REPLY BRIEF FOR PLAINTIFF-APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 78-1107

HAROLD WEISBERG,

Plaintiff-Appellant

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,

Defendants-Appellees

On Appeal from the United States District Court for the District of Columbia, Hon. John H. Pratt, Judge

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I. ADEQUACY OF FILE SEARCH IS A GENUINE ISSUE OF MATERIAL FACT IN DISPUTE WHICH PRECLUDES SUMMARY JUDGMENT

A. District Court Finding Violates Summary Judgment Standards

Appellant contends that the adequacy of the government's file search for records he requested is a material fact in dispute in this case. The district court found otherwise, holding

that:

> *Although plaintiff has impugned defendants' affidavits on the ground that they do not specify the files searched in compliance with plaintiff's request, Opposition, at 12, the Government's response to a FOIA request need not be as specific as plaintiff would require, it being sufficient that the affiant has personal knowledge that all files which might contain requested material have been searched.* Exxon Corp. v. FTC, *384 F. Supp. 755, 759-61 (D.D.C. 1974),* remanded without opinion, *527 F. 2d 1386 (D.C. Cir. 1976).*
>
> *As in* Nolen, supra, *"[t]he Government has in candor and good faith before this Court, stated that all the records available have been made available to the plaintiff." 535 F. 2d at 891.* [App. 302]

In so holding, the district court went beyond its proper role in considering the government's motion for summary judgment, which "is not factfinding, but rather an ascertainment of whether factfinding is essential to disposition of the litigation . . .." National Association of Government Employees v. Alan K. Campbell, et al., D.C. Cir. Nos. 76-2010, 76-2013, 76-2022, decided May 9, 1978, slip op. at 15. As this Court also stated in that case:

> *Summary judgment is unavailable if it depends upon any fact that the record leaves susceptible of dispute. Facts not conclusively demonstrated but essential to the movant's claim, are not established merely by his opponent's silence; rather the movant must shoulder the burden of showing affirmatively the absence of any meaningful factual issue. That responsibility may not be relieved through adjudication since [t]he court's function is limited to ascertaining whether any factual issue pertinent to the controversy exists [and] does not extend to the resolution of any such issue.* (Citations omitted) National Association of Government Employees v. Campbell, supra, slip op. at 9-10.

Appellees try to make out a case that summary judgment was proper by relying upon some language in the first of two affidavits executed by FBI Agent John W. Kilty before the remand in this case. This affidavit, they assert, "was sufficient to make a prima facie case that the appellees had completely satisfied their FOIA obligation." [Brief for Appellees, at 16]

However, as will be discussed in some detail below, Kilty's affidavit is fatally defective and his credibility was irremediably damaged by facts developed on remand. Moreover, appellant directly contested appellees' claim that an adequate search had been made and provided uncontradicted evidence that it had not.

B. Kilty's Affidavit Does Not Demonstrate That FBI Made A Thorough, Good Faith Search of All Relevant Files

In arguing that Kilty's 1975 affidavit was sufficient to establish that the FBI has made an adequate search of its files for the records sought by Weisberg, appellees refer to this Court's decision remanding the case to the district court and assert:

> *The Court's opinion did not suggest in any way that the Government had been shown to have acted other than in good faith or that the affidavits of Kilty were insufficient to show a proper check of the files.* [Appellees' Brief, at 3]

This is illogical. If this Court did not have questions about whether Kilty's affidavit could be relied upon to establish that a thorough search of all relevant files had been made, then

then there was no point in remanding the case for further discovery to determine if records existed which had not been provided to Weisberg. If, as appellees submit, "this part of the case was essentially resolved before the first appeal," (Appellees Brief, at 19) then the remand decision was an exercise in futility. For all that Weisberg could accomplish, save to waste large amounts of his limited resources of time and money, would be to establish that records had existed which had not been given to him, and about which he had not been told, but for which no additional search need be made.

In an effort to explain away the glaring deficiencies in Kilty's affidavit, appellees put their own interpretative gloss on it, asserting:

> *. . . although appellant repeatedly states that the affidavit fails to assert that all relevant files were searched, we submit that is a misreading of Kilty's affidavit. Although the affidavit does not explicitly use the word "all," its clear import is that all relevant files which in Kilty's personal knowledge would contain the type of documents sought by appellant had been searched.* [Appellees' Brief, at 16-17]

The first problem with this is that it doesn't make sense. If Kilty meant "all," why didn't he say "all"? The word takes up very little space. It makes for a much stronger affidavit, one that expresses exactly what has to be asserted in order to meet summary judgment standards. Its omission suggests that Kilty may have been building his defenses against the day when other records which should have been given Weisberg are found in locations other

than those which thus far have been searched in connection with this lawsuit.

The second problem with this explanation of "what Kilty really meant but didn't say" in his affidavit is that it is not true that the "clear import" of Kilty's affidavit is that "all relevant files which in Kilty's personal knowledge would contain the type of documents sought by appellant had been searched." An analysis of Kilty's affidavit shows that this is not the case at all.

Agent Kilty's first affidavit, executed May 13, 1975, states in pertinent part:

> *8. I have conducted a review of FBI files which would contain information that Mr. Weisberg has requested under the Freedom of Information Act. I have had compiled the materials which have been furnished to Mr. Weisberg through his attorney, Mr. Lesar. The FBI files to the best of my knowledge do not include any information requested by Mr. Weisberg other than the information made available to him.* [App. 54]

Insofar as this paragraph purports to demonstrate that the FBI has in good faith made a thorough search for the records which Weisberg requested, it is fatally defective. To begin with, it does not attest to a personal search by Agent Kilty. The first two sentences seem to suggest that Kilty merely "reviewed" materials which somebody else compiled for him, and that Kilty then selected those which were given to Weisberg. The affidavit does not state that <u>all</u> files which might contain relevant records were searched, either by Kilty or by others. Because Kilty's affidavit refers only to a "review" of "FBI files" and does not in any way

describe or specify the files reviewed, much less those actually searched, it is meaningless. Kilty's affidavit does not make it clear whether he has personal knowledge of all files which should have been searched or all files which were in fact searched. For example, it is impossible to know from the face of Kilty's affidavit whether the Dallas Field Office files were searched for records responsive to Weisberg's request.

