

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

_____)	
UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 77-118
)	
SERGE KOWALCHUK, a/k/a)	
SERHIJ KOWALCZUK,)	
)	
Defendant.)	
_____)	

GOVERNMENT'S POST-TRIAL MEMORANDUM

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I. FACTS

A. Historical Background

Lubomyl is a town in the Wolhnyia region of the Ukraine. Until 1939 it was part of Poland. In September 1939, when Nazi Germany and the Soviet Union invaded and divided Poland, Lubomyl was occupied by the Soviets. (Lifschutz depo. p. 14.) Lubomyl was very close to the demarcation line which divided the areas of occupation. (Hilberg testimony.) 1/ On June 22, 1941 the Nazis surged across the demarcation line to invade the Soviet Union and Lubomyl was occupied by the third day of war. (Lifschutz depo. p. 15; Fedchuck depo. p. 10; Trofimovich depo. p. 22). It remained under German military jurisdiction until September 1, 1941 when a civilian administration controlled by the Nazis was installed. (Hilberg testimony; Lifschutz depo. pp. 16, 70-71.)

Prior to the invasion of the Soviet Union the Nazis dealt with Jews by means such as concentrating them into ghettos. This changed to a policy of complete annihilation of Jews when the Soviet Union was invaded. Jews in the Soviet Union were murdered by specially created mobile

1/ Doctor Raul Hilberg is a professor at the University of Vermont who is a recognized expert on the Holocaust. His work in the field started in 1948 and has included studies at all the major archives in the United States and abroad. Among his publications is the major work The Destruction of the European Jews.

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killing units of the SS and Police called Einsatzgruppen, which shot the Jews with the help of local police and auxiliary units. 2/ The Einsatzgruppen travelled with military units and operated in the front line areas. The four Einsatzgruppen which traversed the U.S.S.R. trapped Jews caught in the confusion of invasion and shot them en masse at mass graves. However, the Einsatzgruppen moved so quickly toward the east that many Jews survived those first killing operations. (Hilberg testimony.)

As the Einsatzgruppen moved east, those Jews who had escaped killing were forced to move into ghettos. They remained in the ghettos until the Einsatzgruppen began a second sweep by moving from the east back toward the west. The ghettos of the Ukraine existed an average of eight months before the mobile killing units returned. (Hilberg testimony.)

Lubomyl, which sometimes was referred to as a "Jewish town" (Koret depo. p. 63) had a population of approximately

2/ Extermination of Jews was also carried out in the General Government -- that part of pre-1939 Poland not annexed by Germany. The method of extermination used in the General Government involved the establishment of stationary killing centers. Jews were transported to these centers from ghettos in the General Government as well as from elsewhere in Europe. Most Jews were killed in those centers by gassing. See, The Destruction of the European Jews, Chap. IX (Government Exhibit 1).

10,000, half of which was Jewish. (Hilberg testimony; Lifschutz depo. p. 7.) A ghetto was established in Lubomyl in December 1941 (Lifschutz depo. p. 39; Koret depo. p. 19; Trofimovich depo. p. 53) and Jews from Lubomyl and the surrounding area were required to move into the ghetto. (Trofimovich depo. p. 53; Voloshkevich depo. p. 23.) Approximately 5,000 Jews were placed into the ghetto. 3/ (Fedchuck depo. p. 15.)

Before they were annihilated en masse the Jews of Lubomyl were subjected to indignities specially created by the Nazis. They had to wear an armband with the Star of David and, later, also a yellow round badge. (Lifschutz depo. p. 39; Getman testimony; Koret depo. p. 17; Voloshkevich depo. p. 13.) They were prohibited from conducting worship services and their children were excluded from schools. (Lifschutz depo. p. 39.) They were forced to perform labor (Koret depo. pp. 33-34) and received only 200 grams of bread per day. (Lifschutz depo. p. 39.) After they were ordered into the ghetto their living conditions were horrible: there was extreme overcrowding with as many as 22 people living in each house and severe shortages of food and

3/ Mosche Lifschutz and Abraham Getman, Jewish survivors, and Aleksandr Voloshkevich mentioned that there was a "little ghetto" in Lubomyl not far from the main ghetto. (Getman testimony; Lifschutz depo. p. 41; Voloshkevich depo. pp. 12, 23.) It consisted of perhaps eleven houses. (Voloshkevich depo. p. 12.)

even water. (Getman testimony; Fedchuck depo. p. 17; Koret depo. p. 44-45.) Their valuables were taken (Lifschutz depo. p. 36; Fedchuck depo. p. 59; Koret depo. pp. 16-17). The Jews were not allowed to leave the ghetto and were to be shot without warning if they attempted to do so. (Fedchuck depo. p. 10.) There were periodic "actions" in which Jews were apprehended and shot. (Getman testimony; Lifschutz depo. pp. 26-34; Koret depo. p. 35; Fedchuck depo. p. 57.)

The Lubomyl ghetto existed until October 1, 1942 when all of its residents were marched three kilometers to the village of Borki. There they were shot to death at mass graves. The method of killing which was used resembled the packing of sardines. (Fedchuck depo. p. 34.) That method had been standardized by the Einsatzgruppen. (Hilberg testimony; The Destruction of the European Jews, pp. 209, 249 (Government Exhibit 1).) The operation carried out in Lubomyl was as follows: A group of Jews was ordered to lie down in a grave and was shot. A second group was ordered to enter the grave and lie on top of the corpses. They too were shot. The shooting operation, directed against even babies, lasted all day. Five thousand Jews were killed. (Fedchuck depo. pp. 34, 55.)

The liquidation of the Lubomyl ghetto occurred during the second sweep of the Einsatzgruppen. Ghettos throughout

the area were being emptied at the same time. The ghettos in nearby Tomatschewka and Domatschewo were liquidated on September 19 and 20, 1942. (Gendarmerie Report October 6, 1942 (Government Exhibit 11).) Lutsk, Rovno and Dubno were also emptied of their Jews. (Hilberg testimony; map of Ukraine, Government Exhibit 2-B.) An armaments production report sent to Berlin stated that there had been large scale "evacuations" of Jews throughout Wolhnyia in October 1942. (Government Exhibit 10.) During the second sweep many hundreds of thousands of Jews were shot. In the summer and autumn of 1942 the average was between 150,000-200,000 victims per month. (Hilberg testimony.)

From the start, the Einsatzgruppen used local citizens to assist in the killings. They guarded Jews at the killing sites and at times participated in the shootings. (Hilberg testimony.) One Einsatzgruppe report, which was later used at Nuremberg proceedings, noted that Ukrainian police were assigned the killing of 581 children while the German personnel murdered the adult Jews. (Incident Report, September 19, 1941, (Government Exhibit 9); See also Report to General of the Infantry Thomas, December 2, 1941 (Government Exhibit 12).)

The use of local citizens was not limited to early Einsatzgruppen operations. When the Nazis conquered the Soviet territory and set up their occupational apparatus there were not enough German police in the U.S.S.R. to kill all the Jews and carry out other police tasks. In response

to the manpower shortage, Heinrich Himmler, Reichsfuehrer SS in charge of all police, decreed just one month after the invasion that additional local police forces were to be established throughout the conquered territories. (Himmler decree, July 25, 1941 (Government Exhibit 4).) They were to be formed on the model of the German police and were to be under the supervision of local German police agencies.

(Daleuge order November 6, 1941 (Government Exhibit 5).) The indigenous police in the Ukraine were referred to as schutzmannschaften, militia or Ukrainian police. (Hilberg testimony; Fedchuck depo. p. 10.) A few of the indigenous police were placed under the jurisdiction of the German criminal police but "well over 99%" came under the German order police. (Hilberg testimony.) The indigenous police assisted the Germans by keeping order in the towns, ensuring that grain was collected by the occupiers, gathering forced laborers, fighting partisans and patrolling and guarding the ghettos. Finally, they were used at the mass murders when the ghettos were liquidated. (Hilberg testimony.) As noted by defendant, the Ukrainian militia did whatever it was told by the Germans. (Serhij Kowalchuk testimony.)

The ratio of indigenous personnel to Germans was 10 to 1. 4/ (Hilberg testimony.) In the Ukraine nearly 25,000 men

4/ Dem'yan Fedchuck, himself a Ukrainian policeman, stated that at the Lubomyl mass murder there were 10 schutzmann to every German. (Fedchuck depo. p. 29.) The ratio is also shown by Government Exhibit 11. In that report from a German gendamerie post there were 308 Ukrainian police and 26 German gendarmes.

worked as indigenous police. In Wolhnyia, where Lubomyl was located, there were about 9,500 members of the schutzmannschaften (Table of organizations dated July, 1942 (Government Exhibit 6)), and 950 German police. (Hilberg testimony.) The collaborationist police were of crucial importance to the occupiers in carrying out Nazi policies because the number of German personnel was totally insufficient -- in Wolhnyia alone the population was five million (Hilberg testimony.)

