UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

FILED NOV 29 1978

GEORGE A. FISHER

HAROLD WEISBERG, Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
et al., Appellees.

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M-29

MOTION FOR LEAVE TO FILE APPELLEES' PRINTED BRIEF, TIME HAVING EXPIRED

Appellees respectfully move for leave to file their printed brief in this case, time having expired.

Appellant and appellees originally filed their briefs in Xerox form prior to appellant's filing of a deferred appendix. Appellees filed a motion for leave to file their brief in Xerox form pending receipt of the deferred appendix. Appellant filed its deferred appendix on November 7, 1978, and thus appellees' printed brief was due on November 21, 1978, pursuant to Rule 30 (c), Federal Rules of Appellate Procedure.

The Assistant United States Attorney assigned to this case has, since September, been assigned to the Felony Trial Section of this office in Superior Court. He is appearing before the Honorable Sylvia Bacon and has a heavy load of trial and other work. Through oversight, he allowed the due date for the printed brief to pass without entering the citations to the appendix and having the brief filed.

MOTION GRANTED
George A. Fisher, Clerk
By [signature]
First Deputy Clerk
DEC 4 1978

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BRIEF FOR APPELLEES

UNITED STATES COURT OF APPEALS
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UNITED STATES DEPARTMENT OF JUSTICE, et al., Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EARL J. SILBERT,
United States Attorney.

JOHN A. TERRY,
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JOHN H. KORNS,
Assistant United States Attorneys.

C.A. No. 75-226

I N D E X

TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUE PRESENTED*

In the opinion of appellees the following issue is presented:

Whether the trial court erred in granting summary judgment in this Freedom of Information Act case seeking documents relating to the FBI laboratory work in the Kennedy assassination investigation, where appellees submitted affidavits stating that no documents existed other than those already produced for appellant which were responsive to his request, this Court remanded for the taking of evidence from those with first-hand knowledge of the original laboratory investigation, on remand appellees responded to interrogatories and requests for documents, appellant deposed four present and former FBI special agents who had participated in the laboratory investigation, and the trial court made detailed specific findings on each claim by appellant, concluding that there was no genuine material issue relating to the existence of any additional documents.

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* This case was before this Court previously in Weisberg v. United States Department of Justice, 177 U.S. App. D.C. 161, 543 F.2d 308 (1976).

UNITED STATES COURT OF APPEALS
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BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

This is a Freedom of Information Act [hereinafter "FOIA"] suit filed February 19, 1975, seeking materials related to scientific and ballistics tests performed on items of evidence related to the assassination of President John F. Kennedy. Appellant sued the Department of Justice, to which he had directed requests for laboratory records of the FBI, and the United States Energy Research and Development Administration, to which he had directed requests for records of the Atomic Energy Commission [hereinafter "AEC"]. Following a dismissal by the trial court and a remand by this Court, Weisberg v. United States Department of Justice, 177 U.S. App. D.C. 161, 543 F.2d 308 (1976) [hereinafter Weisberg I], further discovery was taken by appellant pursuant to interrogatories and depositions. On October 5, 1977, the Honorable John H. Pratt

granted appellees' motion for summary judgment in a published memorandum opinion. Weisberg v. United States Dept. of Justice, 438 F. Supp. 492 (D.D.C. 1977) (hereinafter Weisberg II] (App.). This appeal followed.

Following the filing of the complaint and the delivery to appellant of a number of documents, appellees in 1975 submitted an affidavit of FBI Special Agent John W. Kilty, a supervisor in the FBI's Laboratory Division. The affidavit included the following statement:

> 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. (R. 17.)

This conclusion was reasserted in a supplemental affidavit of Kilty (R. 18).[1/] Based on these affidavits, Judge Pratt refused to order the Government to respond to interrogatories, found that the Government had complied substantially with appellant's demands and, on July 15, 1975, dismissed appellant's action as moot (R. 20). From his dismissal, appellant appealed.

