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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,                     | ) | OPPOSITION TO MOTIONS TO ALTER   |
|                                   | ) | OR AMEND JUDGMENT; POINTS AND    |
| 13 v.                             | ) | AUTHORITIES; DECLARATIONS OF     |
|                                   | ) | ALLAN J. FAVISH, CHARLES SMITH & |
| 14 OFFICE OF INDEPENDENT COUNSEL, | ) | JOHN CLARKE                      |
|                                   | ) |                                  |
| 15 Defendant.                     | ) | Date: March 5, 2001              |
|                                   | ) | Time: 3:00 p.m.                  |
| 16                                | ) | Place: 312 N. Spring St., L.A.,  |
|                                   | ) | CA, Rm. 1600                     |
| 17                                | ) | Judge: Hon. William Keller       |

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**TABLE OF CONTENTS**

1

2 TABLE OF CONTENTS .....i

3 TABLE OF AUTHORITIES .....iii

4 MEMORANDUM OF POINTS AND AUTHORITIES.....2

5 1. INTRODUCTION .....2

6 2. THE UNDISPUTED FACTS SHOW THAT THE FISKE AND

7 STARR REPORTS ON THE FOSTER DEATH ARE UNTRUSTWORTHY.....5

8 A. The Amount Of Physical Damage Is Not Fully Reported By Starr.....6

9 B. Evidence That Initially There Was No Gun In Foster’s Hand Is

10 Not Fully Reported By Starr .....8

11 C. The Invalid Gun Identification Used By Fiske And Starr ..... 9

12 D. Fiske And Starr Failed To Report That The Park Police Chief

13 Made A False Statement About Alleged Identification Of The Gun. ....13

14 E. Fiske And Starr Fail To Report Important Information About The Haut Report. .... 14

15 F. Starr Misleads The Public About Police Observance Of The Autopsy. ....15

16 G. Starr Fails To Report Evidence That Foster’s Car Was Not At The

17 Park Shortly After The Death. .... 16

18 H. Starr Fails To Report Evidence Refuting Henry Lee’s Credibility

19 Regarding The Body Being Dragged ..... 18

20 3. ADDITIONAL EVIDENCE THAT THE FISKE AND STARR

21 REPORTS ARE UNTRUSTWORTHY.....19

22 A. The FBI Memo That States “No Exit Wound” Was

23 Not Mentioned By Fiske Or Starr. .... 19

24 B. The OIC Has Never Explained Why Its Certified Copy Of The Haut Report

25 Is Different From The Other Certified Copies Of The Haut Report. .... 20

26 4. THE OIC MISSTATES THE STANDARD REGARDING

27 GOVERNMENT MISCONDUCT ..... 23

28 5. THE PUBLIC BENEFIT TO BE OBTAINED BY RELEASE OF THE PHOTOS. .... 25

|    |   |    |
|----|---|----|
| 1  | A. The Privacy Of The Foster Family . . . . .                                       | 25 |
| 2  | B. The Public Benefit To Be Obtained By Release Of The Photos. . . . .              | 26 |
| 3  | i) The Leaked Gun-In-Hand Photo. . . . .  | 29 |
| 4  | ii) The Photograph Entitled “3 – VF’s body looking down from top of berm”. . . . .  | 30 |
| 5  | iii) The Photograph Entitled “5 – VF’s body – focusing on the                       |    |
| 6  | Rt. side shoulder/arm”. . . . .   | 33 |
| 7  | iv) The Photograph Entitled “4 – VF’s body focusing on right side and arm”. . . . . | 33 |
| 8  | v) The Photograph Entitled “5 – VF’s body – focus on top of head                    |    |
| 9  | thru heavy foliage”. . . . .  | 33 |
| 10 | 6. THE ORIGINAL PRISTINE PHOTOS MUST BE   |    |
| 11 | AVAILABLE FOR PUBLIC INSPECTION AND COPYING . . . . .                               | 34 |
| 12 | 7. CONCLUSION. . . . .  | 35 |

13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Cases

*Favish v. Office of Independent Counsel*,  
217 F.3d 1168 (9<sup>th</sup> Cir. 2000) . . . . .2, 23, 25, 28, 29, 30, 33

*Hunt v. FBI*,  
972 F.2d 286 (9<sup>th</sup> Cir. 1992). . . . . 24

*Schiffer v. FBI*,  
78 F.3d 1405 (9<sup>th</sup> Cir. 1996) . . . . .24

*Silets v. U.S. Dep’t of Justice*,  
945 F.2d 227 (7<sup>th</sup> Cir. 1991). . . . . 24

*Van Bourg, Allen, Weinberg & Roger v. National Labor Relations Board*,  
751 F.2d 982 (9<sup>th</sup> Cir. 1985). . . . .23

*Wichlacz v. U.S. Dep’t of Interior*,  
938 F. Supp. 325 (E.D.Va. 1996) . . . . .24

Statutes and Rules

28 U.S.C. § 1746. . . . . 25

Federal Rule of Evidence 201 . . . . . 3, 19, 33

Newspaper & Magazine Articles

Peter J. Boyer, *Life After Vince*, The New Yorker at 54 (Sep. 11, 1995) . . . . . 26

Books

Mastering Documentation (Springhouse Corp., 2d ed. 1999). . . . .22

Government Hearings and Reports

Hearings Relating to Madison Guaranty S&L and the Whitewater Development  
Corporation--Washington, DC Phase, S. Hrg. 103-889, Volumes 1 (1995). . . . .3, 25, 29

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **1. INTRODUCTION**

3 I sympathize with the Foster family. I do not oppose the proposed intervention in this  
4 case by one of Vincent Foster’s sisters, Sheila Foster Anthony and his former wife, Lisa Foster  
5 Moody. Apart from the tragedy of Foster’s death, Ms. Anthony and Ms. Moody have been  
6 denied the closure that any family would desire. However, the blame for this lack of closure  
7 does not lie with those who are seeking the truth in order to keep their government honest. It lies  
8 with government officials who have produced reports about the death that have no credibility.

