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

HAROLD WEISBERG,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 86-5289
	)	86-5290
WILLIAM H. WEBSTER, et al.,	)	
	)	
Defendants-Appellees.	)	
	)	

OPPOSITION TO MOTION FOR SUMMARY AFFIRMANCE

Appellees' Motion for Summary Affirmance, euphemistically self-described as an "unusual procedure," should be denied. It is out of order, improper, misrepresents, is based on untruths such as that Appellant Weisberg seeks to "reopen" the underlying litigation (page 6), and it fails to state that there are no legal or factual matters that are in dispute, as assuredly there are. It cites no authority and does not even cite the rule under which the motion is made for the information of the court or the pro se appellant. The motion is a subterfuge by which appellees seek to avoid having to face the charged, proven and entirely undenied felonious misconduct by means of which, and only by means of which, they procured the judgment from which Weisberg seeks relief. Weisberg seeks and for years has sought nothing else, despite the by now boilerplated and prejudicial fabrication that he wants to reopen the underlying litigation, an allegation abundantly refuted by the case record and by his grossly and deliberately misrepresented brief. It is because, despite their promise, appellees cannot refute what

what Weisberg states in his brief that appellees resort to this dodge which, in and of itself, insults and demeans the court, as Weisberg indicates below.

Appellees were required to file any dispositive motion within 45 days of docketing. The claimed reason for not complying with the rule is that they did not know the issues Weisberg was raising on appeal, which is not true, and that "it was only with the filing of plaintiff's brief that it became obvious that plaintiff was engaging in a frivolous attempt to reopen the merits decision."

"Apparent" is hardly the word for it and if appellees read anything to come up with this basis for seeking summary affirmance, perhaps it is "Through the Looking-Glass" in "Alice in Wonderland." It certainly is not in Weisberg's maligned brief, which is quite specific to the exact opposite at several points. For example, in addressing this fabrication appellees have misused with grim regularity (on page 27), "Weisberg has no interest in reopening the underlying case, which he earlier sought to dismiss because of his impaired health. He then was opposed by appellees and denied this by the [district] court. The actual purpose and Weisberg's clearly stated objective, the title of Rule 60(b), is 'Relief from Judgment or Order.' ... Weisberg sought nothing else and he addresses nothing else. His actual claim is limited to entitlement to relief from the judgment because it was procured only on the basis of undenied fraud, perjury and misrepresentation."

How genuine appellees' yearning to save the time of the

court in this litigation, their claim in making this "unusual" motion out of order, is indicated in Weisberg's brief (on page 15) in reference to appellees' refusal to permit him to dismiss this litigation years ago with prejudice to himself. All the time and trouble of all parties since then come directly from that refusal. Instead, as Weisberg's brief states, appellees "insisted on making a totally unnecessary and costly Vaughn index. [FBI SA] Phillips' March 2, 1982, declaration states that a full Vaughn would require 126,000 man hours and a 1/100 Vaughn would require 1300 manhours."

Weisberg's brief speaks for itself, not through appellees' gross and deliberate misrepresentation of it. Any impartial reading of his brief makes it apparent that without any question there are legitimate questions of law and of fact before this court that require its consideration. Whether or not it is fair or even honest to characterize them as "frivolous" becomes apparent on reading this brief, not appellees' misrepresentation of it, and that is what, above all, appellees seek to avoid. How important this is for appellees can be seen when to this day they have not made even pro forma denial of Weisberg's allegation that "the judgment ... was procured only on the basis of undenied fraud, perjury and misrepresentation." (Again quoted from brief, page 27)

Weisberg's brief begins with three pages of "issues presented." (Attached as Exhibit 1) Not one is cited by appellees as "frivolous." It has a page and a half of "summary of argument" (attached as Exhibit 2) and again, appellees fail to cite

a single word of alleged "frivolity." (Reopening the underlying litigation is not included.)

That when charged with misrepresentation and other offenses appellees still do not make even pro forma denial, leave alone, even at this very late date, make any effort at refutation and instead misrepresent all over again to this court, insults and demeans this court and suggests that appellees expect and depend upon immunity before this court from any offenses. They suggest also that this court will not read Weisberg's brief and instead will take the word of an adverse party, a word already at the very least questioned.

Appellees' intended insult to this court is made more serious by the subject matter of the underlying litigation, the investigation of the assassination of President Kennedy, a subject matter in which, in the words of an earlier panel of this court, interest will never end. Anyone, historians, journalists or others, reading Weisberg's brief and appellees' Motion for Summary Affirmance, will be hard put to avoid seeing appellees' reflection of belief they would get away with anything before this court. Otherwise, any impartial mind will wonder, how would they dare file such gross and deliberate misrepresentations to the very court which has Weisberg's brief before it.