Members of the local population who were accepted into the police received only rudimentary training (Hilberg testimony) and as late as October 1942 a German gendarmerie report remarked that their training was still poor. (Government Exhibit 11.) The police in Lubomyl were trained in that town itself. (Fedchuck depo. pp. 12-13.) The Nazis provided a salary to the police. (Daleuge Order, November 6, 1941 (Government Exhibit 5); Fedchuck depo. p. 24.) The indigenous police wore uniforms but those uniforms which were ultimately used were the result of an evolution. (Hilberg testimony.) At first the police wore only civilian clothes (Lifschutz depo. p. 20) with an armband identifying them as schutzmann. (Hilberg testimony; See also Fedchuck depo. pp. 27, 54.) At other times they wore captured Polish and Soviet uniforms which had been stripped of insignia. (Hilberg testimony.) The police in Lubomyl wore green uniforms (Lifschutz depo. p. 21; Fedchuck depo. p. 25-26; Kotsura depo. p. 19.) but as the years went by they also wore navy blue and green-gray uniforms. (Mykola Kowalchuk testimony.)

Ordinary policemen carried rifles while their leaders had pistols. (Fedchuck depo. p. 25; Voloshkevich depo. p. 20; Mykola Kowalchuk testimony; Lifschutz depo. p. 92.)

When Lubomyl was placed under civilian administration on September 1, 1941 it was within the Reichskommissariat Ukraine under the Generalbezirk Wolhnyia-Podolia. (Hilberg testimony; map of administrative regions (Government Exhibit 2A).) That area was economically backward and highly rural. (Hilberg testimony.) Lubomyl became the seat of an administrative region called a kreisgebiet. There were 85,500 people within the kreisgebiet Lubomyl; the principal towns were Lubomyl, Shatsk and Golovno. The leader of the kreisgebiet was named Uhde (Koret depo. p. 71; Lifschutz depo. p. 16) and the German gendarmerie leader was Lt. Anton Kurz. (Daleuge order with charts dated March 13, 1942, p. 18 (Government Exhibit 3).) Kurz functioned as SS leader and the Ukrainian police in the kreisgebiet were subordinate to him. (von Bomhard order, January 8, 1942 (Government Exhibit 7); von Bomhard order, May 18, 1942 (Government Exhibit 8).) 5/ Although the Nazis decided that each kreisgebiet was to have 20-25 gendarmes (von Bomhard order, January 8, 1942 (Government Exhibit 7)), Lubomyl had fewer. (Hilberg testimony.)

5/ Lt. Ernest Deurlein, stationed in the Brest-Litovsk Kreisgebiet, had the same function as Kurz. (See Government Exhibit 8.) The Ukrainian police whom he supervised participated in Jewish ghetto liquidations in September, 1942. (See Deurlein's report dated October 6, 1942 (Government Exhibit 11.)

Several hundred Ukrainian police were stationed throughout kreisgebiet Lubomyl in places such as Lubomyl, Golovno, Shatsk and Rymatchi. (Fedchuck depo. pp. 46, 48-49; Kotsura depo. p. 10.) The commandant of the Ukrainian Police in Lubomyl was Isko Prykaziuk (Answer to Amended Complaint ¶13; Lifschutz depo. p. 17; Kotovich depo. p. 16; Kotsura depo. p. 8.) Prykaziuk was also the senior commandant for the entire kreisgebiet, superior to the police commandants in the other towns. (Kotsura depo. pp. 14, 25; Fedchuck depo. pp. 50-51.) Prykaziuk had two deputy commandants -- Pawel Bulwaka (Answer to Amended Complaint ¶13; Trofimovich depo. p. 31) and Serhij Kowalchuk. 6/ (Fedchuck depo. p. 11; Kotovich depo. p. 14; Kotsura depo. p. 10; Voloskevich depo. pp. 15, 20; Trofimovich depo. p. 19.) Kowalchuk's rank was also superior to those who commanded the Ukrainian police in other towns. (Fedchuck depo. p. 50.)

B. Activities of Defendant as a Ukrainian Policeman

Serhij Kowalchuk's connection with Lubomyl started in 1933 when he moved along with his family to that town from Kremenets, Poland. (Serhij Kowalchuk testimony; Mykola

6/ Jewish witnesses Lifschutz, Koret and Getman referred to defendant as commandant.

Kowalchuk testimony; Voloshkevich 7/ depo. p. 24.) His father Demetri worked in Lubomyl as a civil servant assigned to the finance office. (Serhij Kowalchuk testimony; Lifschutz depo. p. 11; Koret depo. pp. 26, 57-58, 64.) The Kowalchuk children consisted of defendant, brother Mykola and sisters Vera and Raya. (Mykola Kowalchuk testimony; Fedchuck depo. p. 39.) They attended school in Lubomyl. (Lifschutz 8/ depo. pp. 13, 46; Trofimovich 9/ depo. pp. 21-22; Voloshkevich depo. pp. 8, 10; Kotovich depo. p. 12; Serhij Kowalchuk testimony; Mykola Kowalchuk testimony.)

Government witnesses testified that the Ukrainian police was formed at the beginning of the occupation (Voloshkevich depo. p. 21; Kotsura depo. p. 8) and defendant himself

7/ Aleksandr Alekseyevich Voloshkevich, who currently lives in Lubomyl, testified that he knew Serhij Kowalchuk since about 1933 and that he went to school with him in Lubomyl prior to the war. Mr. Voloshkevich lived in Lubomyl during the German occupation.

8/ Mosche Lifschutz, who currently lives in Tel Aviv, is a Jew who lived in Lubomyl during the German occupation, up until the time the Jewish ghetto was liquidated. He knew the Kowalchuk family, including Serhij, from the 1930's.

9/ Alexandr Sidorovich Trofimovich, currently residing in Lubomyl, lived in Lubomyl in the 1930's and 1940's and knew Serhij Kowalchuk since about 1936.

testified that the police were formed about two weeks after the occupation began. (Serhij Kowalchuk testimony.)

Witnesses from the Soviet Union, Israel and the United States, most of whom knew defendant before the war, testified that defendant was a member of the Ukrainian police in Lubomyl from the earliest days of the occupation until the Nazi retreat. When Demy'an Fedchuck 10/ and Gerasim Kotsura 11/ became rank and file policemen in Autumn, 1941 defendant was already deputy commandant. (Fedchuck depo. p. 11; Kotsura depo. pp. 8, 10.) As a police leader he was armed with a pistol. (Lifschutz depo. pp. 34, 92; Voloshkevich depo. p. 15; Kotsura depo. p. 19.) Jews who witnessed "actions" in the summer of 1941 saw Kowalchuk gathering victims. (Getman 12/ testimony; Lifschutz depo. pp. 26-31.) Defendant himself confirmed that he resided in Lubomyl from the time of invasion until the Nazi retreat.

10/ Dem'yan Markovich Fedchuck was born in a village three kilometers from Lubomyl and now lives in Krasnodar Territory, U.S.S.R.

11/ Gerasim Kaptonovich Kotsura was born in the same village as Fedchuck and now lives in the town OrdzhonkiAZE, U.S.S.R.

12/ Abraham Getman, who currently lives in the United States, knew defendant before he joined the Ukrainian police because Getman saw defendant at the shoe store owned by Getman's father on several occasions.

(Serhij Kowalchuk testimony; Fedchuck depo. p. 8.)

Defendant, however, maintained that he was a mere clerical employee for the police 13/ and was attending a secretarial training course in another town when the ghetto was liquidated.

The actions against the Jews in Lubomyl were periodic. (Koret 14/ depo. p. 35.) The Ukrainian police referred to those actions as roundups. (Fedchuck depo. pp. 57-58.) Witness Aleksandr Trofimovich testified that he saw Jews taken away to be shot dozens of times (Trofimovich depo. pp. 45-46) and defendant escorted the doomed Jews on almost every occasion. (Trofimovich depo. pp. 27, 28.) During one action the defendant shot to death an elderly Jewish couple who lagged behind. (Trofimovich depo. pp. 28-29.)

The defendant participated in a Jewish action which took place just one week after the occupation started. All the

13/ When the complaint in this case was filed in 1977 defendant answered that he had no knowledge of the existence of the "Ukrainian militia or police." (Answer to Complaint, ¶13). In his answer to the amended complaint and at trial, however, defendant demonstrated intimate knowledge of the police.

14/ Shimeon Koret, who lives in Jerusalem, Israel, testified that he was a Jew who lived in Lubomyl during the German occupation, up until the time of the liquidation of the Jewish ghetto. He knew Serhij Kowalchuk from before the Soviet and German occupations.

Jewish men of Lubomyl were ordered to assemble at the town marketplace. (Getman testimony; Lifschutz depo. p. 19.) About 800 appeared. (Lifschutz depo. p. 21.) A German military officer, accompanied by local policemen -- including defendant -- announced that field telephone lines had been sabotaged and that five Jews were to be shot in retaliation. The defendant thereafter assisted in selecting the five victims 15/ and marching them behind a small hill where they were shot. (Lifschutz depo. pp. 22-26; Getman testimony.)