1/ Appellees have not asserted in this case that any documents sought by appellant fall within the FOIA exceptions. Their position has been that they have complied fully with the request to the extent of existing documents and that other materials sought by appellant do not exist.

In Weisberg I, this Court remanded for further proceedings. The Court's opionion 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. Instead, relying on the particular national interest in the investigation of the Kennedy assassination, the Court noted that appellant had been addressing his inquiries to, and appellees had been relying on affidavits of, agents who had not participated in the original investigation years before and who were mere file custodians. It held that the existence or nonexistence of documents in this case should be determined on the basis of evidence from witnesses who had personal knowledge of the investigation. It remanded the case to the trial court with direction to allow interrogatories and depositions or trial testimony, and to make detailed findings as to the evidence adduced.

On remand appellant served interrogatories and requests for production of documents on both appellees (R. 24-27) and appellees responded (R. 29-32).[2/] Appellant also deposed four present or former FBI special agents with personal knowledge of the laboratory work in the investigation of President Kennedy's assassination: Robert A. Frazier, who had been a special agent in

2/ For a short period, appellant's request for the present home addresses of retired FBI special agents was refused because of the policy of the FBI not to give out such information, in order to avoid harrassment of retired agents. This matter was eventually worked out when appellant and his counsel agreed to receive the information in confidence for purposes of this lawsuit only.

the laboratory's firearms and toolmarks unit during the investigation and who had direct responsibility for the laboratory's efforts in the investigation (Weisberg II, 438 F. Supp. at 494-495, App.); John F. Gallagher, assigned to the laboratory's spectrographic unit during the investigation and responsible for any neutron activation analysis in the investigation (id. at 494, 499, App.); Lyndal L. Shaneyfelt, assigned as a documents examiner and photographic specialist during the investigation (id. at 494, App.); and Cortlandt Cunningham, a supervisor in the firearms and toolmarks unit during the investigation (id.). The depositions totaled approximately 300 pages. Much of the deposition questioning by appellant's counsel dealt not with what tests had been performed and what documents were created, but with evaluations of evidence relating to the assassination and inquiries as to the correctness of the conclusions of the Warren Commission.

At a status hearing on March 30, 1977, shortly after the completion of the depositions, counsel for appellant represented that the depositions showed that there were documents that had not been provided to him. Counsel for appellees asserted that, to the contrary, the depositions showed that no such additional documents existed and sought time to file a motion for summary judgment. The trial court accepted appellees' suggestion and specified a time for filing such a motion. See Transcript of

Proceedings, March 30, 1977 (R. 39).[3/]

On April 19, 1977, appellant filed a notice to take Agent Kilty's deposition, requesting that Kilty bring (1) all documents provided pursuant to appellant's FOIA request; (2) "all files searched in locating said documents, together with the documents contained in them"; and (3) all work sheets or other documents reflecting the time spent searching for documents responsive to appellant's request (R. 37). Appellant also had Kilty served with a subpoena duces tecum for the same documents. Appellees moved to quash the subpoena and for an order that the deposition of Kilty not be taken, asserting that appellant's move was burdensome because the document requests covered matters already addressed in Kilty's two affidavits and in the answers of the Department of Justice to appellant's interrogatories, sworn to by Kilty. They further contended that the requests were beyond the scope of the remand since Kilty had not personally participated in the investigation of the Kennedy assassination (R. 38). The court, on April 25, without a hearing, quashed the subpoena and ordered that the deposition not be taken (R. 38).

