UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff, v. DEPARTMENT OF JUSTICE, Defendant.	C. A. 75-1996

AFFIDAVIT

My name is Harold Weisberg. I reside at 7627 Old Receiver Road, Frederick, Maryland. I am the plaintiff in this case.

1. I have read defendant's Motion for Extension of Time to comply with the Court's Order of December 1, 1981, and its attached Phillips Sixth Affidavit and the Notice of Filings and its attached Fourth and Fifth Phillips affidavits, the December 18, 1981, affidavit of SA John W. Kilty, the copies of two letters to me and the Declarations of Robert J. D'Agostino and Robert M. Yahn and the attached memorandum on possible conspiracy evidence.

2. I peepared the first part of this affidavit prior to learning that the Court had issued its Order. What I had prepared constitutes a further documentation of defendant's bad faith. I prepared the second part of this affidavit after learning from my counsel that in Allen v. Department of Justice the FBI provided an unexpurgated copy of a pertinent Department record the entire text of which had been withheld from me by both the FBI and the Civil Division. That record was withheld from me only because it is un unequivocal Department acknowledgment that the Court and I were deceived, misled and lied to by defendant in this instant cause while defendant was stoutly proclaiming the exaat opposite.

3. After reading reading the records identified in Paragraph 1 I state again that the truth is not in these people and that, as they have from the first in this case that they have prolonged for so long a time and persist in prolonging, they again mislead, deceive and swear falsely, as I set forth in following

paragraphs.

4. The FBI letter of December 18, 1981, to me was written by SA Phillips. A copy was sent by defendant to the Court. In it and in his Fifth affidavit, Phillips represents that the copy of 44-38861-1256 mailed to me under date of December 18, 1981, is identical with the copy provided earlier except that "Material previously deleted from serial 1256 to protect the names of FBI Special Agents ... has been restored." This is subterfuge. In truth, in all of this lengthy serial, only one agent's name (Johnson) was withheld. It was disclosed in other records and it appears on one page only.

5. These representations by Phillips, in the letter a copy of which was sent to the Court and under oath, are deceptive, misleading and false. The two versions of this one record are radically different.

6. One obvious purpose of this falsification is to deceive the Court into believing that years ago I had been provided with neutron activation information that, in fact, was withheld until the December 18, 1981, mailing. The two versions also are not identical in other respects.

7. Although Phillips represents that I was provided with the first copy of serial 1256 "by letter dated January 10, 1977," in even this he is not truthful. In fact, I picked it up at FBIHQ on November 17, 1976, when it was handed to me by SA Tom Lenehan. I then immediately noted its incompleteness as well as its inclusion of information that the same SA Kilty had already sworn to this Court did not exist.

8. It is not now possible for me to make an actual page-by-page comparison of these two versions because I would have to spread out, examine and compare 131 pages. (Because of their historical importance, I also preserve all the records in precisely the condition in which I receive them.) But by count, serial 1256 as provided in 1976 consists of but 49 xeroxed pages, whereas the new version, represented by Phillips as identical with it, consists of 82 pages. This is to say that, until the December 18, 1981, mailings, and despite my many efforts to obtain what was withheld, the FBI steadfastly refused to provide me with these 33 pages and now grossly misrepresents to the Court in order to hide this.

9. How the FBI could copy serial 1256 and provide all of it, as it has alleged in the past as well as currently, and not include these 33 pages is not

apparent if the FBI did what it assured this Court in the summer of 1976 it would do, namely, process the entire MURKIN HQ file seriatim and account for every page not provided, unless these 33 new pages then were not in the FBIHQ MURKIN file.

10. This raises substantial questions about many other records which did exist and the FBI claims it does not have.

11. It also raises the most substantial questions about the request for an extension of time because of the alleged need to consult with records processed five years ago before disclosing copies to me now. As I have informed the Court on prior occasions, the only reason for wasting this considerable extra time, and it has wasted months in the past, is to keep from disclosing nonexempt information that was previously withheld. Moreover, including by but not limited to a number of Congressional investigations, much information has been disclosed and cannot properly be withheld today. There also has been disclosure to other private persons of what was withheld from me, as is stated in the affidavit of Professor David Garrow, which I provided.

12. Phillips compounds his lying and false swearing in Paragraph 4 of this affidavit in which he states that earlier I had been provided with the neutron activation analysis (NAA) material now in serial 1256. As provided to me in 1976 in serial 1256 there is not an iota of information pertaining to neutron activatin analyses. There is no mention of it at all. In the present slipup, in which the FBI discloses what it lied about and withheld, there are 24 unidentified pages that can pertain to eight NAA items.

13. Present Department counsel and SA Kilty are not innocent in this regard because on deposition Kilty was questioned about the NAA information. He then was represented by present Department counsel. (See also Paragraphs 116 and 117.) After trying to play with words for a while when questioned about the NAA printouts, Kilty did acknowledge that the Lab did have them in the form of what he referred to as "Polaroids." I attached pertinent excepts from the transcript of that deposition to an earlier affidavit that, characteristically, defendant ignored. During the deposition it was pointed out to Kilty and Department counsel that this information is specifically called for in Item 2 of my April 15, 1975, request, pertaining to which Kilty conducted the searches and provided an affidavit attesting to full compliance. I then repeated my

request for this information. But it remained withheld until now, without identifying it, the FBI tries to sneak it in by false representations and false swearing.

14. The NAA information now provided to me in serial 1256 is not and cannot be all pertinent NAA information. There is, for example, no authorization for those tests, no request for them to be made and no report of the results is included in what was sent to Memphis, the Office of Origin, for use in the presecution. Exhibit 1 is the first page of serial 1256. It list all the examinations requested and made. It is the report to Memphis on all examinations made to then and included in serial 1256. There is no reference to any NAAs.

15. The fact that all the pages that appear to pertain to NAA are the final pages in the new versionsof serial 1256 can be because Kilty transferred them to Central Records, as he attests he did at a date he is careful not to specify, after the original version was provided. This means that Kilty transferred them from the Lab to Central Records at least a year after this litigation began and long after he filed his first affidavit in which he attested to complete Lab compliance.

16. If this is what was done, then it was perpetrated with wrongful intent because it was pulled off by departing from FBI practice, of which I have knowledge from the examination of more than a third of a million pages of FBI records. Practice requires that records later added to an existing serial be identified with an "X". In this case the pages added should have been identified as serial 1256X. They are not.

