BRIEF FOR DEFENDANTS-APPELLEES

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

NO. 82-1072

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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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CASES

* Cases chiefly relied upon

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I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court below properly found that the Department of Justice's response to Weisberg's discovery and the Department of Justice's additional searches for documents responsive to Weisberg's Freedom of Information Act request satisfied the issues raised in the last remand of this case, Weisberg v. U.S. Department of Justice, 200 U.S. App. D.C. 312, 627 F.2d 365 (1980)), and were adequate for purposes of summary judgment; and

2. Whether plaintiff's September 8, 1981 motion (a) to compel a further search, (b) to direct the FBI to perform tests and examine evidence, and (c) to refer testimony of Special Agent John W. Kilty to the Attorney General and the U.S. Attorney for a determination as to whether prosecution may be warranted, was properly denied.

* * *

In accordance with Local Rule 8(b), the Department of Justice states that this case has previously been before this Court on the following occasions:

Weisberg v. U.S. Department of Justice, 160 U.S. App. D.C. 71, 480 F.2d 1195 (1973) (en banc), cert. denied, 416 U.S. 993 (1974) (Weisberg I);

Weisberg v. U.S. Department of Justice, 177 U.S. App. D.C. 161, 543 F.2d 308 (1976) (Weisberg II); and

Weisberg v. U.S. Department of Justice, 200 U.S. App. D.C. 312, 627 F.2d 365 (1980) (Weisberg III).

II. STATEMENT OF THE CASE

A. Procedural History

On February 19, 1975, Mr. Harold Weisberg ("Weisberg") filed this Freedom of Information Act ("FOIA") case in order to obtain the results of certain spectrographic analyses made by the FBI for the Warren Commission. Complaint, pp. 1-3 (R. 1).

Initially, Weisberg's request for this information was rejected because the documents he sought were investigative and, thus, exempt from release under FOIA exemption 7. Weisberg v. U.S. Department of Justice, (Weisberg I) 160 U.S. App. D.C. 71, 489 F.2d 1195 (1975) (en banc), cert. denied, 416 U.S. 993

Not subsequent to 1975

(1974). Congress subsequently narrowed the scope of exemption 7 and plaintiff renewed his requests, expanding them to include results of neutron activation analysis of Kennedy assassination evidence.

Subsequent to the change in the law, Weisberg received many documents responsive to his FOIA request. He also made demands for the production of documents and addressed interrogatories to the Department of Justice in order to discover to his satisfaction whether all of the documents requested had been produced. In hearings held on May 21 and July 15, 1975, the district court refused to order the Government to respond to Weisberg's interrogatories which it described as "oppressive" (Transcript of May 21, 1975 Hearing at 22, R. 11; Transcript of July 15, 1975 Hearing at 205, R. 21), found that the Government had "complied substantially" with plaintiff's demands, and granted defendants' motion to dismiss the action as moot. (Transcript of July 15, 1975 Hearing at 19). The Government's position, as sustained by the district court, was that all data still in existence which had been described in plaintiff's requests had been furnished, and that other data asked for by Weisberg did not exist. This Court subsequently reversed and remanded the case to the district court, noting that Weisberg had not received answers to interrogatories and had not "had the opportunity to examine a single live witness either on deposition

or on trial before the District Court." Weisberg v. U.S. Department of Justice, (Weisberg II) 177 U.S. App. D.C. 161, 163, 543 F.2d 308, 310 (1976). This Court ruled that plaintiff was entitled to such discovery. Specifically, it held:

> Plaintiff's attempt to secure information from the Government defendants by interrogatories was not the most efficient means, if used alone, of gaining access to the whole story, but it was chosen as a preliminary first step to outline parameters of discovery and as being the most economical means available to plaintiff. We think in these circumstances plaintiff was entitled to insist on his interrogatories being answered and that they should not have been dismissed as oppressive.

Id. at 164; 543 F.2d at 311. This Court advised Weisberg to proceed with depositions or a court hearing. It also noted:

> [W]e cannot cast all the blame on the Government defendants here. Part of the reason for plaintiff obtaining unsatisfactory responses undoubtedly lies in the fact that plaintiff has been addressing inquiries only to the opposing parties, who by this date in history are nothing but file custodians with no personal knowledge of the matters in issue.

Id. This court advised plaintiff speedily to proceed to obtain live testimony by deposition or in court of individuals who had personal knowledge of events at the time the investigation was made. Id.

Upon remand, plaintiff proceeded to follow this Court's suggestion that he hold depositions. In February and March,

1977, Weisberg took the depositions of four former and present employees of the FBI laboratory, all of whom worked directly with evidence associated with the assassination. On March 30, 1977, he indicated to the Court that no further depositions of FBI employees who had participated in the Bureau's investigation were planned. Six months later, the district court granted defendants' motion for summary judgment. Weisberg v. United States Department of Justice, 438 F. Supp. 492, 495 (D.C. 1977). In its opinion, the district court reviewed in detail the evidence adduced from the depositions that had been held. The trial court specifically found that Weisberg's FOIA action now demonstrably lacked genuine issues of material fact, and that there was "not an iota of evidence" to support Weisberg's claims, "sounding of conspiracy", that reports and materials had been stolen and mislaid and that Government witnesses had lied under oath. Id. at 504.