One month after the occupation began there was another action against the Jewish men of Lubomyl. Trucks filled with Germans and Ukrainian police travelled through the streets. Jewish men were apprehended and loaded onto the trucks. They were taken to the Jewish cemetery and shot. Both Mosche Lifschutz and Abraham Getman saw defendant participate in the action. (Getman testimony; Lifschutz depo. pp. 26-31.) Getman particularly recalls this action because both his father and brother were killed. Getman testified that a truck appeared at the street corner and defendant entered his

15/ Israeli witness Lifschutz was present when the five men were marched away. Among the victims was Schmucl Wajngarten. (Lifschutz depo. p. 25.) United States witness Getman, who had chosen not to go to the town square, had seen Wajngarten heading toward the marketplace. Getman later saw five bodies, among them Wajngarten, at the small hill. (Getman testimony.)

home and took his father. Getman followed them to the street and saw Kowalchuk and a German gendarme standing by the truck. Elsewhere on the street Ukrainian police were apprehending other Jews. Getman thereafter obeyed his father's command to get away. When Getman was again inside his home defendant reentered and demanded shovels, saying that he was taking Getman's father to work. Getman followed the trucks to the Jewish cemetery where he heard shots. The following day Getman dug up the bodies of his father and his brother. His brother, who had not been home when the father was taken, had been taken to the cemetery from elsewhere. (Getman testimony.)

The Jewish women and children of Lubomyl were included in an action which took place a month later. (Koret depo. p. 35; Lifschutz depo. pp. 31-34; Getman testimony.) For two to three days Germans and Ukrainian police entered homes and dragged away Jewish residents. Mosche Lifschutz saw defendant searching for Jews several times during the action (Lifschutz depo. p. 33) and Abraham Getman saw Kowalchuk apprehend two of his female neighbors named Stern. (Getman testimony.)

Defendant also took away Jews for forced labor. Israeli witness Szymon Koret recalled that defendant and other Ukrainian policemen appeared at his family's sawmill to check work certificates. Those Jews who had no papers were taken

away to perform forced labor. (Koret depo. pp. 24, 32-34.) In August, 1941 two Germans and three Ukrainian policemen -- defendant among them -- took Koret's father and several others to perform labor. Defendant and the other Ukrainian policemen first beat the Jews, including Koret's father who was then about 64 years old. (Koret depo. pp. 30-34.) A week or two later defendant reappeared at the sawmill with Germans and other Ukrainian police to check work certificates. On that occasion Baruch Koret tried to escape and was shot and then beaten to death by defendant and the other policemen. (Koret depo. pp. 35-43, 56.) In yet another incident defendant beat a Jewish forced laborer named Hersh Izan because he believed that the Jew was not doing the job well. (Lifschutz depo. pp. 34-35.) In May, 1942, when the Jews were in the ghetto, defendant and other Ukrainian policemen searched the Lifschutz home for the younger brother of Mosche Lifschutz; the brother and a hundred other Jews had been ordered to take horses to the German front. While in that house defendant beat the mother of Mosche Lifschutz. (Lifschutz depo. p. 37.)

Defendant and the other Ukrainian police further assisted the occupiers by controlling the ghetto. The ghetto was guarded on the outside by German gendarmes and the Ukrainian police. (Serhij Kowalchuk testimony; Trofimovich depo. pp. 26, 37; Lifschutz depo. p. 19; Koret depo. pp. 58-59.) The Ukrainian police performed that task on orders

from Kowalchuk and the commandant. (Fedchuck depo. pp. 15-16.) Kowalchuk himself testified that he scheduled policemen, including Fedchuck, Kotsura and Rogovsky, 16/ to patrol the ghetto. (Serhij Kowalchuk testimony.) A policeman who had served under Kowalchuk testified that defendant ordered the police to shoot without warning any Jew who tried to leave the ghetto. (Fedchuck depo. pp. 16, 28.)

The Ukrainian police did not confine themselves to the borders of the ghetto. (Trofimovich depo. p. 27.) They entered the ghetto to search for valuables (Lifschutz depo. p. 36; Koret depo. p. 45), for people to be taken to work (Lifschutz depo. p. 37; Fedchuck depo. pp. 60-61), or simply to beat Jews. (Koret depo. pp. 45-46, 58-60.) Defendant entered the ghetto to inspect his policemen (Fedchuck depo. p. 16) and himself searched ghetto houses including that of Mosche Lifschutz (Lifschutz depo. pp. 36-38).

Jewish survivors of Lubomyl testified, and defendant acknowledged, that the Ukrainian police enforced the requirement that the Jews wear marks of identification. (Serhij Kowalchuk testimony; Lifschutz depo. p. 39-43; Getman testimony.) The defendant and other Ukrainian policemen made Mosche Lifschutz run a gauntlet where he was severely beaten because he was not wearing his yellow patch. Lifschutz was

16/ Rogovsky was a Ukrainian policeman who during the ghetto liquidation shot to death an elderly woman who was unable to walk. (Voloshkevich deposition pp. 13, 22-23.) He departed Lubomyl in 1944 along with defendant. (Fedchuck depo. pp. 40-41.)

then taken into defendant's office in the police station. While waiting for defendant to interrogate him Lifschutz observed defendant giving orders and issuing instructions. During the interrogation defendant struck Lifschutz several times. (Lifschutz depo. pp. 40-43.)

The defendant, as did other Ukrainian policemen, served the occupiers by performing tasks unrelated to the persecution of the Jews. (Hilberg testimony.) For example, in August 1941 defendant came out of his office in the police station and participated in the beating of a Polish cripple. The cripple was then incarcerated and in August 1942 was shot to death by a German gendarme accompanied by Ukrainian policemen. (Getman testimony.) In the summer of 1943 defendant, other Ukrainian policemen and Germans hung a Ukrainian woman in the center of the town. (Trofimovich depo. pp. 30-31, 40.)

In July of 1943 defendant appeared with Germans at the home of Aleksandr Trofimovich. While defendant stood guard outside, the Germans searched the house and arrested Trofimovich's father. Two days later the father was shot. (Trofimovich depo. pp. 29, 34.) Trofimovich knew defendant well because the Kowalchuks had been his neighbors and he had attended school with defendant's sister Raya. (Trofimovich depo. p. 21.) Mykola Kowalchuk testified that Trofimovich

had been a schoolmate and was the same age as Raya. (Mykola Kowalchuk testimony.)

Petr Kotovich, 17/ a former schoolmate of defendant, was arrested by Kowalchuk for posting underground leaflets. 18/ That arrest occurred in September, 1942, a time when defendant claims to have been at the town of Matieu learning secretarial skills. Kowalchuk took Kotovich to his office in the police station and interrogated and tortured him, pouring water into Kotovich's nose until he lost consciousness. (Kotovich depo. pp. 16-18.) Kotovich was later turned over to the Germans and spent the remainder of the war at the death camps Majdanek and Auschwitz. (Kotovich depo. 22-23.) (See, The Destruction of the European Jews, pp. 572-574 (Government Exhibit 1).) To this day Kotovich has a concentration camp tattoo mark on his arm. (Kotovich depo. p. 24.)

Akim Yarmoluck, 19/ a resident of a village in the Lubomyl district, was arrested in May, 1942 for harboring

17/ Petr Kotovich, who resides in Lubomyl, testified that he knew Serhij Kowalchuk since 1936.

18/ Dem'yan Fedchuck, who had been a low ranking policeman, testified that ordinary policemen were not sent to arrest activists. Instead, Kowalchuk and people of his rank had that assignment. (Fedchuck depo. p. 71.)

19/ Akim Silovich Yarmoluck was born in Polapy, Lubomyl District and resided there during the war. He now resides in Zgorani village, Lubomyl District.

Soviet prisoners of war. He remained incarcerated in Lubomyl until January or February, 1943. Kowalchuk and two German gendarmes interrogated 20/ and tortured Yarmoluck.

(Yarmoluck depo. pp. 12-15.) During the nine months of his incarceration, a time when Kowalchuk claims to have been in Matieu, Yarmoluck saw defendant almost daily at the jail. The defendant had keys and checked the cells. (Yarmoluck depo. p. 16.)

The most striking assistance that the Ukrainian police in Lubomyl provided to the Nazis was during the killing of 5,000 Jews on October 2, 1942. The testimony showed that defendant worked hand-in-hand with the occupiers in carrying out that slaughter of innocents.

Kowalchuk and Prykaziuk ordered Ukrainian police from all the towns and villages around Lubomyl to assemble in Lubomyl. (Fedchuck depo. pp. 18-19, 48-50; Kotsura depo. p. 12; See Gendarmerie Report, October 6, 1942 (Government Exhibit 11) for similar use of Ukrainian police in nearby Tomatschewka and Domatschewo.) Several hundred Ukrainian policemen were used at the Lubomyl massacre (Fedchuck depo. p. 49.); also present were German gendarmerie and SD. (Fedchuck depo. p. 30; Kotsura depo. p. 15.) The Germans had

20/ Yarmoluck testified that an interpreter named Pasko, who was from Golovno, was present. (Yarmoluck depo. p. 28.) Defense witness Bazyle Pasko, a native of Golovno, testified that he saw Yarmoluck at the gendarmerie office and "I talk with him and two schutz."

sheepdogs which they used for guarding the Jews.