With regard to appellees' spurious claim not to know "the issues plaintiff was raising on appeal," this is self-serving nonsense and can be uttered only on the basis of the appellees' permeating fabrication that Weisberg seeks to reopen the underlying litigation. On the actualities, what Weisberg could do was apparent and what he was limited to also was apparent. He can

do nothing about his advanced age, infirmities and serious illnesses and he can do nothing about his lack of legal training, about which the motion appears to complain. He did indicate promptly what his appendix would be limited to and he is foreclosed from presenting anything new to this court. His brief is based entirely on the case record and on the district court's memorandum and therefore was not and could not be any kind of surprise to appellees. Therefore, appellees resort to their own and oft-corrected fabrication, the very fabrication that is basic to this "unusual" and improper motion the real purpose of which is appellees' longing not to have to face their own record in this litigation.

Weisberg's brief presents many reasons for granting him the relief from the judgment that he seeks. These range from abuse of discretion and error by the district court to serious, felonious misconduct by appellees. Attributing error to the district court cannot, properly and honestly, be dismissed by appellees' partisan characterization of it as "a discursive personal attack on the district court." Allegation of error by the district court is a srious matter and appeals courts exist to judge such allegations. There is, Weisberg believes, a documented case in his brief. For appellees to be content to attempt to dismiss this as "an abuse of the Court's appeal process" is to admit the truth of these allegations. Moreover, if Weisberg abuses "the Court's appeal process," this court is not without remedy. It likewise is not without remedy if appellees have abused the appeal process and Rule 11. With regard to Weisberg's allegation that

the judgment against him was procured only on the basis of undenied fraud, perjury and misrepresentation, also very serious matters, appellees still refuse to make even pro forma denial, still refuse to confront the proofs advanced, now in the brief, and instead seek to dismiss the brief as "a frivolous attempt to reopen" the underlying litigation - an obvious falsehood, as any reading of the brief makes apparent. Under these circumstances, even daring to request summary affirmance is at least inappropriate and an insult to this court.

Weisberg believes and requests that appellees' motion shou be dismissed and that appellees be required to respond to the actual brief, not any further fanciful and self-serving misrepr sentations of it.

He believes also that this court's decision in Tinsley v. Nagel, No. 86-7021, requires this.

ARGUMENT

As his brief states, Weisberg's study is not of the assass nation per se. It is a study, and a very large study, of the functioning of our basic institutions in that time of great stress and since. His FOIA requests thus are for public inform tion that can be and often has been exceedingly embarrassing tc the executive agencies. He has never filed any case that had to be litigated and when he did litigate it was only because the executive agencies have long had a policy of stonewalling him. They have resisted in the litigation with zealotry, as examination of the case record establishes. Almost 20 years ag these appellees decided to "stop" him and his writing. Were it

not for appellees' policy his effort to dismiss this litigati with prejudice against himself because of his serious health lems would have been welcomed rather than resisted successful Basic in this zealous resistance to disclosure of nonexempt a potentially embarrassing information and to "stopping" him an his writing has been misrepresentation. This misrepresentati extends to this court and to misrepresentastion of his reques documented in the brief and beyond any denial. Before the ne evidence on which Weisberg proceeded pro se after remand was closed to another requester, he presented evidence bearing on this to the district court, which ignored it all. After reman and based entirely on this new evidence - different in form an content because it is appellees' own records that appellees' o had until then - he alleged, without even an attempt by appell at refutation, that the money judgment against him, for allege not complying with the district court's discovery order, was p cured only by means of fraud, perjury and misrepresentation an that the new evidence proves this beyond question. (In fact, and again without contradiction, Weisberg attested that he had already provided voluntarily all the requested information and documentation of which he is aware - two file drawers of it - admitted in writing by appellees to be more information and doc mentation than anyone else had ever provided.)

Instead of confronting these serious allegations at this late date, not having made even a pro forma effort to refute th before the district court, appellees now engage in another seri of misrepresentations all over again - and there is nothing els

else in appellees' motion. It is obvious that if Weisberg's allegations are not valid appellees have every motive for confronting and refuting them. Instead, appellees do not even deny them and seek to have this court abdicate its responsibilities and dismiss these truly serious matters without any consideration of them at all. Appellees' motion is an effort to convert this court into a rubber stamp for officialdom which lacks even that minimal self-respect involved for making a self-serving denial.

The motion represents that it is supported by the attached Memorandum in Support, but what supports the supposedly supporting Memorandum? Nothing. Not a single word of any authority save for a single misrepresentation of Rule 60(b), the misrepresentation adopted by the district court, that there is, allegedly, an "ironclad" one-year time limit. (page 2)

In stating that "plaintiff moved pursuant to Rule 60(b) ... for relief from judgment," appellees fail to state that in this Weisberg invoked the first three and the last two of its six clauses. Appellees here then pretend that fraud is the only allegation Weisberg made and that under any and all circumstances there is a limit to "one year after the order was entered."