17. This can be a device for hiding the results of the NAAs long after this litigation began because anyone searching the Central Records copy would be led to believe that no such information is included in serial 1256. Indeed, none belongs in this record, which pertains to other tests only.

18. As this first page of serial 1256 reflects, 12 copies were made. Of these, in addition to the Lab's file copy, designated as "Lab Files," at least a half-dozen other copies of serial 1256 were routed to the Lab. No copy of any of these copies has been provided and there is no attestation to a search to determine whether any of them hold other withheld information. As stated above and below, other pertinent NAA information remains withheld.

19. Phillips also swears falsely with regard to NAA information in this same Paragraph where he states, "Plaintiff received part of this enclosure consisting of nine pages of raw data at a meeting at FBIHQ on March 23, 1976, in which he indicated those pages to be the only material in serial 1256 in which he was interested." (Emphasis added) This is an unmitigated lie.

20. Phillips was not present at that meeting. Kilty was, but it is conspicuous that Kilty does not swear to any lie of this magnitude - not that he has not lied repeatedly under oath. That meeting was arranged by SA Thomas Wiseman. He was accompanied by SA Parle Blake, of the FBI's Legal Counsel Division. I spoke to Wiseman by phone earlier that day, after having protested repeatedly that I had not been given all pertinent data pertaining to the spectrographic and neutron activation analyses. Wiseman then informed me that they had located an additional nine pages. SA Kilty then brought them to the meeting. Neither he nor anyone else displayed, referred to or offered any other information. I was told that no other pertinent information existed and, indeed, Kilty later so swore in this instant cause.

21. The FBI has never let me examine any record prior to disclosure and it did not let me examine serial 1256 at any time or under any circumstances until finally, eight months later, it let me have the 49-page copy I received on November 17, 1976.

22. As of the March 1976 time of that meeting, the FBI and the Department were ignoring my December 23, 1975, amending of the April 15, 1975, request and refusing to provide any information within the amended request to the ridiculous degree of obliterating it from documents provided. Even when the Court ridiculed the FBI for withholding this pertinent and nonexempt information by maskigg it when xeroxing records responsive to the April 15 request, the FBI steadfastly persisted in these withholdings of nonexempt information on the contrived ground that it was not pertinent to the April 15 request but was to the December 23 request.

23. As of the time of the March 1976 meeting I had not heard of the FBI's code name "MURKIN." The FBI never mentioned it to me. It never mentioned or in any way identified its MURKIN file as 44-38861. I then had no knowledge of it from any other source.

24. The two versions of serial 1256 are different in other respects. The

The copy sent me under date of December 18, 1981, was not and could not have been made from the Central Records copy provided November 17, 1976.

25. Both versions begin with Exhibit 1, the HQ report on Lab tests sent to Memphis on April 17, 1968. As mailed with the December 18, 1981, letter, there are four pages of notations that do not appear at this point in the version provided November 17, 1976. Without making a page-by-page comparison, I cannot state whether these are among the 33 pages withheld in 1976. At other points in the 1981 version there are notes that do not appear at those points in the 1976 version.

26. What may include the "Polaroids" and a few handwritten notes about them are the last 24 pages in the 1981 version. They do not exist in the 1976 version. If there is any NAA information in this serial, which Phillips attests these is without identifying it, it cannot be included in any pages of this serial as provided in 1981. However, as stated above, no NAA information belongs in any version of serial 1256 and what was provided December 18, 1981.

27. Phillips' intent to deceive and mislead the Court is apparent from close examination of the exact formulations in his Fifth Affidavit. While at question are NAA information and the spectrographic plates, he refers instead to "the search for neutron activation and spectrographic analyses" (Paragraph 2). With regard to spectrographic analysis, it is the plates that are at issue. He makes no mention of them. Instead, he uses the broadest possible reference. Following the untruthful statements pertaining to serial 1256, quoted above, and with the clear intent of deceiving and misleading the Court into believing that what he says addresses what is in question, he states, "During the processing of the Headquarters MURKIN file, plaintiff was furnished additional testing materials (sic) and lab reports by letter dated January 10, 1977." (Paragraph 4) With neither that letter nor with any other letter was I ever provided the withheld NAA materials.

28. Conspicuously, Phillips does not attach that letter to this affidavit. However, he attaches a different one of those covering letters, the FBI's letter to me of July 27, 1977, to his Third Affidavit. Blinded by his limited purpose, to show that two records originally withheld were provided later, with the very end of the FBIHQ MURKIN file, he appears not to have perceived the significance of

other parts of that letter.

29. The note added by the FBI to its file copy states, "This concludes the processing of Murkin files at Headquarters." This refers to the processing of the last five sections, 86 through 91, which were provided with that letter. They hold the FBIHQ "bulkies." These were added to the end of the MURKIN file after this instant cause was filed and shortly before disclosure of them to me. The bulkies are supposed to hold all pertinent Lab records. (At the May 2, 1977, calendar call defendant's counsel estimated that there are 3000 Lab pages in the bulkies.) In a meeting with my counsel and me the FBI specifically stated this. Bulky serial 5586 is described in this letter in the following language: "... consists of Exhibits Section material; lab reports pertaining to ballistics, spectrography and the examination of cigarette butts."

30. There is no mention of NAAs although all such material should have been included in this bulky serial. Phillips also avoided referring to this serial although he well knows what the bulkies are and consist of, as he well knew that serial 1256 did not include and should not have included any NAA information.

31. If Phillips had referred to this letter it would have been apparent that no NAA material was included in the bulky and thus that none had been provided to me.

32. Thus the vague and general reference in his Fourth Affidavit, to those "additional testing materials" I supposedly received with the letter of January 10, 1977. While it does not say so, this is intended to convey the idea that I received NAA information with the January 10, 1977, letter. Without this interpretation, Phillips' language serves no purpose. I received "additional testing materials" on a number of occasions, beginning long before any MURKIN records were processed. January 10, 1977, is not the only letter covering "additional testing materials." Obviously, that of July 27, 1977, also conveyed "additional testing materials," including spectrographic.