(Voloshkevich deposition p. 15; Kotsura depo. p. 21.) The Ukrainian policemen far outnumbered German personnel.

(Voloshkevich depo. p. 15; Fedchuck depo. p. 29.)

Kowalchuk ordered some of the Ukrainian policemen to enter the ghetto and drive the Jews from the houses.

(Fedchuck depo. pp. 20, 29.) Those policemen, sometimes accompanied by Germans, tried to ferret out Jews hidden in bunkers. (Koret depo. p. 47; Voloshkevich depo. p. 19.)

Szymon Koret, who had been hiding in a bunker with his family, testified that his mother sacrificed her life and that of his ten month old daughter by leaving the bunker during the ghetto clearing operation. The child had been making noise which would have revealed the hiding place.

(Koret depo. p. 48.)

The Jews were driven to the central square of the town where they were surrounded by Ukrainian policemen. (Kotsura depo. p. 15; Fedchuck depo. p. 30; Trofimovich depo. p. 41.)

The defendant, conferring with Germans who were present (Fedchuck depo. p.30), ordered the policemen on the square to guard the Jews and to shoot anyone who tried to escape.

(Fedchuck depo. pp. 31, 59.) When the Jews were assembled, German and Ukrainian police marched them to the killing site at Borki. (Fedchuck depo. p. 31; Kotsura depo. p. 15.)

Those who fell behind were shot. (Voloshekevich depo. p. 23; Kotsura depo. p. 22.) At Borki defendant continued to supervise his policemen guarding the Jews and to consult with the Germans. (Fedchuck depo. pp. 33, 59; Kotsura depo. p. 16.) Defendant ordered some Jews to undress and to enter the pit (Kotsura depo. p. 22). The shooting was done by the Germans. (Kotsura depo. p. 17.)

Defendant's employment with the police ended in 1944 when the Nazis retreated from Lubomyl. Defendant left that town by train along with other Ukrainian policemen and German gendarmes. (Fedchuck depo. pp. 36, 40-41.) Mykola Kowalchuk, who accompanied defendant, testified that they had not been forced to leave Lubomyl. (Mykola Kowalchuk testimony.)

C. Defendant's Accounts of His Wartime Activities

Defendant accommodated the Government's evidence by acknowledging employment at the police, albeit in a clerical capacity. He also offered an excuse for having been seen wearing a uniform. He claimed that in July 1941 he was hired by the local Ukrainian government to work part-time at a food distribution center and, by August 1941, the local administration assigned him additional part-time work at the militia office. His job was to make reports to the Germans

and to make up patrol schedules. 21/ The defendant testified that he was absent from Lubomyl when the mass murder was carried out because in August, 1942 he was sent 20-30 kilometers away to attend a secretarial school in Matieu. He claims to have remained at school until January, 1943 and to have never once returned to Lubomyl during that time.

Defendant testified that upon his return he worked full-time at the police station but nothing new was added to his clerical duties. 22/ He testified that only he, commandant Prikaziuk and deputy commandant Bulavka had offices in the police building. The defendant stated that he was not issued a uniform and was not permitted to wear one but occasionally did so to avoid curfew violation.

It is incomprehensible that in the middle of hostilities on the eastern front and while Jewish liquidations were being carried out throughout the Ukraine -- requiring all available

21/ Dem'yan Fedchuck testified that the Lubomyl police force did not have a separate secretary and defendant had secretarial duties along with the job of deputy commandant. It was Kowalchuk who accepted Fedchuck's employment application and who made up duty rosters. (Fedchuck depo. pp. 11, 53, 57.) The defendant has obviously chosen to emphasize the clerical duties which he performed and to deny his other duties.

22/ Government exhibit 11, a gendarmerie report from nearby Tomatschewka for the month of September, 1942, was "typical" for the number of arrests that it reported. (Hilberg testimony.) For the entire month the 308 Ukrainian police and 26 German gendarmes stationed there made only 23 arrests. It would be fair to conclude that the amount of time needed to make arrest reports under the Nazis was not great.

manpower -- the occupiers would provide defendant the luxury of a six month course to improve his typing skills.

Professor Hilberg had stated that the German forces were strained to the utmost already in 1942. It is also incomprehensible that an individual not permitted to wear a uniform would move about the streets so disguised. Professor Hilberg, testifying about the uniforms of the indigenous police, had stated that one thing that the Nazis would absolutely not tolerate was the unauthorized wearing of uniforms.

Defendant never reported his residence or schooling in Matieu when he applied to the IRO, the Displaced Persons Commission, or to a consular official. When interviewed by the Immigration and Naturalization Service in 1975 he made no mention that he held what he obviously considers to be such innocuous employment. (Government Exhibit 15K.)

Mykola Kowalchuk attempted to corroborate defendant's account of his employment but his testimony was riddled with contradictions. For example, in 1966 Mykola Kowalchuk had told the Immigration and Naturalization Service that his brother had been a tailor. He specifically denied under oath that defendant had any other job during the occupation, any job with occupation forces or police or any job with the City of Lubomyl. (Defendant's Exhibit H pp. 6-7, 11.) He later amended that statement to say that defendant had been attached to the city government as an auxiliary policeman with only clerical duties. (Defendant's Exhibit H p. 19.) At trial Mykola Kowalchuk once again changed his account and

testified that defendant was a mere civilian clerical employee who worked part-time for the police. However, he contradicted defendant by stating that his brother continued to work part-time even after he returned from the schooling at Matieu. At deposition Mykola Kowalchuk stated that defendant had a uniform sometimes, "whatever the schutz was wearing" 23/ but at trial he said that he had never seen defendant in a uniform. Under cross-examination he changed his testimony and said that defendant did have a uniform but kept it at the office. That, of course, contradicted defendant who had testified that he was not permitted to have a uniform and certainly would not have kept it at the police station.

Neither Bazyle Pasko nor Mykola Prokosa assisted Kowalchuk's defense since each stated that he did not know whether defendant had been in the schutzmannschaften.

D. Procedures for Obtaining a Visa Under the Displaced Persons Act

When World War II ended Europe was in rubble and populated by millions of homeless people. Countless individuals who had been slave laborers or held in Nazi concentration camps were in need of food, shelter and medical

23/ Defendant, Mykola Kowalchuk and Mykola Prokosa had invoked the Fifth Amendment during discovery. Prokosa and Mykola Kowalchuk waived the Fifth Amendment on the eve of trial after all government eyewitnesses save Getman had been deposed; defendant provided a deposition after Getman was deposed.

treatment. The United Nations responded by creating the United Nations Relief and Rehabilitation Administration (UNRRA) to provide the necessities of life and repatriation to those who were willing to return to their homelands.

When UNRRA was phased out and replaced in July, 1947 by the International Refugee Organization (IRO), practically all who had desired to return to their homelands had already done so. (Thomas 24/ depo. p. 22.) The hundreds of thousands of persons remaining in European refugee camps were unwilling to return to their countries of origin. In response to the problem, the IRO made efforts to resettle those persons in other countries.

The United States was among those nations which agreed to accept them. In 1948 Congress enacted the Displaced Persons Act which set aside the quota restrictions of the 1924 Immigration and Nationality Act in order to permit entry to over 200,000 homeless individuals. (§3 Displaced Persons Act, 1948.) However, not all persons who had been found qualified to immigrate to the United States gained entry

24/ Michael R. Thomas was an official of the United Nations Relief and Rehabilitation Administration (UNRRA) from 1945 to 1947. (Thomas depo. p. 4.) Thereafter, when the functions of UNRRA were taken over by the Preparatory Commission of the International Refugee Organization (PCIRO) and later the International Refugee Organization (IRO), Mr. Thomas was an official of these organizations. (Thomas depo. pp. 6-7.) Mr. Thomas first served as Zone Eligibility Officer for the British Zone of Germany from July 1947 to August 1948, and then became the Chief Eligibility Officer for the entire IRO in August 1948. (Thomas depo. p. 7.)

because their numbers exceeded the allotted number of visas.
(Warren 25/ depo. p. 20.)

In order to receive a visa as a displaced person, an applicant first had to qualify under the standards enunciated in the Constitution of the International Refugee Organization. Only those persons who were of "concern" to the IRO were considered for visas under the Displaced Persons Act because the Displaced Persons Act incorporated the IRO Constitution. (Displaced Persons Act, 1948 §2(b); Thomas depo. pp. 16, 23-24; Warren depo. p. 7; Chapin testimony.)