Kilty's statement that "[t]he FBI files to the best of my knowledge do not include any information requested by Mr. Weisberg other than the information made available to him" is equally meaningless. There is no specification as to what is referred to by "the FBI files," nor is it at all clear what Kilty meant by the phrase "any information requested by Mr. Weisberg." The context seems to limit this to the spectrographic and neutron activation testing performed on items of evidence in President Kennedy's assassination.

But Weisberg is seeking not just materials related to those tests but all other scienticic tests and examinations as well. For example, ex-FBI Agent Robert W. Frazier testified on remand that he had instructed another agent, he thought Special Agent Paul Stombaugh, to determine whether or not the holes in the President's shirt collar coincided. It is vitally important for Weisberg to obtain all materials related to this essential examination because he has adduced proof that clearly shows that the holes in the shirt collar do not coincide, thus eliminating the possibility

that they were caused by a bullet exiting the President's throat as alleged by the Warren Commission. [See July 28, 1977 Weisberg Affidavit, ¶¶109-146 (App. 141-148); October 15, 1977 Weisberg Affidavit, ¶¶132-161 (App. 333-338) and ¶188 (App. 345)] Yet it is evident that Kilty's affidavit, executed nearly two years before Frazier's deposition adduced the first evidence that such an examination had in fact been made, does not address itself to the issue of a search for materials related to this examination. There is no evidence in the record which even suggests that Kilty had personal knowledge of this examination at the time he executed his May 13, 1975 affidavit. Nor does the record contain any statement that any search for materials related to this examination of the President's shirt collar was made subsequent to Frazier's deposition.

On this basis alone, Kilty's 1975 affidavit is inadequate to support a finding that a thorough search of all relevant files has been made. There are, however, still other reasons for questioning it.

C. Evidence Shows That Other File Locations Were Not Searched

As shown above, insofar as Kilty's affidavit was intended to make a showing that the FBI conducted a thorough search for the records sought by Weisberg in this lawsuit, it is fatally defective. In addition, Weisberg has also produced extrinsic evidence that the FBI's search was not thorough.

At the March 30, 1978 status call, Weisberg's counsel attempted a brief explanation as to what had been accomplished by the depositions which had already been taken. He specifically raised the issue of whether there had been an adequate file search:

> *We have also established the locations of files which apparently should contain documents of the kind that we are requesting, and apparently those files have not been searched.*
>
> *Specifically, the Dallas Field Office of the FBI, and the Communications Division of the FBI. There are also other files that we are uncertain as to whether or not they have been searched, and we would hope to establish that from a short deposition taken of Mr. Kilty, and Mr. Marion Williams, who are FBI agents who have searched the files in response to this request.* [App. 108]

Appellees made no attempt to respond to the questions thus raised. The FBI did not deny, under oath or otherwise, that the files of its Communications Division and its Dallas Field Office should contain records pertaining to Weisberg's request. Nor did the FBI respond to the assertion that those files had apparently not been searched for documents responsive to Weisberg's request. In fact, when Weisberg noticed Kilty's deposition in order to ascertain the nature of the search made, appellees filed a motion to quash which was granted by the court before Weisberg's counsel had even received it.

In his October 15, 1977 affidavit, filed in support of his motion for reconsideration, Weisberg set forth facts which make

it obvious that the FBI has not made a thorough search for the records he has requested. His statements are worth quoting in extenso:

> *12. In its Opinion this Court conjectures about what it designates as FBI "practice," having been misled by its trust in the depositions of the former FBI agents and having been denied demeanor evidence, as well as a testing of its credibility. Their testimony was not full, not forthright and not truthful.*
>
> *13. I have knowledge of the actuality of FBI practice with regard to the distribution of the reports of the FBI Laboratory from having obtained a very large number of unexpurgated samples of this in another case. It is the regular practice to distribute memoranda, reports and other written communications throughout the top FBI hierarchy. Some of the copies of original records I possess contain dozens of initials and bear the initial routing directions showing this. Some records bear the names of 10, perhaps more, officials to whom separate copies are sent. In an effort to withhold this intelligence from me in this matter, such records have not been provided. Instead, I have been given copies with such names obliterated from them by masking. More on this withholding follows.*
>
> *14. I have not yet been given copies of any of these records distributed elsewhere within the FBI.*
>
> * * *
>
> *18. * * * My request is for all records, whether or not duplicative. Over the years I have paid the FBI for many seeming duplicates. In a sufficient number of instances I have found that duplication is not exact, that seeminly identical records are not identical. However, in this case, my request is for "all." * * **
>
> *19. I did not require Frazier's testimony to know that as the "00" in FBI code, or the "Office*

*of Origin," the Dallas Field Office has extensive relevant files. However, his testimony does establish this. It is the standing FBI pretense that all such records are duplicated in headquarters, "FBIHQ" or "SOG," its modesty of self-description meaning "Seat of Government." This is a pretense I have, since filing of my prior affidavit, been able to establish as false. Although in another matter that court and I had been assured of full compliance from FBIHQ central files, when I persisted I obtained what as of the time of this affidavit is about 10,000 relevant pages from a single field office. I also have been informed that about 6,000 more are being copied. This is when not all the field offices are being searched. These are records that are not alleged duplications of those in headquarters. * * * While the FBI practice of having a "do not file" system has recently become public knowledge, what is not generally known is that it uses its field offices as a means of burying what could be embarrassing if exposed from the Washington files.*

20. In FOIA matters "OO" can be what in slang is known as "the circular file" and in Orwell as "the memory hole." That I have not received a single piece of paper from the Dallas Field Office in this instant case . . . is irrefutable proof on noncompliance and of the deliberateness of noncompliance. Frazier's deposition confirmed my prior knowledge, which is what led to his being so questioned.

