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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 ALLAN J. FAVISH,)	Case No. CV-97-1479-WDK
)	
12 Plaintiff,	)	MOTION FOR COURT TO COMPEL
	)	TESTIMONY REGARDING
13 v.	)	ALLEGATIONS OF ILLEGAL
	)	GOVERNMENT CONDUCT REGARDING
14 OFFICE OF INDEPENDENT COUNSEL,	)	SUBJECT PHOTOGRAPHS; POINTS AND
	)	AUTHORITIES; DECLARATION OF
15 Defendant.	)	ALLAN J. FAVISH
)	
16	)	Date: February 12, 2001
	)	Time: 3:00 p.m.
17	)	Place: 312 N. Spring St., L.A.,
	)	CA, Rm. 1600
18	)	Judge: Hon. William Keller

19 To all parties and their attorneys of record in this action:

20 Please take notice that on February 12, 2001, at 3:00 p.m., before the Honorable William
21 Keller, Rm. 1600, 312 N. Spring St., Los Angeles, California 90012, plaintiff Allan J. Favish
22 will move the court for an order compelling testimony regarding allegations of illegal
23 government conduct regarding the subject photographs. The motion is based on the attached
24 points and authorities, the attached exhibits, the attached declaration of Allan J. Favish, the files
25 and records in this action and all other evidence that may be presented at the hearing.
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27 This motion is made following the conference of counsel pursuant to Local Rule 7.4.1,
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1 that took place on October 13, 2000.

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3 Dated: January 19, 2001

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Allan J. Favish

In pro se

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **1. INTRODUCTION**

3 By order of January 11, 2001, this court ruled that five of the photos must be released and
4 five can be withheld.¹ The parties and the court must be absolutely certain that any photographs
5 produced by the government to this court on January 10, 2001 and later to the public, are the
6 pristine originals. This is especially true given that the Ninth Circuit stated that “Favish, in fact,
7 tenders evidence and argument which, if believed, would justify his doubts” about the
8 government’s conclusion of suicide in the park. *Favish v. Office of Independent Counsel*, 217
9 F.3d 1168, 1173 (9th Cir. 2000). There is a legitimate reason to be concerned that instead of the
10 pristine originals, the government may have produced originals that were “touched-up” or
11 otherwise tampered with, or produced copies of originals.

12 The reason for concern arises from two books by major United States publishers that tell
13 a story of illegal conduct by members of the Office of Independent Counsel and the Federal
14 Bureau of Investigation in trying to keep the pristine original of at least one of the subject
15 photographs from being properly examined in order to conceal a neck wound that officially did
16 not exist.² The books describe an effort to illegally obstruct the work of Assistant United States
17 Attorney Miquel Rodriguez and his former assistant Lucia Rambusch, while they were working
18 on the Vincent Foster death investigation at the OIC.

19 _____
20 ¹ *Favish v. OIC*, CV 97-1479 WDK, Civil Minutes – General at 1-2, filed Jan. 11, 2001
21 (summary judgment ruling).

22 ² While it is unclear at this point, at least three of the subject photographs may depict the
23 alleged neck wound described in the books. These three photographs are described as “5 - VF’s
24 body - focusing on Rt. side shoulder/arm,” “4 - VF’s body focusing on right side & arm,” and “8
25 - VF’s face - Taken from right side focusing on face & blood on shoulder. . . .” See *Favish v.*
26 *OIC*, CV 97-1479 WDK, Civil Minutes – General at 1-2, filed Jan. 11, 2001 (summary judgment
ruling). This court ordered the first two of these photos released, but withheld the third. The
book excerpts appear to indicate that the third photo, the one the court did not order released, is
the alleged neck wound photo.

27 The court withheld this third photo because it is “so explicit as to be not discoverable as it
28 clearly violates the privacy of the survivors.” *Id.* at 2. It is unclear from the court’s ruling
whether partial redaction of the photo, perhaps of the face area, while leaving the neck area
visible, would make it appropriate for release, given the public’s interest in seeing whether the
alleged neck wound exists.

1 It is requested that the court take judicial notice pursuant to Federal Rule of Evidence
2 201,³ of the publication of these books. However, such judicial notice only establishes that the
3 books were published; the judicial notice does not establish the accuracy of the facts alleged in
4 the books.