9 The Office of Independent Council (“OIC”) refers to “the alleged conspiracy theories  
10 relied upon by plaintiff . . . .”<sup>1</sup> The OIC states that I am engaged in “baseless speculation . . . .”<sup>2</sup>  
11 Contrary to the OIC’s statement, I rely upon undisputed facts from the government’s own  
12 underlying investigative record. Those facts do not prove to a certainty either murder or suicide  
13 in the park. However, when compared with the reports on the Foster case from Independent  
14 Counsels Robert Fiske and Kenneth Starr, those facts establish beyond question that both of  
15 those reports are not worthy of the public’s trust. Two judges on the Ninth Circuit stated that  
16 “Favish, in fact, tenders evidence and argument which, if believed, would justify his doubts”  
17 about the government’s conclusion of suicide in the park.<sup>3</sup> The discussion below establishes that  
18 these judges had good reason to make that statement.

19 Because these two reports are untrustworthy, the public must see the evidence to make its  
20 own conclusions. Although the OIC likes to use the phrase “conspiracy theory” as a pejorative,  
21 whether the reports are untrustworthy because of a conspiracy to hide the truth or because of a  
22 mass coincidence of innocent errors by separate individuals, the fact remains that the reports are  
23 untrustworthy and the public is entitled to a trustworthy investigation. Accordingly, all ten of the  
24

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25 <sup>1</sup> OIC’s Notice of Motion and Motion to Alter or Amend Judgment and for Clarification;  
26 Memorandum of Points and Authorities, at 20:5-6 (“OIC’s Motion to Alter”).

27 <sup>2</sup> *Id.* at 20:11-12.

28 <sup>3</sup> *Favish v. Office of Independent Counsel*, 217 F.3d 1168, 1173 (9<sup>th</sup> Cir. 2000). Although the  
Ninth Circuit stated “if believed,” it should be emphasized again that none of the evidence  
depends upon my credibility because the evidence consists almost entirely of the government’s  
own documents.

1 original pristine photos at issue in this case must be released to allow the public to do the job that  
2 Fiske and Starr failed to do.<sup>4</sup>

3 Ms. Anthony and Ms. Moody state that there have been “five separate investigations – by  
4 the Park Police, two independent counsels, and Congressional committees of both houses of  
5 Congress . . . .”<sup>5</sup> Contrary to the implication by Foster’s two relatives, the facts establish that the  
6 Congressional investigations were so limited that they did not investigate the issue of whether  
7 Foster was murdered or committed suicide at the park.

8 The Senate Banking Committee’s “investigation” into the Foster death was limited to the  
9 issue of whether the United States Park Police’s investigation was proper. The Banking  
10 Committee did not conduct a full investigation to determine whether Foster was murdered or  
11 committed suicide in the park. Committee Chairman Sen. Donald Riegle (D-MI) said that the  
12 Committee was operating “under specific legislative instructions from the full Senate.”<sup>6</sup> He said:

13 The scope of our present effort was carefully defined by the Senate  
14 Resolution 229 to pursue only three specific matters in order to not interfere  
15 or compromise in any way the full-scale inquiry being directed by  
16 Independent Counsel, Robert B. Fiske, Jr.

17 . . . .

18 Now, Senate Resolution 229 directed this Committee to conduct hearings  
19 on three specific matters in this phase . . .

20 . . . .

21 No. 2, I quote again:

22 The Park Service Police investigation into the death of White

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23  
24 <sup>4</sup> I will be appealing the district court’s withholding of the remaining five photos.

25 <sup>5</sup> Defendants-in-Intervention Sheila Foster Anthony’s and Lisa Foster Moody’s Notice of Joinder  
26 and Joinder in Support of the Office of Independent Counsel’s Motion to Alter or Amend  
27 Judgment; Memorandum of Points and Authorities; Declarations of Sheila Foster Anthony and  
28 Lisa Foster Moody at 3:12-13 (“Fosters’ Motion to Alter”).

<sup>6</sup> Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation--  
Washington, DC Phase, S. Hrg. 103-889, Volume 1 (1995) at 1 (“S. Hrg. 103-889”) (exhibit 1)  
The court is requested to take judicial notice of this exhibit pursuant to Federal Rule of Evidence  
201.

1 House Deputy Counsel Vincent Foster.<sup>7</sup>

2 Several Senators, both Democrat and Republican, said in their opening statements on July  
3 29, 1994 that they were not investigating whether Foster was murdered or committed suicide in  
4 the park. Sen. Robert Bennett (R-Utah) said:

5 No. 2, I will be happy to stipulate that Vincent Foster committed suicide.  
6 There was a time when the rumors in the press led me to believe there was  
7 some credence to an additional theory. I find no possible justification for that  
8 now. I am one Senator who is willing to say that this hearing should not be  
9 about whether or not Vincent Foster committed suicide. He committed  
10 suicide. I will so stipulate.

11 I will not stipulate that the investigation of that suicide was handled in a  
12 proper fashion. I think that's a legitimate thing for us to go into.<sup>8</sup>

13 Sen. Pete Domenici (R-NM) said: "I don't think anyone on our side is challenging  
14 whether or not it was a suicide. So perhaps we can get rid of that rather quickly."<sup>9</sup>

15 Sen. Orrin Hatch (R-UT) said:

16 Accordingly, I want to be clear on one point. There is absolutely no  
17 credible evidence to contradict the Fiske Report's conclusion that Vincent  
18 Foster took his own life and it happened at Fort Marcy Park. There is no  
19 credible evidence to the contrary.<sup>10</sup>

20 Sen. Carol Moseley-Braun (D-IL) said:

21 At the outset, let me say, Mr. Chairman, I would like to associate myself  
22 with the remarks of Senators Bennett and Boxer regarding the Vincent Foster  
23 issue. We are not conducting an investigation into a suicide. Our  
24 investigation is only into the propriety of the investigation surrounding his  
25 tragic and untimely death.