*21. There is no evidence before this Court in which the government states that all known files were searched. I have sought this information without success. * * * Aside from the records of the higher echelons to which copies are sent and from which nothing at all has been provided, I state, without stating that it is the full extent of my knowledge, in Headquarters alone there are these files that should be searched in compliance and about which there is no affidavit of there having been any search at all:*

> *No. 62-109060, Assassination of John F. Kennedy.*
> *No. 62-109090, Liaison with the Warren Commission.*
> *No. 105-82555, Lee Harvey Oswald.*
>
> *22. So that this Court can better understand the obfuscation that is built into the FBI's filing system, I state that my FOIA requests are filed under a "100" number. That is reserved for what to the FBI is "Internal Security."* [App. 306-308]

As Weisberg stated in this affidavit, the fact that he was not given any records responsive to his request from the files of the Dallas Field Office or other locations is irrefutable proof of noncompliance with his request, which is for all copies of such records regardless of whether they are alleged duplicates or not. This circumstance alone makes reliance on appellees' claim that there was a thorough search untenable.

II. DISTRICT COUT ABUSED ITS DISCRETION IN DENYING PLAINTIFF DISCOVERY ON ISSUE OF ADEQUACY OF SEARCH

On remand Weisberg initially sought to establish that records had been created which, if still extant, would be responsive to his FOIA request. Once he had accomplished that, he then indicated he wanted to take the depositions of two FBI agents who presumably would be able to shed some light on the nature of the search which had been conducted by the FBI in response to his request. Accordingly, he noted the deposition of FBI Agent John W. Kilty. However, the district court quashed the deposition on ap-

pellees' ex parte representations that this would be "burdensome"[1/] and was beyond the scope of the remand because "Kilty had not personally participated in the investigation of the Kennedy assassination." [Appellees' Brief, at 5]

Appellees now respond to Weisberg's argument that they have failed to show that an adequate search was made by stating, in a footnote:

> *Appellant asserts that a litigant is entitled to conduct discovery to challenge the good faith of the search for documents, citing National Cable Television Association, Inc. v. FCC, 156 U.S.App.D.C. 91, 479 F. 2d 183 (1973). That case dealt with an entirely different issue. The FCC did not claim that it did not have the requested documents, but that the specific documents were not identifiable among many others. The Court held that discovery should be used to identify the particular documents desired.*
>
> *Here the trial court found no evidence of bad faith by appellees. Further, the actions of the custodians were not the issue to be considered on remand. The remand was to allow discovery from those personally involved in the laboratory work on the assassination investigation. Their evidence supported appellees' assertion that they have no additional documents responsive to appellant's request.* [Appellees' Brief, fn. 15, at 18-19]

1/ When this case was first in district court, appellees objected to Weisberg's interrogatories on the ground that they were burdensome and the district court opined that they were "oppressive." This notwithstanding, on remand appellees failed to object to a single interrogatory. Since forcing this case to another appeal is obviously more costly and burdensome than taking the Kilty and Williams depositions would have been, it is apparent that appellees had an ulterior motivation for opposing them.

The text of National Cable makes it clear that appellees' place an unduly restrictive interpretation on it. In Association of National Advertisers, Inc. v. Federal Trade Commission, et al., 28 Ad. L. 2d 643 (D.D.C. 1976), then Chief Judge Jones of the United States District Court for the District of Columbia construed National Cable in exactly the same way as has Weisberg. Confronted in that FOIA case with plaintiff's challenge to the adequacy of the search for responsive documents, Chief Judge Jones ruled:

> *It is clear that civil discovery is a proper method for pursuing factual disputes as to the adequacy or completeness of an agency search for records requested pursuant to the FOIA. See National Cable Television Ass'n, Inc. v. FTC, 479 F2d 183, 193 (DC Cir 1973). Where the record before the court indicates that the agency search was reasonably thorough, however, discovery may be limited by the court. See Exxon Corp. v. FTC, 384 F Supp 755, 759-60 (D DC 1974), remanded without opinion, January 28, 1976 (DC Cir No. 74-1966).* Association of National Advertisers, Inc., supra, 28 Ad. L. 2d at 644.

There are at least five reasons why the district court should have allowed Weisberg to proceed with discovery on the issue of the adequacy of the file search in this case. First, the Kilty affidavit is too vague and unspecific on its face to demonstrate that a thorough search of all relevant files has been made. Second, the depositions of former FBI agents, particularly that of ex-agent Robert W. Frazier, establish file locations which have apparently not been searched and from which Mr. Weisberg has received no records. This deposition is corroborated and added to

by Weisberg's October 15, 1977 affidavit. Third, the alleged failure to perform certain vital tests and the purported lack of records on some that were performed contrasts sharply with the FBI's conduct where the tests were of little or no significance. Fourth, facts developed on remand irremediably damaged the credibility of John W. Kilty, the FBI agent who executed the May 13, 1975 affidavit that is the sole basis for appellees' claim that an adequate search has been made. Fifth, evidence that Warren Commission findings are in error and that FBI misrepresented facts to the Warren Commission and withheld important information from it gives the FBI a strong motivation for withholding embarrassing records through such guises as hiding or "losing" or "destroying" them and by failing to search all relevant files for them.

The first two reasons have already been discussed in detail above and need not be treated again. The others, however, deserve some attention.

