IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Appellant v. U.S. DEPARTMENT OF JUSTICE, ET AL., Appellees	)	Case No. 78-1107

MEMORANDUM REGARDING ORDER OF THE COURT

Pursuant to this Court's Order of March 7, 1978, it is the position of the appellant, Mr. Harold Weisberg, that the record in this case can and should be remanded before a decision on the merits in order to allow the District Court to consider the effect, if any, the materials now proffered by Weisberg would have had upon its judgment. In addition, Weisberg submits that an even more appropriate and just disposition of this appeal would be to decide the merits on the basis of an augmented record without remand to the District Court.

According to this Court's opinion of July 7, 1976, the issue before the District Court upon the first remand was the "existence or nonexistence" of the records sought by Weisberg, "matters of interest not only to him but to the nation." Weisberg v. U.S. Department of Justice, 543 F.2d 308, 311 (D.C. Cir. 1976). On remand, the District Court granted summary judgment for appellees (the "Government"), finding essentially that all relevant extant records had been furnished to Weisberg and

that other records requested by him "do not exist". The finding that certain records "do not exist" was based in part upon the imprecise recollections of three former and one present FBI agents who testified upon deposition that certain records never existed and in part upon the inference that other records were destroyed or discarded, most notably records relating to spectrographic testing of a metallic "smear" on the "Dealy Plaza Curbstone". See 438 F.Supp. at 503-504. Subsequent to the District Court's Order of October 4, 1977 and during the pendency of this appeal therefrom, the Government furnished documents to Weisberg indicating that records which it had said were destroyed in fact were not and could not have been destroyed. These same documents also contain information which suggests a motive for the Government's failure to produce the records sought in this lawsuit. In light of this development, this Court should, at the very least, exercise its remand powers under 28 U.S.C. §2106 to give the District Court the opportunity to reconsider its former holding.

At the outset, it should be noted that the evidence now proffered by Weisberg could not, in the exercise of due diligence, have been discovered by him prior to the District Court's October 4, 1977 judgment and order. One record is from the FBI Headquarters file on the JFK Assassination. That file was made available to Weisberg only as a result of a court order of January 16, 1978 in Weisberg's lawsuit to

obtain the file, Weisberg v. Bell, C.A. No. 77-2155. Other proffered records are from the Dallas Field Office files in the JFK case and were not furnished to Weisberg until the summer of 1978 as a result of a lawsuit for such files instituted by Weisberg on February 24, 1978. Weisberg v. Federal Bureau of Investigation, C.A. No. 78-0322. In addition, another group of Headquarters files described in Weisberg's affidavit of January 9, 1979 were not furnished to Weisberg until January 5, 1979.

The relevance and potential impact of the materials proffered by Weisberg are unmistakable. Although these materials are relevant to virtually all of the Government's representations and the District Court's findings in this case, this relevance can best be understood by focusing upon one specific area--records relating to the curbstone.

According to an internal FBI memorandum of June 16, 1975, a search of unspecified dimension "has not turned up the spectrographic plates nor the notes made therefrom" regarding the metallic "smear" on the curbstone. (App. 191) This spectrographic examination had been conducted by Special Agent William R. Heilman, now retired. Weisberg did not have an opportunity to depose Heilman, contrary this Court's mandate that depositions be permitted of "the witnesses who had personal knowledge of events at the time the investigation was made."

Weisberg v. Department of Justice, supra., 543 F.2d at 311.[1] Instead, the District Court relied upon a hearsay representation that "Heilman believes [the spectrographic plate] was discarded in the course of one of the laboratory's periodic housecleanings." 438 F.Supp. at 504 (emphasis added). The Government has emphasized this finding in its brief and has, for example, assured this Court that:

> . . . the proceedings and findings on remand demonstrated that the appellees had overwhelmingly complied with appellant's FOIA requests in 1975 to the extent possible and that other documents sought by appellant did not exist: they either had never been created or they had been destroyed as duplicative or as part of regular housecleaning.

Brief for Appellees at 14 (emphasis added). Significantly, the Government has produced no direct evidence that any records sought by Weisberg have been destroyed but rather has relied on inference and innuendo in support of this representation.

