaded on a train by the Germans at the end of World War II and this train may have been captured by the advancing Russian army. (Gov't Br. 42). This theory is unsupported by testimony from any of the custodians of the documents. Such testimony is required, as the Court in Wright v. Hull, 83 Ohio St. 385, 94 N.E. 813, (1911) explained: "In order to render it [a debt instrument] admissible as evidence, there must be at least some evidence accounting for its custody

and that it was produced from the proper custody." 94 N.E. at 815. In fact, the only witness with any personal knowledge, Imants Lesinkis, testified that the KGB admitted possessing no archives of documents incriminating Baltic emigres as Nazi "war criminals." (DX 537, pp. 28-29). The appearance of the "Kairys" documents in the Soviet archives has never been adequately explained.

In a similar context, the Court in Sage v. Dayton Coal & Iron Co., 148 Tenn. 1, 251 S.W. 780, (1922), refused to find a land contract authentic, even though the present custodian was proper and the document appeared authentic on its face. As the court stressed, there was an evidentiary gap in the custody of the document that precluded authentication:

> The serious question is: When and how did Col. Norwood come into the possession of this paper and is there any evidence to connect his possession thereof with the Shannons so as to make him its proper custodian?
>
> We have searched the record with great care and have been unable to find any evidence to support this contention. There is absolutely no evidence as to when or how this instrument came into the possession of Col. Norwood . . . . The record is absolutely silent as to the custody of this deed from 1853 until it was seen in the possession of Col. Norwood in 1879. . . .

(251 S.W.2d at 783). Similarly, the record is silent on how these purported German military documents fell into the hands of Soviet officials. See also, Rio Bruno Oil Co. v. Statey Oil Co., 138 Tex. 198, 158 S.W.2d 293 (1942) (land deed excluded absent showing of proper custody).

Nor are the Soviet documents proffered by the Government "self-authenticating" under Rule 902(3) and (4).[39] As the final sentence of 902(3) and its precursor, Federal Rule of Civil Procedure 44(a)(2) illustrate, the central concern with foreign documents is authenticity. When, after examination by the experts of both sides, the authenticity is still in issue, the short-cut of self-authentication cannot be employed. Cf. Linnas, 527 F.Supp. 426 (Soviet documents authenticated under Rule 902(3) only after the documents were proved to be "authentic and unaltered").

Moreover, the circumstances in which the Soviet documents arose creates suspicion as to authenticity. The charges against defendant first appeared in the Communist Party organ Tiesa and were subsequently picked up by the western press. This is a standard method of Soviet disinformation. (DX 14). That the Soviet Union would hold such documents in secrecy for over thirty years strains belief. Their resurfacing at this time creates further suspicion as to their genuineness. In United States v. Regner, 677 F.2d 754 9th Cir. (1982), the Ninth Circuit found the records of a Hungarian-owned taxicab company

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39/ Similarly these documents are not authentic under the Public Records exception of Rule 901(b)(7). As Judge Weinstein points out, this Rule refers only to records from "federal, state, or local or other public offices." 5 Weinstein & Berger, Weinstein's Evidence, ¶901(b)(7)[01] 901-94-95. Consequently, only domestic public records can be authenticated under this provision.

authentic under Rule 901(3) only after concluding that Hungarian officials had no animus against an ex-Hungarian citizen:

> The record, however, is devoid of any evidence that the particular Hungarian officials harbored any ill will against Regner or that they were brazed or prejudiced against him or would be motivated to prepare false documents. Without such facts, we are in no position to conclude that every document executed by public officials of communist countries is a fabrication and presumptively unreliable.

(677 F.2d at 754). Such evidence does exist in this case. Defendant is a leader of the independent Lithuanian community. (Tr. 1065-66). His father fought in the war of Lithuanian Independence against the Russians. He was editor-in-chief of a Lithuanian cultural magazine which focused exclusively on preserving the memory of a Lithuania free from Soviet oppression. (Tr. 1067). All of these activities are anathema to the Soviet Union. As Lesinkas testified, defendant is a "prime target" for such mischief. (DX 537, pp.34-35). Consequently, the Soviet documents cannot be ruled self-authenticating under Rule 901.

b. Even if authentic, the Soviet documents are inadmissible hearsay.