26  
27 <sup>7</sup> *Id.* at 1-2 (exhibit 1).

28 <sup>8</sup> *Id.* at 29 (exhibit 1).

<sup>9</sup> *Id.* at 32 (exhibit 1).

<sup>10</sup> *Id.* at 38 (exhibit 1).

1 . . . However, we do have an obligation, nonetheless, to the public to ensure  
2 that no untoward or inappropriate activities occurred that would reflect on the  
3 remaining issues before this Committee. The first part of this hearing, I  
4 believe, will rightfully look into the process by which that investigation took  
5 place.<sup>11</sup>

6 No committee in the House of Representatives conducted an investigation of Foster's  
7 death. As the OIC states on page 7 in its report on Foster's death, Rep. William Clinger, then the  
8 ranking Republican member of the Committee on Government Operations, wrote a six-page  
9 "Summary Report" of his investigation into the death. It was not a committee investigation. His  
10 report does not answer the questions I have raised here.

11 Accordingly, any attempt to convince this court and the public that Congress conducted  
12 any full or credible investigation into whether Foster was murdered or committed suicide at the  
13 park should be rejected.

14 The reason why there is public interest in this case is simple. The Fiske and Starr reports  
15 on the death are untrustworthy. If the government had conducted credible investigations of this  
16 death, I know I would not be pursuing this. There is one certain way to significantly reduce, if  
17 not eliminate the public interest in this case: The government must make all the evidence public  
18 so that all the questions that can be answered, will be answered, and the government must  
19 explain how each significant distortion and omission infesting its reports about Foster's death  
20 came to be. Release of the original pristine photos at issue in this case would help end the  
21 controversy, not prolong it.

22 **2. THE UNDISPUTED FACTS SHOW THAT THE FISKE AND STARR REPORTS**  
23 **ON THE FOSTER DEATH ARE UNTRUSTWORTHY.**

24 The following is a summary of the detailed discussion and exhibits I presented in my  
25 Motion for Summary Adjudication, filed February 11, 1998 and in my appellate briefs filed in  
26 April and August of 1998. No matter how much the OIC and others argue that it is impossible  
27 for such a significant number of government officials and consultants to have produced such  
28

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<sup>11</sup> *Id.* at 39 (exhibit 1)

1 deceptive reports, the fact remains that they did, and that is the fundamental truth from which our  
2 analysis must begin.<sup>12</sup> The OIC states: “Having examined, and rejected, all of Favish’s specific  
3 factual assertions, at best Mr. Favish’s assertion of ‘public interest’ in this case is based upon  
4 conspiracy theories and speculation of a mass governmental cover-up relating to Mr. Foster’s  
5 suicide.”<sup>13</sup> Although the OIC may have “rejected” all of my specific factual assertions, it has not  
6 refuted them. Although I cannot eliminate the possibility that some people have conspired to  
7 obstruct justice in connection with the government’s Foster death investigations, neither can I  
8 eliminate the possibility that the significant deceptions and omissions in the government’s  
9 reports are all the result of innocent mistakes by incompetents. Contrary to the OIC’s statement,  
10 my assertion of the public interest is not based exclusively on “conspiracy theories.” Such  
11 conspiracies remain a possibility, especially because the OIC has failed to explain how the  
12 significant distortions and omissions in the Fiske and Starr reports were made.

13 The OIC states that privacy interests “cannot be trumped by such speculation of  
14 government wrongdoing or misconduct.”<sup>14</sup> The word “speculation” implies that I have not  
15 shown any proof that the Fiske and Starr reports are untrustworthy and that there was  
16 government misconduct, either intentional or negligent. Contrary to the OIC’s statement, the  
17 proof of at least negligent misconduct is overwhelming. As to whether any of the misconduct  
18 was intentional, there is plenty of circumstantial evidence to take that conclusion beyond the  
19 point of mere “speculation.”

20 **A. The Amount Of Physical Damage Is Not Fully Reported By Starr.**<sup>15</sup>

21 The evidence does not show what one would expect from a .38 caliber high-velocity  
22 gunshot into the mouth: massive amounts of blood coming out of the nose and mouth, broken  
23 teeth from the recoil of the gun, a significant hole in the back of the head with lots of blood,  
24 \_\_\_\_\_

25 <sup>12</sup> It should be noted that it is not necessary for everybody involved in the Foster investigations to  
26 have deliberately deceived the public. In addition to those who act deliberately, shoddy work is  
27 done by people who are disinterested, lazy, or who are acting reasonably, but who have been  
28 given incorrect or incomplete information from which to work.

<sup>13</sup> OIC’s Motion to Alter at 19:5-9.

<sup>14</sup> OIC’s Motion to Alter at 19:9-11.

1 brain and bone spatter on the surrounding area.

2 To the contrary, a United States Park Police officer who examined Foster's body at the  
3 park testified that he saw a "pool of blood under his head, gun in his right hand, appeared to be a  
4 .38 caliber revolver, no sign of a struggle, no other obvious signs of trauma to the body." This  
5 same officer reported that there "was no blood spatter on the plants or trees surrounding  
6 decedent's head," and testified that he did not observe any "blowout" from the back of the head.  
7 Additionally, a Federal Bureau of Investigation report of its interview with the only medical  
8 doctor to view Foster's body at the park says, "no blood was recalled on the vegetation around  
9 the body." Starr omits these observations from his report.

10 In its motion, the OIC does not dispute these facts.

11 However, the OIC correctly states that in my summary adjudication motion, I had a  
12 section heading at page 24 that stated: "Starr Failed to Explain How Dr. Lee Found 'Possible'  
13 Bloodstains in Polaroids When Nobody at the Death Scene Saw Such Bloodstains."<sup>16</sup> The OIC  
14 also correctly states that the relevant portion of Starr's report (p. 59), when quoting Lee, does not  
15 reflect whether the photographs to which Lee was referring were Polaroids or not.<sup>17</sup> The OIC  
16 then states: "That is not surprisingly, [sic] since a review of Dr. Lee's report reflects that the  
17 photographs referenced by Dr. Lee are not the Polaroid photographs."<sup>18</sup>

18 There are two problems with what the OIC has done here. First, it purports to describe  
19 Dr. Lee's report without providing me or the court with a copy of the report. Therefore, there is  
20 no evidentiary basis for the OIC's statement about what "a review of Dr. Lee's report reflects . . .  
21 ." The OIC should produce those portions of Lee's report upon which it is relying to make this  
22 motion.