The materials proffered by Weisberg seriously challenge the veracity of the Government's representations and the District Court's conclusion that some of the records sought by Weisberg have been destroyed.[2] The proffered materials

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1/ The District Court stated incorrectly that "[a]t a hearing on March 30, 1977, counsel for [Weisberg] indicated that no further depositions of FBI employees who had participated in the Bureau's investigation were planned." 438 F.Supp. at 495. See Brief for Plaintiff-Appellant at 29 n. 7.

2/ In this connection, this Court can take judicial notice of a publication dated August 1978 by the FBI Records Management Division entitled FBI Central Records System. This publication, at pages 25 ff., describes the criteria for destruction of FBI investigative files and sets forth the requirement that authority be obtained prior to destruction of records. The publication further notes: "It is interesting that the FBI has never destroyed an investigative matter of substance." (Emphasis in original.)

would establish the following:

1. That in the summer of 1965 the FBI Laboratory made a review of "various Laboratory reports and other documents prepared in the Laboratory" (emphasis added) in connection with a pending review to determine which documents should be withheld from public disclosure.

2. That on August 1, 1969, the Special Agent in Charge of the Dallas Field Office was instructed that "all bulky exhibits and evidence in these cases should be indefinitely retained." The instruction expressly stated that it was in accordance with the October 31, 1966 order of then 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 Federal Register No. 212, November 1, 1966).

3. That on January 31, 1973, the Dallas Field Office was again instructed to retain "the considerable material gathered in this investigation . . . due to the magnitude and importance of this matter and because we still receive frequent inquiries both from the Bureau and from private citizens . . . ."

4. That on January 7, 1977, the Dallas Field Office informed the Justice Department, via teletype, that "[n]o known materials relative to . . . the above listed files related to the John F. Kennedy assassination have been destroyed under destruction of files and records program."

These records directly contradict the Government's representation that the spectrographic plate of the curbstone "smear" has been destroyed and suggest that the Government is not in compliance with the FOIA with respect to this plate and the notes made therefrom.[3/]

An additional record proffered by Weisberg strongly suggests the Government's motive for withholding materials relevant to the curbstone. Specifically, the record in this case already contains evidence indicating that the original nick on the curbstone made by a projectile during the assassination was "patched" over prior to the removal of the curbstone by the FBI in July 1964. If this is so, regardless of who "patched" the nick or why, then the FBI could not have spectrographically examined the original nick in the curb and the lead smear actually subjected to spectrographic examination by the FBI was not in fact caused during the assassination. This, in turn, would mean that the information about the curbstone furnished to the Warren Commission by the FBI was not legitimate. Among the materials now proffered by Weisberg is an August 5, 1964 synopsis by the case supervisor in an FBI report which establishes that, prior to making its

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3/ In its "Opposition to Appellant's Motion for Leave to File Reply Brief With Addendum" dated December 27, 1978, the Government disputes the implications of this proffered material, in part, by stating that "[t]here is no indication that these memoranda have anything to do with the retention of scientific test results generated in the FBI Laboratory in Washington" and, further, that there is no indication "that the FBI Laboratory in Washington would have sent any raw test results to the Dallas office." The proffered evidence on its face belies this contention. In addition, Headquarters files not disclosed to Weisberg until January 5, 1979, reveal that data relating to scientific testing generated in the FBI's Washington Laboratory was routinely sent to the Dallas Field Office along with all other relevant data. See Weisberg Affidavit of January 9, 1979, ¶¶23-25.

spectrographic examination, the FBI knew that the original nick in the curbstone had vanished:

> 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).

If this recital is accurate, then the FBI tested a metallic smear which it knew was not the one made during the assassination and reported its findings to the Warren Commission without disclosing this fact. At the very least, these circumstances, if true, would be a source of embarrassment to the FBI and would suggest a powerful motivation for withholding records relating to the spectrographic examination of the curbstone "smear".

In addition, the proffered materials include a February 15, 1969 memorandum from the Dallas Field Office files which discloses that a bullet which "appeared to have ricocheted off of something" had been found in Dealey Plaza. Regardless of whether this bullet was or is even likely to have been connected with the assassination, it is reasonable to state that the FBI should have subjected it to various examinations, including spectrographic, to evaluate its authenticity. Weisberg has not been provided with any records regarding the testing of this bullet, nor has he been assured that a search for such records has been made and that none have been found.