33. Phillips has no personal knowledge but Kilty does, and Kilty does provide an affidavit. But he avoids all of this. For Kilty it would not be a mere lie, it could be perjury because when we deposed him he admitted that as of then the Lab had the previously referred to "Polaroids." Those portions of the transcript are attached to a prior and unrefuted affidavit I provided. Having

testified that long after the processing of all FBIHQ MURKIN records the Lab still had these withheld NAA materials, Kilty could hardly have executed an affidavit including the overt lies in Phillips' affidavit.

34. Moreover, I again asked for these withheld NAA materials at that deposition. Thereafter, they were not provided until this 1981 hanky-panky with serial 1256, which still does not and cannot include all pertinent NAA information.

35. Kilty attests to duplicating an earlier search without specifying the date of either search. However, his second search was in response to the Court's December 1, 1981, Order, hence was after December 1, 1981. He attests (in Paragraph 4) that he, personally, sent all the NAA materials "generated during the investigation of the assassination of Dr. King" to "the Records Management Division, FBIHQ, for retention in the appropriate file(s)." Kilty manages to avoid stating <u>when</u> he made this transfer. While he could and did come up with an inappropriate 1956 memorandum to attach to his affidavit, he avoids providing the request for authorization and the authorization for this transfer from the Lab to Central Records.

36. I am familiar with FBI practice. I have been provided with countless records in which such authorization is requested, together with records of the transfers. I have provided examples in prior affidavits. Moreover, what is now provided by stealth and misrepresentation is not and cannot be, as Kilty now attests, <u>all</u> NAA materials "generated during the investigation of the assassination of Dr. King."

37. When he was deposed in this case Kilty testified that the Laboratory had the printouts he called "Polaroids." The reason for his failure to date the transfer and provide the records pertaining to it this is apparent: It was more than a decade after the crime and investigation and long after the filing and litigating of this instant cause. Because they were in the Lab when he was deposed, it has to have been after he was deposed.

38. (While Kilty attests that the transfer was to the "appropriate" MURKIN file, as stated above, serial 1256 is <u>not</u> an appropriate file because the tests included in it <u>exclude</u> NAA.)

39. This shell game is an effective means of hiding NAA information and contriving that it not surface in any search because the tests and records indicated

on the administrative page list the seven tests requested, authorized, performed and reported on and NAA is not one of them. There thus is no reason for any FBI employee to waste the time required to read the other 81 pages of this record in quest of NAA information.

40. This makes it more provocative that Phillips could attest that NAA information is included in serial 1256 when it should not be there and until recently was not there.

41. No date appears on any of the 24 pages pertaining to NAA, yet it is required that some dates be recorded, like the dates of the request and performance of the tests, including the dates of radiation and the amount and duration of it. (NAA is performed by subjecting the material to be tested to fixed amounts of radiation and measuring the decay of the radiation for a stated period of time.)

42. At the time of the tests requested and ordered in serial 1256, there was no apparent need for NAA. The results of one of the tests Memphis requested, spectrographic analysis, could have obviated the need for and cost of NAA. Only if the results of the spectrographic analysis did not meet the FBI's need was there any reason for making any NAA examinations. And while the FBI has been careful to hide it, the fact is that the spectrographic examinations did not provide the incriminating evidence sought. This is stated in technical language in one of the handwritten pages not provided in the 1976 version of serial 1256. This information is that all the specimens tested and compared with the remnant of bullet removered from Dr. King's body, "Q4,5,6,7 & 8, while all of the same manufacture, varied in comp.(osition), Q64 was sim.(ilar) in comp.(osition) to Q4." "Similar", as the agent who wrote this report testified to the Warren Commission, is not used by the FBI Lab because it is meaningless. (That portion of his testimony was removed from the transcript as printed because he testified to "similar" compositions only to the Commission.) Yet in the King case, knowing full well that "similar" does not mean identical and that the evidentiary requirement is that the compared specimens be identical, he uses only "similar." Paint, printing type and bullet metal are "similar" in that all contain lead, but they are not identical.

43. ~~Remarkably, again finding parallel in the JFK assassination, the FBI~~ No record provided in this instant cause states when the spectrographic

examinations were performed. The evidence tested was flown to Washington the night of the crime by a Memphis special agent. He reached Washington shortly after midnight, when the evidence was turned over to the Lab. In other such cases, like the assassination of President Kennedy, the FBI performed more tests and sent the results to that Office of Origin the same day it received the evidence. With regard to serial 1256, however, the date of the report to Memphis is 13 days after the crime, or April 17. And that just happens to be the date the FBI decided to file a conspiracy complaint in Birmingham against "Eric Starvo Galt," an alias of James Earl Ray.

44. Remarkably, again finding parallel in the JFK assassination investigation, the FBI and the same Kilty claim not to be able to find the spectrographic plates they are required to preserve. Spectrographic examination is performed by burning a minute specimen, photographing the flame and then analyzing the spectrum of light of the burn. Qualitative spectrographic analysis identifies the components of the material tested. Quantitative spectrographic analysis discloses the percentage of each of the components. To determine whether specimens did have or could have had common origin, the need in both Kennedy and King assassination investigations requires quantitative spectrographic analysis. It requires the generation of other records not provided and not hinted at in any records provided. They are not mentioned in the Kilty or Phillips affidavits. The FBI managed not to conduct quantitative analysis in the Kennedy assassination investigation and to keep that sensational fact secret. Instead, it pretended it had conducted those tests and provided deceptive and misleading testimony to the Warren Commission. It and the nation through it were led to believe that the FBI had determined the quantitative composition of the specimens and that they were identical. If the FBI performed only qualitative analyses in the King assassination investigation, then it was in the pointless if not ridiculous position of conducting these tests only to learn when it knew beyond any question without making the tests that the bullet metal specimens it tested were bullet metal.

45. However, the previously withheld handwritten notes indicate that quantitative examination was made. All the bullets were composed of the same elements because they are of the same manufacture. Yet they "varied in composition," meaning in the percentages of the substances. Variation is not uncommon in

different batches of manufacturers' runs but for the most part, within any batch mix there is consistency. Along with the plates not provided, the quantitative measurements are withheld in this case.

46. The spectrographic examinations thas do not contribute to incriminating James Earl Ray as the lone assassin of Dr. King. The plates may, in fact, be exculpatory. And, remarkably, these possibly exculpatory plates can no longer be located by the FBI, according to the Kilty affirmation. Yet they are required to have been preserved, contrary to Kilty's supposition.