A. Inconsistency in Laboratory Testing and Record-Keeping

In his October 15, 1977 affidavit Weisberg noted that the FBI Laboratory took immaculate pains with regards to its tests and examinations ~~in some~~ areas, and kept records on them:

> *106. As an example of the fineness of detail of the scientific work of the laboratory, there is its work on Oswald's pubic hair and his blanket. The Commission's Report goes into detail on pages 586-591, complete with the elaborate FBI charts of an entire hair, a longitudinal and a cross-section of the hair and of cotton, wool and viscose fibers. There was no*

> *question about the blanket. Indubitably and uncontradictedly, it was the blanket of Lee Harvey Oswald. Yet with the collaboration of the Dallas police, the FBI obtained pubic hair from Oswald before he was killed, compared it with the fabled precision of the FBI lab with hairs vacuumed from Oswald's blanket and, after exhausting all the possibilities afforded by science, the FBI lab concluded first that these were pubic hairs, next that they were Oswald's pubic hairs and thus that, because Oswald's pubic hairs were on the blanket, the blanket that everyone knew was Oswald's, indeed was Oswald's. In keeping the Director's word in this instance, the lab did the totally unnecessary, and made and kept records of it. It did this for all the world as though anyone other than Oswald's wife should have concern over whose pubic hiars were on what was without peradventure of doubt known to be Oswald's blanket to begin with.* [App. 326-327]

This is totally at variance with the picture that has been painted with respect to the vitally important tests and examinations which are the focus of Weisberg's request. As the following paragraph of Weisberg's October 15, 1977 affidavit states:

> *107. With the FBI having used the lab in such futilities that are at best window-dressings, the same FBI and the same lab now . . . want it believed that it was less diligent with the actual evidence of the crime; that like the biblical maiden entrusted with the keeping of the family vineyards, her own vineyard she did not keep. It made no single meaningful report on the overall spectrographic or neutron activation testing; noen of the combination of these tests; has no real report of any nature; does not have most of its own work records; that it went to all the trouble of conducting costly tests at the overloaded Oak Ridge reactor and didn't bother to keep even the printouts while seeing to it, as Gallagher himself testified, that nobody would have the remotest notion of what was tested or the actual results of the testing.* [App. 327]

The absurdity of appellees' claims (and the district court's findings) is summed up in earlier passage in this same Weisberg affidavit:

> *86. * * * Despite the alleged informality of "practice" in the FBI, presumably even more informal when the President was killed, we have the representation of the Opinion of nobody minding the store. We have a Gallagher who forgets to make notations, does not know what happened to his records, even does computer calculations in his head and then makes no notations of them. "He might have skipped the step of noting down the readings and done the tabulations in his head" is the conjecture at page 6. From the Opinion the hazard to the computer industry is great indeed. Given enough Gallaghers, there would be no need for these fantastic calulators. The ERDA printouts I have received of four-digit figures are pages wide and of many pages. It is a unique Gallagher who can keep all of this in his head, not making notes, yet not recall making any tests and comparisons when asked about them, about the killing of a President and about studies for a Presidential Commission. Only thus are there no records. Gallagher carries in his head what for other humans requires the most sophisticated and elaborate of advanced machinery. But this same marvel of a head is utterly devoid of other recollections. Unless it has a record to confront. Faced with the lack or records on the Q3 he claimed not to have remembered at all, Gallagher then alleges he replaced the machine and did the calculations in his head. Making no notations, of course, because he was in Oak Ridge, not Washington, because there was nobody else to answer to in the FBI and no Presidential Commission to satisfy. Nobody else had to know anything.* [App. 321-322]

That the FBI thoroughly tested insignificant items of evidence and kept records on those tests but claims not to have performed essential tests or to have lost or not made records on such tests severely strains one's credulity. It is a factor which weighs in

favor of allowing Weisberg to use the traditional tools of civil discovery to explore the dispute issue of the adequacy of the file search.

B. Kilty's Credibility Was Irreparably Damaged on Remand

Appellees' entire case hinges upon the first Kilty affidavit and an unrestrained willingness to perceive in its nebulous language a statement that all relevant files which might contain the records sought by Weisberg have been searched. Even if Kilty's affidavit stated this--and it does not--it could not be believed. The facts developed on remand damaged Kilty's credibility irretrievably.

In his first affidavit, executed May 13, 1975, Kilty swore that "[n]eutron activation analysis and emission spectroscopy were used to determine the elemental composition of the borders and edges of holes in clothing and metallic smears present on a windshield and curbstone." [App. 53] His second affidavit, executed June 23, 1975, directly contradicted the first, stating unequivocally that: "NAA was not used in examining the clothing, windshield or curbing." [App. 59]

When the Department of Justice answered the interrogatories put to it on remand, Kilty again swore that Q15, the windshield scapings, had not been subjected to NAA testing. [App. 102] In addition, he also swore that speciment Q3 had not been tested by NAA. [App. 103] Yet the evidence adduced on remand shows that both Q15 and Q #3 were tested by NAA. [App. 652, 671-673]

Appellees now admit that "several erroneous statements have been made in this case." [Appellees' Brief, at 18] This is sufficient reason why no court should rely upon Kilty's untested word to conclude that a thorough search was made. But appellees-and the district court--seek to explain away Kilty's sworn statement that the windshield scrapings (Q15) and bullet fragment Q3 were not subjected to neutron activation analysis by asserting that these "errors" were a consequence of good faith confusions on his part which resulted from his reliance on "virtually blank worksheets." [Appellees' Brief, at 9-10]

This explanation just won't wash. First, the single sheet of paper on Q15 which the FBI gave Weisberg shows the time this specimen went into the reactor and the time it came out. Thus, the attempt of appellees' counsel to testify on behalf of Kilty is frustrated by the fact that the one thing this document shows beyond doubt is that specimen Q15 was subjected to NAA. Kilty swore first that it was, then that it wasn't. His second affidavit was false. Second, Weisberg has been given no "virtually blank" worksheet on Q3. Unlike Q15 and other NAA tested specimens, there is no sheet of paper showing that it was put into the nuclear reactor and no worksheets showing how the results were computed. However, Q3 is listed on a chart along with other specimens. Unless the chart or the Q3 entries on it were fabricated, this clearly shows it was subjected to NAA. Yet Kilty swore it was not. Thirdly, the "virtually blank worksheets" explanation does not explain how Kilty

came to swear in his first affidavit that the windshield scrapings, the President's clothing, and the curbstone had all been subjected to neutron activation analysis. No worksheets or other records have been produced in regard to any NAA testing of the clothing or the curbstone and it is now alleged that no such testing took place.