On October 5, 1977, Judge Pratt issued a detailed memorandum opinion making extensive findings of fact. Weisberg II, App. ___. It first made general findings relevant to the procedural

3/ At this status hearing, appellant's counsel said that he wanted to take three further depositions, not yet scheduled. As discussed below, see page 6, infra, the court determined in its memorandum opinion that these desired depositions were outside of the scope of the remand proceedings.

context of the case. It found that the four depositions taken in February and March were the only ones which appellant planned of witnesses who had personal knowledge of the events occurring at the time the investigation was conducted. The other depositions that appellant planned were of people who had not participated in the investigation and thus were not within the scope of the remand by this Court.[4/]

The court also made findings regarding the personnel and organization of the FBI's laboratory work in the assassination investigation, and discussed the types of testing done by the laboratory. For instance, regarding neutron activation analysis [hereinafter "NAA"], the court found that it was in a relatively infant state of development. Its limitations precluded its use on many items of assassination evidence and vitiated the results of some tests that had been performed on the evidence. Although the AEC had made recommendations regarding the use of NAA, the FBI did not follow closely the suggestions regarding NAA that had been made by the AEC and in fact the FBI agent in charge of NAA resented its suggestions (id. at 495 n.1, 499, App.

4/ The court noted that the other depositions planned were of appellant himself, of the custodian of the materials at the National Archives, and of the FBI special agent who had searched the files and made the affidavit to the effect that no other materials existed which had not been supplied to appellant (id. at 495 n.2, App. ____).

___, ___).[5/]

The court also made findings about the decision-making process regarding what tests to perform and whether and how to memorialize the results of the tests that were done. The decisions regarding what tests to perform were made on a highly informal basis: sometimes by Frazier and his superiors, and sometimes by Frazier and the individual examiners. Rarely were determinations recorded as to what tests to perform. When tests were done, there was no requirement that results be expressed in a particular format or expressed at all if the results were felt to be insignificant. All four deponents testified to not having made notes on results they deemed insignificant or insufficiently reliable (id. at 495-496, App. ___-___).

The court also found irrelevant much of appellant's allegations and questioning in the depositions. It found irrelevant the allegations as to destruction of assassination evidence and falsification of test results. It further found that there was no necessity to deal extensively with appellant's allegations that reports and materials had been deliberately stolen or mislaid and that witnesses had lied under oath, suggesting a conspiracy. "[A]part from these allegations, there is not an iota of evidence

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5/ The court also found that appellant had been denied no reports of microscopic examinations of evidence, because although such examinations were conducted, the practice in the FBI laboratory was to make no note in reports regarding such examinations. This was because they were widely accepted as preliminary steps to other tests (id. at 499-500, App. ___ - ___).

to support either assertion" (id. at 504, App. ___). Responding to appellant's wide-ranging allegations, the court defined the issue presented as follows:

> It should be stressed that the question throughout is not whether tests ought to have been made, or even whether tests that actually were made should have culminated in the preparation of reports, but simply whether there is any genuine issue as to the existence of the reports and other materials plaintiff Weisberg seeks. (Id. at 498, App. ___.)

The court, sifting through appellant's allegations in his opposition to the motion for summary judgment, identified nine specific areas for which he asserted that documents existed which he had not received (id. at 497-498, App. ___-___). The discussion below will describe the nine areas and the court's findings.

1. NAA of Clothing. The court found that only spectrographic testing of clothing had been done, that appellant had received all materials related to this testing, and that NAA was not performed on clothing because laboratory personnel did not deem it an appropriate technique for those items (id. at 502, App. ___).[6/]

6/ Kilty had stated in his May 13, 1975, affidavit as follows:

> [NAA] 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 a curbstone. (R. 17.)