47. In the JFK assassination investigation, the FBI also conjectured that it destroyed a single one of many spectrographic plates, allegedly to save space - the thickness of a piece of photographic film. In that case also the results were not incriminating and not wanted by the FBI. In that case also it withheld from me what it attested it had provided but in fact I obtained that withheld information outside that litigation, through other litigation. What I learned, what had been withheld, and what in fact the FBI also withheld from the Warren Commission, is bizarre. The FBI went to Dallas, located the curbstone that had been hit by a "missed" shot, knew the curbstone had been patched, yet proceeded to test the patch as though it were the hole caused by the impact. This page of that report, withheld from both the Commission and me, was and is in Central Records. It is the only extant record in which the FBI acknowledges knowing that the curbstone was altered before it proceeded with the tests that the FBI then palmed off as the testing of the metallic residue of the bullet's impact on the curbstone. Moreover, in the Kennedy case the handwritten Lab notes were withheld from me and the Warren Commission. Lab SA Robert Frazier, who had the same role in the King investigation, testified to the identification of bullet metal only. But his notes say that the deposit would have been made by other objects, including even an automobile tire wheel-balancing weight.

48. In this other FOIA litigation it is the same Kilty who provided the same conjecture, that the curbstone spectrographic plate had been destroyed. In that case also it is Kilty who made the nonsearch, pretended to be a search.

49. After being ridiculed over this in the other litigation, Kilty now and belatedly comes up with a memorandum 25 years old to explain the supposed disappearance of all the King assassination spectrographic plates. These missing

plates reflect the fact that the fatal bullet is not identical in composition with the other bullets alleged to have been left behind by James Earl Ray.

50. Kilty pretends to have made a good-faith search but careful examination of his affidavit does not disclose that he made any search outside the Lab. He also fails to identify any of the places he claims to have searched, save for what is essentially meaningless, room numbers. It is not possible to determine from his affidavit when he searched which rooms, whether all the enumerated rooms were searched after the Court's December 1, 1981, Order or when, why, and on what authority he made any transfers of any records from the Laboratory. From his affidavit he may have searched janitors' broom closets and included their numbers. He fails to identify the rooms.

51. In C.A. 75-226, by Order of that Court, I was given some 5,000 pages of FBI records pertaining to the destruction and preservation of records. The one memorandum Kilty attaches is like others in that collection, save that others also are of much more recent date. The rest of those records make it clear beyond any question that in the King case the destruction of any records was and is strictly prohibited, by law, regulation and practice.

52. The FBI is required to seek and obtain the permission of the Archivist of the United States before any records of historical importance are disposed of in any way. The Archivist has and exercises the right to transfer such records to the National Archives and, from time to time, the FBI itself has sought such transfers. This is how the FBI saves its filing space. Also, the FBI is prohibited from destroying any pertinent records involved in ongoing litigation. There has never been a time, as my prior and uncontested affidavits state, from the time the spectrographic plates were generated to this very moment, when those plates were not pertinent in some litigation. Ray's appeals were not exhausted until long after this instant cause was filed. In addition, the plates are pertinent to my requests going back to 1969. In fact, the FBI's late 1975 reason for refusing to comply with my litigated request is the claim that there was ongoing litigation. As records pertaining to retention regulations state, evidence like these plates is required for expert testimony. On this basis also their retention is required as long as there is any chance that expert testimony may be required. In the King-Ray case that possibility still exists.

53. Kilty swears that "the only logical explanation for the fact that I did not locate any spectrographic plates" is that they "were destroyed by the FBI in accordance with the provisions of the memorandum" referred to above.

54. Although he attests to the personal transfer of pertinent information to Central Records, Kilty is careful not to state whether or not these plates then existed. He does not state when he made the transfer. He produces none of the records pertaining to the transfer that are required to exist. These establish the time and show what was transferred.

55. Kilty invokes his special variant of "logic" to describe the alleged exhaustiveness of his alleged search for these plates. His language is as tricky as it is intended to be impressive, "This search conducted by me encompassed all logical and reasonable locations in the Laboratory where this type of material would be maintained." What is obvious is that it was even more "logical" to search other known repositories of records - if the places searched in the Lab are all the places in it that the plates might have been. He does not identify any of the places he claims to have searched except by room number. This not only meaningless, it defies any effort to keep him honest, a need established by his record in FOIA matters.

56. In C. A. 75-226, when Kilty was deposed, he acknowledged that all pertinent information is sent to the Office of Origin and that Office of Origin files may hold what is not at FBIHQ. In this instant cause he did not make any search outside the Lab at all and did not have any search made at the Memphis FBI office.

57. He also did not learn whether the FBI had loaned these plates or any other missing information to the prosecution. As I informed the FBI and its counsel early in this litigation, in 1973, when I was James Earl Ray's investigator, I saw nine large cartons of FBI materials that had been loaned to the prosecution.

58. During the long life of this instant litigation, the FBI has serviced several Congressional committees, including but not limited to the House assassins committee. When other records known to exist did not surface in the FBI's alleged searches for them and the FBI claimed these records did not exist, Mr. Quinlan Shea, then Director of Appeals, following leads I provided him, found missing records in the possession of the FBI's Congressional liaison section.

59. There were several so-called internal investigations by the Department's Civil Rights Division and Office of Professional Responsibility. No search of those components or the places to which they transferred records is claimed to have been made.

60. There are other components of the FBI which had information not in the Lab or Central Records. I have repeatedly asked that they be searched but to date I have had no response and no such searches have been made. The FBI's divisions, for example, did remove and retain parts of Central Records files, as the Central Records copies state. Several divisions were heavily involved in this investigation and they did keep files of pertinent information.

61. If without independent corroboration Kilty's word can be taken, and his record in this and in other cases is that he is not truthful, he still does not make claim to having made a good-faith search with due diligence. He did not make or have made any searches outside the Lab, he does not provide any meaningful description of the places within the Lab he searched, and from the very first in this instant cause he and others in the FBI have steadfastly refused to search places I informed them did have pertinent records.

62. Even the ancient memorandum Kilty attaches means and says other than he represents. It states that the plates are preserved after trial for the duration of the statute of limitations, five years in most cases. (The Ray case was still before the courts when I filed this litigation.) It also states that "The plates are normally taken to trial when testimony is required." If the practice of Kilty's own memorandum was followed, those plates, even if not part of an historically important case, are required to have been preserved for five years after the end of Ray's appeals, or until about now.