All of Weisberg's brief, according to appellees who never once quote or even cite it, is "frivolous." Can it be that raising the question, when does that year begin, is "frivolous?" Can it be that appellees did not read in Weisberg's brief (beginning on page 58) his argument that the change in the judgment after remand is a "substantial substantive change sufficient to renew the plaintiff's right to bring a Rule 60(b) motion" (page 59) under Transit Casualty Co. v. Security Trust Co., or that

the year begins to run at the time the district court's Order underwent the (undenied) "substantial substantive change" after remand? Appellees' quoted misrepresentation is followed by an obvious and deliberate falsehood - if one has read Weisberg's brief: "Plaintiff's motion was directly [sic] entirely to seek ing relief from the 1983 merits judgment and did not address th award of attorneys' fees made by the district court in its late order." Throughout Weisberg's brief does precisely what appell tell this court he did not do, and one of its specific referenc to "the award of attorneys' fees made by the district court in its later order" begins on page 55.

What appellees claim justifies summary affirmance is Weisberg's alleged use of Rule 60(b), "that newly discovered eviden about the sufficiency of the FOIA document search required reop ing of the case." [Emphasis added] This, too, is a misrepresentation that cannot be accidental. What Weisberg actually claime and claims is that the new evidence proves that appellees perpetrated perjury, fraud and misrepresentation to procure the money judgment and that he therefore is entitled to relief from that money judgment.

Perhaps appellees assumed that neither this court nor its counsel would even read Weisberg's brief because the exact opposite is stated at various points in it, including under "Summary of Argument" (Exhibit 2, pages 44A, B): "Under Rule 60(b) appellant is entitled to the relief he seeks, according to the author ties cited by the [district] court itself, because the newly discovered evidence, which establishes appellees' serious mis-

conduct, was known to exist and was withheld by appellees, who alone possessed it ... because undeniedly appellees committed serious violations to procure the judgment; and because the Supreme Court says that one may not be the beneficiary of his own misdeeds." (In fact, as Weisberg's brief states, he was under the impression that time for moving to reopen the underlying case had expired.)

Next appellees misrepresent entirely what they say about the one specific item referred to of the new evidence: "The documents [disclosed to Mark Allen] include copies of what plaintiff alleges are the 'ticklers' he was asking the FBI to search for in his FOIA request." (page 2)

Except for the fact that Allen did receive ticklers, this representation is entirely false. The use Weisberg made of that new evidence is to prove that the discovery order upon which the judgment is based was procured by perjury, fraud and misrepresentation in that the FBI claimed to require this discovery from Weisberg to prove it had complied or, in the alternative,to be able to locate what had not been provided. In the course of this, FBI SA John N. Phillips, appellees' major affiant in this litigation and also the FBI's supervisor in the processing and disclosure to Allen, had sworn that all FBI ticklers are routinely destroyed after only a few days and thus no search for them had been made. The enormous ticklers disclosed to Allen are more than 20 years old and still exist and obviously are readily retrievable. Thus no discovery from Weisberg was necessary for any purpose with regard to them and the other relevant field

office information they refer to. Those ticklers are FBIHQ ticklers and thus are not within Weisberg's litigated request and he therefore did not state and could not have stated what appellees here misrepresent to this court, that they and all else disclosed to Allen is what "he [Weisberg] was asking the FBI to search for in his FOIA request." Because the FBI, its affiant Phillips and later its counsel knew that this relevant field office information exists and was and remains unsearched and withheld, no discovery from Weisberg was necessary to locate it and no discovery from him could enable them to prove compliance, appellees' representations on which the judgment is based.

That the meaning and use of the new evidence is irrefutable explains appellees' need to depart from truth with regard to it. It explains appellees' failure to make even pro forma denial of having procured the judgment exclusively by the serious misconduct Weisberg alleges. The misrepresentation quoted above is designed to hide that to which Phillips knowingly swore falsely, as without question he did and cannot deny in the face of this new evidence - which he, personally, was responsible for disclosing to Allen - and since has not retracted or apologized for.

Instead of at this late date being willing to retract and apologize, appellees remove all doubt about their intent to deceive and mislead this court with the concluding sentence of that paragraph: "Plaintiff argued that Mr. Phillips defrauded the court by not providing to plaintiff the information which was provided to Mr. Allen." (pages 2-3) This compounding of the undenied misconduct is knowingly untrue and knowingly impossible because

Allen's request is exclusively for FBIHQ information and Weisberg's is exclusively for field office information and only headquarters records were disclosed to Allen.

Appellees here also misrepresent to this court because Weisberg alleged that not only the district court but he, too, was defrauded. To this day appellees have not denied defrauding Weisberg.

While on its face this fabrication is silly, it also insults this court's intelligence because it asks this court to believe that the aging and seriously ill Weisberg, able to walk but little, to whom stairs are a hazard and a problem, who may not stand still and must hold his legs elevated while sitting, who is to spend five hours a day in therapies, some lying flat on his back with his legs elevated, would go to all this cost and trouble only to get what he has already and has used.