5 Indeed, if the books were being offered to prove the truth of the matters asserted in them,
6 they would be objectionable as hearsay under FRE 801(c). However, because the books are not
7 being offered to prove the truth of the matters asserted in them, but only for the limited purpose
8 of showing that they were published, there is no hearsay. *Gibbs v. State Farm Mut. Ins. Co.*, 544
9 F.2d 423, 428 (9th Cir. 1976) (letters admitted for the limited purpose of showing that State Farm
10 had received them, but not admitted to show the truth of the matters asserted in them, did not
11 contain hearsay).

12 There is no way to establish the truth of the matters asserted in the books without the
13 testimony of Rodriguez and Rambusch. Therefore, this court should compel their testimony,
14 along with any additional testimony the court deems appropriate, either in open court or in
15 camera, in order to determine if there is a legitimate reason for concern that the pristine originals
16 have not been produced to this court or may not be produced to the public. If the allegations in
17 the books are true, then the court will have to take action to insure that the photographs produced
18 to the court and the public, are the pristine originals.

19 On October 13, 2000, this court stated that it was inclined to allow such testimony and
20 that plaintiff should not make this motion until after the court ruled on the photographs:
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22

23 ³ FRE 201 states:

24

25 (b) Kinds of facts.

26 A judicially noticed fact must be one not subject to reasonable dispute
27 in that it is . . . capable of accurate and ready determination by resort to
28 sources whose accuracy cannot reasonably be questioned.

27

28 (d) When mandatory.

A court shall take judicial notice if requested by a party and supplied
with the necessary information.

1 MR. FAVISH: I plan to file a motion to ask the court to compel testimony from
2 two former employees of the OIC regarding allegations of illegal tampering with
3 one or more of these subject photographs. The two former employees are
4 Miguel Rodriguez, who is currently an assistant U.S. attorney in Sacramento,
5 and his former assistant at the OIC, Lucia Rambush. I know under the local rule
6 7.41, I have to have a conference with Ms. Luymes.

7 THE COURT: You are conferring right -- well, I think you better confer further
8 because it may be -- Ms. Luymes, this area is a -- to say the least -- a sensitive
9 area. If Mr. Favish is of the opinion that there is the potential that somebody in
10 some manner compromised these photographs, then I think as a part of the
11 discovery associated with this lawsuit, prior to my ruling or associated with my
12 ruling, he needs to be able to take those depositions. That would be my
13 preliminary ruling.

14

15 THE COURT: . . . Now, the answer is preliminarily he is entitled to those
16 depositions. How you arrange it, it's up to you. You meet and you figure it out.
17 And I am giving you a little bit of prompting, i.e., I am favorably inclined to
18 issue an order to the effect that the two depositions will be taken. Okay?

19

20 THE COURT: Here's the thing. If you can't agree -- if you can't agree -- one
21 would hope you would -- I just gave you preview ruling, okay, not a final ruling,
22 a preview ruling called a preliminary ruling. The preliminary ruling is given the
23 nature of the statute, given the nature of the subject matter, given the
24 background in this case with it going to the court of appeals, the answer is that it
25 seems to me that Mr. Favish is entitled under his theory of the case -- albeit very
26 speculative, one could argue -- entitled to limited discovery, i.e., "who are you?
27 Did you have these photographs? Did you ever do anything to them?" The man
28 says "no." That's just about it. The deposition is over. It isn't a very long

1 deposition. Okay? Now, I'm not arguing it any further. I'm just telling you that's
2 where you are.

3

4 THE COURT: At any rate, so here we are then. I'll look at them. And if I need
5 further hearing in view of the in-camera review, I'll tell you. If I don't, I'll rule.
6 And associatedly, if you want to pursue some type of discovery, discovery to the
7 effect of, "well, what you're looking at, judge, isn't really what was originally
8 photographed, i.e., it's been doctored or altered," you can take the -- you can
9 take the discovery. As I talk it out, I think the better way to do this is that you
10 proceed with my making a ruling on the photographs. . . . Now, I'll make the
11 ruling. The ruling will be yes or no. If it's a "no," then your back-up argument is
12 "wait a second, judge. You know, what you looked at wasn't the original. I want
13 a deposition." Under those circumstances, subject to briefing, I think you're
14 entitled to it. On the other hand, if I release all of the photographs and you look
15 at it, you may -- what you haven't seen -- you may say, "I don't need the
16 deposition." So I think the deposition logically comes after my ruling. Follow
17 me? Okay. So that's the way we're going to do it. I'll make my ruling and then
18 you're going to have your rule umpty-um meeting, seven or whatever it is. You
19 have your meeting. And if you can't agree on it, then you notice your
20 deposition, but do so after I've made the ruling on the ten photographs. Okay?