The Government argues that the "Trawniki documents" (GX 32, GX 36, GX 37) are admissible as a party admission under Rule 801(d)(2)(A) because they purportedly bear defendant's signature. As the previous discussion details, however, these documents do not refer to defendant. In no way can they constitute a party admission.

Quite simply, there is no link between the documents and defendant. Absent this nexus, the party admission principle

of 801(d)(2)(1) cannot apply. As Judge Weinstein emphasizes, for Rule 801(d)(2) to apply it is essential that all "admissions" be made by the party. 4 Weinstein & Berger, Weinstein's Evidence, ¶801(d)(2)(A)[01] at 801-42 ("All that is required is that the statements have been made by the party.").

Even if Kairys's actual signature and thumbprint were on these documents (which is disputed), the documents would still not qualify as "admissions." An admission must be a party's "own statement" or one "of which he has manifested his adoption or belief in its truth." Fed.R.Evid. 801(d)(2)(A)-(B). There is no evidence that the statements on the documents are Kairys's "own" or that he ever "manifested his adoption or belief in [their] truth." In fact, even assuming that the documents are "authentic," they contain statements (e.g., dates and places of service) that necessarily were added after any signature or thumbprint were affixed. These statements perforce cannot qualify as "admissions."

The Government next argues that the transfer list and promotion order, referring to a "Kairis" (note spelling) are admissible as an exception to the hearsay rule for ancient documents. For a document to overcome the hearsey rule as an ancient document, however, it must first be authenticated as an ancient document under 901(b)(8). Connecticut Light & Power Co. v. Federal Power Commission, 557 F.2d 349 (2d Cir. 1977) (ancient documents are only admitted into evidence as an exception to the hearsay rule if "generally considered authentic"), quoting, Montana Power Co. v. Federal Power Commission, 185 F.2d 491, 498

(D.C.Cir. 1950). Neither the promotion order nor transfer sheet can be authenticated. Both misspell defendant's name. The back dating of the promotion order and custody of both documents also raise suspicion. This alone bars authenticity under 901(b)(8). (See Section I,B,2,a, supra).

Finally, the Government asserts that the Soviet documents constitute "public records and reports" and are thereby admissible under Rule 803(8). The Government cannot get to first base on this claim. Rule 803(8) limits admissibility to documents of "public offices or agencies." As Dr. Scheffer testified, the operations of the SS and its records were secret. (DX 535, pp.161-62). The Government also claims that the existence of several similar personnel files confirms that the records were regularly kept and accurate.[40/] The face of the Personalbogen belies this assertion. Even according to the Government's story, there are numerous misspellings including place and county of birth and languages spoken. The undisputed existence of at least eleven erasures throughout the form undercuts the assertion that such records were accurately kept.

In addition, admission of public records under Rule 803(8), like business records under Rule 803(6), should be supported by testimony of the records custodian or other qualified

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40/ The Government conveniently overlooks the fact that the Trawniki personnel records it sponsored in the Demjanjuk case bear no resemblance to the "Kairys" Personalbogen, GX 32. Not only are the forms completely different, but GX 32 lacks the stamps, seals, and signatures featured prominently in the Demjanjuk documents. Compare GX 32 with DX 370, 371. Moreover, the "Kairys' Trawniki documents also lack the stamps and signatures which appear on Zajanckanskas's documents. See GX 15-18.

witness.[41/] Such foundation testimony is necessary to substantiate the record keeper's duty of accuracy. Cf. E.C. Ernst, Inc. v. Koppers, Co., 626 F.2d 324 (3d Cir. 1980) (proper foundation under 803(6) where custodian of records testified that he helped prepare sheets, they were checked for accuracy, and that this was done routinely). Dr. Scheffler could not provide such a foundation. He had no personal knowledge of the record keeping procedures. Moreover, he lacked even "expert" knowledge. He conceded that he had never read documents or regulations concerning the creation and maintenance of Trawniki personnel documents. (DX 535, pp.154-56). The Government thus failed to lay an adequate foundation for the admission of the Trawniki personnel files as "public" or "business" records. They must, therefore, be excluded.