This misrepresentation also illustrates appellees' practice of stating anything that may at any time appear to be expedient, without regard to fact and truth, and to now with immunity. Weisberg made a request that Allen later duplicated. Time passed, Weisberg was unable to file suit, Allen filed suit, and a different court compelled disclosure to Allen. After Allen provided the relevant information to Weisberg, Weisberg wrote appellees and withdrew his request for this information so, without any request it cannot possibly be true that Weisberg "argued that Mr. Phillips defrauded the court by not providing to plaintiff the information which was provided to Mr. Allen" for which Weisberg had withdrawn his request.

What appellees state to this court is knowingly impossible because the information disclosed to Allen is not within Weisberg's litigated request or any other existing request by him, a matter on which appellees had been corrected earlier. Appellees' stating the knowingly impossible to this court is not without precedent. When this case was earlier on appeal, appellees stated that the district court had "closely observed" Weisberg's alleged misconduct in improperly influencing his then counsel when Weisberg was never once with his counsel before the district court in this litigation as the case record reflects, and when his health and its limitations made his presence impossible.

Even when there is a partly truthful admission in appellees' argument, it is immediately rendered untruthful. After stating that Weisberg's "primary allegation in his Rule 60(b) motion was that he received new evidence from Mark Allen," which is not true because Weisberg's primary allegation is that he is entitled to relief from the judgment, the matter that must be "primary" under that rule, appellees state that "(p)laintiff contended that the documents Mr. Allen received proved the existence of other documents in field office files which are responsive to plaintiff's FOIA request but which have not been provided to him." (page 2) This part is entirely true and, notably, is entirely undenied - what was disclosed to Allen undeniedly established the existence of known, relevant field office records not provided in this litigation. It also is true that they "have not been provided" and remain withheld. But this is not the use Weisberg made of the new evidence. His Rule 60(b) motion does

not request that, belatedly, this withheld information be provided. And, despite appellees' misrepresentation of Weisberg's "primary" allegation, Rule 60(b) does not enable a litigant to use it to obtain withheld information. The "primary" and only purpose is "relief from judgment." And that is how Weisberg invoked the rule and phrased his motion.

There is consistency and unity of purpose in appellees' misrepresentations. After the obvious untruths addressed above, that Weisberg, who was not pro se until after remand, was only trying to reopen the underlying FOIA case and that "(n)one of plaintiff's claims went to the issue of the award of attorneys' fees," appellees argue that time had lapsed, that they had "opposed the motion as a frivolous attempt to reopen matters beyond the time allowed by the" rule. They also allege "failure to respond to the discovery orders." (page 3) Neither allegation is true, as Weisberg states in his brief, time had not expired and he did "respond."

It is undenied, as Weisberg did state, that before the order was issued Weisberg provided two file drawers of the information requested by appellees and that this includes all that was later demanded all over again as "discovery." That does "respond." He also attested, without refutation, to a number of other reasons for not providing all that information all over again, ranging from the impossibility of his doing it to the undenied fact that to procure the discovery orders appellees engaged in perjury, fraud and misrepresentation. All that he attested to does "respond." The apparent reason appellees did not say "comply" is

because they cannot deny that Weisberg had already "complied" by providing the requested information - which appellees promptly ignored. Two file drawers of documents and information can hardly be described as noncompliance and ignoring all that information is hardly proof that it was needed all over again.

It is notable that appellees never provided any evidence to refute Weisberg's attestations. Instead, counsel continues to misrepresent and describe what cannot be denied as "frivolous."

After repetition of the untruths that Weisberg seeks to reopen the underlying FOIA case (page 4) and that his brief "does not address the limited issues decided by the district court on remand" comes the misrepresentation of that "ironclad" one-year time limit under this rule ("not more than one year") which is immediately compounded by the misrepresentation that Weisberg's motion was untimely because of this time limit on fraud. ("It was, therefore, untimely.")

If there were an "ironclad" limit of a year on fraud, a matter Weisberg's brief disputes and addresses (another "frivolity?"), there is no one-year time limit on that rule's last two clauses.

It is not true, as appellees next state (page 5), that "(i)t is irrelevant that plaintiff's Rule 60(b) motion was filed within one year after the district court's decision on remand," with Weisberg's invocation of two clauses that do not have a one-year limit and because whether or not the changes in the judgment are substantial substantive changes, which toll that year, is properly a matter for this court's consideration and is in

Weisberg's brief.

That "(t)he Rule 60(b) motion did not address the issues decided on remand" (page 5), which happens not to be true, is irrelevant to the filing of the Rule 60(b) motion which can be filed only before the district court and was properly filed there.

That appellees do mean that there is an "ironclad" one-year time limit to all of Rule 60(b) is left without doubt in "(p)laintiff has done nothing in this appeal to remedy the untimeliness of the motions upon which it is based." Here, too, appellees must assume that this court will not read Weisberg's brief or that it will tolerate any kind of misrepresentation by appellees because, with only passing reference, appellees later do acknowledge, Weisberg did invoke clauses (5) and (6), and they have no such time limit. Weisberg also did argue - and on this appellees are totally silent - that the order issued after remand is a "substantial substantive change" and therefore the one-year limit to the first three clauses begins with this new order. Appellees may disagree with this, but they cannot honestly say that Weisberg "has done nothing in this appeal to remedy [sic] the untimeliness."