Finally, it should be pointed out in his first affidavit Kilty swore both that "[a]ll available data" relating to "[l]aboratory examination data which may be available regarding testing done on a curbstone" had been furnished to Weisberg's attorney on March 31, 1975 and that "[t]he FBI files to the best of my knowledge do not include any information requested by Mr. Weisberg other than the information made available to him." [App. 53-54] In his second affidavit he stated that a laboratory worksheet already furnished Weisberg "is the notes and results" of the spectrographic testing of the curbing and that "[a] thorough search has uncovered no other material concerning the spectrographic testing of the metal smear on the curbing." What these declarations concealed was the very material fact that the FBI knew there were "missing" records pertaining to the spectrographic testing, notably the spectrographic plates and "the notes made therefrom." Had this Court not distrusted Kilty's affidavits and remanded the case, the fact of these missing records would still remain concealed. Today, because of the facts developed on remand, there is even less reason for trusting Kilty's affidavits.

C. FBI Has Strong Motivation For Not Locating Embarrassing Records

Appellees seek to prejudice this Court by asserting that "much of the deposition questioning . . . deal not with what tests had been performed and what documents created, but with evaluations of evidence relating to the correctness of the conclusions of the Warren Commission." [Appellees' Brief, at 4] They emphasize that the district court found that allegations as to destruction of assassination evidence and falsification of test results were irrelevant; and that it held that questions as to "whether tests ought to have been made, or even whether tests that actually were made should have culminated in the preparation of reports" were also irrelevant. [Appellees' Brief, at 7-8]

Appellees' cited no specifics to support their characterization of the deposition questioning. The depositions, which have been reproduced in their entirety as Volume II of the Appendix, show that the focus of the questioning was always on whether tests were or should have been performed and did result or should have resulted in the creation of records. Weisberg contends, however, that he could not begin with the preconception that the Commission concluded in opposition to FBI reports and other records, and that some inquiry into the basis for Commission's conclusions was necessary in order to determine whether those conclusions were founded upon records not provided him, or to establish that, given the nature of the evidence, certain tests and examinations were called for and should have been made, with the results preserved in some form of record. In addi-

tion, Weisberg contends that questions as to whether tests should have been performed and records on them created and kept are indeed relevant to the FBI's denials that such tests were done or that records on them were made and preserved. Particularly where the assassination of the President is concerned, it cannot be presumed that the FBI didn't do what it should have done.

The FBI has an exceptionally strong motivation for not conducting a thorough search of all records sought by Weisberg. A prime example of this is the missing spectrographic plates and notes on the testing of the curbstone allegedly struck by bullet. The FBI's so-called definitive five volume report on the assassination completely omitted any mention of the "missed shot" associated with this curbstone. The FBI pretended for months that it could not find the curbstone. [See July 1, 1975 Weisberg Affidavit, ¶¶42-59, App. 73-78] However, in August, 1964, at the specific insistence of the Warren Commission, the FBI at long last located the curbstone and subjected it to spectrographic analysis. On the FBI's representation that the testing disclosed metal smears which "were spectrographically determined to be essentially lead with a trace of antimony," the Warren Report found that:

> *The mark on the curb could have originated from the lead core of a bullet but the absence of copper precluded "the possibility that the mark on the curbing section was made by an unmutilated military full metal-jacketed bullet such as the bullet from Governor Connally's stretcher."*
> Warren Report, p. 116.

The Warren Report thus concluded that "the evidence indicated that a bullet fragment did hit the street." Ibid.

The evidence clearly indicates, however, that what was once a fresh chip, scar or hole in the curbstone has since been altered. Where photographs taken at the time of the assassination show a portion of concrete missing and the lighter color of the previously unexposed concrete, there is now a perfectly smooth surface which is darker rather than lighter and of a different shape. [See July 28, 1977 Weisberg Affidavit, ¶¶177-197; App. 156-162. See also Tague Affidavit, App. 254-280]

Weisberg has charged that the chip in the curbstone was patched and that the FBI knew it. [See October 15, 1977 Weisberg Affidavit, ¶¶125-131; App. 331-333] Additional evidence on this point was obtained after the appeal in this case was taken. It is, therefore, not in the record of this case. However, Weisberg would make an offer of proof based on an August 5, 1964 FBI report which states in pertinent part:

> *Additional investigation conducted concerning mark on curb on south side of Main Street near triple underpass, which it is alleged was possibly caused by bullet fired during assassination. No evidence of mark or nick on curb now visible. Photographs taken of location where mark once appeared . . .. (Emphasis added)* [See Addendum 1]

It is apparent, therefore, that the FBI tested a specimen which it knew had been altered and was no longer relevant to the actual assassination shooting. It did not tell the Warren Commission this. Nor did it inform anyone else of this drastic alteration of evidence. This is abundant reason for the FBI not to locate "missing" spectrographic plates and notes which might further manifest the nature of the fraud.

III. OFFER OF PROOF WITH RESPECT TO EXISTENCE OF RECORDS

Appellees frequently assert that records sought by Weisberg which did exist were either "destroyed as duplicative" or "discarded in periodic housecleanings." [Appellees' Brief, at 11-12, 14, 20-22] There is no first-hand testimony to this effect, however, and the district court quashed depositions which Weisberg sought to take which would have addressed the closely related issues of the existence of records and the adequacy of the file search. Weisberg did point out, however, that the only spectrographic plate said to be missing is the one on the curbstone, and that no space would be saved by discarding it.