C. Defendant's Identity Card (DX 1) Substantiates his Whereabouts During World War II, is Authentic and Reliable.

All experts agree that defendant's known signature appears on DX 1. Unlike the Soviet documents, the card contains no alterations, substitutions, or interlineations. The document correctly describes defendant's physical characteristics and contains defendant's admitted photograph. Moreover, the identity

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41/ Courts construe the business records exception of 803(6) in substantial overlap with the public records exception of 803(8). United States v. Oates, 560 F.2d 45 (2d Cir. 1977); United States v. Smith, 521 F.2d 957 (D.C.Cir. 1975).

card substantiates defendant's personal history and corroborates his presence in Radviliskis and Vainutas, Lithuania during World War II.

Neither Purtell nor Epstein found any evidence to dispute the authenticity of the identity card. As Purtell stated in his final report of May 24, 1982:

> The document contains no signs of mechanical of [sic] liquid erasures, nor signs of alterations or substitutions. The paper has the wear characteristics of an old well handled document.

(DX 463 pp.2-3). Epstein's reports substantiate this conclusion.[42/]

The identity card was further corroborated by evidence showing that such cards were carried by all Lithuanian citizens. Bronius Kviklys, a Secretary for the central office of the Lithuanian Police Department from 1941 to 1942, explained that from 1919 to 1939 all Lithuanian citizens carried a Lithuanian passport. (Tr. 1072). In 1939, the central office began issuing temporary identity cards as surrogate identification until more passports could be printed. This procedure was abandoned during the Bolshevik takeover but started again with the German occupation in 1941. (Tr. 1072-73).

Due to a shortage of paper during the German occupation, the central office of the police department directed

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42/ See 11/4/81 Preliminary Notes (DX 123) ("the document has not been altered by either mechanical or liquid eradication"); 3/26/82 notes (DX 125) ("the document bears no visual signs of mechanical or chemical erasures"); 3/31/82 Final Report (DX 126) (same). In regard to the clinical tests on paper and ink, Dr. Cantu could also not find any evidence to indicate that the temporary identity card is not authentic. (Tr. 560).

local communities to issue their own identity documents. Consequently, each local police precinct developed a separate form which, because paper was scarce in local communities as well, often appeared on different types of paper. (Tr. 1074). While the form of the document and the paper on which it was printed would vary, Kviklys explained that the central police office would issue identical residence registration stamps to the different locales:

> Q. Where did these [residence registration] stamps come from?
>
> A. The central office of the Police Department used to order stamps for the entire police precincts in Lithuania, usually more than 300 of them.

(Tr. 1076-77).

These identity papers were presented by the bearer to the officials in each village when the person switched residences. Defendant's card was issued in Radviliskis on August 7, 1941 and as the reverse side reveals, he resided in that town until May, 1942. At that time, he moved to Vainutas, as a second stamp on the back of the document attests. Kviklys affirmed that there were police stations in both Radviliskis (ten to twelve policemen) and Vainutas (three). (Tr. 1077).

Unlike the Government's "very important" Personalbogen photo, the picture on the identity card is conceded to be defendant's. There is no indication it was not on the original document in 1942. As Epstein's notes of November 4, 1981 state: "There was no evidence of photo substatution [sic] and the wet stamp impressions over the photograph and page fit as expected."

(DX 123, p.1). Purtell reinforced this conclusion when he testified that the signature was placed on the identity card after the picture was affixed to the document. (Tr. 919). As Purtell concluded, a telltale dot of ink on the bottom edge of the picture revealed that it was placed on the document before the signature:

> Q. Did you try to determine whether the signature was put on before or after the photograph was put on?
>
> A. Yes.
>
> Q. What did you find out when you did that?
>
> * * *
>
> A. Only on the capital letter K, the right arm, there is a spot of ink that touched the photograph when the letter was written. It shows that the photograph was on before the signature was written.