63. Robert J. D'Agostino of CRD confirms, at this late date, that pertinent and withheld information exists in other components, including those I specifically requested be searched because I had personal knowledge of their having records. In Paragraph 9 of his declaration of December 21, 1981, he identifies the following Departmental components which originated pertinent information and where no searches have been made: The Community Relations Service; the Office of Legal Counsel; the U.S. Marshal's Service; and the Executive Office for United States Attorneys.

64. Mr. D'Agostino, new to this case and the multitudinous official

dishonesties in it, unbags the cat. I do not now ask that further searches be made of those components where searches should have been made more than six years go. Because defendant has been able to stonewall me for all these many years and because of my age and now more seriously impaired health, it is, as I have stated to the Court in the past, simply beyond my capacity to persevere further in this litigation unless I am compelled to. But I do cite this as new evidence of the worst kind of bad faith because defendant and those representing defendant in this instant cause knew all along that such records exist in the unsearched components and are pertinent. But even when I made an issue out of searching these components and called this failure to their attention, instead of being truthful and living within the law, these people deliberately misinformed the Court.

65. D'Agostino and Robert M. Yahn do not attest to a search for records not provided but referred to in disclosed Department records, as in file 41-157-147. They state that this file number, although posted on their records, is not accurate. They go through a long song and dance routine in which they do everything except try to discover the error and correcg it by providing those missing records. Mr. Yahn tries to say that none of the numbers is part of an actual file. In this he states (Paragraph 8) "that the FBI does not use the secondary number '157.'" Whether or not this is true - and I very much doubt it because secondary FBI file numbers appear to be seriatim - Yahn does not say that the FBI does not use 157 as a primary number. In fact, it does and in fact it is the most common primary file number in all the FBI's many King assassination files. It is for "Extremist Matters-Racial Unrest" and is a "security-related classification." The FBIHQ files pertaining to the Memphis sanitation strike and the Invaders are 157 files. FBI field offices classified their King assassination and other pertinent files as 157.

66. There is apparent motive for the withholdings that persist and the false representations made to the Court pertaining to them. Defendant has something to hide, something that can be embarrassing.

67. Phillips' Fourth Affidavit reports an alleged search for the manifest of Memphis cab driver, James McCraw. It is not made on personal knowledge. It is untruthful. Rather than Phillips, those who made searches could have attested to their searches. Instead, Phillips states that neither the manifest nor any reference to McCraw was found in FBIHQ or in Memphis.

68. Phillips also states that "in an effort to locate any material referring to a James McCraw who might be associated with a taxicab manifest, inquiries were made of appropriate Bureau personnel," with negative results. Phillips does not state that he made the appropriate inquiry, which would not be at FBIHQ but would be in Memphis. And in Memphis appropriate inquiry would include the case agent, Joe Hester. There is no doubt that the case agent as well as other agents who worked on the assassination case would know about this, for reasons that follow.

69. The FBI turned up but a single alleged eyewitness, Charles Quitman Stephens. He is represented as having seen James Earl Ray two hours before the crime and fleeing at the instant of the crime. The FBI has no eyewitness to the crime itself. Both the FBI and the Civil Rights Division prepared knowingly deceptive and untruthful affidavits for Stephens to sign and he signed them. A Stephens affidavit was used in the extradition to placé Ray at the scene of the crime. However, prior to the preparation of these affidavits for Stephens to sign, on about April 18, 1968, the FBI and others showed Stephens a picture of Ray. Stephens then made firm negative identification. (CBS-TV filmed Stephens looking at the Ray picture and saying, "That's not the man.") Defendant's representatives knew, before preparing a false affidavit for Stephens to sign, that what they prepared for him to swear to was false. They procured Ray's extradition on a false affidavit they prepared and got a drunk to sign. This is ample reason for withholding information pertaining to Stephens, and despite my appeals significant Stephens information remains withheld. The withheld McCraw manifest is part of this withheld truth.

70. Stephens, a partly disabled Army veteran, has a long arrest record, much but not all for alcoholism. When he was able to buy whiskey and did not want to walk for it, he used a cab, not uncommonly that of James McCraw. This was well known in the area of the crime. A number of persons told me about it, including persons who told me they had reported it to the FBI. I later learned they also told the public defender, whose records confirm them. But along with the FBI's report of the interview with Stephens in which he told the FBI the Ray photograph is not of the man he said he saw, McCraw's manifest is missing from the Memphis main file and all other records as provided to me. My appeals are ignored and none

of the leads I provided Mr. Shea's office appear to have been pursued.

71. McCraw was not a reluctant witness. I located him without difficulty in 1971 and with his assent tape-recorded an interview that was used in support of hhe Ray habeas corpus petition. At the evidentiary hearing McCraw testified to precisely what he had told me.

72. McCraw's entirely undisputed evidence is exculpatory of Ray. Part of what McCraw says is supported by a number of witnesses interviewed by the FBI. His manifest is a time clock. It places him, only moments before the crime, at the flophouse from which the FBI says the fatal shot was fired. Part of his testimony is that Stephens was so drunk that McCraw would not transport him. Obviously, an alcoholic who is that drunk is not a dependable person. In fact, the FBI's investigation discloses that it was impossible for Stephens to have seen anyone in the flophouse at the time of the crime.

73. McCraw testified that as soon as he got back to his cab he radioed the dispatcher that Stephens was too drunk and that he could respond to any other call. McCraw testified that he was given another call, which the manifest also would show, and that not long thereafter the dispatcher notified the drivers of the crime and told them to avoid the area of the crime.

74. McCraw testified that the day after the crime the FBI appeared at the cab company's office and took the original of his manifest, not a copy of it.

75. Phillips does not attest to any search under the name of the cab company or under the name of any of its officials or dispatchers. The manifest would have been filed under any of these names, without cross-reference because of the motive the FBI had for not wanting that information to be known.

76. Without the false Stephens affidavit the Department could not even pretend to place Ray at the scene of the crime at any time. The FBI has managed to keep hidden, contemporaneously and to this very day in this litigation, its FD302-form interview with Stephens and any other record reflecting what he stated, that Ray is not the man the affidavit claims he saw. For the same reasons, it has had to hide the McCraw manifest, which it did obtain. Producing either record would be to produce proof positive that the Department and the FBI, knowing full well that they were false, prepared false affidavits for Stephens to sign and with one of these deliberate falsifications procured Ray's extradition.