Shortly thereafter, Kilty in a second affidavit dated June 23, 1975, changed the representation as follows:

(Footnote continued on next page)

2. NAA of windshield scrapings.

3. NAA of Q3, bullet fragment discovered beside the right front seat of Presidential limousine. Appellant had asserted that he had not received the results of NAA of residues obtained by scraping the inside of the limousine's windshield and of a bullet fragment recovered from beside the right front seat of the limousine. The Department of Justice's answers to interrogatories, relying on virtually blank worksheets for such tests which it provided to appellant, had asserted that neither material had been subjected to NAA. The trial court accepted Gallagher's deposition testimony that he had subjected both to NAA but that the tests yielded no significant results and therefore he had left his worksheets virtually blank. 7/ The court found that, therefore,

6/ (Footnote continued from preceding page)

> [F]urther examination reveals emission spectroscopy only was used to determine the elemental composition of the borders and edges of holes in clothing and metallic smears present on a windshield and a curbstone. . . . NAA was not used in examining the clothing, windshield or curbing. (R. 18.)

The trial court found that there was no basis for appellant's assertions that Government witnesses had lied under oath and that in fact the Government had acted in candor and good faith in this proceeding (id. at 504, App. ___).

7/ Kilty had previously stated that NAA had been applied to the scrapings, and then had asserted that this was in error and that NAA had not been applied to this material. This reflected good faith confusion on his part. See note 6, supra. The court found that the Department of Justice's misstatement that NAA had not been applied to these materials resulted in good faith from

(Footnote continued on next page)

appellant had received all relevant material when he had been provided the virtually blank worksheets (id. at 503, App. ___).

4. Print-outs for NAA of Q3 and other specimens. Regarding the print-outs for the above NAA testing, the trial court relied upon Gallagher's testimony that because the data on print-outs was duplicative of that on his worksheets, the print-outs might not have been retained. Based on this, the court found that there was no indication that material existed related to these tests which had not been furnished to appellant (id. at 503, App. ___).

5. Testing of the live round found in rifle determined to have been the murder weapon and comparison of it with shells found at scene. The court found that the live round was not tested and was subjected only to visual scrutiny and determined to be of the same manufacture as cartridges found in the school book depository building. These findings were incorporated in a November 23, 1963, report which had been furnished appellant. (Id. at 501-502, App. ___-___). The court also found that no spectrographic analysis had been performed on copper jacket material because it was not expected that the test would yield

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7/ (Footnote continued from preceding page)

the fact that the worksheets were virtually blank (id. at 503-504, App. _____, ____). Further, contrary to appellant's assertion that Gallagher was forced to admit this fact, the court found that after first testifying that he could not recall applying NAA to these two materials, "on his own initiative" he subsequently remembered subjecting them to NAA and emerging with no significant results (id. at 503, App. ___).

useful results (id. at 501, App. ___). The court further found that Gallagher had run multiple tests on limited samples he removed from CE 399 -- the bullet which the Warren Commission found had passed through President Kennedy's neck and Governor Connolly's chest, wrist and thigh -- and that he prepared no reports of the tests other than the worksheet results incorporated in the November 23, 1963, report; that he did not test other portions of that bullet because of a directive to preserve it for posterity, and that there was nothing to suggest that there were any comparative test reports other than those furnished to appellant (id. at 500, App. ___).[8/]

6. Spectrographic testing of the curbstone in Dealey Plaza. A curbstone near the assassination scene -- believed to have been struck by a bullet, bullet fragments or other debris -- was removed and examined microscopically and spectrographically, with the conclusion that a foreign substance thereon "could be bullet metal." The court found that the curbstone was not subjected to NAA and thus that there were no results of any such test. As to the spectrographic test, appellant had received no plate showing the results. However, the court adopted the belief of FBI special Agent William R. Heilman, that the spectrographic plate reflecting

8/ The court did note that appellant directed much of his questioning to the irrelevant issue whether the Warren Commission was correct in finding that a bullet showing the type of visible damage shown by CE 399 could have caused the multiple injuries ascribed to it. It further noted that in fact the deposition testimony of both Cunningham and Frazier explained how this could have happened (id. at 500, App. ___).

the single run to which he subjected the curbstone had been discarded in one of the laboratory's periodic housecleanings. The court concluded therefore, that appellant had received all available material on the testing of the curbstone (id. at 504, App. ___).