(Tr. 918-19). This tangible evidence demonstrates the identity card is an original unaltered document and bears the information that was first placed on the document.[43/]

The identity card also depicts defendant's physical characteristics. It states correctly that defendant's eyes are blue and hair dark. It substantiates defendant's testimony that he was born in Kaunas, Lithuania on December 20, 1924. (The document reveals that this information was also cross-checked with the birth registry in Kaunas.) These vital statistics contradict

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43/ In this regard, Epstein emphasized that the card "was made out from blank for information that is presently contained on it." (DX 123, p.2) Importantly, Epstein does not make this conclusion about any of the Soviet documents.

the data on the Soviet's Asmens Zinios (GX 41) and Vidaus Reikalu Ministrui (GX 40), two documents with signatures that neither expert could identify.

Finally, both experts agreed that the signature on the identity card is a known signature of defendant. Epstein concluded that "there is no doubt that the [DX 1] signature was made by the writer of the known Kairys signatures that are available for examination." (DX 123, p.1). In comparing the known signatures with the identity card, Purtell concluded there were no significant differences. (Tr. 913).

In the face of this tangible proof of authenticity, the Government asserts that defendant somehow forged this document after the war and submitted it to immigration officials as a genuine article.44/

Defendant's identity card has two residential registration stamps on the reverse side. The Government asserts that both stamps are identical and thus must have been forged. The Government's speculation that the residential stamps are "identical" is not supported by any expert testimony. This subject was never even addressed by either expert. Moreover,

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44/ This rationale for exculpatory evidence was employed by the Government in a prior Seventh Circuit case and rejected. See United States v. Walus, 616 F.2d at 283, 297.

Kviklys testified that, with some exceptions, the same residential stamp design was used by different towns.45/

Additional stamps on the identity card from the municipalities of Radviliskis and Vainutas reinforce the document's authenticity. The Government argues that these stamps were made by some unknown "German stamp engraver" at some unknown time, in some unknown locale. The Government has no proof to support these claims. In contrast, defendant did adduce evidence that the Radviliskis stamp designs are identical to that of other known Radviliskis stamps (DX 520, DX 521). A comparison of the design reveals:

45/ Kviklys' precise testimony was:

> "Q. Mr. Kviklys, listen to my question. The stamps you are saying are the police registration stamps are these two rectangular stamps on the back of the document, is that correct?
>
> A. Yeah, this is correct. This is for --
>
> Q. Okay.
>
> A. -- This is, this is most of the time they used to be same type of stamps for the whole Lithuania, but there were some exceptions when they used to make up their own stamps."

(Tr. 1084).

DX 1 Radviliskis

DX 520

DX 521

Defendant's expert could not state that the designs were identical because the stamps were smudged during application. (Tr. 921). Examination of the exhibits does reveal the very similar designs. Such similarity is not the work of a speculative faceless, nameless, dateless "German Stamp Engraver."

The Government next asserts the document must be a forgery because the identification picture depicts defendant with his head turned slightly. The prosecution refers to other temporary identity cards produced by defendant, and argues that all other pictures were taken head on. The Government's assertion is not accurate. Purtell did not testify that all identity cards produced by defendant had full-faced photographs. Rather his testimony was:

> Q. Isn't it true, Mr. Purtell, that the vast, vast majority of those documents, the pictures on those documents appearing as Defense Exhibit 259 are, indeed, full face?
>
> A. I remember going through them in the deposition, just handling them most of them were full-faced photographs, yes.

(Tr. 1005).

Mr. Kviklys testified that during World War II the temporary identity card was often issued with angled photographs and, at times, with no photograph at all. (Tr. 1093).