77. The filings addressed in the preceding Paragraphs are, as is so much of what defendant has presented to the Court, both written and oral, unfaithful to fact, an imposition on the trust of the Court. They are the more recent of the innumerable evidences of official bad faith that taint this case from its outset.

78. It shocked the Court when, more than five years ago, I believed it was necessary to inform the Court that untruthfulness was presented to it by the defendant and defendant's then counsel. It is conspicuous that I was not rebutted in a single one of the many instances in which I attested that defendant and/or defendant/s counsel were untruthful. The closest thing to a manly attempt at refutation was the plaint, "What can I say?" What that and other counsel could say by way of refutation was absolutely nothing because I was accurate and the untruths, verbal and sworn, were deliberate, not accidental. Now there is proof that at least one of defendant's employees was aware that the FBI was lying and so stated.

79. Mr. Shea's March 27, 1980, memorandum to the Department's Office of Information Law and Policy, copy to the FBI's FOIA chief, is quite explicit about this and about Civil Division untruthfulness. That memorandum was provided to me with all, after the identification of these persons and the subject, obliterated with a (5)(b) claim. Recently, with nothing withheld, it was disclosed to another plaintiff, Mark Allen, who also is before this Court. (Attached as Exhibit 2)

80. If it were necessary to interpret some of what Mr. Shea said to be advice that must be withheld, that cannot be claimed for his factual reporting. He was the Department's FOIPA chief and I provided him with great amounts of information, with extensive documentation, after the Court requested that I cooperate with him. In his January 12, 1979, testimony, he went out of his way to express his appreciation for this cooperation. He also conducted his own inquiries.

81. With regard to my King information requests (and I recall only one of the FBI that is outside this litigation, my request for the political records to which the FBI attached the Orwellian designation, "security"), Mr. Shea stated:

> I disagree with many of the assertions in Mr. Flanders' memorandum. I do not agree that the Bureau has searched adequately for "King" records within the scope of Mr. Weisberg's numerous requests. In fact, I am not sure that the Bureau has ever conducted a "search" at all, in the sense that I (and, I believe, the FOIA) use that word.

82. I am aware that defendant again tried to obfuscate once I presented

this memorandum to the Court. Without an attempt at obfuscation, the damning facts in the Shea memo are complete and compelling proof of the worst of bad faith. In my affidavit of February 5, 1982, I address what defendant calls Points and Authorities pertaining to what my counsel filed and Mr. Shea stated. Because that affidavit also deals with bad faith, I incorporate it by reference.

83. Mr. Shea next, (with nothing omitted in quotation) said this of the FBI/Flanders memo:

> It is confusing two totally different matters -- the scope of his requests administratively, and the scope of a single lawsuit which we claim is considerably narrower than his administrative requests.

84. My April 15 and December 23, 1975, requests have a total of 35 different requests in them, thus Mr. Shea's reference to requests in the plural. What he is talking about is not outside this case, as defendant's counsel tries to deceive the Court into believing, but is this case. Mr. Shea uses the language, "which we claim is considerably narrower than his administrative requests," because of one of those things over which I felt impelled to call official dishonesty to the attention of the Court in 1976. The FBI, with the lusty collaboration of the Civil Division and higher authority in the Department, rewrote my request to substitute the FBIHQ MURKIN file. I had not heard of it and I certainly did not request it. At the time and thereafter I informed the Court that my requests could not be complied with from that file. The Shea reference to "narrower" is to providing me with the MURKIN file rather than making searches to comply with the 35 Items of the requests involved in this litigation.

85. Defendant and defendant's counsel were well aware of what Mr. Shea was addressing when they again undertook to deceive and mislead the Court in their Points and Authorities. It is based on a deliberately untrue representation of what Mr. Shea was talking about. That there is not and cannot be any doubt about this is clear in Mr. Shea's next sentence:

> Not really touched on in Mr. Flanders' memorandum, but very much involved in this matter, is the issue of what are "duplicate" documents for purposes of theFFreedom of Information Act.

86. This question exists in this litigation and it alone. Mr. Shear refers to a King case and the FBI and I have no other King litigation involving the FBI. There is no other King litigation or request in which I have made any

issue of what is a duplicate. In this case, when we deposed Messrs. Shea and Mitchell, both testified that the Stipulation was violated by the FBI by its unilateral rewriting of the Stipulation to avoid providing me with field office records that are not exact duplicates of FBIHQ records. Present defendant's counsel is well aware of this because he represented both men at those depositions.

87. In making the untruthful representations in their Points and Authorities, present Department counsel, the Civil Division and the FBI all are well aware that it simply is not possible for Mr. Shea not to be referring to this litigation because, as they all know, nothing else is possible.

88. Mr. Shea also confirms what I earlier told the Court, that pertinent information is not filed under MURKIN and that the FBI and its counsel used the MURKIN device to avoid searching for the requested information:

> The key point is that it extends to records by virtue of their subjects and contents, to the extent they can be located with a reasonable effort -- and it is not determined by where and how the Bureau has filed its records. ... I am personally convinced that there are numerous additional records that are factually, logically and historically relevant to the King and Kennedy dases which have not yet been located and processed -- largely because the Bureau has "declined" to search for them.

89. Defendant, aware of Mr. Shea's conviction that there was deliberate noncompliance, tries to deceive the Court into believing that Mr. Shea gave his wholehearted endorsement to compliance in this litigation. Defendant's counsel, Civil Division and the FBI all know that he steadfastly maintained exactly the opposite. This is the real reason defendant refused to participate when the Court asked us both to cooperate with Mr. Shea; the real reason defendant refused, even though Mr. Shea was defendant's own employee, when I proposed Mr. Shea as an unquestioned arbiter to decide what is pertinent and what is exempt.

90. With regard to searches in this 1975 litigation, in 1980 Mr. Shea stated not only that the FBI had not made them and knew where to make them, he also says that it "declined" to make them. Whether Mr. Shea made specific requests of it or not I do not know, but I do know that he had copies of my communications to the FBI in which I identified specific files to be searched to comply with specific items of my requests. He knew that the FBI "declined" those searches. He also knew that defendant's counsel also "declined" when I raised these matters during the depositions.