This Court, on a third appeal, ruled the trial judge should have permitted Weisberg to depose Special Agent John Kilty, an FBI laboratory employee who had originally searched the FBI files in response to Weisberg's FOIA request, and perhaps others who

examined the files."[1/] Weisberg v. United States Department of Justice, (Weisberg III), 200 U.S. App. D.C. 312, 627 F.2d 365 (1980). This Court held also that Kilty's affidavit regarding that search for documents responsive to Weisberg's request

> . . . gives no detail as to the scope of the examination and thus is insufficient as a matter of law to establish its completeness.

Id. at 317, 627 F.2d at 365.

B. Activities Of The Parties After Remand

Pursuant to this Court's order, the case was once again remanded to the trial court. Weisberg once again submitted discovery requests to the Department of Justice. He began by requesting, on July 24, 1980, the production of documents including "all regulations, orders, directives or instructions concerning the destruction, transfer, or removal of FBI records in effect from 1963 to date" which amounted to over 7,000 pages. Plaintiff's Motion for Production of Documents, ¶11, R. 58. He insisted that the documents either be delivered to him at his home in Frederick, Maryland or copied and given to him for inspection free of charge. (Plaintiff's Motion of November 12,

1/ Plaintiff first noticed the Kilty deposition on April 19, 1977 (see Weisberg III at 314, 627 F.2d at 362), nine months after the remand. The trial judge refused to permit the deposition to be taken because it read this Court's mandate as requiring only depositions of "witnesses who had personal knowledge of events at the time the investigation was made." Weisberg v. DOJ, 438 F. Supp. at 499 quoting Weisberg II at 164, 543 F.2d at 311.

1980, R. 58.) The Government agreed only to produce such voluminous documents for inspection at the FBI building. (Plaintiff's Memorandum, November 12, 1980, R. 64). Plaintiff rejected this offer and explained to the trial court that "Mr. Weisberg's health precluded his coming to Washington, D.C. to inspect them." (Plaintiff's Memorandum, November 12, 1980, p. 3, R. 64). The trial court subsequently ruled that

> [T]he just, speedy, and inexpensive termination of this long pending action will best be served by a waiver, pursuant to 5 U.S.C. §552(a)(4) of copying charges for all of the discovery materials which have not heretofore been provided [Weisberg] in connection with prior FOIA requests.

(Order. January 7, 1981, p. 2, R. 69). Weisberg received his discovery documents free of charge.

On December 24, 1980, Weisberg "moved to compel" the release of "all spectrographic plates of any item spectrographically tested" in connection with the Kennedy assassination (R. 67). While this was not related to any discovery request and was not the "spectrographic analyses" described in his FOIA request, copies were provided. (Defendants' Memorandum Supporting Their Motion for Summary Judgment, ("Memo"), Exhibit 1 to Phillips Affidavit, R. 89). Pursuant to Weisberg's request, these plates were subsequently interpreted for him as well. (May 7, 1981 Response to Plaintiff's Interrogatories, R. 75). On March 18, 1981, plaintiff's attorney, Mr. James Lesar, requested additional

materials and explanations (Memo, Exhibit 2, R. 89). On April 22, 1981, the FBI responded in considerable detail (Memo, Exhibit 3, R. 89) and on May 27, 1981 sent 52 additional pages of documents requested in the March 18, 1981 letter (Memo, Exhibit 4, R. 89).

On April 6, 1981, plaintiff served interrogatories on the Department of Justice which were answered on May 7, 1981 (R. 72 and R. 75). Also on April 6, 1981, plaintiff filed a "Motion to Compel" which was again not clearly based on any previous discovery request (R. 73). It included requests for items that the FBI had previously claimed it did not have, items that had never been previously requested, and a request that certain excised documents not before the trial court be released in their entirety. (See Memorandum in Opposition, April 22, 1981, R. 74). The next month, on May 26, 1981, over a year after this Court's remand of the case to the district court, Weisberg noticed the deposition of FBI Agent Kilty (R. 76). Weisberg gave notice that the deposition would be held at Weisberg's home in Frederick, Maryland and required that Kilty bring with him among other things, "all records responsive to plaintiff's request in this case that have been provided him . . ." (Civil Subpoena, June 1, 1981, R. 76). Since the place of service was more than 40 miles distant from the place of deposition, Kilty declined to voluntarily attend the Frederick deposition. Weisberg moved for an order designating Frederick as the place for taking the

deposition because he could not go to Washington for reasons of health (R. 77). In a hearing held on June 5, 1981, the district court found that the Government was "perfectly entitled not to show up." (Hearing, June 5, 1981, p. 1, R. 84). Nevertheless, it ruled:

> Well, there is only one way to cut the Gordian knot. I'm going to require Mr. Kilty to go to Frederick .

Id. at 16, and Kilty went.

In the same June 5, 1981 hearing, the Court also denied Weisberg's motion to compel. In answer to the trial court's question whether he had anything left in this case, Weisberg's counsel said:

> Essentially, that is the discovery matters, yes. As I say, we are prepared to go ahead with the Kilty deposition . . . .

Id. at 13. He added that he would like to take his own client's deposition (a request that was later dropped and which was made and dropped previously, see Weisberg v. DOJ, 438 F. Supp. at 485), and said: "the whole matter would then be before the Court" (Hearing, June 5, 1981, p. 13, R. 84). Accordingly, the Court set dates for dispositive motions.

Defendant Department of Justice filed its motion for summary judgment on September 8, 1981 (R. 89) and plaintiff filed his "Motion For An Order Requiring Federal Bureau Of Investigation To Make A Thorough And Complete Search For Unproduced Records, And For Other Relief" on the same day (R. 88). Plaintiff filed an opposition to Defendant's motion on October 9, 1981 (R. 93).