In spite of the fact that Weisberg's request for records relating to spectrographic examinations has been pending since May 23, 1966, the Government did not disclose the proffered materials to Weisberg until after the District Court's October 4, 1977 decision in this case. These materials are vital to Weisberg's case and should have been considered by the District Court which, in their absence, appears to have made erroneous findings of fact.[4/] In interests of justice, fairness and preserving the integrity of litigation in the federal courts, this Court should, at the very least, exercise its broad authority under 28 U.S.C. §2106 to remand the record in this case to allow the District Court to reconsider its earlier holding.

As requested by this Court in its March 7, 1979 Order, this memorandum will focus upon the authority of this Court and the District Court under 28 U.S.C. §2106, Fed. R. Civ. P. 60(b), and Carr v. District of Columbia, 543 F.2d 917 (D.C. Cir. 1976).

1. 28 U.S.C. §2106.

This Court's appellate jurisdiction includes the power to "remand the cause and . . . require such further proceedings

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4/ This, of course, is in addition to erroneous findings of fact made by the District Court and apparent on the basis of the record before the Court, as discussed in Brief for Plaintiff-Appellant and Reply Brief for Plaintiff-Appellant, passim.)

to be had as may be just under the circumstances." 28 U.S.C. §2106 (1970). As this Court noted in Gomez v. Wilson, 477 F.2d 411, 417 (D.C. Cir. 1973), "[t]his broad authorization clearly encompasses remands for the purpose of . . . taking additional evidence . . . ."

This Court has recognized that exercise of this broad power to remand is appropriate in an FOIA case where "a substantial change in the factual context of the case" appears for the first time during the pendency of the appeal. See Jordan v. U.S. Department of Justice, D.C. Cir. No. 77-1240, decided October 31, 1978, Slip Op. at 56-57. In addition, the Supreme Court has indicated that the broad remand power granted by §2106 must be exercised where information disclosed during the pendency of an appeal suggests that a party has perpetrated a fraud upon the court or courts below. In United States v. Shotwell Manufacturing Co., 355 U.S. 233 (1957), the Court stated:

> It is obvious that the Government's new evidence casts the darkest shadow upon the truthfulness of the disclosure testimony given by or on behalf of the respondents in the District Court . . . . Were we to undertake to review the Court of Appeals upon a record as suspect as this, we might very well be lending ourselves to the consummation of a fraud which may already have made the Court of Appeals its unwitting victim. In these circumstances it is imperative that the case be remanded to the District Court for a full exploration of where the truth lies before the case is allowed to proceed further. The integrity of the judicial process demands no less. 355 U.S. at 240-41 (Emphasis added).

As in Shotwell, Weisberg's proffered and other new evidence "casts the darkest shadow upon the truthfulness" of the

Government's representation to this Court and to the District Court that certain records were routinely destroyed. At the same time that it made these representations, the Government withheld from both Courts and from Weisberg evidence of directives to preserve FBI assassination records and certification that such records in fact had not been destroyed. Surely, the "integrity of the judicial process demands no less" than the remanding of the record in this case "for a full exploration of where the truth lies."

2. Fed. R. Civ. P. 60(b)

Although the one year limitations period for some motions under Rule 60(b) has elapsed, the Rule contains a saving clause for "fraud upon the court" which is not subject to any time limitation. Rule 60(b) provides: "This rule does not limit the power of a court . . . to set aside a judgment for fraud upon the court." See Dausel v. Dausel, 90 U.S. App. D.C. 275, 195 F.2d 774 (1952). As used in the rule, "fraud upon the court" includes "the fabrication of evidence by a party in which an attorney is implicated . . ." United States v. International Telephone & Telegraph Corp., 349 F.Supp. 22, 29 (D. Conn. 1972), affirmed without opinion, 410 U.S. 919 (1973). See also United States v. Standard Oil Co. of Calif., 73 F.R.D. 612, 615 (N.D. Cal. 1977). In the instant case, the discrepancies between the proffered evidence and the representations made by the Government constitute at least a

prima facie case that the Government has fabricated evidence. Under these circumstances, a motion under Rule 60(b) seeking relief from a judgment obtained through fraud upon the court may properly be entertained by the District Court, and this Court would be warranted in remanding the record for such purpose. See Smith v. Pollin, 194 F.2d 349, 350 (D.C. Cir. 1951).