Very recently Weisberg obtained documentary evidence which bears directly on the existence or records he has not received and the alleged destruction of some such records. On the basis of these documents, Weisberg would make an offer of proof that:

1. As noted in a July 19, 1965 FBI memorandum, the FBI Laboratory made a review of "various Laboratory reports and other documents" and "carefully scrutinized the 202-page listing of documents submitted for our review." [Addendum 2]

2. That on August 1, 1969, in accordance with the October 31, 1966 order of Attorney General Ramsey Clark that the national interest required that the entire body of evidence considered by the Warren Commission and then in the possession of the United States be preserved intact (31 Feceral Register No. 212, Nov. 1, 1966), the Special Agent in Charge of the Dallas Field Office was in-

structed that "all bulky exhibits and evidence" in specified files on the assassination of President Kennedy "should be indefinitely retained." [Addendum 3]

3. That a January 31, 1973 memorandum reflects that the Dallas Field Office was again advised to retain its bulky exhibits on the Kennedy assassination and reference was made to "the semi-annual inventory of Bulky Exhibits." [Addendum 4]

4. That a January 7, 1977 teletype from the Dallas Field Office provided an inventory of its files on the Kennedy assassination and stated: "No known materials relative to . . . the above listed files related to the John F. Kennedy assassination have been destroyed under the destruction of files and records program." [Addendum 5]

5. That a February 15, 1969 memorandum to the Dallas SAC reports on the finding of a bullet in the vicinity of Commerce Street and the Stemmons Freeway which the finder said "appeared to have ricocheted off of something" and which he suggested might be the third bullet in the assassination of President Kennedy; but that Weisberg has not been provided with any records regarding the testing of this bullet. [Addendum 6]

These newly obtained records cast the severest doubt on claims that vitally important records on the testing of Kennedy assassination evidence were destroyed or discarded. In addition, Weisberg points out that he initially requested spectrographic records on May 23, 1966 and that there has been virtually continuous litigation

on this matter since 1970. If destroyed after Weisberg's request was made, then this was done in violation of Departmental regulations. In addition, if destroyed, there should be a record of that fact. Appellees submitted none to the district court.

CONCLUSION

On remand Weisberg established that records were created that have not been given him. A partisan court peremptorily cut short Weisberg's discovery so he could not test whether an adequate search was made for extant records. The court then threw out the case.

Many of the district court's findings are plainly erroneous, others highly suspect. Lack of space has precluded Weisberg from addressing each of these errors, many of which are repeated in appellees' brief. Instead, Weisberg has focused on the central issue: there is no competent evidence of a thorough search for records that there is every reason to believe are still extant. The adequacy of the file search is a disputed issue of material fact precluding summary judgment. Weisberg also should have been allowed to undertake discovery on the nature of the file search. The government's opposition to this is evidence that it is more interested in grinding Weisberg up in endless litigation than it is in resolving this case on its merits. For these reasons, the decision below should be reversed.

Respectfully submitted,

James H. Lesar
910 16th Street, N.W.
Washington, D.C. 20006

Attorney for Appellant

ADDENDUM

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

ADDENDUM 1

Copy to:

Report of: ROBERT P. GEMBERLING
Date: 8/5/64

Office: DALLAS

Field Office File No.: DL 100-10461

Bureau File No.: 105-82555

Title: LEE HARVEY OSWALD

Character: INTERNAL SECURITY - RUSSIA - CUBA

Synopsis:

CLOTILE WILLIAMS heard assassination shots while standing on northwest corner of Houston and Elm Streets, Dallas, Texas, but did not see anything that aroused her suspicion and did not know from where the shots came. Supplemental listing of exhibits by item number and description prepared. Additional investigation conducted concerning mark on curb on south side of Main Street near triple underpass, which it is alleged was possibly caused by bullet fired during assassination. No evidence of mark or nick on curb now visible. Photographs taken of location where mark once appeared, together with other photographs reflecting angle of such location in relation to the sixth floor window of the Texas School Book Depository (TSBD) from which assassination shots fired. Photographs also taken from inside sixth floor of TSBD southeast corner window from which assassination shots fired, showing distance between floor and window sill and height of opening in the window when window half open. Photographs taken of person approximate height of OSWALD showing relative position of window ledge and window to such person. Photographs taken at Methodist Hospital of Dallas of bone specimen allegedly from skull of President KENNEDY obtained. Additional investigation conducted with negative results concerning claim by Mrs. EDITH WHITWORTH that she directed OSWALD family to Irving Sports Shop, Irving, Texas, in early November 1963, which investigation consisted of interviews of certain parents of female babies born 10/20/63, in the Irving and Dallas, Texas, area to determine if they were the individuals

105-82555-458-4

ADDENDUM 2

ROUTE IN ENVELOPE

July 19, 1965

SECRET

TO: Inspector J. R. Malley

RE: COMMISSION DOCUMENTS ORIGINATING IN THE BUREAU
PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY

In connection with the pending review of documents originating in the Bureau that were submitted in connection with this matter looking toward public disclosure, the Laboratory has completed a review of the copies maintained of various Laboratory reports and other documents prepared in the Laboratory. In addition, the Laboratory has carefully scrutinized the 202-page listing of documents submitted for our review. Based upon these reviews two items were noted that should be withheld from public disclosure as follows:

[redacted]

Enclosures (2)

REC 45 62-109090-466 (3)

- Mr. Sullivan (Mr. Stokes, Room 6M RB) (enc - 3)
- Mr. Raupach, Room 5716
- Mr. Griffith

AUG 23 1965

62-109090

Classified by 2040
Exempt from GDS, Category 1, 2, 3
Date of declassification Indefinite
EFG/ak 1/10/78

[redacted] (S)

Copies of the two sensitive Laboratory reports are enclosed for General Investigative Division and Domestic Intelligence Division. U

No other patently objectionable documents were noted; however, for possible assistance and guidance of the other divisions conducting reviews, the following three items of possible significance were noted: U

[redacted] (S)

3. Laboratory report dated 7/8/64, CR-12614 KA. The result of this examination is the decryption of two personal letters in Braille. The letters are answers to communications sent by an apparently mentally deranged blind person and do not deal directly with the Oswald matter. There is no question of cryptanalytic sensitivity, it is rather a question of personal aspects of the source of this material, which we are not in a position to evaluate. U

J. W. Conrad

ADDENDUM 3

SAC, DALLAS (100-10461) (C) 8/1/69

SA ROBERT P. GEMBERLING

LEE HARVEY OSWALD, aka.
IS - R - CUBA
DL file 100-10461 (C)

ASSASSINATION OF PRESIDENT JOHN FITZGERALD KENNEDY,
11/22/63, DALLAS, TEXAS
MISCELLANEOUS - INFORMATION CONCERNING
DL file 89-43 (P*)

In view of continued correspondence and inquiries from time to time necessitating acknowledgement and also in view of Public Law 89-318 relating to items of evidence obtained in captioned investigations to be designated by the Attorney General for preservation by U. S., all bulky exhibits and evidence in these cases should be indefinitely retained.