The Court granted summary judgment for defendants and denied plaintiffs motion on November 18, 1981 (R. 94, App. 521).

III. ARGUMENT

A. Weisberg's Discovery Requests Have Been Met.

In both Weisberg II and Weisberg III, this Court remanded this case to the District Court to permit plaintiff to take further discovery, or otherwise to confront witnesses. Following Weisberg II, plaintiff took depositions of four FBI employees. Weisberg III accepted plaintiff's claim that he had indeed desired to take one more deposition, that of Special Agent John Kilty, "and perhaps others who examined the files." Weisberg III, at 318, 627 F.2d at 371. On remand, the trial court allowed the Kilty deposition to be taken in Weisberg's own home. The deposition, taken over a year after this Court's ruling, was preceded by new Document Production Requests, interrogatories, letters requesting additional information and assorted other discovery. (pp. 4-6, supra). Plaintiff was permitted all the discovery he wanted to take. At the June 5, 1981 hearing, Weisberg's counsel denied that he had any additional discovery requests. In pleadings before this Court now, he makes no further discovery demands.

Thus, it is clear that, unlike in earlier remands of this case, no further information is sought by plaintiff with which to augment his case before the trial court.

and thus obtain requisite information

The rationale of the previous remands has been precisely that plaintiff was entitled to exhaust his discovery demands before the trial court could grant summary judgment in the case. Weisberg II, at 164, 543 F.2d aat 311; Weisberg III, at 318, 627 F.2d at 371. See also Founding Church of Scientology v. NSA, 197 U.S. App. D.C. 305, 317, 610 F.2d 824, 833 (1979). No such claim can be made by Weisberg on this appeal.

B. No Genuine Issue Of Material Fact Remains In This Case As To Whether All Extant Documents Encompassed By Weisberg's Request Have Been Located.

At the outset, it is imperative that a basic truth be stated: in the course of seven years of litigation in this case, no additional document responsive to plaintiff's request had been discovered. Defendants have long claimed that Weisberg has had, since 1975, all of the documents he ever requested. It still does.

Most of the documents requested and obtained by Weisberg were prepared approximately eighteen years ago by people who are no longer government employees. This has long put defendants in the position, so aptly described by this Court of "nothing but file custodians with no personal knowledge of the matters in issue." Weisberg II, at 164, 543 F.2d at 311.

They can make a mistake

There have been two searches for information responsive to Weisberg's FOIA request. The first was by Special Agent Kilty in 1975. In his June 19, 1981 deposition, Kilty explained that this

search was performed on the seventh floor of the Justice Department seven years ago, before the present FBI Building existed. While he was naturally unable to recall certain details about that search, he recalled looking through file cabinets in the FBI laboratory, (Kilty Deposition, pp. 39-43, App. 48-52) and "cart after cart after cart of sections of files in [the Kennedy assassination central file]" (Kilty Deposition p. 44, App. 53). Referring to his 1975 search during his deposition at Weisberg's home, Agent Kilty testified that:

> Based on my search of the records and knowing the items that were subjected to examination, I have found the reports pertaining to those specimens.

(Kilty Deposition, p. 51, App. 60.)

The second search was performed subsequent to this Court's decision in Weisberg III. Agent Kilty searched again for anything responsive to Weisberg's request for a period of ten days. (Kilty Deposition, p. 130, App. 139). He looked in "file cabinets located in Room 2B451, file cabinets located in Room 3342, and plate drawers located in two parts of Room 3971 of the FBI Building because these were the "only places that these kinds of documents would be stored." (Kilty Deposition, p. 131, App. 131). He also solicited information from colleagues at the FBI's Unit Chief Meeting for additional information on items relevant to his new search. (Kilty Deposition, p. 131, App. 131.) The Department of Justice submits that this systematic file search, and the resulting failure to discover any new document responsive

to Weisberg's FOIA request should dispose of Weisberg's claims before this Court. Weisberg III at 318, 627 F.2d at 371 (1980), see also Founding Church of Scientology v. NSA, supra at 618-9, 610 F.2d at 837-8 (1979).

This Court, in granting plaintiff the opportunity to hold additional depositions in Weisberg III, noted three specific instances where plaintiff had challenged the FBI's sworn testimony that it had released all documents requested. These three problem areas, which were all discussed in considerable detail in the trial court's 1977 opinion, Weisberg v. United States Department of Justice, 438 F. Supp. 492, 502-504, formed the basis for most of the questioning of Kilty by plaintiff's attorney. The information that resulted from this examination is as follows.

(a) The Curbstone Plate (See Weisberg III at 316, 627 F.2d at 369)

In the trial court's opinion of 1977, following the first remand, the trial court reviewed the history, as revealed by depositions and documents then before the court, of a spectrographic plate which had been prepared regarding a "smear" of foreign substances on a Dallas curbstone. The plate, while not a "report" responsive to Weisberg's FOIA request, has nonetheless figured prominently in this lawsuit. Weisberg v. United States Department of Justice, 438 F. Supp. 492, 503-504.