21

22 MR. FAVISH: Your honor, my concern is the timing of my motion, which I've
23 actually prepared and I'm --

24 THE COURT: The deposition motion?

25 MR. FAVISH: Yes, to ask the court to --

26 THE COURT: I just told you. Hold it until I give you the ruling. That's the
27 logical way. Put a note in the file. Okay?

28 MR. FAVISH: All right, your honor. Thank you.

1 THE COURT: It will help you, believe me. Okay. Thank you.⁴

2 **2. THE COURT IS AUTHORIZED TO ALLOW THE TESTIMONY TO BE TAKEN**

3 Discovery is appropriate in a FOIA case when there is valid concern about the credibility
4 of agency affidavits. In *Van Strum v. U.S. E.P.A.*, 680 F.Supp. 349 (D.Or. 1987), the FOIA
5 requestor received documents from an anonymous source that according to the court, “indicate
6 that plaintiff may have a valid concern regarding the credibility of some affidavit statements
7 accompanying EPA’s motion for summary judgment.” *Id.* at 352. The court held that “plaintiff
8 in this case has raised sufficient questions as to the integrity of the EPA affidavits to warrant
9 discovery.” *Id.*

10 In our case, the OIC has filed declarations concerning the body photographs.
11 Additionally, the OIC has been ordered to produce the original pristine photographs to the court
12 and allegedly did so on January 10, 2001. The OIC has been ordered to make five of the original
13 pristine photographs available for public inspection and copying.

14 The book excerpts, with their citations to confidential sources, raise valid concerns about
15 whether the OIC presented the original pristine photographs to its own personnel, the FBI and
16 this court, and whether it will do so to the public. The book excerpts raise valid questions. Are
17 the OIC’s affidavits based on viewing of the original pristine photographs? Have the original
18 pristine photographs been located? Have they been produced to this court? Would the original
19 pristine photographs be made available to the public for inspection and copying if ordered by the
20 court?

21 The court should not take any action on the assumption that the book excerpts are true.
22 However, the book excerpts are not mere speculation. They are serious accounts that have been
23 published by major publishers. The proper course is to conduct the limited discovery requested
24 in order to learn whether the book excerpts are true. The court will then be free to determine the
25 appropriate course of action after the limited discovery is completed.

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28 ⁴ *Favish v. OIC*, CV 97-1479 WDK, Reporter’s Transcript Of Proceedings Hearing: Filing
And Spreading-Reversal/Remand at 12:14 - 18:17, Oct. 13, 2000 (attached as Exhibit 3).

1 **3. THE BOOK EXCERPTS THAT MAKE TESTIMONY BY RODRIGUEZ AND**
2 **RAMBUSCH NECESSARY**

3 **A. The Strange Death of Vincent Foster: An Investigation**

4 In “The Strange Death of Vincent Foster: An Investigation,”⁵ author Christopher Ruddy
5 states:

6 Backing up [former Independent Counsel Robert] Fiske's claim that what
7 [paramedic Richard] Arthur saw was only a bloodstain on Foster's face was an
8 FBI analysis of one key close-up Polaroid analyzed for Fiske. The FBI lab had
9 described a bloody mark on Foster's neck, in the precise area that EMT worker
10 Richard Arthur claimed he saw a bullet wound or trauma, as a stain. But a later
11 review of the photographic evidence led others to believe that the FBI working
12 for Fiske had done some finagling to cover much more than a stain. Soon after
13 Fiske departed, Starr's prosecutor, Miquel Rodriguez, after considerable
14 haggling, was able to gain custody of the original 35 mm film that had been
15 underexposed through apparent negligence in the Park Police labs. Fiske and
16 the FBI had stated the photos were useless. He also got custody of the scene
17 Polaroids. Rodriguez and his assistant, Lucia Rambusch, then took the photos to
18 Asman Photo, a private agency in Washington used by the Smithsonian
19 Institution. Rambusch stood by as the photos were enhanced.