Significantly, there is no dispute that the temporary identity card does depict defendant. Both ears are not showing, but during World War II in Lithuania, photographs were scarce and proper photographic techniques were not common. As Kviklys stated succintly:

> A. (In English) Is wartime. You Americans, you cannot understand what is wartime.

(Tr. 1093).

The Government also asserts that two 1946 registration papers (GX 123, GX 124) from the town of Wiesent, Germany reveal that defendant did not have an identity card with him at that time. The Government argues that because there is no listing of identification papers on the form, the defendant must have obtained the identity card at some time after 1946.

This theory has several flaws. First, review of the registration forms reveals that much of the requested information was not transcribed onto the forms. The entrance papers contain no response to questions concerning prior residence, military history, city of last registration, husband's parents, and family history. The exit form also contains several omissions. Clearly, the Wiesent, Germany residence registration forms were not prepared carefully. The lack of an entry in response to the question for identification papers is consistent with these several other omissions.

Moreover, there is doubt that these 1946 residence forms even refer to defendant. They are not signed, although the copy defendant received from the Government appears to have some writing near the signature area. In addition, the entrance

form contains an improper birth date for defendant and even different from the Government's contentions. If these forms do refer to defendant, the birth date error alone reveals the haphazard manner in which the forms were created.

The Government introduced no testimony to support the Wiesent documents. The form was transcribed from an oral interview. There is no assurance that defendant, or the person to whom the document refers, ever reviewed the answers to determine their accuracy. Without any foundation testimony to provide some context to these papers, they mean nothing.

Finally, Epstein testified that the temporary identity card signature, while definitely Kairys' known signature, was "in some very small respects" closer to the late 1940's signatures of defendant. (Tr. 459). This, the Government argues, supports the conclusion that the identity card was prepared in the late 1940's. Epstein's equivocal conclusion is based on an erroneous comparison of the early 1940's questioned signatures with the known documents. (Tr. 459-60). Purtell expressly denounced such tactics. (Tr. 992). Epstein's uncertain opinion, therefore, cannot be credited.

Epstein's November 4, 1981 notes (DX 123), March 26, 1982 draft report (DX 125), and final report (DX 126), state only that the signature on the identity card is the known signature of Liudas Kairys. There is no mention of a greater similarity between the DX 1 signature and the late 1940's writing. The first reference to dating the identity card signature was in the Government's Rule 26 Report to defendant on May 5, 1982. (DX 124). At trial, Epstein explained that

once he concluded the questioned documents contained defendant's signature, he treated those signatures as known and compared them with the identity card signature:

> [T]hose three signatures [GX 32, 36, 37] I have already been identified as being done by Kairys and are, in my examination, known signatures now. Although they are still a question to the Court I have identified them and I can use the variation that exists within those three signatures in my comparison in conjunction with the knowns.

(Tr. 459-60).

By taking a questioned signature, identifying it, and then treating it as a known signature by which to compare other questioned signatures, Epstein commits the ultimate bootstrap of signature analysis. Under these tactics a questioned signature can become the basis for identifying another questioned signature ad infinitum. Moreover, as Purtell unequivocally stated, a questioned signature can never be used to prove another questioned signature:

> Q. In your opinion, is it proper in the science of questioned handwritings to have two sets of questioned documents and make a determination that one set, because of certain comparisons, is known, not questioned, and then use the set which it was once questioned and now is concluded to be known as a means for a comparison with still further unknown documents, is that proper?
>
> A. Any one questioned document remains a questioned document in your examination.
>
> Q. Why is that, Mr. Purtell?
>
> A. Because you can't use a questioned document to prove another questioned document.

(Tr. 922). That is, of course, exactly what Epstein did when he treated the early 1940's documents as a known writing.

Most importantly, Epstein's determination concerning the dating of the personal identity and signature is extremely tentative. He cannot state with any degree of scientific certainty, indeed any certainty at all, when the temporary identity card was signed. (Tr. 464, 467).