The trial court explained in its 1977 opinion that some witnesses to the Kennedy assassination believed that a bullet or bullet fragment had struck a curbstone during the shooting. At the request of the Warren Commission, the curbstone believed to be the one struck was removed from Dallas by the FBI and examined in the FBI's laboratory by means of microscopic and spectrographic analysis. It was discovered to have foreign substances on it that "could be bullet metal" Id. at 503. The spectrographic examination, conducted by Special Agent William R. Heilman, involved the making of a spectrographic plate which indicated the presence of chemical elements. The results from the analysis of this sample were supplied to plaintiff as attested by the June 25, 1975 affidavit of Agent Kilty, which stated, in part:

This also is false, as my affidavit attests

> Concerning plaintiff's allegation that he has not been given the "spectrographic testing" of "small foreign metal smears on a piece of curbing": the Laboratory work sheet which was previously furnished plaintiff and from which he quotes is the notes and results of this test. A thorough search has uncovered no other material concerning the spectrographic testing of the metal smear on the curbing.

(Kilty Affidavit, June 23, 1975, p. 1, App. 168). The plate itself was lost. As the district court explained:

> The spectrographic plate which reflects the single run to which Heilman subjected the curbstone has not been furnished to the plaintiff; Heilman believes it was discarded in the course of one of the laboratory's periodic housecleanings.

Id. at 504. This Court suggested, on appeal, that while there was no evidence to dispute the Court's conclusion, Heilman could have been incorrect "and the the plate [might] remain[] somewhere in the FBI's domain." Weisberg III at 316, 627 F.2d at 369. The Kilty deposition was ordered, in part, as a way to ensure that all efforts to find the "Lost Curbstone Plate" had now been made.

In his deposition, Agent Kilty was questioned on his original search for the plate from which the written analysis was made. He explained that he had called Heilman at his retirement home in Florida back in 1975 in an attempt to discover what had happened to the missing plate. Kilty recalled that Heilman did not remember what he did with the plate (Kilty Deposition, p. 89, App. 98) but that he had indicated, "if it wasn't with all the Kennedy Assassination plates, that it would have been destroyed" (Kilty Deposition, p. 91, App. 100). Why this one plate would have been destroyed while others were not was explained as follows:

> Well, this was done completely at a different time and by a different examiner that (sic) did all the other work in this case and he may not have attached his plate to where the other plates were.

(Kilty Deposition, p. 92, App. 101).

In response to plaintiff's counsel's question:

Did you provide every pertinent record relating to the curbstone testing?

Mr. Kilty responded:

> I've provided all the records pertinent or impertinent regarding the curbstone testing.

(Kilty Deposition, p. 100, p. 109).

Later in the deposition, Kilty described a new search which he had made after this Court's last remand:

> I've searched all the places where spectrographic plates or data concerning spectrographic plates could be kept and of items that you do not have, namely, the curbstone plate. That was the main item. And I have looked for everything again and I found what I've given you, and I can't find anything that I haven't given you.

(Kilty Deposition, pp. 120-121, App. 129-130.) He detailed the precise rooms where he had looked for items both responsive to plaintiff's FOIA request and items relating to but not covered by that request, including the missing spectrographic plate of the curbstone "smear", and recounted advising his colleagues that "I was looking for a spectrographic plate . . ." and was told by ". . . everyone that they had nothing that would be responsive to this." Kilty Deposition, p. 131, App. 140.

The new Kilty search for the "missing curbstone plate" clearly shows that no factual issue still persists as to whether "the plate remains somewhere in the FBI's domain." Weisberg III at 316, 627 F.2d at 369.

(b) Computer Printouts Containing Raw Data From Neutron Activation Analysis (NAA) Of Samples Q3 and Q15.

As with the "missing curbstone plate", a review of the "Q3 and Q15" matter can properly begin with the trial court's

opinion in 1977.

As explained by that court, Weisberg had claimed:

> not to have received extant reports on the neutron activation analysis of Q3, a fragment recovered beside the right front seat of the Presidential limousine, and Q15, residues obtained by scraping the inside of the limousine's windshield.

Weisberg v. U.S. Department of Justice, 438 F. Supp. 492, 503 (D.D.C. 1977). As indicated in answers to interrogatories on October 20, 1976 (App. 183), and an affidavit of June 23, 1975 by Agent Kilty (App. 168), no actual neutron activation anaysis was ever performed on these samples. This was borne out by virtually blank worksheets (which were the subject of plaintiff's FOIA request and were originally produced for him). Plaintiff's deposition of Special Agent Gallagher, however, revealed that that agent had subjected both samples to neutron bombardment in a reactor but that, for the reasons given in the 1977 trial court's opinion, no analysis had been performed on the resulting data. Gallagher indicated that the data on the worksheets would have been duplicative of computer printouts from the neutron bombardment itself and, consequently, the printouts themselves might not have been kept. Id. p. 503. This Court remanded this issue to the trial court, however, to determine if the printouts had indeed actually been discarded. Weisberg III at p. 316, 627 F.2d at 319.

At the Kilty deposition, the issue of the computer printouts was conclusively clarified. Mr. Kilty produced the printouts from these tests, (Kilty Deposition, p. 83, App. 92), which proved to be strips of "adding machine style paper with channel numbers on one side, data counts on the other side." (Kilty Deposition, p. 55, App. 64). Mr. Kilty explained that he had earlier shown these to Weisberg, (Kilty Deposition, p. 54, App. 63), and that "my recollection is that Mr. Weisberg did not want these items." (Kilty Deposition, p. 129, App. 138). Expanding on the topic, Kilty explained:

> With regard to the computer tapes and notebooks with data in them, these were shown to him in a folder something like this red paper folder and he said something about the fact that I can't make head nor tails out of those things; I don't want those things.