The Constitution of the International Refugee Organization set out a two step process to determine whether an applicant was "of concern" and entitled to assistance. First, it had to be shown that the applicant was a victim of the Nazi regime or a bona fide refugee. If so, it then had to be shown that the applicant was not disqualified on grounds such as collaboration with the Nazis. (Thomas deposition page 9.) If those two requirements were met and if the applicant provided valid objections to returning to his homeland, the IRO then assisted him in resettling in another country.

25/ George L. Warren worked for the United States Displaced Persons Commission from 1948 to 1952. During that period he served as a case analyst and later deputy senior officer for the DP Commission in Salzburg, Austria. (Warren depo. p. 5.) Mr. Warren was the Displaced Persons Commission case analyst who certified that the defendant was eligible under the DP Act. (Exhibit 15D; Warren depo. p. 14.)

The IRO Constitution specifically identified certain categories of persons who were not the "concern" of that Organization including:

- "1. War criminals, quislings, traitors.
 2. Any other person who can be shown:
 - (a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or
 - (b) to have voluntarily assisted the enemy forces since the outbreak of the Second World War in their operations against the United Nations."
- Annex I, Part II of the Constitution of the International Refugee Organization, 62 Stat. at 3051-3052.

As a consequence of the large number of applicants and limited investigative resources -- the IRO had no investigators -- the determination of IRO eligibility was made by reliance upon the applicant's version of his personal history. (Thomas depo. p. 20.) The IRO was so encumbered with providing assistance to hundreds of thousands of people that it would have been unable to carry out its mission if it were required to conduct an in depth investigation of each applicant. (Thomas depo. p. 46.) Accordingly, it was incumbent on the applicant to provide a full and truthful personal history so that the IRO could determine eligibility. (Thomas depo. pp. 15, 20, 45, 64, 73.) That personal history was recorded on a CM/1 form which was the basic document upon which the IRO relied. (Thomas depo. p. 17.)

Once the IRO found that an applicant was eligible for resettlement, it referred him to those nations which had agreed to accept refugees. (Thomas depo. pp. 15, 45, 64.)

The IRO presented to the United States Displaced Persons Commission the CM/1 form, and an additional form executed by the applicant called a "Fragebogen" (questionnaire). (Thomas depo. pp. 23, 24; Warren depo. p. 10.) The Fragebogen was prepared solely for the purpose of determining eligibility for emigration to the United States under the Displaced Persons Act. (Government Exhibit 15A; Warren depo. pp. 10-11, 15, 18; Thomas depo. pp. 24-25, 37.)

Once the Displaced Persons Commission received the CM/1 form and Fragebogen of an applicant found eligible under the IRO Constitutional standards, the Counter Intelligence Corps of the U.S. Army (CIC) conducted a security and background investigation for those applicants residing in areas occupied by the U.S. military. The CIC relied upon the CM/1 form and Fragebogen in investigating the applicant. (Warren depo. pp. 11-12.) If the CIC found no derogatory information, a case analyst for the Displaced Persons Commission reviewed the file to determine whether the applicant was eligible for a visa under the terms of the Displaced Persons Act. To make that determination the case analyst relied upon the finding of the CIC and the information provided by the applicant in the CM/1 form and Fragebogen. (Warren depo. pp. 14, 15-18.) The case analyst summarized his findings in a report. (Government Exhibit 15D.) If there was any question that the applicant had been involved in wrongdoing, the case analyst

resolved the matter against the applicant because "there were too many people in the camps at that time to risk passing a case where there was a possibility of misbehavior and leave someone with an absolutely clean record rotting in a refugee camp." (Warren depo. p. 23.)

The case analyst's report, along with the CM/1 form and Fragebogen, were sent to an American consulate so that the applicant could apply for a visa. (Chapin testimony; Warren depo. p. 18; Thomas depo. p. 24.) At the consulate a vice consul of the United States Department of State reviewed the file which had been forwarded and thereafter called in the applicant for an interview. The applicant was sworn to the truthfulness of the information in the documents. (Chapin testimony.) 26/ If the interview was consistent with the applicant's eligibility, the visa was issued.

E. Defendant's Immigration to the United States

Under the IRO Constitution anyone who assisted the enemy in persecuting civilians was not eligible to be certified as

26/ John Chapin worked for the United States State Department from 1942 to 1951. He served as a vice consul in Salzburg, Austria in 1948 and 1949 and then as a vice consul in Vienna from 1949 to 1951. While in Salzburg, Mr. Chapin worked at the DP Visa Office, where defendant was granted a visa.

of "concern" to the IRO. Annex I, Part II, ¶2(a). Defendant was clearly ineligible because he had participated in mass murder and other forms of persecution against Jews. (See Thomas depo. p. 29.)

Defendant's mere membership in the Ukrainian police would have rendered him ineligible under IRO standards, even if he had not committed any acts of persecution against civilians. (Thomas depo. p. 27.) Under the IRO Constitution anyone who voluntarily assisted enemy forces was not of concern. Annex I, Part II, ¶2(b). Police forces were considered enemy forces. (Thomas depo. p. 85; IRO Manual for Eligibility Officers, p. 33 ¶22 (Ex P-1 to Thomas depo).) As a general rule, a member of a police force in a country that was occupied by the Nazis was considered to have voluntarily assisted the enemy. (Thomas depo. pp. 27, 56.) The mere fact of belonging to a police force that was established during the Nazi occupation of the Ukraine 27/ was considered to be voluntary assistance to the enemy because it freed the enemy from using its own personnel for doing that particular job. (Thomas depo. p. 35.)

Defendant's participation in the arrests, interrogation and torture of persons such as Yarmoluck and Kotovich also

27/ The fact that the Ukrainian police was not specifically mentioned in the IRO Manual did not mean that members of the Ukrainian police were eligible for IRO assistance. (Thomas depo. p. 56.)

constituted voluntary assistance to the enemy. (Thomas depo. pp. 27-28, 32.) 28/

From the beginning of the process which led to his immigration to the United States Serhij Kowalchuk misrepresented his past. When he applied for IRO assistance on November 25, 1947 he misrepresented his wartime occupation, residence and the circumstances under which he left his homeland. On the CM/1 form defendant stated that he resided in Kremenets, Poland from 1939 to 1944 where he had been employed as a tailor's apprentice. (Government Exhibit 15B ¶s 10, 11.) His testimony at trial establishes that this was untrue. On the CM/1 form he claimed that he had been deported from Kremenets to Brunn, Czechoslovakia.

(Government Exhibit 15B ¶ 11.) 29/ At trial he admitted that he voluntarily left Lubomyl. On November 21, 1949, on the basis of these misrepresentations, the IRO made a final

28/ Even under defendant's version of his wartime employment, as a supply and clerical assistant for the police, he would not have been of concern to the IRO. His admitted role in assigning policemen to patrol the ghetto (Serhij Kowalchuk testimony) would have rendered him ineligible under the IRO Constitution. (See Thomas depo. pp. 73-74.)

29/ At trial defendant admitted that he lied when he executed the CM/1 form. (See also Answer to Amended Complaint ¶18.) He excused the misrepresentations on the ground that the Russians had access to IRO information and would persecute his family if he had revealed the truth. He claimed that he notified the IRO employee who filled out the CM/1 form that he was providing false information and that official permitted him to do so. Defendant's testimony is incredible for the following reasons: the Russians were not participants in the IRO and had no access to its information (Thomas depo. p. 26); only a week before defendant filed his CM/1 form, Mykola Kowalchuk filed his. (Defendant's exhibit C.) On his CM/1, Mykola revealed the fact that he had lived in Lubomyl from 1939 to 1944.

determination of eligibility which allowed defendant to be considered for emigration to the United States. (Government Exhibit 15B; Thomas depo. p. 21.)

On April 19, 1949, defendant executed a "Fragebogen" (questionnaire). (Exhibit 15A; Serge Kowalchuk testimony; Thomas depo. pp. 24-25; Warren depo. pp. 10-12, 15, 18.) The purpose of the Fragebogen -- determining eligibility for emigration to the United States -- was clear from its language:

"I declare that the above information and answers are correct and complete according to my best knowledge and conscience. I sign this declaration in the certain knowledge that the veracity of the information given here will be checked, and if it is found to be untrue, incomplete, or misleading in any point, I may be denied entry into the United States." (Exhibit 15A.) 30/

This warning and declaration appeared directly above the place where defendant signed the Fragebogen. The Fragebogen also contained the following language at the top of the first page:

"ATTENTION:

Before the questions asked here are answered, the attestation at the end of the questionnaire must be read." (Exhibit 15A.)

30/ This warning is written in German. Defendant now claims that he was unable to understand German and that he was unaware that the Fragebogen was for emigration to the United States. (Serge Kowalchuk testimony.) However, in his CM/1 form defendant claimed that he spoke and wrote German fluently. (Government Ex. 15B, ¶13.) Even if it is true that defendant could not speak German at the time he signed the Fragebogen, the IRO always provided an applicant with an interpreter who could speak the applicant's language. (Thomas depo. p. 17; Serhij Kowalchuk testimony.) Furthermore, in his later face-to-face meeting with a U.S. consular officer defendant was sworn to the truth of the facts in the Fragebogen.