Appellees next argue what should by itself defeat their motion for summary affirmance, that "this appeal seeks review of a motion for reconsideration. The standard for appellate review of denial of such a motion is whether the district court abused its discretion." Weisberg's brief does state precisely this, that the district court did abuse its discretion and thus the need for review by this court.

Next appellees argue that "the saving clause (singular is

employed) is not applicable to this case since plaintiff does not meet either [sic] of the exceptions to the one-year limit." Here it cites the district court's memorandum, page 7. There the district court admits to only a single savings clause and it does not refer to but entirely ignores the last three clauses. Without regard to whether the time begins to run on issuance of the changed judgment and Weisberg's claim to clause (6) and by reference to what Weisberg did not invoke, his right to an independent action, the memorandum says "neither exception is applicable." This is another of the matters Weisberg briefs in his appeal. The district court is not automatically right in whatever it says. If it were, there would be no need for appeals courts. The district court made no mention of Weisberg's invocation of clauses (5) and (6), two different savings clauses and a basis for attribution of abuse of discretion to it in Weisberg's brief. This certainly is not "frivolous" and is a proper matter for consideration on appeal.

It certainly is not, as appellees state (page 6), either "a discursive personal attack on the district court," relating to which more follows below, or "an abuse of the Court's appeal process." Appellees' resolute misrepresentation does appear to the nonlawyer appellant to be actual abuse of the appeals process. He hopes that the appeals process will require demonstration that appellees have not misrepresented and have not abused process or Rule 11.

When as next they do appellees finally and for the first time anywhere acknowledge Weisberg's claim "that he is entitled

to relief from judgment under sections (5) and (6) of Rule 60(b) which are not subject to the one-year time limit" (bottom, page 5), they say no more than that "(p)laintiff's argument under section (5), however, is simply that the judgment is inequitable. His argument under section (6) is that the improper conduct of defendant justifies relief. These arguments are merely a repetition of his claims of new evidence and fraud in a different form that attempts to avoid the applicable time limit." No more, nothing omitted in quotation.

The one word "simply" addresses a claim in court to inequitability? Especially when in all of this litigation this is the one reference appellees make to the claim, and still do not even deny inequitability? (Where here it would be appropriate, having said that Weisberg claims the "improper conduct of defendant justifies relief," appellees still make no denial of any improper conduct.) Weisberg's invocation of these clauses is not "merely a repetition of his claim(s) of new evidence," which is a non sequitur, and, contrary to appellees' innuendo, both clauses are, without question, specifically intended to toll the one-year time limit. So, even if there were a one-year limit after issuance of the changed order, it does not apply to a proper claim to relief under clauses (5) and (6). This is a proper matter on appeal and is in Weisberg's brief in some detail and with citation of authority. (Appellees do not deny at any point that anything in Weisberg's brief is not properly a matter for appeal.)

Weisberg emphasizes that appellees did not dispute or in any way address his inequitability argument before the district

court, when they had amply opportunity, motive and need to do so. On this basis alone, particularly after addressing only the single word "simply" to Weisberg's briefing of that issue, appellees cannot properly now ask for summary affirmance with that claim to relief so undisputed. Whatever the standards for summary affirmance may be, can it possibly be that "simply" is a legal argument so cogent and persuasive that it refutes Weisberg's briefing of the question? Because appellees provide no citation of authority or precedent and no reference to any accepted standards for summary affirmance, the nonlawyer, pro se appellant has no way of knowing what these standards are or whether there are any such standards; but he does believe that his briefing of the question is entirely uncontested when appellees address it with only this one word, "simply."

There could not be more factual contradiction and dispute than there is between Weisberg's actual brief and appellees' representation of it in their penultimate paragraph. Appellees portray the district court this way: it "conducted a painstaking review of all of plaintiff's allegations and concluded they were utterly unfounded." (Emphasis added) Beyond question, this is untrue and this untruth cannot be accidental if appellees can read and did read the district court's memorandum and Weisberg's motions and his brief. Illustration of the deliberateness of this intended untruth. which Weisberg believes exceeds what can be accepted as proper adversarial zeal, are immediately above: Weisberg claimed entitlement to relief from judgment, the matter before that court, under Rule 60(b)(5) and (6). He briefed this

claim extensively, with quotations from recognized authorities, and they are not even mentioned in the district court's memorandum, as appellees, who attached it to their motion, know very well. Their argument, if for the first time, does acknowledge, and for all other practical purposes also ignores, Weisberg's invocation of the fifth and sixth clauses. Reasonably and honestly, can anyone in the face of these facts that are beyond any question represent that the district court's so-called "review" is "painstaking" and encompassed "all" that Weisberg alleged? Obviously not. This untruth is immediately followed with another untruth, that Weisberg's brief does not raise any "new or serious allegations." Whether or not on appeal there must be a "new" allegation when an appellant is foreclosed from response to the district court's memorandum before that court, with existing questions of bias, prejudice, abuse of discretion and error, can it be that he also is foreclosed from raising such matters on appeal? If he is, is the appeals court anything but a rubber stamp for the district courts? No "serious allegations" in Weisberg's brief? The illustrations in the preceding sentences are not "serious" enough? Allegations of felonious misconduct are not "serious," more serious when to this moment they are denied? Inequitability is not a "serious allegation?"