(Kilty Deposition, p. 129, App. 138).[2/]

After this statement, plaintiff's attorney engaged in the following dialogue with Kilty:

> Q: Subsequent to that time, did you learn from anyone that these items -- that Mr. Weisberg had changed his mind regarding these items?

2/ The existence of such tapes is no secret. They were described in Appellees' 1978 Brief to this Court as "continuous, folded tapes -- similar to stenographic tapes -- containing NAA raw data ... shown to both appellant and his counsel by Kilty in early 1975 [which] appellant said then that he did not want...." Appellees' Brief, filed Nov. 29, 1978, p. 21 (fn. 17).

A: Well, some of the notes that were in the notebooks, yes, he asked for those subsequent to this and he got those.

Q: As to the computer . . .

A: Printouts?

Q: Printouts?

A: I have no knowledge that he's ever asked for those. (Kilty Deposition, p. 129, App. 138).

Weisberg now has the printouts not just from Q3 and Q15 but from all NAA performed on Kennedy assassination evidence. A sample has been provided in plaintiff's Appendix on pages 169-181. A brief perusal of these pages reveals why Agent Kilty indicated that even a scientist would find it "tough" to make heads or tails out of them. (Kilty Deposition, p. 130, App. 139). However, their production clearly shows that this second "issue" has been finally laid to rest.

(c) The "Stombaugh Report."

After lengthy litigation, there is still only one analytical document (as opposed to data strips and plates) which plaintiff still claims has not been produced. This is the so-called "Stombaugh Report".

In the trial court's 1977 opinion, the court examined plaintiff's assertion that there had once been and might still be a report "comparing the two anterior holes" in "the shirt worn by President Kennedy" on the day of his assassination. Weisberg v. United States Department of Justice, 438 F. Supp. 492, 502 (D.D.C. 1977). The sole basis for suspecting the existence of

such a report was the comment of former Special Agent Frazier in his deposition that he had asked another examiner to determine, by buttoning the shirt, whether the two holes overlapped. Id. Initially, Frazier could not recall whether, thirteen years before, he himself had conducted that aspect of the examination of the shirt. He subsequently indicated that another examiner, whom he thought was Paul M. Stombaugh, might have the examination and prepared a report. Id. Weisberg did not take Agent Stombaugh's deposition. The trial court found that there was never any indication, outside of Frazier's testimony, that Stombaugh, or any examiner other than Frazier, prepared such a report. The court found, in its examination of the evidence, that it was probably true that Frazier himself had conducted the examination of the President's shirt as he had indicated in 1964 to the Warren Commission. Id. The court held that Frazier's attributing the preparation to Stombaugh was mere error, resulting from the lapse of thirteen years and the fact that Stombaugh had indeed examined a shirt linked to the assassination, the shirt worn by Lee Harvey Oswald. Id. at 502-3.

While this Court agreed that the lower "court's deduction was hardly illogical" Weisberg III at 316, 627 F.2d at 369, it found that the possibility still existed that Stombaugh might have written a report. Id. at 317, 627 F.2d at 370.

After this Court's last remand, Agent Kilty searched for the "Stombaugh Report" (Kilty Deposition, p. 121, App. 130). He did not find any notes produced by Stombaugh regarding any examination of President Kennedy's shirt. He added that he had looked "through all the documents produced by Stombaugh." (Kilty Deposition, p. 125, App. 134), including "hundreds of pieces -- thousands of pieces of paper" (Kilty Deposition, p. 126, App. 135) What Kilty did find in another part of his search was a report prepared by Frazier (Kilty Deposition, p. 122, App. 131), which addressed the issue of whether the two holes in President Kennedy's shirt collar overlapped, the exact issue supposedly covered by the "Stombaugh Report." See Weisberg III at 316, 627 F.2d at 319. The report, dated December 5, 1963, (Memo in Support of Summary Judgment Motion, Exhibit 6, R. 89), described holes in the President's shirt and stated:

> A ragged slitlike hole approximately 1/2" in length is located in the front of the shirt 7/8" below the collar button. This hole is through both the button and buttonhole portions of the shirt due to the overlap.

Id., p. 2. This report was already in the possession of Weisberg. (Kilty Deposition, p. 132, App. p. 141). While Weisberg has claimed that "the report produced does not state whether an examination was made to see if the slits in the President's shirt collar coincide", Plaintiff's Brief, p. 21, the

portion of the report cited and underlined above can hardly be read as anything else.[3/] Consequently, the existence of the Stombaugh Report is no longer a genuinely disputed issue of fact.

C. Weisberg's Allegations On Appeal Are Frivolous.

As indicated earlier in this brief, plaintiff no longer claims that the trial court curtailed his opportunity to obtain additional information about the alleged existence of unproduced documents. He now relies solely on allegations of bad faith on the part of the FBI in his effort to require either 1) a new, improved search for documents, or 2) "appropriate tests and examination of Kennedy assassination evidence" (Plaintiff's Brief, p. 22). Such allegations of FBI bad faith have previously been rejected by the trial court as not being supported by "an iota of evidence." Weisberg v. DOJ, 438 F. Supp. 492 (D.D.C., 1977). Nonetheless, they figure prominantly in plaintiff's brief before this Court and must be addressed.