7. Testing of bullet holes below the collar button of President Kennedy's shirt. Appellant had argued that the deposition of Frazier showed the existence of a report by another agent evaluating whether two holes in the collar of the President's shirt overlapped. The trial court noted that Frazier in the deposition initially could not recall whether he had himself conducted the examination of the shirt and had then indicated that another examiner, whom he thought was Paul M. Stombaugh, had made the examination and prepared a report on his conclusions. The court noted that there was no other indication that any one other than Frazier had conducted such an examination. The court, noting that the deposition occurred more than thirteen years after the examination, referred to Frazier's testimony before the Warren Commission, in which he stated that he had conducted such an examination of the shirt himself and found overlapping holes. The court held that Frazier's Warren Commission testimony compelled the conclusion that he was mistaken in the deposition in attributing responsibility for this examination to another.[9/] The

9/ The court noted as an explanation of Frazier's mistaken deposition testimony -- in addition to the passage of a long time since the investigation -- the fact that Stombaugh had examined, and testified before the commission regarding, another shirt -- that worn by Oswald when he was captured. (Id. at 502-503, App. ___.)

Court found, therefore, that there was no genuine issue as to the existence of the report referred to in Frazier's deposition (id. at 502-503, App. ___).

8. A formal report prepared by Frazier on the basis of Gallagher's comparison of windshield scrapings and other bullet matter.

9. Report on NAA. Before the Warren Commission Frazier was questioned about a "comparison made of the lead residues on the inside of the windshield with . . . the bullet fragments . . . ." Frazier stated then that he had prepared "the formal report of the entire examination" based on a report Gallagher had submitted. Appellant claimed not to have received either the formal report or the report of Gallagher. The court accepted the deposition testimony of both Gallagher and Frazier that the referred to "report" submitted by Gallagher was his worksheets and that the "formal report of the entire examination" related not to the laboratory's entire investigation but to Frazier's report on the procedures about which he had just been queried -- the comparison of windshield residues with CE 399 and bullet fragments -- which was contained in a November 23, 1963, letter. Both the worksheets and the letter had previously been furnished to appellant. The court found that there was no evidence to suggest that there was any formal report by Frazier covering the entire investigation

(id. at 500-501, App. ____).[10/]

In effect the court found that Kilty's affidavit statement -- that there were no further documents responsive to appellant's request -- was supported in all material respects by the evidence. The only additional documents which the court on remand found to exist were the blank worksheets relevant to items 2 and 3, reflecting the fact that NAA tests had yielded no significant results. Thus 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.

ARGUMENT

The trial court was correct in finding that there was no genuine issue of material fact.

Appellees were entitled to summary judgment only if they satisfied the burden of demonstrating that there was no remaining genuine issue of material fact. Fed. R. Civ. P. 56 (c); Bloomgarden v. Coyer, 156 U.S. App. D.C. 109, 116, 479 F.2d 201, 208

10/ In his motion for reconsideration (R. 50), filed twelve days after the trial court's memorandum opinion was issued, appellant challenged only findings on issues 6 and 7 and raised apparently for the first time a claim that there were 1000 pages of neutron activation data that had not been furnished to him.

(1973). Although matters of fact are to be viewed in the light most favorable to the party opposing the motion, Nyhus v. Travel Management Corp., 151 U.S. App. D.C. 269, 271, 466 F.2d 440, 442 (1972); Semaan v. Mumford, 118 U.S. App. D.C. 282, 283, 335 F.2d 704, 705 n.2 (1964), mere assertions in the pleadings will not suffice to defeat a motion for summary judgment, Dewey v. Clark, 86 U.S. App. D.C. 137, 141, 180 F.2d 766, 770 (1950).