23 Second, although Starr's report did not state on page 59 whether the photographs to  
24 which Lee was referring were Polaroids or not, Starr effectively stated that they were Polaroids  
25

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26 <sup>15</sup> The evidence is presented in my Motion for Summary Adjudication at 19 n. 83 and at 25;  
27 Appellant's Opening Brief at 10-11, 46.

28 <sup>16</sup> OIC's Motion to Alter at 13:2-4.

<sup>17</sup> OIC's Motion to Alter at 13:4-13.

<sup>18</sup> OIC's Motion to Alter at 13:13-16.

1 later in his report. On pages 72-74 of his report, Starr has a section entitled “Photographs” that  
2 relate to “the conduct of the initial 1993 investigation . . . .”<sup>19</sup> In that section he describes only  
3 photographs that were apparently taken on the day of death and only two types of photographs:  
4 Polaroids and 35-millimeter.<sup>20</sup> He states that “[t]he 35-millimeter photographs were  
5 underexposed; thus, the Polaroids were of greater investigative utility.”<sup>21</sup>

6 Therefore, according to the Starr report, the only photographs of the scene from July 20,  
7 1993, that are usable are Polaroids. Accordingly, it was not unreasonable for me to assume that  
8 the photos referred to by Lee, were Polaroids. However, now the OIC is stating that “a review of  
9 Dr. Lee’s report reflects that the photographs referenced by Dr. Lee are not the Polaroid  
10 photographs.”<sup>22</sup> This statement by the OIC contradicts the statement in the Starr report that the  
11 non-Polaroid photos (the 35-millimeter) “were underexposed . . . .” Why is the OIC now  
12 contradicting the Starr report?

13 Could it be that some of the “underexposed” 35-millimeter photos were not so  
14 completely underexposed as to be completely useless? That could explain why Lee was  
15 referring to non-Polaroid photos, if that is the case. However, if it is the case, then the Starr  
16 report was being very deceptive because it strongly implied that the 35-millimeter photos were  
17 useless.

18 **B. Evidence That Initially There Was No Gun In Foster’s Hand Is Not Fully**  
19 **Reported By Starr.**<sup>23</sup>

20 Although the official government story holds that Foster was found with a gun in his  
21 hand, the first person who officially found Foster’s body said that there was no gun in his hand.  
22 This witness, known as the “confidential witness,” testified that Foster’s hands were palms-up  
23 and empty. In concluding that this witness “simply did not see the gun that was in Mr. Foster’s  
24 hand,” Starr cited the witness’ FBI interview in which the witness said that it was possible there  
25

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26 <sup>19</sup> Exhibit 2.

27 <sup>20</sup> Exhibit 2.

28 <sup>21</sup> Exhibit 2.

<sup>22</sup> OIC’s Motion to Alter at 13:13-16.

1 was a gun on the rear of Foster’s hand that he might have missed.

2 But Starr failed to tell the public that one of the body site photos shows a gun in Foster’s  
3 right hand that eliminates the possibility of there having been a gun on the rear of Foster’s hand  
4 that went unseen by the witness. This photo, leaked to ABC-TV and published in Time  
5 magazine, shows Foster’s gun-hand palm down, while the witness said the hand was palm-up  
6 and empty. This photo shows the gun underneath the palm of Foster’s right hand with the rear of  
7 Foster’s hand facing up. The gun is in a position where the witness could not have missed it if it  
8 was there when he saw Foster’s hand. This means that the only possible condition which the  
9 witness agreed would account for his not seeing the gun, is a condition that did not occur.

10 Starr also failed to tell the public that the witness testified that his concession that he  
11 could have missed seeing the gun was based on the FBI’s representation that Foster’s hands were  
12 palms-up with the gun concealed on the other side of Foster’s hand. The witness further testified  
13 that the FBI would not show him the photo. But when he subsequently saw it, he testified that it  
14 was not a picture of what he saw. Therefore, Starr failed to tell the public that he relied upon a  
15 statement by the witness that the witness later testified was based on a false representation by the  
16 FBI.

17 In its motion, the OIC does not dispute these facts.<sup>24</sup> Instead, the OIC states that Starr’s  
18 report “does discuss the statements of the confidential witness . . . .”<sup>25</sup> However, the point is that  
19 Starr’s report deceptively fails to discuss the most important statements by the witness, as  
20 described above. Apparently, the OIC cannot defend the Starr report on this issue.

21 **C. The Invalid Gun Identification Used By Fiske And Starr.**<sup>26</sup>

22 Identification of the gun was a major problem for the government. Starr failed to tell the  
23 public that his predecessor, Robert Fiske, who also issued a report on the death, used an invalid  
24 gun identification from Foster’s former wife, Ms. Moody. Nine days after the death, according  
25

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26 <sup>23</sup> The evidence is discussed in my Motion for Summary Adjudication at 28-30; Appellant’s  
27 Reply Brief at 16-19.

28 <sup>24</sup> OIC’s Motion to Alter at 14:16 – 15:2.

<sup>25</sup> OIC’s Motion to Alter at 14:21-23.