Underlying the specific claims made by Weisberg against the FBI is a general belief on his part that:

3/ Both this Court and plaintiff appear to have made the error that the holes were in the shirt collar. This is not supported by the evidence. The overlap was where the shirt buttoned up the front. As Frazier put it in his Warren Commission testimony, "Actually, it is a hole through both the button line of the shirt and the buttonhole line which overlap down the front of the shirt when it is buttoned." Weisberg v. United States Department of Justice, 438 F. Supp. 492, 502 (D.D.C. 1977)

> ...notwithstanding the findings of a Congressional committee that the President was probably murdered as the result of a conspiracy, the implications of evidence that the FBI deliberately faked its investigation are such that records of the nature sought by Weisberg in this case have the potential of compelling that result.

Plaintiff's Brief, p. 8 (emphasis added). Plaintiff thus finds that the FBI has "an exceptionally powerful motive for continuing to stonewall Weisberg -- and this Court" (Id., p. 8) and to engage in a "war of attrition" designed "to grind Weisberg down and weary the courts." (Id., p. 4.) A candid look at Weisberg's examples of FBI "faking" of its investigation show that his allegations are groundless.

Even though plaintiffs' twenty-five page brief is organized somewhat on stream-of-consciousness lines, his main allegations of FBI bad faith are specified on pages 1-2. They are:

> (a) after two remands by this Court, FBI produced records that it earlier had claimed didn't exist or had been destroyed;
>
> (b) on latest remand plaintiff adduced evidence of the testing of other specimens in regard to which the FBI produced no records;
>
> (c) FBI admittedly did not search all possible locations for responsive records;
>
> (d) crucial items of Kennedy assassination evidence are inexplicably missing and FBI's present explanation for this contradicts that formerly given;

(e) FBI agent who testified as to nature of search conducted had executed false affidavits, testified falsely regarding fBI laboratory records when deposed in another case, and generally lacked credibility.

There is not a scrap of substance to any of these claims.

(a) "After two remands by this Court, FBI produced records that it earlier had claimed didn't exist or had been destroyed."

This allegation appears to be based on the FBI's release of the so-called "computer printouts" on samples of Q3 and Q15. (See Plaintiff's Brief, pp. 2, 4, 18.)

The truth about these "printouts", which are raw data samples and unintelligible to non-experts, is that Weisberg was shown them long ago and stated that he did not want them. For that reason, Weisberg did not receive this material in 1975. When the new search produced these items, and when Mr. Kilty was informed that the items were now desired by Mr. Weisberg, they were retrieved and released.

While it is true that Agent Gallagher assumed that these printouts might not have been kept, (Gallagher Deposition, pp. 92, 117, R. 42) he apparently knew nothing of Agent Kilty's earlier retrieval of the "printouts" and discussion with Weisberg. Consequently, this example of "bad faith" is merely a red herring, totally without substance.

(b) "On latest remand plaintiff adduced evidence of the testing of other specimens in regard to which the FBI produced no records."

It is difficult to know for certain to what Weisberg is referring in the above allegation. It appears, however, that he

is referring primarily to the existence of documents regarding the testing of a "sidewalk scar" (Plaintiff's. Brief, pp. 4, 8, 14, 19), which should not be confused with the curbstone discussed at pp. 13-16, supra. From the "evidence" presented by Weisberg, there is no reason to suspect that any spectrographic or neutron activation analysis was ever carried out on this "scar" (See Weisberg Aff., Exh. 53-60, App. 440-454). Consequently, it is hardly surprising that no records of such analyses were produced for Weisberg in response to a FOIA request.4/

Weisberg also claims that records of certain FBI laboratory "ballistics tests" have not been released to him in this suit, a point that he claims is conceded by the FBI. (Plaintiff's Brief, p. 15). The words "ballistics tests" have not previously been used to describe the records in this case. In no way, however, has the FBI "conceded" that any relevant laboratory records have not been given to Weisberg (except for the computer printouts given to him recently). Supra, p. 19. See Kilty Deposition, p. 54, App. 63). Consequently, Weisberg's claim that the FBI has "conceded" existence of withheld reports relevant to this case is false.

4/ No credible evidence even exists to tie this sidewalk "scar" to the Kennedy assassination. The only allegation of such a connection comes from a Weisberg correspondent, Eugene Aldridge (App. 449). Aldridge has been described by a local Dallas reporter as someone who "sounded to him like a 'mental case'" (App., 452). He apparently holds the view that this scar (which he originally found) has been patched by the FBI in order "to protect the Soviets." (App., 451.)

(c) "FBI admittedly did not search all possible locations for responsive records."

After the last remand of this case, Agent Kilty searched again for documents sought by Weisberg in this case. He spent parts of ten days in his search (Kilty Deposition, p. 130, App. 139), looked in places where he thought documents might be located (as specified in Kilty Dep. p. 131, App. 140) and requested help from his colleagues. He looked specifically for items listed in the last remand. The results of the search have been previously outlined (supra, pp. 16-20). Essentially, the search turned up only documents that had been previously made available to plaintiff. Nonetheless, Weisberg argues that "the FBI's search in this case was not thorough and complete" (Plaintiff's Brief, p. 16). One basis for this conclusion is Agent Kilty's failure "to obtain first-hand knowledge ... from those most likely to know" (Plaintiff's Brief, p. 19), by which he appears to mean retired Special Agent Heilman. (See Kilty Deposition, 139, App. 148). However, Kilty did call Heilman at the time of his prior search, learning only that the lost spectrographic plate might have been thrown away (Kilty Deposition, p. 91, App. 100). Plaintiff is apparently of the view that Kilty should have questioned Heilman further for, as his counsel explained:

> You never know. Do you recall that there was an item in the papers a couple of years ago that an FBI Agent had taken home a spectroscope....