Of course, the FOIA requires an agency to disclose only existing records. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 161-162 (1975); Nolen v. Rumsfeld, 535 F.2d 890, 891 (5th Cir. 1976), cert. denied, sub nom. Nolen v. Brown, 429 U.S. 1104 (1977). The trial court found that there was no genuine issue regarding whether appellees possessed any documents responsive to appellant's FOIA request which had not been produced. Appellant contends that the trial court erred in granting summary judgment because there were genuine issues of material fact remaining in the case relating to his contention that appellees had not delivered all documents to which he was entitled under the FOIA. He contends in particular that (1) the affidavit submitted by Agent Kilty was insufficient to show that an adequate search of the proper files had been conducted and (2) that the record on remand demonstrated that documents existed which were responsive to his requests and which had not been produced for him. We submit that appellant is incorrect on both points.

Both before and during the early stages of this litigation, appellee Department of Justice had turned over to appellant a number of documents in response to his FOIA request. As to other demands, it asserted no privilege. Instead it responded that it possessed no documents responsive to the request other than the ones already turned over. In support of that position, appellees filed the affidavit of Special Agent Kilty, quoted above,[11/] to the effect that he had personally reviewed the FBI files which would contain the documents requested by appellant and that the files did not contain any requested documents other than those which had been provided to appellant.

The affidavit was sufficient to make a prima facie case that the appellees had completely satisfied their FOIA obligation. Contrary to appellant's assertions, there is no requirement that an affidavit detail which particular files were searched.[12/] Further, although appellant repeatedly states that the affidavit fails to assert that all relevant files were searched, we submit that

11/ See page 2, supra.

12/ Vaughn v. Rosen, 157 U.S. App. D.C. 340, 484 F.2d 820 (1973), cert. denied, 415 U.S. 977 (1974) -- not cited by appellant -- is not to the contrary. That opinion requires that where an agency acknowledges the existence of documents but asserts that they are covered by an FOIA exemption, the agency is required to specify many details regarding the location and content of the documents asserted to be exempt. The requirement was based on the need for the trial court to evaluate the propriety of the claim of exemption, document by document. However, where the agency asserts that it has searched its files and no document such as that sought exists in its files, it would be unnecessarily burdensome to require an affidavit detailing exactly which files were searched.

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.[13/]

Exxon Corp. v. FTC, 384 F. Supp. 755 (1974), remanded without opinion, 174 U.S. App. D.C. 77, 527 F.2d 1386 (1976), does not establish any more demanding requirements. That opinion did not even deal with the question of the search description that must be contained in an affidavit. It was an entirely different kind of case, where the FTC declined to produce documents -- conceded to exist -- from among its vast files on issues, because the particular documents sought were exempted by the FOIA from the requirements of disclosure. The Secretary of the FTC, the legal custodian of the documents, had sworn that a search of the files had been conducted under his supervision. The question discussed by the court was whether an affidavit was sufficient when it was made by a person who had not personally conducted the search. The court held that it was sufficient, reciting the necessity to construe the FOIA reasonably to not impose an unreasonable

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13/ Appellant's assertions, Brief at 34-35, regarding statements by Williams are unfounded. The 1970 affidavit is not part of this suit and says nothing regarding the location of particular material. The 1975 letter on which appellant bases a claim of far-flung documents does not on its face support the claim, as it shows no first hand knowledge of the location of materials. Instead it speculatively "assumes" that documents might be in the case file. A memorandum containing such speculation is not sufficient to defeat summary judgment.

or undue burden on agencies. Id. at 760.[14/]

Appellant in many and various ways suggests that the affidavit should not be accepted because he believes the FBI is acting in bad faith. He argues that the Warren Commission's findings are incorrect, that the FBI would be embarrassed if weaknesses in the case were exposed, and that past assertions by the FBI have been deceitful. Of course, several erroneous statements have been made in this case, a not unlikely event when people who did not participate in activities occurring 15 years ago are asked to tell what happened then. There is absolutely no evidence whatsoever, however, of any bad faith on the part of appellees. The trial court found that "there is not an iota of evidence" to support appellant's allegations of conspiracy. Weisberg II, 438 F. Supp. at 504, App. ____.[15/]

