UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

HAROLD WEISBERG, Appellant,

v.

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

APPELLEES' MEMORANDUM OPPOSING REMAND

Pursuant to this Court's order of March 7, 1979, appellees file this memorandum regarding the issue of remanding this case to the District Court to consider materials newly proffered by appellant. Appellees are of the view that such a remand would not be appropriate.

The District Court granted summary judgment in this case October 5, 1977. Appellant's Reply Brief containing the additional documents was attempted to be filed December 17, 1978, more than one year later. Therefore the time has passed for a proper motion pursuant to Rule 60(b), Fed. R. Civ. P., in the District Court. Carr v. District of Columbia, 543 F.2d 917 (D.C. Cir. 1976), by implication suggests that remand for purposes of receiving newly discovered evidence is not a favored procedure: while discussing in detail the alternatives of

Rule 60(b) and an independent action, the Court made no reference to remanding the case for new evidence. The cases cited by appellant are critically different. United States v. Shotwell Manufacturing Co., 355 U.S. 233 (1957), involves the question of a deliberate fraud upon the court; no such issue is presented here. And Jordan v. United States Department of Justice, D.C. Cir. No. 77-1240 (October 31, 1978), discusses remand where "a substantial change in the factual context of the case" appears during the pendency of an appeal. The documents put forward by appellant, in contrast, are not at all significant to the issues put before the District Court.

Appellant's meandering pleadings before the District Court were carefully combed by that court to determine the validity of his complaint. The court found nine specific types of documents -- relating to scientific tests performed on items of evidence in the Kennedy assassination investigation -- which appellant asserted had not been provided to him in response to his Freedom of Information Act request. The court made particular findings regarding whether any such documents were in existence, finding that appellant had received all documents in existence.

The materials appellant seeks to put before the Court have no specific relevance to the types of materials appellant alleged had been withheld. Proposed addenda 3, 4 and 5 to the reply brief contain directives ordering that evidence relating to the investigation be retained. This does not undercut in any way findings that some tests were not done (and therefore no documents produced) or that two limited categories of test results were no longer in existence. Proposed addendum 2 relates to a listing of documents submitted to the Warren Commission. It does not appear to cast any light on the issues considered by the District Court. Proposed addendum 6 relates to a report by a citizen that he had found, 5 years after the assassination, a bullet which another citizen felt might be connected with the Kennedy assassination. There is no indication that this bullet was recovered or tested by the FBI. Most important, the pleadings below did not specify any claim that such material existed and had been withheld.

Proposed addendum 1 merely states that as of August 8, 1964, no evidence was visible of a mark on a curbstone. The FBI later subjected this curbstone to testing based on a citizen report and concluded only that the smear "could be bullet metal." The spectographic plate

produced in the testing was not turned over to appellant, and the trial court found that it was not available to be turned over. Despite appellant's repeated assertions that the FBI has a motive to suppress such a plate, the proposed addendum does not in any way indicate this. That the FBI was aware that the mark was not then visible shows nothing regarding causation of any change in the mark and nothing regarding motivation. Therefore it has no bearing on the existence of the plate, the only issue raised below to which it might be relevant.

Further, in this case there is no reasonable basis for believing that "one more chance" in District Court would satisfy appellant. It is clear from the pleadings in this case that appellant starts from the presumption that the FBI's actions were all part of a conspiracy to cover up the truth regarding the Kennedy assassination and that he unreasonably interprets many obviously legitimate and innocuous statements in old documents as proof of this preconceived view. It should be repeated that the District Court found that not an iota of evidence had been presented to indicate any bad faith or conspiracy on the part of appellees.

WHEREFORE, appellees respectfully submit that the Court should not remand this case to the District Court for evaluation of the document newly proffered by appellant.

EARL J. SILBERT
United States Attorney

JOHN A. TERRY
Assistant United States Attorney

JOHN H. KORNS
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a copy of the foregoing Memorandum has been mailed to counsel for appellant, James H. Lesar, Esquire, 910 Sixteenth Street, N.W., Washington, D.C., 20006, this 16th day of March, 1979.

JOHN H. KORNS
Assistant United States Attorney