91. As of the 1980 time of this memo, which Mr. Shea did not long survive

as defendant's FOIPA appeals chief, his committee was being asked to approve what, in his own words, "would contradict or be inconsistent with promises made to Mr. Weisberg by Bureau and Department representatives, and to representations made in court, and to testimony before the Aboureszk (Senate FOIA) Subcommittee." While he employs less pointed language, in these words Mr. Shea, four years later, stated exactly what I first told the Court in 1976, that promises made to me and the Court were not being kept and that untruth was presented to the Court to hide it.

92. In 1980 Mr. Shea and his committee still were being asked "to approve" what he said "would contradict or be inconsistent with promises made to Mr. Weisberg by Bureau and Department representatives, and to representations made in court..." Mr. Shea's reference to "Department representatives" means Civil Division. From his memo he was not joined in his opposition to dishonesty and untruth by the Civil Division or by defendant's counsel. In this also Mr. Shea here confirms what I have told the Court throughout this long case.

93. The only predecisional advice I find in this memo, all of the text of which was withheld from me on the phony claim that 100 percent of it is predecisional, is in the brief conclusion. There Mr. Shea recommends "strongly" that my counsel and I be "invited to attend and participate in the discussions" of that committee pertaining to this litigation. This did not happen and the stonewalling continued.

94. If the foregoing Paragraphs do not detail and document bad faith, there can be no bad faith in FOIA litigation.

95. The volume of my undisputed earlier affidavits attesting to bad faith is so great that it is not possible for me now to review and summarize them. I do state that I am not aware of any meaningful denial of any of these allegations by anyone representing defendant.

96. Perfection is not a state of man, and it is possible that, by error or by accident, at some point or in some way, I may have been unfair or inaccurate. I did not and I do not intend this. However, particularly because the case record in this litigation has become an important historical record, I want it to be as accurate as possible. So, when I saw Mr. Shea's reference to unfairness and inaccuracy, I wrote asking him to inform me so that I could either correct any

error or unfairness or substantiate the accuracy and fairness of what I said. I have not heard from him.

97. This Shea memo also refers to defendant's fee waiver abrogation. So that the record in this case be as complete as possible, I state that in all the months that have passed since I provided the Court with a copy of the memo by defendant's present counsel in which he recommended that abrogation and my reply, I have heard nothing from him or anyone else in the Department, including the FBI. I stated in what I sent to the Department that he was untruthful and that some of what he said is outright fabrication. His long silence after all the time that has passed is his endorsement of my accuracy and fairness in those serious charges. Fabrication and untruth are no less fabrication and untruth if by a Department lawyer who can expect immunity from almost any offense. This also represents bad faith.

98. One of those overt fabrications has influenced this and other courts. It is the canard that I believe the FBI was involved in the King assassination. My belief is quite the opposite. In fact, in June 1977, when I was unwell, I was working in Dallas and, although it was difficult for me to get there, I abandoned that work and flew to New York to defend the FBI from precisely this charge on "Good Morning America." Earlier I defended the FBI from the same charge on the local Dallas TV station, which then syndicated my defense of the FBI to ABC network. I have never believed that the FBI was involved in the King assassination and have never said it. The damage done to any requester about shom such overt lies and fabrications are disseminated throughout the government is not easily exaggerated. This, too, represents bad faith.

99. Parenthetically, I note that there are criteria for granting a fee waiver, that I am aware of those criteria, have claimed that I meet them, and there is not even a pro forma denial from the Department. It would prefer to force me to litigate that also, thus wasting still more of my life and thus running the clock on what time remains for me to write what the Department does not like but cannot refute.

100. Of the many manifestations of bad faith I have alleged in this long case, there are a few about which I remind the Court because of their importance.

101. One that has greater point because of defendant's new canards,

styled Points and Authorities, is the FBI's failure to do as it agreed, respond in writing to the comments, criticisms and complaints I made in writing. I do not recall any single communication from the FBI responding to any one of my many and detailed complaints, criticisms and comments about noncompliance. The case record holds a copy of an FBI internal record in which this undertaking is stated unequivocally.

102. In 1969 the FBI's higher echelon ordered that my requests be ignored. In 1975 Stephen Horn, of CRD, urged that my requests be denied out of hand and then some legalism be contrived to cover that overt and deliberate violation of the Act.

103. In a successful effort to withhold pertinent and nonexempt information, FBI SA Horace P. Beckwith provided an elaborately long affidavit with more than 50 attachments. I proved that his affidavit was falsely sworn and that he even attached phony documents to it. I provided the Court with the genuine articles and his phonies. I also informed the Court that Beckwith was an unindicted co-conspirator in the "Pat" Gray case. That put him under impermissable pressure as an affiant in this case. The Court banished him from the case but the FBI found others in its stable of affiants willing to be untruthful, deceptive and misleading under oath. None of the withheld information has since been disclosed.

104. The Stipulation requested by the FBI was entered into in bad faith and was violated in secret by the FBI which, in secret, sent instructions to its field offices telling them how to avoid proper compliance. I obtained the proof outside this litigation, from a field office that was responding to my PA request and did not understand what it really was disclosing to me. These bad-faith instructions are the direct cause of the withholding of field office records that are not exact duplicates, the matter Mr. Shea refers to in his memo.

105. Deceiving and misleading the Court into having me act as defendant's consultant (in my suit against it), intendedly bad faith, was pulled off by the same Civil Division representative who made the unkept promises about me to the Aboureszk committee to which the Shea March 27, 1980, memo refers. In plain English, the Court was lied to by the Civil Division representative in camera in order to waste more time for the Court and for me. After I provided the long and

detailed consultancy report, it was and to this day remains entirely ignored.

106. One of the Items pertaining to which there were knowingly incomplete searches pertains to information provided to other writers. When I correctly identified files required to be searched for compliance, defendant's counsel refused to have those searches made. I now here address only two of the writers listed in that Item. With regard to Jeremiah O'Leary, who was virtually an adjunct of the FBI, he stated unequivocally that the FBI provided him with all the information he used in a Readers Digest article. I provided what O'Leary said and what the results of that article were in an undisputed affidavit. William Bradford Huie, a wealthy writer, underwrote the Ray "defense" with the explicit intention of getting Ray convicted. Huie actually believed and stated that he bought Ray's confession of guilt. When FBIHQ would not comply with the Huie item of my request, my counsel, in his name rather than mine, filed the request with the Birmingham field office, in whose territory Huie lives. My counsel obtained the incriminating records withheld from me. There is no doubt that Huie paid Ray's lawyers to do what he wanted, not what Ray needed. If these FBI records had been available when the Ray case was before the courts, especially before the guilty plea was coerced, there is the possibility if not the certainty that the criminal case would have had a different end. That would have been enormously embarrassing to the FBI.