What then immediately follows is the previously quoted "instead (of being "serious" and "new") plaintiff has simply engaged in a discursive personal attack on the district court." (The matters in Weisberg's brief are not "new?" Is not everything addressed in the memorandum necessarily "new," the memorandum representing

the conclusions of the district court and the brief being Weisberg's appeal from it?)

Weisberg's brief speaks for itself, as this filing by the Department of Justice speaks for itself. The few summary pages from Weisberg's brief attached hereto also speak, at less length, for themselves. This court can decide for itself whether the district courts are immune from all criticism; whether what Weisberg's brief states about this district court is within accepted practice (with which he is not familiar); whether appellees' descriptives are more dependable than "simply" as a refutation of a claim to inequitability; whether no review is an "exhaustive" review; whether a twice-refused hearing is an "extensive" hearing; and whether Weisberg's briefing relating to the district court's memorandum is "a discursive personal attack" on it and an "abuse of the Court's appeal process" or correctly represents the district court's memorandum and raises matters that are properly raised on appeal that appellees now seek to avoid having to face and answer.

What Weisberg's brief actually does state about the district court is made more relevant by appellees' quoted representations of his brief and their "personal attack on" Weisberg. Weisberg does attribute bias, abuse of discretion and error to the district court in his brief and he believes that they are proper matters to raise on appeal and do not constitute any "personal" attack. So what does Weisberg's brief actually say about the district court and its memorandum and order? And if Weisberg does not misstate, has he abused process or been "frivolous?"

The district court claimed several "reviews" of the case record, at least one represented by it to be "exhaustive," yet after this self-proclaimed judicial diligence, allegedly in deference to Weisberg's pro se status, the district court did not know and repeatedly misstated in its memorandum who was being sued or what was being sued for. Is this briefing "frivolous" or not "serious" and is accurate reporting a "personal attack on the district court?"

The district court claimed to have held an "extensive hearing" when in fact it held no hearing and refused Weisberg both an evidentiary hearing and a trial. Its order refers to the only proceeding after Weisberg was pro se and filed under Rule 60(b), this so-called "extensive hearing," as what it actually was, "oral arguments." Is it "frivolous" to report this accurately, is this a "serious" matter, is it a "discursive personal attack on the district court?"

Weisberg's brief alleges that the district court picked and chose selections from the case law cited, eliminating what was relevant and favorable to Weisberg in them, and that it altered the language in quotations from case law. This is a "frivolous" allegation, is not a "serious" matter? (Weisberg's brief is specific with regard to this and all other allegations and he notes that in support of their "personal attack on" Weisberg appellees quote not a single word from his brief that they consider proves their allegations in this newest effort to avoid direct confrontation with their record and practices in this litigation. Surely if he was "discursive" and made a "personal attack on the

district court" appellees and appellees' counsel could have made specific citation of at least one illustration to give their nakedly untrue allegations a fig-leaf of cover.

Appellees' argument ends with what is represented as justification of noncompliance with the 45-day limitation on filing dispositive motions, their boilerplated fabrication that they did not "know" that Weisberg merely seeks to reopen the underlying FOIA litigation ("reopen this dismissal of his case"), which is not true, and "that plaintiff raised no new issues," obviously untrue. (In addition to stating to both courts that he does not seek to reopen the underlying FOIA litigation; that without denial he tried to dismiss it with prejudice to himself years ago; he also stated that he understood he was foreclosed from reopening the underlying FOIA litigation - and this is in his brief.)

Whether or not appellees' justifications for noncompliance with the 45-day rule are in accord with the facts and with the actualities of Weisberg's brief, as the court will decide for itself, there is the separate question, whether or not the actualities of Weisberg's brief, its citation of the case record, quotations from case law and other authorities and its analysis of the district court's memorandum can be properly dismissed without consideration by this court. In this regard Weisberg notes again that appellees cite no authority or cases or precedents or standards of any kind to support the notion that summary dismissal, without consideration, of the issues raised and addressed in Weisberg's brief is proper or that they are not properly

matters to be both raised and responded to on appeal.

