In Tinsley v. Nagle (No. 86-7021, published November 4, 1986) this court remanded and faulted the district court for precisely the same errors it overlooked in this litigation when it supported the district court's identical errors. The two decisions are thus inconsistent and ought be reconciled so that there be no confusion on these issues and questions.

In his not doing as ordered by the district court Weisberg was specific in stating his reasons. One is that what the court ordered was impossible for him. He also twice requested oral testimony and cross-examination, first when he had counsel and requested an evidentiary hearing and then, pro se, when he requested a trial. Both times the district court denied him. He also alleged pro se that the district court had made no findings of fact and should have. In its Memorandum of March 4, 1986, the district court denies it should have made findings of fact (pages 10-11). In all respects this is the exact opposite of what this court held in Tinsley. Weisberg also alleged that appellees stonewalled and needlessly protracted this litigation, even refusing to permit him to dismiss with prejudice against himself. This parallels Tinsley's language, "the litigation had been 'unreasonably protracted and vexatiously maintained.'" (page 3)

This court faults the district court for deciding "without hearing any testimony or entering any findings of fact ..." (page 4)

This court commented that what Tinsley "contended before the district court" was "without contradiction," (page 5) exactly the same as Weisberg's undenied statement that what he presented to the district court was undenied.

One of Weisberg's unrefuted attestations in that he, in Tinsley's

language, "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." (page5)

On "inability" Weisberg's lengthy, detailed and documented explanation of why he could not comply with the discovery order issued by the district court stated more than that it was impossible for him. Without refutation he attested that the discovery demanded was so designedly excessive that, if it had been needed or proper, which he denied, compliance was impossible and that honest attestation to such a sweeping demand is not possible. This, again without denial, is the reason he gave for refusing to make a pro forma gesture when his counsel pressed such a course upon him - he could not honestly swear to what he would have been required to swear to - nobody could - to finding "each and every" document and remembering "each and every" reason in more than 40 file cabinets, 300 cubic feet of records at the National Archives, 10,000,000 words published in 27 large volumes by the Warren Commission, and in the two file drawers of precisely this information that he had provided voluntarily before it was demanded all over again as "discovery."

This court found Tinsley's temporary illness a factor the district court should have considered (page 4), but the district court refused to consider Weisberg's permanent and serious illnesses and the permanent limitations they impose on him, and it also refused to consider the series of potentially dangerous and debilitating additional illnesses for the period in question. It entirely

ignored his unrefuted attestations, accompanied with all his hospital bills covering arterial surgery and two subsequent emergency operations and all of his family doctor's bills for the period in question when he twice suffered, among other things, pneumonia and pleurisy. Weisberg's attestations are unrefuted, the district court made no findings of fact and it refused him oral testimony and cross-examination.

Also without denial or attempted refutation, Weisberg attested to the physical impossibility of his repeating under the title of "discovery" what he had done earlier, when he had the assistance of a graduate student. This was well known to appellees who, ~~mark~~ in earlier litigation, saw her in the courtrooms, at depositions and met with her several times and knew she had chauffered Weisberg because since 1977 he has not been able to drive to Washington.

He attested that most of his records are in his basement, as appellees also know; that he is limited in his ability to use stairs; that he can still stand only momentarily and thus could not make the file cabinet searches demanded; that if he had been able to make the searches and retrieve the multitudinous files he would have to comb, it would be impossible for him to carry them up to his office to work on them and impossible to return them to their proper places for any further uses (all his records are to be a permanent public archive at a major university system); that the xeroxing required is impossible for him since he is limited in his ability to use his table copier because he cannot stand and sitting near it is impossible; and that this would be close to impossible for his wife (also a septuagenarian and also partly disabled).

footnote on 3

1/ For the period in question, of "discovery" only, the other illnesses listed in the family doctor's bills include vascular insufficiency, anticoagulation problems, bronchitis, influenza, peripheral vascular disease, edema, and ecchymosis.

He attested also and not only without denial but with admission of it in the case record, that he had already provided - two full file drawers - of what was demanded all over again as discovery and that doing this again is physically impossible for him. He also provided appellees' written admission that nobody had ever provided as much information (see ).

With his privacy waiver and all his medical bills in the case record, no refutation was even pretended. No denial was made or is possible, save for appellees' counsel's fabrication, that because he could sit and type in his office he could search, retrieve and copy and could have done this in the time he spent drafting affidavits. (When appellees' phony arithmetic was examined the time Weisberg spent drafting those affidavits came to less than 10 minutess a day, he so attested and that, too, is undenied.)

There thus is not and never has been any question, what was ordered by the district court was impossible for Weisberg and what was demanded by appellees ("each and every" reason and document from that large accumulation) was intended to be impossible. Moreover, if Weisberg had failed to mention anything he had already provided, he would have been subject to charges of perjury. This is a contrived Catch22.)

This court concludes Tinsley by stating that it "is required to take such reasonable steps as necessary to adjudicate a colorable claim of impossibility of performance" (the exact opposite of its holding when Weisberg was before it earlier in identically the same situation) and that "(t)he district court ... failed to make any specific findings about appellant's specific defense. Indeed, the court chose not to entertain any testimony." This is precisely

Weisberg's situation, except that Weisberg asked for oral testimony twice and was refused by the district court.

Tinsley was remanded "for an adjudication of appellant's contention" of impossibility. For the identical reasons this case also should be remanded.