UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1107
(C.A. No. 75-226)

HAROLD WEISBERG, Appellant,

v.

U.S. DEPARTMENT OF JUSTICE, et al., Appellees.

OPPOSITION TO APPELLANT'S MOTION FOR
LEAVE TO FILE REPLY BRIEF WITH ADDENDUM

Appellees respectfully oppose appellant's motion for leave to file a reply brief with an addendum. We submit that the documents proffered by appellant in his addendum are not properly before this Court and that no reference to such documents should be made in appellant's reply brief.

The documents which appellant seeks leave to append to his brief are not part of the voluminous record of this case. Appellant seeks to justify putting these documents before the Court by suggesting that appellees in their brief have made assertions, not supported by the record, that documents sought by appellant had been destroyed or discarded.[1/] No such out-

1/ Appellant also asserts that FBI Agent Kilty's affidavit was misleading and that appellees had made ex parte representations to the District Court (Motion at 2). As to the first charge, this issue is discussed in our brief at pages 9-10 and in footnote 7. As to the allegation of ex parte representations, this is totally without basis. Appellees filed a motion to quash subpoenas, with points and authorities, which was mailed to appellant's counsel on April 22, 1977; on April 25, 1977, the court granted the requested relief based on the papers filed and the entire record of the case (R. 38).

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of-record assertions have been made by appellees.[2/] As we pointed out in our brief, as to categories 4 and 6 of the materials sought by appellant, the District Court in its memorandum opinion made a finding, based on material in the record, that materials which once were in existence no longer existed at the time appellant was seeking them. Appellant had full opportunity before the granting of summary judgment to depose those who have created the relevant records and to submit pertinent documents to the District Court. He failed to take advantage of that opportunity.

Further, there is no valid reason for this Court to accept these documents newly proffered on appeal. First, though described as "newly discovered," there is no explanation why they were not available for submission to the District Court. More importantly, they are not helpful to this Court in deciding this case. Without testimony or evaluation, they mean nothing. On their face they appear to have nothing to do with the existence or non-existence of the documents requested in this case. The first attachment, the document dated August 5, 1964, does not in any way support appellant's allegation that the curbstone was "altered" by the FBI; it merely re-

2/ The only representations by appellees not based in the record were those in footnote 17 on page 21 of our brief, responding to allegations made by appellant after the District Court had granted summary judgment.

ports that as of that date no mark was visible. If a change had occurred, the document provides no basis for believing that the change resulted from intentional government action rather than weather conditions and traffic. The second attachment adds nothing to the case. The third and sixth documents, memoranda dated August 1, 1969, and January 31, 1973, both refer to "bulky exhibits," evidence obtained in the assassination investigation and retained in the Dallas Field Office. There is no indication that these memoranda have anything to do with the retention of scientific test results generated in the FBI Laboratory in Washington.

The fourth document, a memorandum dated February 15, 1969, deals with a report that a citizen had recovered a spent bullet in late 1968 -- five years after President Kennedy's assassination -- in the area where it occurred. The existence of this report shows nothing about whether that bullet was actually received by the FBI, whether it was of a type that could have been involved in the assassination, or whether it was ever subjected to any testing. The fifth document, a teletype dated January 7, 1977, relates to files kept in the Dallas Field Office; it contains no indication that the FBI Laboratory in Washington would have sent any raw test results to the Dallas office.

These documents proffered by appellant are irrelevant to this case, which focuses on the existence at this time of

certain other documents sought by appellant. His motion merely continues the basic argument made in his brief; it seeks to have this Court review the findings of the Warren Commission on the basis of apppellant's broad-ranging but unsupported allegations of a conspiracy to suppress evidence. Because these documents were not before the District Court and because they are of no obvious relevance to the propriety of the District Court's ruling, we submit that this Court should not allow appellant to append them to his brief.

WHEREFORE, appellees respectfully submit that appellant's motion for leave to file a reply brief with an addendum should be denied.

EARL J. SILBERT
United States Attorney

JOHN A. TERRY
Assistant United States Attorney

JOHN H. KORNS
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a copy of the foregoing Opposition has been mailed to counsel for appellant, James H. Lesar, Esquire, 910 16th Street, N.W., Suite 600, Washington, D.C., this 27th day of December, 1978.

JOHN H. KORNS
Assistant United States Attorney