14/ The court there also noted that the question of the scope of inquiry to be allowed an FOIA litigant is an issue relevant not only to the limits of discovery but also to the scope of the trial. Here, if appellant were given unlimited rein, it is clear he would seek to adduce testimony from many people with tangential knowledge of the Kennedy assassination to prove that the Warren Commission's conclusions were erroneous, to adduce testimony about FBI dealings with him on other FOIA requests and other cases and FBI attitudes regarding the assassination in order to prove a motive to cover up investigative results, and to adduce testimony from many FBI agents regarding their knowledge of the laboratory investigation or what documents might exist or where they might be kept. Even then, it is clear from his pleadings, appellant would never acknowledge that the FBI was not conspiring to fool both the Warren Commission and him.

15/ 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

(Footnote continued on next page)

Further, and most important, we submit that this part of the case was essentially resolved before the first appeal. Kilty's affidavit was submitted during the original proceeding. This Court in Weisberg I did not suggest in any way that Kilty's affidavit was insufficient to show that a proper search of the files had been conducted in response to appellant's FOIA request. The Court instead held that, because of the national interest in the Kennedy assassination and the fact that the present custodians of the files had not personally participated in the laboratory work, appellant should be given an opportunity to attempt to establish the existence of documents by questioning those who had actually participated in the laboratory investigation. As discussed below, the evidence adduced on remand supports Kilty's affidavit: there was no showing of any significant documents which had not been produced for appellant in response to his request.

Appellant's second attack on the trial court's grant of summary judgment is his allegation that the evidence adduced in the remand proceedings demonstrated that there are indeed documents

15/ (Footnote continued from preceding page)

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.

in existence which have not been turned over to him. We submit that the trial court was correct in finding no such evidence.

We shall discuss appellant's challenges to the trial court's findings as to each of the numbered groups of documents discussed in the trial court's memorandum opinion. As to the first group, NAA of clothing, appellant makes no challenge to the trial court's finding that no such tests were done. As to the second and third groups, appellant also makes no real challenge, tacitly acknowledging that the blank worksheets, provided with the Department of Justice's answers to interrogatories, were the only documentary results of the NAA of the windshield residue and the bullet fragment (Brief 30-31).[16/]

As to the fourth group of materials sought, NAA print-outs for testing on bullet fragments and other items, appellant points to Gallagher's testimony that there "probably" would have been print-outs at the time of the testing. The trial court accepted that testimony, but found on the basis of other testimony by Gallagher that such print outs might not have been kept because the small amount of information on them was duplicative of information preserved in other forms (Weisberg II, 438 F. Supp.

16/ Appellant does assert, in a general attack on the credibility of the agents who were deposed, that Gallagher's testimony that he wrote down no more about the NAA of these items is incredible. Given the trial court's findings about the general informality of procedures in the laboratory -- not contested by appellant -- the testimony is quite reasonable. There is no basis in evidence for not accepting Gallagher's testimony that the virtually blank worksheets represented the only documentation of the results of this group of testing.

at 503, App. _____). Appellant's only attack on this conclusion is based on his own conclusion that it would seem that the print-outs were essential and would have been carefully preserved. There is no basis whatever in the record for either of these speculations, and in fact they are inconsistent with the trial court's general findings about the procedures in the laboratory. 17/

Regarding the fifth group of material, appellant's attack is limited to the assertion that Gallagher was incredible in testifying that he could not test all portions of CE 399, the bullet found to have passed through the President and Governor Connolly, because of a directive to preserve the bullet for posterity (Brief 41-42). Appellant merely asserts that there is no evidence of any such directive (ignoring Gallagher's testimony). This assertion is insufficient to prevent summary judgment, as it does not even constitute first-hand evidence that a directive was not issued. Further, it should be noted that the trial court found that Gallagher had tested some portions of the bullet and that