Before the district court Weisberg cited and quoted case law and other authorities to address the specific matters in question and basic American belief and concepts of justice. Included are the supreme court, individual justices and a chief justice. Examination of this newest of what he regards as appellees' endless abuses of him (and the case record is undenied in its documentation of what in his youth would have been considered impossible abuse in the United States, with illustrations undenied in his brief, as it is undenied in the case record before the district court) makes him regret that he does not recall quoting Lord Acton, who said that power corrupts and absolute power corrupts absolutely. Weisberg did quote the 25th of The Federalist Papers, by Alexander Hamilton, who was not a political radical:

> "For it is a truth which the experience of all ages has attested, that the people are commonly most in danger when the means of injuring their rights are in the possession of those of whom they entertain the least suspicion."

He meant the government. Appellees are and represent the government. The government which, for good or ill, in Justice Cardoza's words, is the teacher of us all.

Before the district court in this litigation appellees' then counsel phoned Weisberg's then counsel and threatened to seek contempt citation against Weisberg. Weisberg's message in response was that appellees would not dare risk a trial. Appellees then improvised seeking a money judgment. It was so hastily improvised there are no time records to support it. (This did

not deter or discourage the district court.) When Weisberg did not pay, still seeking a trial and thus calling appellees' bluff a second time, appellees sought a duplicating judgment and, without presentation of a single word of evidence, the district court awarded a duplicating judgment against Weisberg's counsel - because Weisberg did not accept his advice. This created the conflict of interest that denies Weisberg counsel.

It is beyond question that Weisberg sought to dismiss this litigation long ago and that appellees successfully opposed it and thus are responsible for all of this litigation since then. They have misused it and the courts as part of their (entirely undenied and well-documented) campaign against a writer whose writing they do not like and almost two decades ago decided they had to "stop." Keeping him tied up in court, particularly when he is unwell and limited in what he can do, does "stop" him and his writing effectively enough. It and the detailed analysis in this Opposition of what appellees now are up to, Weisberg believes, go back to Hamilton's warning about the "injuring of rights" by the government and to Acton's wisdom, that absolute power corrupts absolutely.

CONCLUSION

Weisberg believes that appellees' motion for summary affirmance should be denied; that appellees should respond to Weisberg's brief; and that in this filing appellees violate Rule 11, as is reflected in this Opposition to it.

Weisberg also believes that in its decision in Tinsley v. Nagle, No. 86-7021, which Weisberg did not have when he prepared

his brief, this court remanded and faulted the district court for precisely the same errors Weisberg attributes to the district court in this litigation.

This court commented that what Tinsley "contended before the district court" was "without contradiction," exactly the same as Weisberg's undenied statement that what he presented to the district court was undenied. One of Weisberg's unrefuted attestations is that he, in this court's words in Tinsley, "could not comply with the district court's order ... It is well established that impossibility of performance constitutes a defense to" what Weisberg faced, and thus "the court must consider as well [a party's] inability, without fault on its part, to render obedience." (page 5, emphasis added) On impossibility, Weisberg attested that what was demanded of him was a physical impossibility for him. Appellees presented no evidence to dispute this and the district court ignored Weisberg's undisputed evidence.

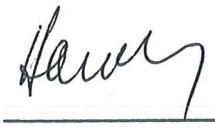
Weisberg asked for and was denied both an evidentiary hearing and a trial. This court held in Tinsley that the district court "is required to take such reasonable steps as is necessary to adjudicate a colorable claim of impossibility of performance." This is precisely the error Weisberg attributes in his brief to the district court. In this litigation it also (contrary to appellees' representation on page 5) "failed to make any specific findings about appellant's specific defense. Indeed, the court chose not to entertain any testimony."

In this case the district court held that it did not err and was not required to make any findings of fact in the absence

of a trial before a jury (which it refused) and it refused "to entertain any testimony" by live witnesses. (This is one of the matters Weisberg briefed because the authorities the district court cited in its memorandum presumes that there would have been live witnesses and cross-examination, both of which Weisberg was denied.)

Tinsley, Weisberg believes, prohibits the granting of appellees' motion and requires remand. Remand also could eliminate the apparent contradiction because the facts in this litigation exactly duplicate those addressed by this court in Tinsley.

Respectfully submitted,



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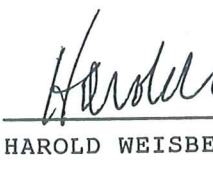
CERTIFICATE OF SERVICE

I hereby certify that on December 26, 1986, I have served by mail a copy of the foregoing Opposition to Motion for Summary Affirmance upon Christine R. Whittaker, Department of Justice, Washington, DC 20530.



HAROLD WEISBERG, pro se

EXHIBIT 1

ISSUES PRESENTED

In a Rule 60(b) case, can a court properly ignore undisputed claims to pertinence of its last three clauses, particularly inequitability, and state that there is an "ironclad" time limit of one year under all six clauses of that rule?

Is there an "ironclad" time limit of one year to all six clauses?

Are there exceptions to the one-year limit to the first three clauses?

When a court has only ex parte attestations and statements by counsel before it from one party, when these are undeniedly perjurious, fraudulent and misrepresentative, and when there are material facts in dispute involving integrity, can a court properly refuse the taking of oral testimony and cross-examination?