It should be noted that, given this Court's power to "require such further proceedings to be had as may be just under the circumstances," 28 U.S.C. §2106, a remand ordered by this Court does not necessarily have to be based upon the District Court's power under Rule 60(b). A district court's power to reconsider its earlier judgments pursuant to motions under Rule 60(b) is in addition to its power to conduct "further proceedings" ordered by the Court of Appeals pursuant to §2106.

3. Carr v. District of Columbia

On its face, this Court's decision in Carr v. District of Columbia, 543 F.2d 917 (D.C. Cir. 1976) is inapposite to the instant case. The key distinguishing factor in Carr was that appellant's newly discovered evidence related to a matter which had not been at issue in the case as tried before the District Court. "As a result, there was no effort to build a foundation in the record for judicial consideration, either in the District Court or here, of the hypothesis which appellants now advance." Id. at 921. In Carr, this Court concluded:

"If appellants are to litigate their newly-found theory, it must be done in another lawsuit." Id. at 922. The instant case is immediately distinguishable in that the newly discovered evidence here goes to the very heart of Weisberg's case, both in the District Court and on appeal. Whereas in Carr all parties had believed that the United States owned a particular tract of land and had acted accordingly, in this case the parties have long been in dispute as to the existence or nonexistence of records sought by Weisberg. Indeed, the question of existence or nonexistence of records was the central issue in the case as defined by this Court in its initial remand. Hence, Carr is not controlling here.

Carr is inapposite for yet another reason. In Carr, this Court affirmed the judgment appealed from "but without prejudice to an independent action by appellants for relief therefrom." 543 F.2d at 929. A similar resolution of the instant case would be manifestly unjust given the delay and expense inherent in an "independent action." Weisberg's initial reuqest for the records he seeks was made more than twelve years ago. The result of the initial round of litigation involving this FOIA request--in which Weisberg did not prevail--was legislatively overruled in 1974. The second round of litigation began in 1975 and has already been the subject of one remand by this Court. Given Weisberg's age (66), the

financial burden to which this litigation has subjected him, the precarious state of his health, the unique credentials he possesses as an expert on this subject, and the important national interest he is serving, the further delay of an "independent action" cannot be justified.[5/]

In closing, it should be stressed that this Court may reverse the judgment of the District Court on the basis of either the current or an augmented record, without the need to remand the record for the limited purposes discussed above. Of course, if this Court agrees with Weisberg that reversal is required on the basis of the current record, it need not consider the newly discovered evidence. If, however, this Court concludes that reversal cannot be justified except by reference to the proffered materials, it may, in the interests of justice, order the record enlarged to include materials which were not before the District Court. Rule 10(e), Fed. R. App. Pro.; Turk v. United States, 429 F.2d 1327 (8th Cir. 1970).

As noted above, any procedure which further delays a final resolution of this case works an unfairness against Weisberg and the national interest he is serving through this lawsuit. In addition, delay subverts one of the crucial purposes of the FOIA, which was intended not only to make more

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5/ If this Court should disagree on this point and affirm without prejudice to an independent action by Weisberg, it would be necessary at least to relieve Weisberg from that portion of the District Court's Memorandum Opinion which states: "If plaintiff has any further recourse, it is not under FOIA." 438 F.Supp. at 504.

governmental information available, but to do so promptly. The 12 year delay involved in this case has already made a mockery of the promptness requirement and further delay can only compound the tragedy. Weisberg is concerned, and hopes that this Court shares his concern, that the Government not be permitted to create delays which virtually negate the FOIA by withholding relevant information until after district courts in FOIA cases have entered judgment and closed the record. Especially in light of its awareness of the new evidence described herein, this Court can help alleviate such subversion of the FOIA in this case by disposing of the appeal in Weisberg's favor without a time-consuming remand of the record.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this ____ day of March, 1979, mailed a copy of the foregoing Memorandum Regarding Order of the Court to Mr. John H. Korns, Assistant United States Attorney, D.C. Superior Court Building, Washington, D.C. 20001.

James H. Lesar