In spite of this warning, defendant persisted in claiming that he had been a tailor in Kremenets 31/ throughout the war (Ex. 15A, ¶s 28, 29) and that he had been forcibly transported by the Germans. (Ex. 15A, ¶42.) He also denied involvement in any military, political, non-political, or paramilitary organization (Ex. 15A, ¶s 30, 39), and denied ever having "criminally, morally or politically" violated a law. (Ex 15A, ¶38.) (See Answer to Amended Complaint ¶21; Serhij Kowalchuk testimony.) 32/

31/ Again, Mykola Kowalchuk answered truthfully in the Fragebogen concerning his residence in Lyuboml from 1941 to 1944. (Defendant's Ex. B.) Defendant admitted that he knew Mykola had revealed this information on the Fragebogen, but claims that he still allowed false information to be put on his Fragebogen to protect his parents. (Serge Kowalchuk testimony.) (See footnote 29, supra.) Despite his claimed purpose of protecting his parents, defendant nonetheless identified each by name and date and place of birth on the Fragebogen.

32/ Defendant testified that he did not personally provide false information about his prior employment when the Fragebogen was filled out. He claimed that the information which appears in response to question 29 was copied directly from the CM/1 form. This assertion is false. There is additional information on the Fragebogen which does not appear on the PCIRO form. For example, on the PCIRO form, it states that from 1939 to 1944 defendant worked as an "apprentice tailor" for the "Filipovicz Firm." In the Fragebogen, it states that from 1939 to 1944 defendant worked as a "tailor assistant" for "Filimonov Serhij" and that his reason for living was "practice and living needs." The IRO official could not have known that defendant worked for Filimonov instead of Filipovicz (defendant testified at trial that he had worked for Filimonov in Kremenets) nor could he have known that this person's first name was Serhij.

[footnote continued]

The Displaced Persons Commission case analyst who handled the defendant's case, George L. Warren, testified that he relied on the Fragebogen and CM/1 form in making his decision on eligibility and writing the report and certification of eligibility (Exhibit 15D). (Warren depo. pp. 15-18.) Mr. Warren testified that any evidence of involvement by an applicant in atrocities against civilians resulted in automatic disqualification. (Warren depo. pp. 21-22.) Mr. Warren also testified that he would have recommended denial of certification of eligibility if an applicant had been a member of a police unit in the Ukraine which had aided the Nazi German occupation forces, if that police unit was on the Inimical List (Defendant's Ex. P). Mr. Warren would have referred the case to DP Commission Headquarters in Frankfurt for further review and investigation if the applicant had been a member of the police unit, but it were not on the Inimical List. (Warren depo. pp. 25-26.) In any case, Warren testified that he would not have signed the eligibility certificate if he were aware of allegations that an applicant had been a member of a

[footnote 32/ continued]

Defendant's response to Question 29 of the Fragebogen sets out the street address of defendant's employer in Brunn and mentions that defendant had his own workshop from 1945-1949, information which does not appear on the CM/1 form.

In any case, defendant admitted that he knew the information contained in the Fragebogen was false but that he did not tell anybody that it was false. (Serge Kowalchuk testimony.)

police force in the Nazi occupied Ukraine. (Warren depo. p. 26.) 33/

Abraham P. Conan 34/ also testified concerning the DP Commission's treatment of the Ukrainian police (or Schutzmannschaft). Mr. Conan testified that an applicant who had been a member of the Ukrainian Schutzmannschaft would have been rejected under the DP Act unless the applicant could overcome a presumption of ineligibility by showing:

1. That his service in the Schutzmannschaft was involuntary;
2. That he had not taken part in atrocities.

If the applicant had been unable to prove these two factors, he would have been rejected. 35/

33/ Mr. Warren testified that even if a specific police organization was not on the Inimical List, membership in the organization could still result in ineligibility. (Warren depo. pp. 34-35.)

34/ Mr. Conan worked for the Displaced Persons Commission from 1948 until 1952. From July 1950 to February 1951 he was the senior officer in charge of the British Zone of Germany for the U.S. Displaced Persons Commission. In this position, Mr. Conan reviewed every rejection made by any other employee of the Displaced Persons Commission in the British Zone. (Conan testimony, December 11, 1981.)

35/ Mr. Conan testified that the Inimical List (Defendant's exhibit P) was used by the DP Commission in processing applicants for immigration to the United States. Any person who was a member of an organization that appeared on the list

[footnote continued]

Government Exhibits 26E and 26L clearly establish that members of the Ukrainian Schutzmannschaft were ineligible under Section 13 of the DP Act, because the Ukrainian Schutzmannschaft was a movement hostile to the United States. Exhibit 26E is a Displaced Persons Commission memorandum rejecting one Alex Eling for admission into the United States under the DP Act. It states the following:

"The Commission * * * finds that the Applicant is rejected under Section 13 because Subject was a member of, or participated in, a movement which was hostile to the United States or its form of government, since he was a member of the Schutzmannschaft in the Ukraine holding the rank of Zugführer [platoon leader]."

Exhibit 26L is a DP Commission memorandum rejecting one August Schimann, which states the following:

"The Commission * * * finds that the applicant is rejected under Section 13 because Subject was a member of, or participated in, a movement which was hostile to the United States or its form of government, since he

[footnote 35/ continued] was ineligible under the DP Act. However, Mr. Conan testified that the Inimical List did not contain the name of every organization considered inimical to the United States. Mr. Conan testified that Gestapo and concentration camp guards were examples of two organizations which were not on the list, but that membership in those organizations would have made an applicant ineligible under the DP Act. Mr. Conan testified that a member of the Ukrainian Schutzmannschaft was also ineligible under the DP Act, even though the organization Ukrainian Schutzmannschaft did not appear on the Inimical List. (Conan testimony.)

was a member of the Ukrainische Schutzmannschaft from 1941 until 1943." 36/

On December 13, 1949, Mr. Warren found that defendant was a displaced person eligible for admission into the United States under Section 2(c) of the DP Act and wrote a report (Exhibit 15D) to U.S. immigration authorities so stating. This report concluded that "the Applicant is not and has not been, a member of, or participated in, any movement which is or has been hostile to the United States or the form of government of the United States." Defendant would not have been so certified if he had revealed that he served in the Ukrainian police or schutzmannschaft during World War II. He

36/ Both of these rejections were dated in May 1952. Defendant received his visa in December 1949. Section 13 of the DP Act was amended in June 1950, between the time of these rejections and issuance of defendant's visa. However, the language of section 13 under which Eling and Schimann were rejected was not changed in the slightest by the amendment. Eling and Schimann were each rejected because he "was a member of, or participated in, a movement which was hostile to the United States or its form of government." (Exhibit 26E and 26L.) That is the same language as is found in Section 13 prior to the amendment. Mr. Conan also testified that the amendment of the DP Act in 1950 did not effect the eligibility of members of the Ukrainian Schutzmannschaft.

See also Government Exhibits 26A-R, which establish that policemen in areas occupied by the Germans were generally excluded under the Displaced Persons Act. These exhibits also show that police units other than the Ukrainian Schutzmannschaft which were also not on the Inimical List were excluded.

also would not have been certified as eligible if it had been known that he had persecuted civilians. 37/

After defendant was certified as eligible by the Displaced Persons Commission, his file was forwarded to the DP Visa Office of the State Department in Salzburg, Austria. John Chapin, who worked as a vice consul issuing DP visas in that office, testified that the Fragebogen and the Displaced Persons Commission report were required to be in the file in order for the vice consul to consider an applicant for a visa. The vice consul read the Fragebogen in all cases before granting a visa. The vice consul looked most closely at the applicant's birth place, residence, and occupation during the war. (Chapin testimony.)

At the Salzburg office, an interview of the applicant was always conducted by the vice consul. If the applicant did not speak English, an interpreter was provided. (Chapin testimony.) The applicant was sworn to the truth of all of the information contained in the visa application and the supporting documents. In every case, the Fragebogen was

37/ Defendant's admitted role in writing up lists of policemen who were to guard the Jewish ghetto would have been sufficient grounds for rejecting his application under the DP Act. (Thomas depo. p. 29; Warren depo. pp. 21-22; Chapin testimony; Exhibits 26K, 26F, 26R.)

among the supporting documents that the applicant was sworn to. (Chapin testimony.)

Like the other witnesses involved in the processing of displaced persons, Mr. Chapin testified that an applicant who had taken part in guarding a Jewish ghetto or who had escorted Jews to a killing site would be ineligible under Section 2 of the DP Act. 38/ He also testified that a person

38/ It is clear that even prior to the 1950 amendments to the Displaced Persons Act, the vice consul had the authority and the duty to determine the applicant's eligibility under the Displaced Persons Act, as well as the other immigration laws. The third semi-annual report of the Displaced Persons Commission to the President and the Congress, dated February 1, 1950 (Defendant's exhibit N), stated the following about the authority and duty of the counselor official:

"10. Consular interview and visa issuance -- The individuals appear before a United States consul. The consul, who has the entire Commission file including all the available security reports, interviews the individual and inquires into and determines the admissibility of the person under regular immigration laws, and the Displaced Persons Act. If the consul is satisfied, he issues a visa. The consul has complete veto power if he finds that the displaced person established eligibility by fraud or that the displaced person is inadmissible under any immigration law of the United States, including the Displaced Persons Act."
Pages 14-15.