1 to the Park Police, they showed Ms. Moody a photo of the official death gun, which is blued  
2 steel and appears black. Ms. Moody reportedly said she could not identify the gun because it  
3 was not silver and did not have a large barrel. The FBI said that ten months later, in May 1994,  
4 it showed Ms. Moody the official death gun and she “believes that the gun found at Fort Marcy  
5 Park may be the silver gun which she brought up with her” from Arkansas. Fiske then reported,  
6 without mentioning the gun colors, that Ms. Moody identified the official death gun.<sup>27</sup>

7 Fiske’s use of Ms. Moody’s statement clearly was deceptive. If she was shown the black  
8 official death gun at this May 1994 interview and simultaneously identified it as being silver-  
9 colored, then she failed to give a valid identification of the black official death gun. Likewise, if  
10 she was shown a silver-colored gun at this interview, then she failed to give a valid identification  
11 of the black official death gun. No matter what color gun Ms. Moody was shown at this  
12 interview, given her reported response, it was deceptive for Fiske to use her response as if it were  
13 a valid identification of the black official death gun.

14 Starr failed to explain why Fiske used Ms. Moody’s invalid gun identification. Starr also  
15 failed to explain why, if Ms. Moody was shown the black official death gun in May 1994, she  
16 reportedly simultaneously described it as silver, without any report of the FBI agents or attorneys  
17 present saying anything about such a bizarre response. Starr also failed to tell the public that Ms.  
18 Moody’s reason for not identifying the gun in the photo shown to her nine days after the death  
19 was because it was not silver. Also absent from Starr’s report is that the FBI expressly stated  
20 that Ms. Moody believed the gun shown to her in May 1994 was silver.

21 The effect of Starr’s omissions are to obscure the possibility that Ms. Moody was  
22 deliberately shown the wrong gun – a silver gun – in May 1994 so that there would be something  
23 in the record that could be presented as a Foster family member’s “identification” of a gun,  
24 without telling the public that she had identified a gun that was not found with the body.

---

26 <sup>26</sup> The evidence is discussed in my Motion for Summary Adjudication at 12-18; Appellant’s  
27 Opening Brief at 35-45.

28 <sup>27</sup> In 1998 the court ordered the OIC to release color copies of photos of the official death gun.  
Now the court can see for itself if the gun is one that somebody would describe as silver as it was

1 In its motion, the OIC refers to my statement that “Starr failed to explain why Lisa  
2 [Foster] reportedly identified a black gun as silver and why this invalid ‘identification’ was  
3 treated as valid” and states that “[c]ontrary to Favish’s assertion [the Starr Report on Foster’s  
4 death] at pp. 79-85 analyzes in detail the description and ownership of the gun, including Mrs.  
5 Foster’s recollections.”<sup>28</sup>

6 However, although Starr’s report does contain such analysis, that analysis is inadequate  
7 because it still fails to explain why Ms. Moody reportedly identified a black gun as silver in May  
8 1994. If her description of the gun as it was being shown to her during the 1994 interview was  
9 erroneous, her error cannot be explained by a faulty memory. Her perception at that interview  
10 had nothing to do with memory. She was reporting her perception of a gun as it was being  
11 shown to her during the interview. Any such erroneous description only can be explained by Ms.  
12 Moody lacking an ability to tell black from silver, her lying during the interview about her  
13 perception or the FBI agent failing to accurately report what Ms. Moody said at the interview.

14 There is no evidence in the public record that Ms. Moody is unable to tell black from  
15 silver, that she lied about her perception or that the FBI failed to accurately record what Ms.  
16 Moody said. Moreover, had she lied about her perception of the gun *as it was being shown to*  
17 *her*, characterizing a black gun as silver, this should have elicited comment from those present.  
18 No such comment appears in the public record.

19 Starr came closest to explaining these issues when he said that in November 1995, Ms.  
20 Moody identified “the gun recovered from Mr. Foster’s hand ... although she said she seemed to  
21 remember the front of the gun looking lighter in color when she saw it during the move to  
22 Washington.”<sup>29</sup> Thus, Starr implied that there never was a silver gun and for some unexplained  
23 reason, Ms. Moody just thought all these years that a black gun in her home was silver!

24 But Starr’s implication that Ms. Moody has a faulty memory about the color of the gun  
25 she and her husband owned is an inadequate explanation. Starr completely failed to explain how

26  
27 being shown to them. Two of the color photos of the gun released by the OIC are at my web site  
28 at (<http://members.aol.com/AllanF8702/photoix.htm>).

<sup>28</sup> OIC’s Motion to Alter at 10 n. 3.

<sup>29</sup> Starr Report at 81 (exhibit 2).

1 it is possible that Ms. Moody could have been shown a black gun in May 1994 that she  
2 reportedly *simultaneously* described as silver. Again, her reported description at the May 1994  
3 interview was not dependent on any memory of what a gun looked like when she saw it in the  
4 past. It was dependent on her ability to describe what she was being shown at the time of her  
5 description.

6 If she was shown a black gun at this interview, the OIC must explain why Fiske's  
7 Deputy, Roderick Lankler and Ms. Moody's attorney, James Hamilton and at least two FBI  
8 agents, apparently failed to note that in their presence, Ms. Moody described a black gun as  
9 being silver.<sup>30</sup> The OIC also must explain why Fiske used that identification as if it were a valid  
10 identification.

11 Starr's failure to explain these matters suggests that the more sinister explanation is true:  
12 At the May 1994 interview, Ms. Moody correctly described the color of the gun she was shown  
13 at that interview. This is because the gun shown to her at that interview was silver and it was not  
14 the black official death gun. She deceptively was shown a silver gun it was known she could  
15 recognize so that there would be something in the record that could be presented as an  
16 "identification" of the black official death gun.

17 According to Starr's report, Ms. Moody "stated to the OIC in November 1995, when  
18 viewing the gun recovered from Mr. Foster's hand, that it was the gun she unpacked in  
19 Washington but had not subsequently found . . . ."<sup>31</sup> However, this does not explain why Ms.  
20 Moody would have described a black gun that was shown to her in May 1994 as silver, as it was  
21 being shown to her. Moreover, a verbatim transcript of this November 1995 interview is not  
22 public and therefore cannot be evaluated properly.