1 - 100-10461
1 - 89-43
RPG:
(2)

89-43-905
SEARCHED INDEXED
SERIALIZED FILED
AUG 1 1969
FBI — DALLAS

ADDENDUM 4

UNITED STATES GOVERNMENT

Memorandum

TO : SAC, J. GORDON SHANKLIN (100-10461) DATE: 1/31/73

FROM : SA ROBERT P. GEMBERLING

SUBJECT: LEE HARVEY OSWALD, aka
IS - R - CUBA

OO: DALLAS

There is still being retained in the Dallas Office considerable material gathered in this investigation and maintained in the Bulky Exhibits of the Dallas Office. The inventory of Bulky Exhibits reflects such evidence.

All such material should continue to be retained in the Dallas Office due to the magnitude and importance of this matter and because we still receive frequent inquiries both from the Bureau and from private citizens necessitating much research in this case.

ACTION: Route to Clerk [redacted] in connection with the semi-annual inventory of Bulky Exhibits.

(1) - Dallas
RPG:lls

100-10461-9307

ADDENDUM 5

FBI

Date: 1/7/77

Transmit the following in _____ (Type in plaintext or code)

Via TELETYPE (Precedence)

563

FM DALLAS (89-43) (P)

TO DIRECTOR (62-117290) PRIORITY

BT

E F T O

ATTN: GENERAL INVESTIGATIVE DIVISION, CIVIL RIGHTS SECTION, CONGRESSIONAL INQUIRY UNIT.

HOUSE SELECT COMMITTEE ON ASSASSINATIONS.

RE BUREAU TELETYPE TO ALL SACS, JANUARY 6, 1977.

RESULTS OF FILE INVENTORY, DALLAS DIVISION, AS FOLLOWS:

1. ASSASSINATION OF PRESIDENT JOHN FITZGERALD KENNEDY, DALLAS, TEXAS, NOVEMBER 22, 1963, MISCELLANEOUS - INFORMATION CONCERNING. OO: DALLAS, BUREAU FILE 62-109060. DALLAS FILE 89-43.

THE DALLAS OFFICE IS OFFICE OF ORIGIN IN CAPTIONED CASE.

THIS FILE CONSISTS OF 122 VOLUMES, INCLUDING NINE VOLUMES OF NEWSPAPER CLIPPINGS. THE 122 VOLUMES CONTAIN 9930 SERIALS, WITH MANY INDIVIDUAL SERIALS CONTAINING NUMEROUS PAGES. THE

1 - Dallas
UHS:bjw
(1)

89-43-4458

Approved: _____ Sent 1830Z M Per _____

Special Agent in Charge

FBI

Date:

Transmit the following in _____ (Type in plaintext or code)

Via _____ (Precedence)

DL 89-43 PAGE TWO

ABOVE VOLUMES ARE APPROXIMATELY 13 LINEAR FEET IN SIZE. THIS FILE ALSO CONTAINS 301 EXHIBITS WITH MANY INDIVIDUAL EXHIBITS CONTAINING NUMEROUS PHOTOGRAPHS AND OTHER DOCUMENTS. THE EXHIBITS ARE APPROXIMATELY TWO LINEAR FEET IN SIZE.

2. LEE HARVEY OSWALD, AKA; INTERNAL SECURITY - RUSSIA - CUBA. OO: DALLAS. BUREAU FILE 105-82555, DALLAS FILE 100-10461.

THE DALLAS OFFICE IS OFFICE OF ORIGIN IN CAPTIONED CASE.

THIS FILE CONSISTS OF 105 VOLUMES, INCLUDING SIX VOLUMES OF TRANSLATIONS, THREE VOLUMES OF INVENTORY WORKSHEETS, AND ONE VOLUME OF OSWALD WRITINGS. THE 105 VOLUMES CONTAIN 9360 SERIALS, WITH MANY INDIVIDUAL SERIALS CONTAINING NUMEROUS PAGES. THE ABOVE VOLUMES ARE APPROXIMATELY 13 LINEAR FEET IN SIZE. THIS FILE ALSO CONTAINS 498 EXHIBITS, MANY INDIVIDUAL EXHIBITS CONTAINING NUMEROUS PHOTOGRAPHS AND OTHER DOCUMENTS. THESE EXHIBITS ARE APPROXIMATELY 2½ LINEAR FEET IN SIZE. IN ADDITION TO THE ABOVE EXHIBITS, ADDITIONAL BULKY EXHIBITS CONTAINING NUMEROUS PHOTOGRAPHS AND OTHER DOCUMENTS AS WELL AS COPIES OF WARREN COMMISSION EXHIBITS ARE LOCATED IN A SECURE METAL CABINET WITH THE TOTAL VOLUME OF THESE EXHIBITS BEING

Approved: _____ Sent _____ M Per _____
Special Agent in Charge

GPO : 1978 O - 969-883

FD-36 (Rev. 2-14-74)

FBI

Date:

Transmit the following in _____ (Type in plaintext or code)

Via _____ (Precedence)

DL 89-43 PAGE THREE

APPROXIMATELY 15 CUBIC FEET.

3. MARINA NIKOLAEVNA PORTER, AKA, MARINA OSWALD, IS-R, OO: DALLAS, BUREAU FILE 105-126032, DALLAS FILE 105-1435.

THE DALLAS OFFICE IS OFFICE OF ORIGIN IN THIS CASE. THIS FILE CONSISTS OF ONE VOLUME CONTAINING 182 SERIALS. THIS FILE CONTAINS FOUR EXHIBITS IN THE SUB A SECTION.