In the absence of oral testimony and cross-examination, particularly when a court twice refuses this, does intrinsic fraud, especially when fraud is undenied, constitute fraud upon the court?

When one party presents nothing but undenied perjury, fraud and misrepresentation to obtain an order, can a court properly claim it was not defrauded?

When there is undenied perjury, fraud and misrepresentation, can the party presenting this to a court be entitled to benefit from it and do the rules and case law permit this?

Can a court which is aware of them properly ignore Supreme Court decisons addressing these questions?

Can a court whose Order describes a proceeding as "oral arguments" properly claim that proceeding was a hearing, suggesting

the taking of "extensive" testimony?

Can a court which lacks the most basic knowledge of what is before it, does not know who is being sued or for what and, in FOIA litigation, what is produced, properly claim to have made repeated and "exhaustive" review of the case record?

When an order has been procured by undenied perjury, fraud and misrepresentation, when a court refuses the taking of oral testimony and cross-examination, and when a court manifests a lack of knowledge of the case before it extending to who is being sued and for what, can it be said that the judicial machinery performed in the usual manner its task of adjudicating the matter that was presented to it for adjudication?

When the government, in FOIA litigation, is the sole possessor of information that proves it obtained a money judgment by means of undenied perjury, fraud and misrepresentation, and it withholds that information until after the case record before the district court is closed, claim that the other party may not properly use it after remand because one year has passed?

Is the foregoing kind of situation appropriate to claim for relief under Rule 60(b)(6), "any other reason" or "excusable neglect," especially when the other party is pro se and a nonlawyer who is aging, seriously ill and handicapped and has no access to any law library?

Is it acceptable or culpable for a government affiant in FOIA litigation to attest to a claimed need for discovery while having and withholding documents establishing beyond question that his attestations were not truthful; and is it acceptable or cul-

pable when, after this new evidence is used, for the government and its representatives not to withdraw their false representations or apologize for them and insist upon enforcing a money judgment based exclusively on this undenied misconduct?

When a party seeking relief from a judgment on the claim that enforcing it is no longer equitable; when this is not disputed by the party in whose favor the judgment was ordered; when the court so completely ignores the equitability argument that its Order and attached Memorandum make no reference to it; when the party seeking relief also claims to be entitled to it under clause (6), "any other reason," and again is not disputed by the party in whose favor the judgment was ordered and again the court completely ignores this argument and makes no mention at all of it; and when that court states that there is an "ironclad" one-year time limit to all of Rule 60(b) when that limit does not apply and is intended not to apply to its last three clauses, can it be said that the court intended fairness and impartiality, intended that justice be done?

Do the foregoing issues justify the granting of the relief from judgment sought?

Is it a "substantial substantive" change to amend a judgment on remand to remove from it a lawyer against whom a judgment had been assessed because his client refused to take his advice and because he pursued his client's lawful and proper desire to appeal?

This case was previously before this court under the same names as Nos. 84-5058, 84-5201, 84-5054 and 84-5202.

EXHIBIT 2

SUMMARY OF ARGUMENT

The district court, displaying bias and prejudice and abusing discretion in these and other ways, boasted of repeated reviews of the case record ("exhaustive") while knowing so little that it does not know and misstates who is being sued or for what or what was disclosed; proclaimed that its concern for appellant's pro se status prompted an "extensive" hearing that was no more than brief oral argument; ignored, indeed, rewarded appellees' undenied perjury, fraud and misrepresentation; denied appellant an evidentiary hearing and a trial when the very authorities it cites state that allegations of fraud are to be resolved through "adversary proceedings" and that there should be oral testimony and cross-examination when the court is confronted with material facts in dispute, especially with credibility involved; took clauses and sentences out of context from the cases it cites and altered quotations from them; ignored what supports appellant in these cases; made a "substantial substantive" change involving precedent in the judgment, pretending to the contrary, and thus claimed that appellant's time had run under all of Rule 60(b), which is not true; pretended appellant did not claim inequitability and ignored that entirely undisputed argument; and even when confronted with diametrically opposite attestations to what is material refused to act as a trier of facts to determine truth and whether crimes were committed before it, as by one party or the other they were.

Under Rule 60(b) appellant is entitled to the relief he seeks, according to the authorities cited by the court itself, because

the newly discovered evidence, which establishes appellees' serious misconduct, was known to exist and was withheld by appellees, who alone possessed it (one of two bases for "excusable neglect") when it established their untruthfulness to procure the judgment; because enforcing the judgment undeniedly is not equitable; because undeniedly appellees committed serious violations to procure the judgment; and because the Supreme Court says that one may not be the beneficiary of his own misdeeds; that "the material questions of fact raised by the charges of fraud could (not) be finally determined on ex parte affidavits without examination and cross-examination of witnesses" and thus this is one of those "situations which demand equitable intervention ... to accord all the relief necessary to correct the particular injustices involved."