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24 <sup>30</sup> James Hamilton is one of the attorneys representing Ms. Moody in this action and was present  
25 during her May 1994. Perhaps he will fill in the gaps left by the OIC and explain to the court  
26 why she described a black gun that was allegedly shown to her at that interview, as silver, while  
27 she was being shown the gun, and whether anybody at the interview asked her why she just  
28 described a black gun as silver. Perhaps he will tell us that she was shown a silver gun at that  
interview and correctly perceived and identified it as such, and then explain whether he or Mr.  
Lankler told the FBI agents that the silver gun they were representing as being the official death  
gun, was not the official death gun.

<sup>31</sup> Starr Report at 81 (exhibit 2).

1 Starr's report, and the OIC's motion also fail to explain why it was proper for Fiske to  
2 use Ms. Moody's May 1994 "identification" as if it were a valid identification of the black  
3 official death gun.

4 The OIC states that I "referred to some confusion among the statements of Mr. Foster's  
5 widow regarding whether the gun she had been shown was black or silver."<sup>32</sup> It is more than  
6 "confusion." It is conclusive proof that Fiske used an invalid "identification" from Ms. Moody  
7 as if it were valid and Starr's report did nothing to dispel that fact.

8 It also should be noted that Fiske and Starr failed to reconcile Ms. Moody's other reason  
9 for her initial failure to identify the black official death gun, i.e., because it didn't have a "large  
10 barrel," with their conclusion that she has identified it, despite the fact that it does not have a  
11 large barrel.

12 In its motion, the OIC does not dispute any of the facts stated above relating to Ms.  
13 Moody's alleged identification of the black official death gun.<sup>33</sup>

14 **D. Fiske And Starr Failed To Report That The Park Police Chief Made A False**  
15 **Statement About Alleged Identification Of The Gun.**<sup>34</sup>

16 Starr also failed to explain why Park Police Chief Robert Langston falsely told the public  
17 at a press conference on Aug. 10, 1993, that the official death gun had been identified by the  
18 Foster family as one of Foster's guns. By the time of the press conference, Ms. Moody had not  
19 identified the black official death gun, in part because it was the wrong color, and one of Foster's  
20 sisters, Sharon Bowman, failed to give a credible identification of the official death gun. By  
21 Aug. 10, 1993, nobody in the Foster family identified the black official death gun as one  
22 previously belonging to Foster. Indeed, Fiske and Starr failed to tell the public that largely  
23 because of its color, the black official death gun could not be identified by Foster's nephew, who  
24 was the surviving family member most familiar with the family's guns.

25 In its motion, the OIC does not dispute these facts, except to disagree with my conclusion  
26

27 <sup>32</sup> OIC's Motion to Alter at 10:4-6.

28 <sup>33</sup> OIC's Motion to Alter at 10:1 – 11:2.

<sup>34</sup> The evidence is discussed in my Motion for Summary Adjudication at 26-28; Appellant's  
Reply Brief at 12-16.

1 that Bowman's statement about the gun photo she was shown did not justify Langston's  
2 statement to the public. The OIC states: "It would appear that the recollection of Ms. Bowman is  
3 consistent with the statements attributed to the Chief of the Park Police."<sup>35</sup>

4 Contrary to the OIC's statement, Langston was not justified in telling the public that  
5 Bowman had "identified" the black official death gun after being shown a photo of it.  
6 Undisputed by the OIC is the fact that the person who showed Bowman the photo wrote: "I  
7 asked if she remembered any other features [other than the wavelike detailing at the base of the  
8 grip]. She did not." So as far as Langston knew on August 10, 1993, Bowman did not even  
9 remember the color of the gun as a feature she remembered seeing. A gun "identification" that  
10 does not include the color of the gun is a very weak identification. Naturally, both Starr and  
11 Fiske failed to mention this additional portion of Bowman's "identification" of the black official  
12 death gun.

13 Moreover, even if Bowman's statements legitimately can be characterized as an  
14 "identification," that is the only possible justification for Langston's statement. Ms. Moody had  
15 not identified it by August 10, 1993, and had in fact rejected it as being one of Foster's guns  
16 because it was not silver with a large barrel. Moreover, largely because of its color, the black  
17 official death gun could not be identified by Foster's nephew, who was the surviving family  
18 member most familiar with the family's guns. Under these circumstances, Langston was  
19 unjustified in telling the public that the "family" thought the gun had been in Foster's possession.  
20 Fiske and Starr let him get away with it and the OIC defends it to this day.

21 **E. Fiske And Starr Fail To Report Important Information About The Haut**  
22 **Report.**<sup>36</sup>

23 Starr's discussion of the medical evidence also is deceptive. The official government  
24 story says there was no neck wound and that Foster shot himself in the mouth, leaving a one by  
25 one and a quarter inch exit hole in the back of the head, three inches from the top. Starr  
26 dismisses a report by one of the paramedics that there was a small bullet-like entrance wound on  
27

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28 <sup>35</sup> OIC's Motion to Alter at 14 n. 6.

1 the right side of Foster’s neck.

2 But the only medical doctor to view Foster’s body at the park, Dr. Donald Haut, wrote a  
3 two-page report that is internally inconsistent. On the first page it states that the death shot was  
4 “mouth-head,” but on the second page it states that the death shot was “mouth to neck.”  
5 Moreover, the report appears to have been improperly altered. On page one there is a section  
6 near the bottom of the page on the left side that states:

7 **CAUSE OF DEATH:**

8 **PERFORATING GUNSHOT WOUND MOUTH-**

9 **HEAD**

10 However, just to the left of the word “HEAD” there appears to be remnants of a four-  
11 letter word that was mostly concealed with correction fluid or tape.<sup>37</sup>

12 Both Fiske and Starr failed to tell the public all the facts about this medical report. Fiske  
13 completely ignored it and Starr quoted from the apparently altered language, while failing to tell  
14 the public about the apparent alteration, and about the unaltered language mentioning a neck  
15 wound. Starr also failed to explain why the report appears to be altered and what, if anything, is  
16 written underneath the apparent alteration.<sup>38</sup>

17 In its motion, the OIC does not dispute any of these facts.<sup>39</sup>

18 **F. Starr Misleads The Public About Police Observance Of The Autopsy.**<sup>40</sup>

19 The medical evidence was further distorted because Starr falsely implied that the Park  
20 Police observed the entire autopsy when they did not do so. Starr reported that several Park  
21 Police officers observed the autopsy, and quoted one of the officers who wrote that after he  
22

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23 <sup>36</sup> The evidence is discussed in my Motion for Summary Adjudication at 9-12; Appellant’s  
24 Opening Brief at 29-35.