(Kilty Deposition, p. 139, App. 148). Of course, the short answer is that this Court -- and the trial court -- gave plaintiff the opportunity to depose Heilman or any other FBI employee after the latest remand. Plaintiff has failed to avail himself of this opportunity.

The only other serious criticism directed at the scope of Agent Kilty's new search, is that Kilty failed to search records of the Dallas Field Office. Kilty's response to plaintiff's suggestion of searching those files was:

> I did not look in Dallas. Not in the wildest, wildest imagination could I ever think that notes produced by an agent in the FBI laboratory would be in Dallas.

(Kilty Deposition, p. 126-7, App. 135-6).[5/]

(d) "Crucial items of Kennedy assassination evidence are inexplicably missing and FBI's present explanation for this contradicts that formerly given."

Again, the nature of plaintiff's claim above is not at all self-evident. Apparently, one allegation is that the FBI formerly stated that the "lost spectrographic plate" was "destroyed" and that it now says instead that the plate was

5/ Pursuant to another FOIA request, Weisberg has received what the FBI purports to be all Dallas Field Office files on the Kennedy assassination, amounting to approximately 40,000 pages of documents. Of course, he has also claimed a failure by the FBI to provide the entire files from Dallas and in consequence, has filed a lawsuit to obtain them, which is still pending. Weisberg v. FBI, C.A. No. 78-328, DDC (J. Smith).

"lost." (Plaintiff's Brief, p. 4). This appears to be a distinction totally without substance. For years, the FBI has explained that it does not know what happened to the plate in question. To suggest that different hypothetical explanations given to Weisberg over the years contradict each other and constitute a basis for again remanding this case to the trial court is hardly convincing.

A similar argument by Weisberg suggests that a "nick" or "chip" in a Dallas curbstone, allegedly caused by a Kennedy assassination bullet was "altered" to become the curbstone "lead smear" previously mentioned. (supra. p. 13-16). There is no evidence supporting this allegation and nothing to back up plaintiff's statement that:

> Indeed, the FBI's own reports establish that the FBI knew that the "nick" had been altered before it subjected the curbstone to spectrographic testing.

(Plaintiff's. Brief, p. 7). A reading of all of the relevant documents attached to the Weisberg Affidavit (App. pp. 400-423) demonstrates that no one ever alleged seeing a "nick" or "chip". The letter from the Warren Commission of July 7, 1964, refers to a "niche" or "mark on the curb" or "curb mark" (App. p. 404). It attached a letter from an Assistant United States Attorney which quoted a reporter as saying "that he examined the curb ... and

that it looked like a piece of lead had struck it." (App. p. 417) Another newsman found a "spot" that could possibly have been made by a bullet striking the curb. He called it a "mark" and noted that it "did not break the concrete." (App. p. 423). All of this is consistent with the FBI lab's finding of a "mark" in the report sent to the Warren Commission. (App. 410-411) While two FBI Laboratory reports written before the curbstone section was identified by the FBI (App. pp. 414-5) refer to the possible future discovery of chip marks or a nick, they do not indicate that such was ever seen. The identity of "the FBI's own reports" establishing the "alteration" of the "nick" (Plaintiff's Brief, p. 7), consequently, are known only to plaintiff. Clearly, this is not evidence, as plaintiff would have this court believe, that:

> the curbstone was patched before the FBI listed it and that the FBI passed phony test results on to the Warren Commission.

(Plaintiff's Brief, 8). Such a claim is utter nonsense.6/

(e) "FBI agent who testified as to nature of search conducted had executed false affidavits, testified falsely regarding FBI laboratory records when deposed in another case, and generally lacked credibility."

While plaintiff's first four allegations can be characterized as baseless, his fifth is, in fact, scurrilous.

6/ Weisberg also claims that "the FBI delayed testing the curbstone for some nine months." Plaintiff's Brief, p. 7. In fact the FBI was asked to examine the curbstone by the Warren Commission on July 7, 1964 (App., p. 408) and submitted its report to the Warren Commission on August 12, 1964 (App. p. 410). A short delay was caused because local agents could not find the "mark" on the curbstone (App. p. 415). This led to the sending of a special agent from FBI Headquarters to find the sample.

Weisberg accuses John W. Kilty, a twenty-year veteran of the FBI and current Chief of the Elemental Analysis Unit of what amounts to perjury.7/

Weisberg attacks Kilty throughout his brief, (Plaintiff's Brief, pp. 9-13, 19-21), concluding tht Kilty has shown a "willingness to give untruthful testimony" (Plaintiff's Br., p. 20) and that he "habitually swears in contradiction to himself" (Plaintiff's Br., p. 20).

Plaintiff appears to rest his case against Kilty primarily on two claims: (1) that Kilty lied in a May 13, 1975 affidavit, and (2) that Kilty lied when he claimed in another Weisberg FOIA assassination case that FBI files were not kept in the laboratory (Plaintiff's Brief, pp. 20-21).

The first claim has been made and responded to in the past before this Court. (See Appellees' Brief, 78-1107, filed Nov. 29, 1978, fn. 6, pp. 8-9). Kilty had stated in a May 13, 1975 affidavit that:

> [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.