The Government asserts that even if the temporary identity card were authentic, it would not provide an alibi for Kairys. The temporary identity card most certainly does substantiate defendant's alibi. Initially, the identity card flatly contradicts the Soviet documents on such crucial areas as age, birth date, birth place, hair and eye color. Moreover, defendant was in Vainutas, Lithuania commencing on May 15, 1942 as the stamp on the reverse side of the document attests. Defendant remained in Vainutas for the balance of the summer of 1942, before he was captured and interned at Hammerstein. Consequently, the June 17, 1942 date appearing on the Personal-bogen cannot refer to the defendant.

* * *

The Government's evidence fell far short of the required "clear, unequivocal, and convincing evidence that does not leave the issue in doubt" that defendant ever served in the SS Wachmannschaft. Its "identifications" turned on questionable use of a questionable photograph. Its "critical" documents turned out to be riddled with erasures, interlineations, and inconsistencies. In a matter of this importance, a conviction cannot rest on such shaky evidence. These substantial doubts on the basic issue of identification require dismissal of the Government's case.

II. THE GOVERNMENT FAILED TO PROVE, AS REQUIRED UNDER COUNT I, THAT KAIRYS MISREPRESENTED OR CONCEALED MATERIAL FACTS DURING THE IMMIGRATION AND NATURALIZATION PROCESS.

Count I required the Government to prove Kairys's knowing, intentional misrepresentation or concealment of material facts during the immigration and naturalization process.[46] The Government's scant evidence fails to establish that Kairys was ever asked or required to disclose concentration camp service. Moreover, it similarly failed to prove that the few inaccuracies on the relevant forms are either "material" or sufficient to support an inference, much less a finding, of "willful" misrepresentation or concealment.

A. The Government Offered no Evidence Regarding Kairys's Dealings with the International Refugee Organization.

After World War II, millions of war refugees found their way to areas occupied by the Western Allies. (Tr. 639 (Curry)). As Government witness Curry explained, for refugees like Kairys who wished to migrate to the United States under the Displaced Persons Act, the first stop was the International Refugee Organization ("IRO"). (Tr. 640-41.)[47] At the IRO, the would-be immigrant was given a questionnaire -- entitled the "CM/1" form or "Fragebogen" -- to set forth his personal history

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46/ The Supreme Court has stated that, for purposes both of visa and citizenship applications, concealments and misrepresentations must be both willful and relate to a material fact. Fedorenko, 449 U.S. at 507-08 n.28.

47/ The IRO became the successor to the United Nations Relief and Rehabilitation Agency ("UNRRA") in 1947. (Tr. 640-41).

to "determine his eligibility with the requirements of IRO." (Tr. 642-45). The IRO then determined whether the applicant was a "concern" of that organization and made a determination of eligibility as a "displaced person." (Tr. 645-46). If found eligible, the applicant received a certificate of eligibility from the IRO. (Tr. 646).

As Government counsel stated at trial: "There is no evidence that this is what occurred with respect to Mr. Kairys in this record." (Tr. 644). In discovery, defendant requested the Government to produce "every initial form for the determination of status, form CM/1, Fragenbogen, or Personalien of the IRO. . . ." (Tr. 644). The Government's answer was "None." (Tr. 644). Moreover, the Government produced no witness from the IRO to explain what Kairys said to the IRO or what information he provided that organization. In short, there is no evidence of what information Kairys gave to the IRO, much less that he willfully misrepresented or concealed material facts.[48/]

48/ A misrepresentation to the IRO could not, in any event, sustain a claim of "illegal procurement" of citizenship by reason of initial inadmissibility to the United States under the Displaced Persons Act. Section 10 of the Displaced Persons Act of 1948 provided, in part: "Any person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." (62 Stat. 1013; DX 158, p.5). The applicable regulations defined "misrepresentation for the purpose of gaining admission into the United States" as a "wilful misrepresentation, oral or written, to any person while he is charged with the enforcement or administration of any part of the act, of any matter material to an alien's eligibility for any of the benefits of the act." (DX 148, p.9170046). As

(Footnote continued on following page)