The amendment to the Act was passed in June 1950. The third semi-annual report quoted above covers the six month period ending December 31, 1949. (See page 1 of the report.)

Mr. Chapin also testified that he had authority to reject an applicant under the DP Act prior to the 1950 amendments.

who served in the Ukrainian police or militia in the Nazi occupied Ukraine during World War II would be ineligible to receive a visa under the Displaced Persons Act. Such a person would have been ineligible because he was not of concern to the IRO and because of membership in a movement hostile to the United States, resulting in ineligibility under section 13 of the DP Act.

Mr. Chapin testified that if an applicant had come to him and said that he had been an employee of a city government in the Ukraine during World War II who functioned as a supply and clerical assistant for the local militia, he would have questioned that applicant very closely concerning his duties in that position. (See Answer to Amended Complaint ¶12.)

Mr. Chapin also testified that if an applicant had misrepresented his employment during World War II on his Fragebogen, and he had learned about it, he would have rejected the applicant or sent his application back for further investigation. Mr. Chapin stated that under the DP Act, there was a separate ground for ineligibility for misrepresentations. (See §10 Displaced Persons Act; Government's exhibits 26G and 26I.)

As a result of the concealments and misrepresentations enumerated above, defendant was granted an immigrant visa pursuant to the Displaced Persons Act on December 29, 1949.

(Exhibit 15E; Chapin testimony.) On February 2, 1950, defendant was admitted for permanent residence to the United States under the Displaced Persons Act. (Exhibit 15E; Answer to Amended Complaint ¶25.)

F. Obtaining United States Citizenship

On or about August 19, 1960 defendant applied to become a naturalized United States citizen by filing with the Immigration and Naturalization Service (hereinafter "INS") an "Application to File Petition for Naturalization" and attached "Statement of Facts for Preparation of Petition" (INS Form N-400). (Exhibit 15F; ¶26 of defendant's Answer to Amended Complaint.) In his N-400, defendant answered "no" to the following question:

"(6) Have you ever, in the United States or in any other country, committed any crime or offense; or been arrested, charged with violation of any law or ordinance, summoned into court as a defendant, convicted, fined, imprisoned, or placed on probation or parole; or forfeited collateral for any act involving a crime, misdemeanor, or breach of any law or ordinance?"

Defendant thereby willfully concealed the fact that he had participated in murders, assaults, arrests and detention of innocent civilians.

The defendant's Displaced Persons Commission report (Government Ex. 15D) was included in his INS administrative file (A-file) at the time he applied to become a United

States citizen. (Levy testimony, 39/ 10/23/81.) The naturalization examiner, Herbert Levy, read this Displaced Persons Commission report prior to interviewing the defendant in connection with his application for citizenship. (Levy testimony.)

On September 13, 1960 defendant was interviewed by Mr. Levy. (Exhibit 15F; Levy testimony, 10/23/81.) During the interview, Mr. Levy went over each question on the N-400 Form with the defendant. Mr. Levy made a checkmark next to each question as it was asked. The defendant signed and was sworn to the truth of the information contained in the N-400. (Levy testimony; exhibit 15F.)

Mr. Levy testified that during the course of the interview he conducted with the defendant, he specifically asked the defendant if he had ever, in the United States or in any other country, committed any crime or offense, or been arrested (question 6 on the N-400). Mr. Levy testified that

39/ Herbert Levy testified that he served as a naturalization examiner in the Philadelphia office of the Immigration and Naturalization Service from 1939 to 1961 (except for army service during World War II). He was the naturalization examiner who conducted the interview of the defendant and recommended to the court that his application for naturalization be granted. (Exhibit 15F; Levy testimony.)

the defendant answered "no" to that question, while under oath.

Mr. Levy testified that if he had information that an applicant for citizenship had been a member of the Ukrainian police or Ukrainian militia in a town in the Nazi-occupied Ukraine during World War II, he would have sent the applicant's file to the investigations section of the INS for an investigation. If the investigation had turned up information that the applicant had assisted the Nazis in persecuting minorities, Mr. Levy testified that he would have turned the case over to the deportation section of the INS and would have recommended denial of the application for citizenship on the grounds that the applicant did not possess the requisite moral character for citizenship.

The questions presented to Mr. Levy concerning what he would have done if an applicant was involved in persecution or had been in the Ukrainian police were not hypothetical. Mr. Levy was the naturalization examiner who handled the case of Mykola Kowalchuk. Mr. Levy ordered a full scale investigation of Mykola Kowalchuk on the basis of allegations in a Soviet newspaper article that were very similar to the allegations against Serge. The investigation of Mykola ordered by Levy consisted of the following:

1. Interviews with neighbors of Mykola Kowalchuk;

2. Interviews with Mykola Kowalchuk's employer and fellow employees;
3. Interviews with leaders and members of the Ukrainian community in the United States;
4. A check of INS records to locate persons who had lived in Lubyoml during World War II, and interviews of those persons;
5. A check was run for records from the Displaced Persons Commission, CIA, and Department of State;
6. Mykola Kowalchuk was thoroughly interrogated on two occasions.

(See Defendant's exhibits G, H, and I). This investigation of Mykola Kowalchuk lasted approximately ten months.

(Levy testimony.)

Mr. Levy testified that the investigation turned up no evidence to corroborate the Soviet newspaper article. Because the only allegations against Mykola came from a Soviet newspaper article, because the investigation had not turned up any corroboration of the newspaper story, because Mykola denied the charges under very extensive questioning, and because Mykola had only been 15 or 16 years old at the time he allegedly was in the Ukrainian police, Mr. Levy recommended that his application be granted with all of the facts made known to the court. (See defendant's exhibit I.) However, Mr. Levy testified that if there had been any

corroboration of the Soviet newspaper article, he would have recommended that Mykola's application be denied.

Mr. Levy testified that he would have ordered a similar investigation of Serge Kowalchuk if there had been allegations of his membership in the Ukrainian police or militia. Defendant's misrepresentations in his Fragebogen and CM/1 form, which were incorporated into the Displaced Persons Commission report, prevented the INS from conducting a full investigation of defendant's background and moral character.

Mr. Levy also testified that if an applicant had stated that he had been a tailor in the Ukraine from 1941 to 1944 when he applied to enter the United States under the DP Act, when in fact he had been an employee of a city government in the Ukraine who functioned as a supply and clerical assistant for the local militia, that he would have sent the case to the investigations section of the INS to determine whether the applicant was deportable.

On September 13, 1960 defendant filed in this court a Petition for Naturalization in which he swore that he had been lawfully admitted to the United States and that he was a person of good moral character. (Exhibit 15G; ¶129 of defendant's Answer to Amended Complaint.) On November 30, 1960 this court granted defendant's Petition for Naturalization and issued to him Certificate of

Naturalization No. 8250996. (Exhibit 15H; ¶30 of defendant's Answer to Amended Complaint.) Since November 30, 1960 defendant has remained a citizen of the United States of America. (¶31 of defendant's Answer to Amended Complaint.)

Defendant's acts of persecution and murder, his employment with the Ukrainian police and his lying to United States immigration and naturalization officials all demonstrate that he was not and is not a person of good moral character.

II. LEGAL BASIS OF THE CASE

Under Section 340(a) of the Immigration and Nationality Act, 8 U.S.C. §1451(a), defendant's citizenship must be cancelled if it was either (a) illegally procured or (b) procured by concealment of a material fact or by willful misrepresentation. In this case, the government has established that the defendant's citizenship was both illegally procured and procured by concealment of a material fact or willful misrepresentation, although only one such ground need be established.

A. Defendant's Citizenship was Illegally Procured

If at the time of naturalization the petitioner lacked any requirement for citizenship, naturalization was illegally

procured and must be revoked. Fedorenko v. United States, 449 U.S. 490, 506 (1981); United States v. Osidach, 513 F.Supp 51 (E.D. Pa., 1981); United States v. Demjanjuk, _____ F.Supp _____ (No. C77-923, N.D. Ohio, June 22, 1981), slip op. at 33 (copy attached); United States v. Linnas, _____ F.Supp. _____ (No. 79 C 2966, E.D.N.Y., July 30, 1981) (copy attached); H.R. Rep. No. 1086 87th Cong., 1st Sess. 39 (1961). In this case defendant lacked two of the requirements: lawful admission to the United States (8 U.S.C. §1427(a)(1), 1429) and good moral character (8 U.S.C. §1427(a)(3)).