17/ Appellant also asserts that a memorandum provided to him shows that there were the equivalent of 1000 pages of NAA data, much more than he received. Appellant did not make this assertion in his opposition to the motion for summary judgment. It was mentioned for the first time in the motion for reconsideration (R. 50), filed after the court issued its memorandum opinion. Thus appellees did not provide on the record a factual response to this allegation. In fact, we would represent to the Court that Special Agent Kilty is familiar with the memorandum on which appellant relies, that the NAA materials to which it refers are continuous, folded tapes -- similar to stenographic tapes -- containing NAA raw data, that this material was shown to both appellant and his counsel by Kilty in early 1975, and that appellant said then that he did not want copies of this material.

his findings were incorporated in a report that had been provided to appellant.

In connection with the sixth group of materials, appellant asserts that it was shown that a spectrographic plate had been created in the testing of the curbstone and that it had not been delivered to him (Brief 31, 33). However, appellant does not even advert to the trial court's finding that the one plate created in the testing of the curbstone had been discarded in one of the laboratory's periodic housecleanings. The finding that the plate had at one time existed did not in any way prevent the trial court from finding that there was no showing that appellees now had that item to deliver to appellant.[18/]

Regarding the seventh group of material, an alleged report on the holes in President Kennedy's shirt by Stombaugh, appellant asserts that Frazier's deposition testimony that he had directed Stombaugh to prepare such a report was uncontradicted. The trial court, citing Frazier's Warren Commission testimony that he himself had conducted such a test and the absence of any testimony by Stombaugh regarding such a test, concluded that Frazier had been mistaken in testifying long after the investigation that

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18/ Appellant also asserts entitlement to notes made regarding the spectrographic testing. The only support appellant cites for the existence of any such notes is an internal FBI memorandum stating that an exhaustive search of the pertinent files and storage locations had not turned up notes made from the spectrographic plates (Brief at 31). This is hardly a substantial indication that any such notes existed which were not disclosed to appellant. Appellant did receive the materials which the laboratory produced on the curbstone testing (id. at 504, App. _____).

Stombaugh was assigned to do such a report and that in fact no such report existed (id. at 502, App. ___). Appellant argues that it was improper for the trial court to have gone outside of the record in citing Frazier's testimony before the Warren Commission. However, that testimony is a public record. It is clear that Frazier's recollection at that time regarding who performed the examination would have been much better than his recollection thirteen years later. Most important, appellant is in a very poor position to criticize citation to the Warren Commission testimony when his allegations in this suit have cited heavily not only to various public parts of the Commission proceedings but also to privately produced transcripts of non-public proceedings of the Commission. E.g., Brief at 4-6. In fact appellant even cites to a portion of Frazier's Warren Commission testimony just nine pages from the material relied on by the trial court (Brief at 13-14).

Regarding the eighth group of material, a formal report by Frazier regarding analysis of the residue of the windshield scrapings from the President's limousine, appellant had argued below that testimony before the Commission by Frazier showed that a report other than the one dated November 23, 1963, had been prepared. The trial court accepted the deposition testimony that no other formal report had been prepared on that matter and that the Commission testimony referred to the November 23 letter that had been provided to appellant. In his brief appellant raises

a new assertion that additional reports exist (Brief at 32). The testimony on which the assertion is based is the following response by Gallagher -- who would not have been the one to write such a report -- to the question whether a later examination resulted in an additional report: "I imagine there was. It probably went to the chief. The best one to ask that is Frazier." (Gallagher Deposition at 86, R. 42.) It is clear that Gallagher was at most speculating, and appellant's reference to this statement for the first time on appeal is not a grounds for defeating summary judgment.

Appellant does not contest the trial court's finding regarding the ninth group of material.

CONCLUSION

WHEREFORE, appellees respectfully submit that the judgment of the District Court should be affirmed.

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