25 <sup>37</sup> Exhibit 3. This is a copy of exhibit 2 from my motion for summary adjudication of issues. It  
26 includes a declaration from Hugh Sprunt, one of the people who found this version of the Haut  
27 Report.

28 <sup>38</sup> See discussion below for new developments that may explain why Starr did not comment on  
the apparent alteration.

<sup>39</sup> OIC’s Motion to Alter at 9:6-26.

<sup>40</sup> The evidence is discussed in my Motion for Summary Adjudication at 21-24; Appellant’s  
Reply Brief at 5-9.

1 briefed the autopsy doctor, the doctor “started the autopsy.” But Starr failed to tell the public  
2 that the next sentence in the officer’s report says: “Prior to our arrival, the victim’s tongue had  
3 been removed as well as parts of the soft tissue from the soft pallet (sic).” Starr’s omission is  
4 significant given that this is an autopsy of a man who allegedly fired a gun into his mouth while  
5 leaving behind unresolved questions about a right-side neck wound whose track might have gone  
6 through the tongue and soft palate.

7         Additionally, Starr failed to tell the public that the autopsy doctor violated policy by  
8 beginning the autopsy before the police arrived, and that the autopsy doctor refused to tell the  
9 police the identity of his assistant.

10         In its motion, the OIC does not dispute any of these facts.<sup>41</sup>

11         **G. Starr Fails To Report Evidence That Foster’s Car Was Not At The Park**  
12         **Shortly After The Death.**<sup>42</sup>

13         Starr also omitted important evidence about Foster’s arrival at the park. Starr mentioned  
14 four people who were in the park between 4:30 p.m., and just before 6:00 p.m., at a time when  
15 Foster was probably already dead and his gray car should have been in the park’s parking lot.  
16 Starr stated that one of these people reported seeing a brown car, not Foster’s gray car. But Starr  
17 failed to mention that the other three people also reported seeing a brown car, not Foster’s gray  
18 car. Yet, Starr inexplicably concluded that Foster’s gray car was in the lot at this time.

19         The OIC does not dispute these facts.<sup>43</sup> Instead, in its motion, the OIC states that Starr’s  
20 report “analyzes each of the private citizen statements as to the car . . . .”<sup>44</sup> However, the  
21 important issue is the quality of that analysis and whether Starr concealed evidence from the  
22 public that would destroy his conclusion that Foster’s car was in the parking lot when he died.  
23 The fact is that Starr’s “analysis” did conceal such evidence.

24         All four of these witnesses reported seeing a brown car, not Foster’s gray car, and Starr  
25

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26 <sup>41</sup> OIC’s Motion to Alter at 12:16 – 13:1.

27 <sup>42</sup> The evidence is discussed in my Motion for Summary Adjudication at 31-34; Appellant’s  
28 Reply Brief at 20-25.

<sup>43</sup> OIC’s Motion to Alter at 17:18 – 18: 19:4.

<sup>44</sup> OIC’s Motion to Alter at 18 n.10.

1 only told the public that one of these witnesses reported seeing a brown car. Starr failed to tell  
2 the public that the other three witnesses also reported seeing a brown car.

3         Instead of admitting that this episode alone makes the Starr report untrustworthy and is  
4 strong evidence of intentional deception, the OIC deceptively tries to make it appear that there is  
5 additional support for Starr’s conclusion that Foster’s gray car was in the parking lot when he  
6 died. In its motion, the OIC states that the Starr report “analyzes” the statement of “one citizen  
7 who saw a dark metallic grey Japanese sedan (Report at pp. 20-21) . . . .”<sup>45</sup> However, on page  
8 21, the Starr report states that this citizen “was shown photographs of Mr. Foster’s car” and “that  
9 the license plate on it differed from that which he recalled.” Therefore, in its motion, the OIC  
10 implies that this citizen saw Foster’s car, but fails to tell the court that the Starr report itself  
11 reports evidence that this citizen did not see Foster’s car.

12         It is significant that in its motion, the OIC has no defense for one of the Starr report’s  
13 most misleading statements. As explained in my summary adjudication motion and appellate  
14 briefs, Starr referred to the statements by two of the witnesses who Starr failed to tell the public  
15 had reported seeing a brown car, not Foster’s gray car. In trying to show that there were no  
16 suspicious people at the park who may have caused Foster’s death, Starr stated that “[a]ccording  
17 to the reports of their interviews at the scene on July 20, 1993, C3 and C4 [the two witnesses] did  
18 not see anyone in or touching Mr. Foster’s car.” They did not “see anyone in or touching Mr.  
19 Foster’s car” because, according to their statements, they did not see Mr. Foster’s car! But Starr  
20 did not tell the public this fact. Starr’s implication that Foster’s car was seen by these two  
21 witnesses is false.

22         In its motion, citing the Starr report, the OIC states: “The only non-official cars positively  
23 identified and known to law enforcement and the OIC were those of Mr. Foster, and two other  
24 citizens.”<sup>46</sup> This proves nothing. The brown car reported by the four witnesses and a  
25 paramedic<sup>47</sup> was never “positively identified” and made “known to law enforcement and the  
26

27 <sup>45</sup> OIC’s Motion to Alter at 18 n. 10.

28 <sup>46</sup> OIC’s Motion to Alter at 18 n. 10.

<sup>47</sup> The evidence regarding the paramedic’s report also is discussed in my Motion for Summary  
Adjudication at 31-34; Appellant’s Reply Brief at 20-25.

1 OIC,” because apparently the government deliberately failed to look for the brown car. There is  
2 no evidence in the Fiske or Starr reports that the government searched for the brown car reported  
3 by all these witnesses.