20 The results were nothing short of remarkable. The private lab recovered
21 more pictures from the 35 mm photos than did the FBI lab (such as a photo
22 indicating Foster's right hand had been moved after the police arrived); even
23 more significant results were achieved by enhancing the Polaroids.

24 The enhancement of a Polaroid made by the outside agency was showing
25 something more awful than a simple bloodstain: A large gash, with black
26 powdery marks, was evident on the right side of Foster's neck. In addition, the
27 enhanced photo showed that some blood from Foster's shirt may have stained his
28

1 neck, but this didn't provide an explanation for the apparent damage to the neck
2 or the black marks.

3 Rodriguez went back and looked at the enhanced photo used by the FBI
4 during the Fiske probe. He noted how blurry it looked compared to the one he
5 had had enhanced at the outside agency. He then began to review the handling
6 of the photos by reading the notations made on the back of each set during the
7 time they were enhanced. These markings showed that the FBI lab had not used
8 the original Polaroids for enhancement as he did when he sent Lucia Rambusch
9 to have them enhanced. Instead, the FBI lab had made copies of the original
10 Park Police Polaroids with another Polaroid camera. Then the second-
11 generation Polaroids were photographed by a 35 mm camera in the FBI lab to
12 make enhancements for analysis. These blurred and enhanced photographs,
13 made from copies of copies, were utilized by the FBI experts and Fiske's
14 pathology team to make conclusions about the stains and blood patterns.

15 According to Fred Santucci, a former New York City detective who spent
16 fifteen years as a forensic crime-scene photographer and analyst, the multiple
17 generation of photos was done "because someone wanted to hide something."
18 As Santucci noted, Polaroids are of lesser quality to begin with. There is no
19 good reason to make a copy with another Polaroid camera, unless one wanted to
20 further distort and blur the original.⁶

21 **B. The Secret Life of Bill Clinton: The Unreported Stories**

22 In "The Secret Life of Bill Clinton: The Unreported Stories,"⁷ author Ambrose Evans-
23 Pritchard states:

27 ⁵ Published in 1997 by The Free Press, a division of Simon & Schuster, Inc.

28 ⁶ C. Ruddy, *The Strange Death of Vincent Foster: An Investigation* 163-165 (1997)
(attached as Exhibit 1).

⁷ Published in 1997 by Regnery Publishing, Inc.

1 Miquel Rodriguez kept holding the photograph up in the light, wondering.
2 He knew there was something wrong with it. The resolution was too blurred,
3 even for a blowup of a Polaroid.

4

5 Miquel Rodriguez, however, was not a fully signed-up member of the
6 Washington power elite. A man of slight stature, a high-pitched voice, Iberian
7 features, and large, round, Pre-Raphaelite eyes, he does not look the part of a
8 tough prosecutor. But he has an almost reverential passion for his work as an
9 Assistant United States Attorney in Sacramento. Clearly, Kenneth Starr did not
10 know quite what he was getting when this young Hispanic—a child of migrant
11 farm workers and a graduate of Harvard Law School—arrived in Washington in
12 the fall of 1994 to take up his new post of Associate Independent Counsel.

13

14 Rodriguez kept muttering about the photograph. “Is this all there is?” he
15 asked.

16 Yes, that’s all there is; that’s the original, replied his FBI staff. And so it
17 might have rested if it had not been for the courage of one person in the Office
18 of the Independent Counsel who managed to gain access to the locked files.
19 Hidden inside was a folder of crime scene photographs that had been
20 deliberately withheld from the prosecutor.

21 Among them was the original Polaroid of Foster’s neck. What it showed was
22 something very different from the “contact stain” in the fraudulent picture that
23 had been circulating. Evidently, somebody had taken a photo of the original and
24 then touched it up to disguise the incriminating evidence. This second-
25 generation copy had then been used to create an enhanced “blow up.”

26 It was blatant obstruction of justice. Indeed it was worse. Whoever had done
27 this was now an accessory after the fact in the death of the Deputy White House
28 Counsel, and they had made the mistake of failing to destroy the original.