7/ In his final dispositive motion requested by the trial court, Weisberg made an identical claim, moving that the court refer the Kilty matter to the Justice Department "for a determination as to whether prosecution may be warranted." (Plaintiff's Motion, September 8, 1981, p. 1, R. 88). This request was ignored by the court in its Order of November 18, 1981, granting defendants motion for summary judgment and denying plaintiff's motion. (R. 94)

(App. p. 159). A month and a half later, on June 23, 1975, Kilty corrected his prior representation, explaining:

> [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.

(App., p. 167-8). This slight change in testimony was inquired into in detail by plaintiff's counsel at Kilty's deposition. The colloquy was a follows:

> Q. This is directly -- directly contradicts your prior Affidavit, does it not?
>
> A. No.
>
> Q. Well, didn't you state in the prior Affidavit that the clothing, the windshield and the curbing had been subjected to testing by neutron activation analysis?
>
> A. Yes. It does not directly and opposite to everything that was said in that paragraph. I added neutron activation analysis in the first Affidavit which I shouldn't have. This is clarifying it, as you know.
>
> Q. So, there was no basis for neutron activation analysis in the first Affidavit for including that?
>
> A. It was a mistake. I should not have included it.
>
> Q. How did the mistake occur?

A. Being born, I guess, causes one to make mistakes sometime before they die.

(Kilty Deposition, pp. 88-89, App. 95-96).

Then plaintiff then inquired as to how it was that the FBI had NAA computer printouts if NAA was not "used to determine the elemental composition" of these samples. Kilty explained:

A. Quite clear. I knew that something was presented to a nuclear reactor at the time because of the notes I gave you that you could see "Q3" and "Q15". There are no calculations regarding the quantitative analysis done on those specimens which indicated to me that there was -- nothing was done to completion on those specimens for some reason.

Q. Your Affidavit does not indicate that. It states flatly that it was not used in examining the curbstone. What you're telling me is now that you knew that it was examined.

A. Well, what do you mean by examine then?

Q. Well, you used it in...

A. Okay, I'll tell you what I use -- I mean, then maybe... It means an examination, to me, is the total analysis and handling of a specimen which produces some kind of a report or final comment or final opinion regarding the totality of all the tests and material that you went through on that specimen.

(Kilty Deposition, pp. 87-88, App. 96-97). Thus, one of Weisberg's bases for accusing Agent Kilty of testifying falsely is really a seven-year-old disagreement over the meaning of the word "examine."

The second and last serious basis for Weisberg's attacks on Kilty arises from a comment in Kilty's deposition on another Weisberg case, indicating that the FBI laboratory does not

maintain its own files (Plaintiff's. Brief, p. 21). Weisberg finds a contradiction since Kilty has acknowledged searching file cabinets in the laboratory in this case (Plaintiff's. Brief, p. 21). Weisberg's proof for this allegation is again primarily a disagreement over semantics.[8/] Kilty explained that "files containing old data generated by neutron activation analysis and spectrographic work," (Kilty Deposition, p. 135, App. 144) plates or something like that" (Kilty Deposition, p. 135, App. 144) were searched for in the laboratory. This is not inconsistent with the general proposition that all FBI files are kept in FBI Central Records, rather than in the laboratory. Of course, given that these locations were all searched for Weisberg in this case anyway, it is difficult to see the relevance of the issue to this case.

Outside of these two allegations, plaintiff's primary complaint regarding Kilty is that he forgot the exact nature of the search he made in 1975. (Plaintiff's Brief. pp. 11-12). A more objective reviewer might conclude that Kilty remembered with unusual clarity events of seven years before.. (Kilty Deposition, pp. 34-120, App. 43-129). It seems most uncharitable to imply that any dimming of memory over such a long period was by design. (See Plaintiff's Brief, p. 13).

8/ The deposition of Kilty in the other case Weisberg v. DOJ, C.A. No. 75-1996 (D.C.D.C. J. June Green) (a FOIA suit brought by Weisberg for Martin Luther King assassination documents) is not in evidence and consequently cannot be used for any purpose by plaintiff. If it were, however, defendants could show in that deposition that Kilty explained that raw data from NAA in the King case was retrieved by him from the laboratory file cabinets for Mr. Weisberg, but that they were not considered FBI "files" (Kilty Deposition, Oct. 12, 1979, p. 20).

IV. CONCLUSION

Plaintiff has come before this Court a fourth time in this case alleging that the Justice Department has failed to meet its burden to prove that "no substantial and material facts are in dispute and that he is entitled to judgment as a matter of law" Weisberg III, at 315, 627 F.2d at 368. He is wrong. Plaintiff has exhausted all efforts to find new information through cross-examining witnesses and falls back on frivolous claims of FBI bad faith. He calls for a "plan ... to insure that the FBI conducts a systematic search" (Plaintiff's. Brief, p. 25) or "an order requiring the FBI to restore informaton (sic) which is allegedly missing from its Kennedy assassination files." (Plaintiff's Brief, p. 23). This first would require a search that could never be more complete than the two searches already performed by Kilty. The second suggestion, for new testing, is not only beyond the scope of this Court's powers as noted by plaintiff (See Plaintiff's Brief, p. 23 and NLRB v. Sears Roebuck Co., 421 U.S. 132 (1975)) but totally uncalled for by the facts in this case.

Defendants respectfully submit that the judgment of the district court granting summary judgment in their favor should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 28 day of May, 1982, sent by United States mail, postage prepaid, to copies of appellee's brief to:

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Makes no ref to records pertaining to tests it did market did not provide