4. JACK L. RUBY, AKA; LEE HARVEY OSWALD (DECEASED) - VICTIM. CR. BUREAU FILE 44-24016, DALLAS FILE 44-1639.

THE DALLAS OFFICE CONDUCTED THE PRIMARY SUBSTANTIVE INVESTIGATION IN CAPTIONED CASE. THIS FILE CONSISTS OF 94 VOLUMES, INCLUDING SEVEN VOLUMES OF NEWSPAPER CLIPPINGS. THESE 94 VOLUMES CONTAIN 6455 SERIALS, WITH MANY INDIVIDUAL SERIALS CONTAINING NUMEROUS PAGES. THE ABOVE VOLUMES ARE APPROXIMATELY 11 LINEAR FEET IN SIZE. THIS FILE ALSO CONTAINS 186 EXHIBITS, WITH MANY INDIVIDUAL EXHIBITS CONTAINING NUMEROUS PHOTOGRAPHS AND OTHER DOCUMENTS. THE EXHIBITS ARE APPROXIMATELY FIVE LINEAR FEET IN SIZE.

5. THE PRESIDENTS COMMISSION ON THE ASSASSINATION OF

Approved: _____ Special Agent in Charge Sent _____ M Per _____

GPO : 1975 O - 569-929

3-36 (Rev. 2-14-74)

FBI

Date:

Transmit the following in _____
(Type in plaintext or code)

Via _____
(Precedence)

DL 89-43 PAGE FOUR

PRESIDENT KENNEDY. BUREAU FILE 62-109090. DALLAS FILE 62-3588.

THE DALLAS OFFICE SUBMITTED ROUTINE COMMUNICATIONS. A REVIEW OF THE 26 VOLUMES CONTAINING THE RESULTS OF HEARINGS BEFORE THE PRESIDENTS COMMISSION IS SET FORTH IN THIS FILE. THIS REVIEW WAS CONDUCTED BY SAS OF THE DALLAS OFFICE.

THIS FILE CONSISTS OF TWO VOLUMES CONTAINING 189 SERIALS. THE ONLY EXHIBITS IN CONNECTION WITH THIS FILE ARE BOOKS DEALING WITH THE PRESIDENTS COMMISSION AND TWO AFFIDAVITS FROM SAS OF THE FBI.

[redacted]

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Approved: _____ Sent _____ M Per _____
Special Agent in Charge

GPO : 1975 O - 569-929

D-36 (Rev. 2-14-74)

FBI

Date:

Transmit the following in _____
(Type in plaintext or code)

Via _____
(Precedence)

DL 89-43 PAGE FIVE

[redacted]

b7E

FOR THE ADDITIONAL INFORMATION OF THE BUREAU, THE DALLAS OFFICE HAS ESTABLISHED A SPECIAL JOHN F. KENNEDY ASSASSINATION FILES INDICES CONSISTING OF APPROXIMATELY 40 LINEAR FEET OF 3" BY 5" INDEX CARDS. THESE INDEX CARDS ARE MAINTAINED SEPARATE FROM THE GENERAL INDICES. ALSO ESTABLISHED WAS A SPECIAL COMMUNICATIONS INDEX IN THE EARLY MONTHS OF THE JFK ASSASSINATION INVESTIGATION CONSISTING OF APPROXIMATELY 2½ LINEAR FEET OF 5" BY 8" INDEX CARDS WHICH ARE ALSO MAINTAINED SEPARATE FROM THE GENERAL INDICES.

NO KNOWN MATERIAL RELATIVE TO THE MARTIN LUTHER KING, JR. ASSASSINATION (MURKIN) AND THE ABOVE LISTED FILES RELATED TO THE JOHN F. KENNEDY ASSASSINATION HAVE BEEN DESTROYED UNDER THE DESTRUCTION OF FILES AND RECORDS PROGRAM.

BT

#

Approved: _____ Sent _____ M Per _____
Special Agent in Charge

GPO : 1975 O - 569-929

ADDENDUM 6

UNITED STATES GOVERNMENT

Memorandum

TO: SAC, DALLAS (89-43) DATE: 2/15/69

FROM: SA ALFRED C. ELLINGTON

SUBJECT: ASSASSINATION OF PRESIDENT
JOHN FITZGERALD KENNEDY,
NOVEMBER ~~XXXX~~ 22, 1963,
Dallas, Texas

MISCELLANEOUS INFORMATION CONCERNING

On this date, REX M. OLIVER, 5810 Phoenix Drive, telephone EM 8-2130, contacted the Dallas Office by telephone, and advised he is employed by the Texas Highway Department, and was so employed during October and November, 1968. During this period, (October or November, 1968) while he was working in the vicinity of Commerce Street and Stemmons Freeway, "at the Commerce Street entrance to North Stemmons Freeway", he found a bullet "which appeared to have ricocheted off of something".

He said he picked up this bullet and put it in his pocket and has had it in his possession since that time. He said the bullet was "somewhat corroded, as if it had been in the weather for a long time". He said he mentioned his finding of the bullet to his engineer, who suggested it may be the "third bullet" which he had heard about in connection with the assassination of President KENNEDY, since he found it "in just about the right spot".

Mr. OLIVER said he has been trying to ~~get~~ contact "MR. GARRISON, in New Orleans" ~~for~~ for about the last 2 or 3 weeks, but has been unsuccessful, and desires to furnish this bullet to the FBI "if you want it".

He said ~~xhx~~ he is currently working on Highway 114, near Highway 183, and can be reached through the Texas Highway Department field office in that area, BL 4-3556.

Mr. OLIVER said he does not know what caliber this ~~xxxx~~ bullet is, but that the ~~xxxxxxxxxxx~~ "front" of the bullet is the only damaged portion, and he feels the caliber can be ~~xxx~~ easily determined by someone "who knows something about it".

89-43-8849

SEARCHED ____ INDEXED ____
SERIALIZED ____ FILED ____
FEB 15 1969
FBI — DALLAS

1A279
1A280

2- 89-43
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