107. With further regard to searches not made, during the depositions we obtained FBI testimony proving without question that the Items of my April 15, 1975, request knowingly were not searched, although complete searches were attested to. With regard to the December 23, 1975, requests, the Shea memo cited above states that the searches not only were not made but were "declined" by the FBI. Yet the FBI, with the stout support of the Civil Division, now claims complete compliance and demands dismissal with prejudice when the initial searches are unmade and "declined."

108. The apotheosis of bad faith is untruth. This Shea memo eliminates any doubt at all: there is persisting untruthfulness, as without contradiction I have alleged throughout this long case.

109. As I state above and as I first informed the Court in 1976, defendant's counsel have been untruthful - all of them, without exception. Not one has bothered

to even try to refute these face-to-face accusations.

110. Even before the first calendar call, at which he claimed this case was moot, the first of defendant's counsel was writing memos in which he claimed that the case was over before it began. It also is he who assured the Court that all my requests would be complied with by providing me with the FBIHQ MURKIN file. It is he who assured the Court that the field office files hold nothing not duplicated in FBIHQ records. All of these and many more such statements are false and in uttering them he should have known that they were false. They had the effect of avoiding the required searches, of denying compliance and of stonewalling the case.

111. While all were deceptive, misleading and untruthful, prior defendant's counsel did not indulge in bad personal conduct as present counsel has. His behavior at the depositions was shocking and it did shock a number of people. It also terrified two women, a court reporter he abused loudly and Ms. Rae Barrett, a young woman who had been helping me. The court reporter refused to continue and in my presence urged her firm never to send another woman reporter. Ms. Barrett fled the room and did not return until he had left.

112. He contrived reasons for all kinds of obstructions. He interrupted my counsel repeatedly to destroy the continuity of his questioning; he insisted on long and often unnecessary breaks, and he made a scene whenever we used a defendant's record we had not expected to use and thus did not have two copies for him. He did insist on two copies of each exhibit. He delayed delivering discovery records until it was too late to use them.

113. He slapped and pounded the table and shouted, creating disturbances throughout the suite of offices. He made so much loud and unpleasant ~~unpleasant~~ noise that, despite the closed door, a man whose office was near the other end of the hallway threatened to throw him out physically if there were another disturbance. But by that morning the FBI witnesses had been deposed and he did not dare misbehave in that fashion when he represented Mr. Shea and Mr. Mitchell. They, unlike the FBI witnesses, refused to take his cues for nonresponsiveness. They answered proper questions when he did not want them to answer.

114. Until we finished with the FBI agents, he kept interrupting the depositions with false accusations that I was talking out loud to my counsel and

disconcerting the FBI agents. Even when I passed my counsel a note he claimed that was an interruption and the FBI witnesses, taking the cue, simply fell silent and stopped in mid-sentence. While the transcript reflects the fact that I did not talk aloud, so he could not dare repeat this fabrication later, I brought a tape recorder so that there would be a tape recording to reflect the fact that he lied to keep the taking of the testimony in turmoil and to try to disconcert my counsel. He refused to proceed with a tape recorder, even when he was offered the tape if he would preserve it. That morning's transcript reflects his refusal to permit tape recording, even though this is done by some court reporters, and the falsity of his accusations. Once he could no longer seek to try his case on me, he turned his histrionics fully on my counsel. At the end of one morning session he threatened my counsel with physical violence as my counsel left the conference room. When I called my counsel back and repeated the threat, defendant's counsel did not dare repeat that threat to my counsel's face and FBI counsel, one of the two FBI agents present, tried to bring him out of orbit.

115. There are other tricks by which he strung out the depositions, to limit what they could accomplish, among them being late when they could begin, sometimes quite late. regularly,

116. During this long case, the attorney general of the prior administration publicly informed all his lawyers that they have a responsibility to satisfy themselves of the truth and accuracy of what they present to courts, a reminder that from my experience was entirely wasted save as a public relations ploy. Earlier in this affidavit and in prior affidavits I state that present defendant's counsel had personal knowledge that in this case the spectrographic plates had not been provided and that the Lab retained NAA information that was withheld, specifically, what SA Kilty called "Polaroids" and we referred to as printouts. From that time until the end of last year this NAA information and those plates remained withheld. Then we received the untruthful Kilty conjectures about the plates and those undescribed pages magically added to serial 1256, which can be NAA information. During that long period of time Department counsel knew the spectrographic plates had not been provided. He also was told by Mr. Shea that the FBI had promised them to me, through SA Beckwith. Yet he was silent. He also heard his witness, Kilty, testify to the opposite of what is now claimed. Kilty said that the plates should still exist and that the NAA Polaroids were in the

Lab. Knowing that we had not received this NAA information, he now presents the false Phillips affidavit alleging that I received it years ago.

117. It also is necessary for there to be additional NAA information that remains withheld. This is obvious from examination of what is belatedly provided with false representations. There is no request or authorization for that testing; no report on its results; and all that is necessary to use it as the basis of testimony, the purpose of making the tests, is missing. It is not possible to examine the NAA materials provided and not realize this, yet there continues the bland false pretense that all is provided and was provided years ago. When, where, by what authority and with what results the tests were made, with what radiation and what rate of decay is entirely missing. This, too, represents the permeating bad faith and perpetuated noncompliance.

118. The real and bad-faith purpose of seeking dismissal with prejudice of requests in which the basic, initial searches have not yet been made after all these years is not some fear that I might refile this case. It is to be able to frustrate future requesters seeking the information withheld from me. It is to be able to suppress into the future what continues to be suppressed after more than six years of litigation, 12 years after the initial and ignored requests.

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HAROLD WEISBERG

FREDERICK COUNTY, MARYLAND

Before me this 11th day of February 1982 Deponent Harold Weisberg has appeared and signed this affidavit, first having sworn that the statements made therein are true.

My commission expires July 1, 1982.

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NOTARY PUBLIC IN AND FOR
FREDERICK COUNTY, MARYLAND