1 Wary of entrusting anything to the FBI crime labs, Rodriguez turned to the
2 Smithsonian Institution for enhancement of the original. The work was done by
3 the Smithsonian’s subcontractor, Asman Custom Photo Service on Pennsylvania
4 Avenue. A set of five “blowups” of the original were made. They revealed a
5 dime-sized wound on the right side of Foster’s neck (his left side) about half
6 way between the chin and the ear. It was marked by a black “stippled” ring—
7 sort of a dotted effect, like an engraving—that was suggestive of a .22 caliber
8 gunshot fired at point blank range into the flesh. . . .

9 One medical examiner who looked at the photo thought that the wound might
10 be the result of a 40,000 volt stun-gun, designed to cause temporary paralysis for
11 about fifteen minutes. Fired at short range it can leave burn marks. But it was
12 more likely to be a low caliber gunshot wound. Something had perforated the
13 skin, causing blood to ooze down the side of the neck and into the collar.

14 The photograph, which I have examined carefully, is one of the few surviving
15 Polaroids taken at Fort Marcy that night. The rest disappeared. . . .

16

17 All that survives is a motley collection of 18 Polaroids. Five of them depict
18 Foster’s grey Honda Accord. The rest are a mix, showing the cannon, the
19 surrounding foliage, Foster’s glasses, the gun in Foster’s hand, and so forth.
20 There is only one Polaroid close-up showing the right side of Foster’s face and
21 neck. It is signed JCR 7/20/93 on the back, indicating that it was taken by
22 Detective John Rolla. This is the Polaroid retrieved from the FBI’s hiding place
23 at the Office of the Independent Counsel.

24

25 . . . [Kenneth Starr] was none too pleased when Miquel Rodriguez started
26 sending memos warning that there was something deeply wrong. Starr was
27 charming, of course. The son of a Texas, small-town, Church of Christ minister,
28 he is a delightful man, and a devout Christian. But had no idea what to do when

1 Rodriguez told him that an original Polaroid showed a wound in the neck, and
2 that renegade elements of the FBI were covering up the case.

3

4 . . . the San Diego Medical Examiner, Dr. Brian Blackbourne, was wrapping
5 up his independent review of the case. I asked him if he had been provided with
6 the original Polaroid showing a black stippled wound on the side of Foster's
7 neck.

8 No, he said, he had not been given anything like that.

9 The most important piece of crime scene evidence remained locked in a file.⁸

10 **4. CONCLUSION**

11 If the allegations in the books are true, then the court will have to take action to insure
12 that the photographs produced to the court and to be produced to the public are the pristine
13 originals. To determine if the allegations are true, the court should allow the testimony of
14 Rodriquez and Rambusch to be taken, either in camera or in open court, along with any
15 additional testimony the court deems appropriate.

16
17 Dated: January 19, 2001

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19 Allan J. Favish
20 In pro se
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28 ⁸ A. Evans-Pritchard, *The Secret Life of Bill Clinton: The Unreported Stories* 135-153 (1997) (attached as Exhibit 2).

1 **PROOF OF SERVICE**

2 I am an attorney licensed to practice before all the courts in California. I am over the age
3 of 18 and my address is 18645 Hatteras St., #289, Tarzana, CA 91356-1802.

4 On January 19, 2001, I served the document entitled MOTION FOR COURT TO
5 COMPEL TESTIMONY REGARDING ALLEGATIONS OF ILLEGAL GOVERNMENT
6 CONDUCT REGARDING THE SUBJECT PHOTOGRAPHS; POINTS AND AUTHORITIES;
7 DECLARATION OF ALLAN J. FAVISH, by placing a true copy thereof enclosed in a sealed
8 envelope addressed to each of those identified in the service list, below.

9 **(XX) BY MAIL**

10 I deposited such envelope(s) in the mail at Los Angeles, California. The envelope(s)
11 were mailed via U.S.P.S. first class mail, with postage thereon fully prepaid.

12 **() BY PERSONAL SERVICE**

13 I caused such envelope(s) or document(s) to be delivered by hand to the addressees or the
14 addressees' office(s).

15 Executed on January 19, 2001, at Los Angeles, California. I declare under penalty of
16 perjury under the laws of the United States that the foregoing is true and correct.

17 _____
18 Allan J. Favish

19 **SERVICE LIST**

<p>20 Ms. Jan L. Luymes 21 Assistant U.S. Attorney 22 U.S. Department of Justice 23 411 W. 4th St., Suite 8000 24 Santa Ana, CA 92701-4599</p>	<p>25 Attorney for defendant Office of 26 Independent Counsel</p>
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