1. Defendant Was Not Lawfully Admitted to the United States

Defendant's admission to the United States under the Displaced Persons Act was illegal for four reasons:

- a. He assisted Nazi forces in the persecution of civilians (and thus was barred from entry under Section 2 of the DP act).
- b. He voluntarily assisted Nazi forces during the Second World War in their operations against the United Nations (and thus was barred under Section 2 of the DP Act).
- c. He was a member of, or participated in, a movement which was hostile to the United States or the form of

government of the United States (and thus was barred under Section 13 of the DP Act).

- d. He made misrepresentations for the purpose of gaining entry to the United States under the DP Act (and thus was barred under Section 10 of the DP act).

a,b. Disqualification for Persecution and Voluntary Assistance to the Nazis

Courts which have denaturalized individuals who entered the United States under the Displaced Persons Act have focused on whether those individuals fit under the IRO Constitutional standards which were incorporated by Section 2(b) of the Displaced Persons Act. (See pp. 26-27, supra.) They have determined that those who voluntarily assisted the enemy or who participated in the persecution of civilians were never eligible to have received visas. United States v. Fedorenko, supra, 449 U.S. at 495, n. 3-4; United States v. Osidach, supra, 513 F.Supp. at 65; United States v. Linnas, supra.

The evidence clearly established that defendant, by his membership in the police and the acts that he committed while so employed, was squarely disqualified under Section 2(b) of the Displaced Persons Act.

c. Disqualification for Membership or Participation in a Movement Hostile to the United States

Section 13 of the Displaced Persons Act provided that:

"No visas shall be issued under the provisions of this Act to any person who is or has been a member of, or participated in, any movement which is or has been hostile to the United States or the form of government of the United States."

As previously discussed, the Ukrainian police or schutzmannschaft was considered by the Displaced Persons Commission to be a movement which was hostile to the United States or the form of government of the United States.

The court in Osidach held that:

"mere willing membership without proof of personal acts of persecution in a movement which assisted the Germans in the persecution of civilians during WWII was sufficient under §13 of the DPA to warrant a denial of eligibility as a displaced person." 513 F.Supp. at 78-79.

The court further held that the Ukrainian police in the town of Rawa Ruska constituted a movement that assisted the Germans in the persecution of innocent civilians, and that defendant Osidach's citizenship therefore had to be revoked. 513 F.Supp. at 83-96.

Even by defendant's own testimony, the Ukrainian police in Lubomyl took part in persecution of Jews by guarding the Jewish ghetto. Defendant's membership in the Ukrainian police or schutzmannschaft is therefore sufficient by itself to revoke his citizenship.

d. Misrepresentation in Obtaining Visa

Section 10 of the DP Act provided that:

"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."

The Supreme Court in Fedorenko held that a misrepresentation, in order to disqualify an applicant from admission under the DP Act, must be material. 449 U.S. at 507-508. The Court further held, however, that a misrepresentation as to service as a concentration camp guard is a material misrepresentation, and that a person who made such a misrepresentation and was admitted to the United States was illegally admitted. 449 U.S. at 513-515. The court in Osidach held that defendant's misrepresentation, on documents submitted to the IRO, as to his membership in the Ukrainian police in Rawa Ruska, was a material misrepresentation made for the purpose of gaining admission into the United States as an eligible displaced person. 513 F.Supp. at 101-103. His citizenship therefore had to be revoked.

The testimony of Thomas, Warren and Chapin clearly establish that defendant's misrepresentations concerning his service in the Ukrainian police were material. Even assuming arguendo the veracity of defendant's story that he was merely an employee of the city government who functioned as a supply

and clerical assistant for the Ukrainian militia, defendant's admitted misrepresentations on the Fragebogen were material.

The court in Osidach specifically found that misrepresentations made in IRO forms were made for "the purpose of gaining admission into the United States as an eligible displaced person." 513 F.Supp. at 101-102. While the Linnas and Demjanjuk decisions did not specifically address the issue of whether misrepresentations in IRO forms constituted "misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person," it should be noted that some of the misrepresentations in those cases were on IRO forms. Demjanjuk, slip op. at 31; Linnas, slip op. at 24-25.

2. Defendant Lacked the Good Moral Character Required for Citizenship

In addition to the requirement of lawful admission, the Immigration and Nationality Act required that the petitioner be a person of good moral character. 8 U.S.C. §1427(a)(3). "In determining whether the petitioner has sustained the burden of establishing good moral character * * *, the court shall not be limited to the petitioner's conduct during the five years preceding the filing of the petition, but may take into consideration as a basis for such determination the

petitioner's conduct and acts at any time prior to that period." 8 U.S.C. §1427(e).

The court in Osidach held that the defendant illegally procured his citizenship because he lacked good moral character at the time he became a citizen in 1963, because of his service in the Ukrainian police and participation in persecution during World War II. 513 F.Supp. at 103, n. 31. See also U.S. v. Linnas, slip op. at 31 (defendant lacked the good moral character required for naturalization in 1960 because of his involvement in atrocities during World War II); U.S. v. Demjanjuk, supra, slip op. at 36, n. 45.

In addition, the Immigration Act specifically provides that, for purposes of naturalization, no person shall be found to be of good moral character who has, during the period for which good moral character is required, given false testimony for the purpose of obtaining benefits under the Immigration and Nationality Act. 8 U.S.C. §101(f)(6). In Osidach, the court held that defendant's misrepresentation on IRO documents in 1949 concerning his service in the Ukrainian police resulted in a lack of good moral character in 1963 when he applied for citizenship. 513 F.Supp. at 103, n. 31. In United States v. Demjanjuk, supra, slip op. at 36, n. 45, it was held that defendant's misrepresentations as to his service as a concentration camp guard established that he lacked good moral character, although this particular false

testimony occurred in the process of obtaining his visa, over fifteen years before his naturalization. See also U.S. v. Linnas, supra, slip op at n. 35.

B. Revocation on the Basis of Concealment of a Material Fact or Willful Misrepresentation

Naturalization must be revoked not only if it has been illegally procured, but also if it has been procured by willful concealment or misrepresentation of material facts. In this context, "material facts" are those facts which, if disclosed, "(1) * * * would have warranted denial of citizenship or (2) * * * might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." Chaunt v. United States, 364 U.S. 350, 355 (1960). 40/

40/ The second prong of the Chaunt test of materiality has been interpreted in many ways. The district court in the Fedorenko case held that the second prong, as well as the first prong, requires that the government prove facts at the denaturalization trial which would have warranted denial of citizenship at the time of application. 415 F.Supp. 893, 916 (S.D. Fla. 1978). The Court of Appeal in Fedorenko reversed, holding that the second Chaunt test requires only proof that a) disclosure of the true facts would have led to an investigation and (b) the investigation might have uncovered other facts warranting denial of citizenship. 597 F.2d 946, 951 (5th Cir. 1979). The Supreme Court did not have to reach this issue in its decision, since it held that Fedorenko illegally procured his citizenship. The government will argue, if the Court feels that it is necessary to resolve this issue, that the Fifth Circuit's interpretation in Fedorenko is the correct one.

It has not been clearly established whether the two-pronged materiality test outlined in Chaunt applies to misrepresentations on visa applications as opposed to naturalization applications. The Supreme Court in Fedorenko, supra, declined to resolve this question, holding that since the defendant's misrepresentation in obtaining a visa made his entry -- and thus his naturalization -- illegal, it was unnecessary to decide whether Chaunt applied to visa misrepresentations.

There is no question at all, however, that Chaunt's two-pronged test of materiality does apply with full force and effect to misrepresentations made when an individual applies for citizenship. As previously discussed, defendant concealed the fact that he had participated in murders, assaults, arrests and detention of innocent civilians when he applied for citizenship. See Linnas, slip op. at 31-32. 41/

41/ The court in Linnas held:

"In stating (1) that he had never 'committed a crime involving moral turpitude,' * * * and (2) that he was and had been 'during all periods required by law, a person of good moral character,' * * * defendant knowingly concealed, among other things, the facts of his service at the concentration camp in Tartu, Estonia during World War II. These facts were material under any view of the test of materiality as announced in Chaunt v. United States, 364 U.S. 350 (1960). See Fedorenko v. United States, supra."

The court need not reach that question, of course, if it finds that petitioner entered the country illegally because he was ineligible for a visa.

III. RELIEF

In denaturalization actions, the government has the burden of proving its case by clear, convincing and unequivocal evidence. Fedorenko, supra, 449 U.S. at 505-506. We have done that here.

The Government seeks:

1. A declaration that defendant procured his citizenship and Certificate of Naturalization illegally and by concealment and willful misrepresentation of material facts.

2. Judgment revoking and setting aside the November 30, 1960 Order of the United States District Court for the Eastern District of Pennsylvania admitting defendant to United States citizenship and cancelling Certificate of Naturalization Number 8250996.

3. Judgment forever restraining and enjoining defendant from claiming any rights, privileges, or advantages under any document evidencing United States citizenship.

4. Judgment requiring defendant immediately to surrender and deliver Certificate of Naturalization Number 8250996 to the Attorney General.

5. Judgment granting plaintiff such other relief as may be lawful and proper.

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