4 **H. Starr Fails To Report Evidence Refuting Henry Lee’s Credibility Regarding**  
5 **The Body Being Dragged.**<sup>48</sup>

6 At this point you might be comparing Starr’s OIC with O.J. Simpson’s criminal defense  
7 team, and you would have good reason. Simpson’s discredited expert witness, Dr. Henry Lee,  
8 was hired by Starr. Starr said Lee’s examination of Foster’s clothes revealed no evidence that  
9 Foster’s body had been dragged. But Starr failed to tell the public that according to the Park  
10 Police, they dragged Foster’s body when it began to slide down the hill during an examination.  
11 Starr failed to mention these Park Police descriptions of the body sliding up and down the dirt  
12 path and failed to reconcile them with Lee’s apparently erroneous conclusion.

13 The OIC’s response to this is: “Obviously Favish and Dr. Lee did not use the term  
14 ‘dragged’ in the same context.”<sup>49</sup> No further explanation is provided. Contrary to the OIC’s  
15 non-sequitur response, the Park Police reported that Foster’s body “slid down the hill,” “began  
16 sliding down the hill,” “slid down,” and was “slipping down the hill” in a “slide,” which is why  
17 they “pulled him back up.” Starr said “examination of Mr. Foster’s clothes by Dr. Lee revealed no  
18 evidence of a struggle or of dragging.” Starr said Lee reported that “[n]o dragging-type soil patterns  
19 or damage which could have resulted from dragging-type action were observed on these pants.”  
20 Starr said “Dr. Lee found no ripping, tearing, or scratch or scraping-type marks on the shirt.”  
21 Therefore, both the Park Police and Lee are talking about the exact same thing: the movement of  
22 Foster’s body across the ground. Lee found no evidence that it happened and the Park Police state in  
23 testimony and a statement to the FBI that it did happen. The OIC refuses to provide a decent  
24 explanation of why it was appropriate for Starr’s report to ignore the Park Police statements and treat  
25 Lee’s conclusions as if they were valid.

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26  
27  
28 <sup>48</sup> The evidence is discussed in my Motion for Summary Adjudication at 18-20; Appellant’s  
Opening Brief at 45-48.

<sup>49</sup> OIC’s Motion to Alter at 11:13-14.

1 In its motion, the OIC does not dispute these facts.<sup>50</sup>

2 **3. ADDITIONAL EVIDENCE THAT THE FISKE AND STARR REPORTS ARE**  
3 **UNTRUSTWORTHY.**

4 **A. The FBI Memo That States “No Exit Wound” Was Not Mentioned By Fiske**  
5 **Or Starr.**

6 After my Notice of Appeal was filed in this case in March 1998, two new documents  
7 became public. The documents were filed with the Ninth Circuit with a request for judicial  
8 notice for consideration in the appeal. Accordingly, I request that the court take judicial notice<sup>51</sup>  
9 of six pages that were released by the FBI in late March 1998 after the district court decision in  
10 this case. These pages were released pursuant to a Freedom of Information Act lawsuit in the  
11 District of Columbia, *Accuracy in Media v. FBI*, Civil Action No. 97-CV-02107-GK (D.D.C.)  
12 The pages are on file in that case as part of the FBI’s Memorandum of Points and Authorities in  
13 Support of its Motion for Summary Judgment, Exhibit A, Bates # 2-4, & 260-262. Those six  
14 pages are attached hereto as Exhibit 4. They show the following.

15 Two days after the autopsy, an FBI agent sent a memo to the director of the FBI stating,  
16 “Preliminary results include the finding that a .38 caliber revolver, constructed from two  
17 different weapons, was fired into the victim’s mouth with no exit wound.” The “no exit wound”  
18 phrase directly contradicts Starr, Fiske and the official autopsy report.

19 The memo was written by an FBI agent in the Washington, D.C., Metropolitan Field  
20 Office to the Acting Director of the FBI, who was Floyd Clarke.<sup>52</sup> A draft of the memo is dated  
21 July 22, 1993, two days after the death and one day after the autopsy and had minor corrections  
22 made to it.<sup>53</sup> The final version is date-stamped July 23, 1993.<sup>54</sup> The memo does not appear to be  
23

24  
25 <sup>50</sup> OIC’s Motion to Alter at 11:3-28.

26 <sup>51</sup> Federal Rule of Evidence 201.

27 <sup>52</sup> William Sessions was fired from his job as FBI Director the day before Foster’s death and  
28 Louis Freeh was not sworn in as Director until September 1, 1993. *See*  
(<http://www.fbi.gov/yourfbi/history/hist.htm>) (relevant portion attached as Exhibit 5).

<sup>53</sup> Exhibit 2 (first 3 pages).

<sup>54</sup> Exhibit 2 (second three pages).

1 an impromptu communication because it says it is, “[t]o confirm referenced telcalls, on 7/21/93.”  
2 Thus, apparently it is restating information that was previously communicated by telephone.

3 Neither Fiske nor Starr mentioned this memo. Nor did they explain the conditions that  
4 would make it possible for a .38 revolver to be fired in the mouth without making an exit wound.  
5 Also unmentioned is whether the FBI Director did anything to resolve the contradiction between  
6 this memo and the official autopsy report of an exit wound. There is no publicly available  
7 information indicating that Fiske or Starr ever questioned the FBI agent who wrote this memo.

8 **B. The OIC Has Never Explained Why Its Certified Copy Of The Haut Report**  
9 **Is Different From The Other Certified Copies Of The Haut Report.**

10 A copy of the report by Dr. Donald Haut, described above, was attached to my motion for  
11 summary adjudication of issues that was filed in this court February 11, 1998. It is a copy of the  
12 Haut Report that was found in the National Archives by non-government researchers Patrick  
13 Knowlton and Hugh Sprunt. At the time, it was the only publicly available version of the Haut  
14 Report. This National Archives copy was certified as a true copy on November 2, 1994, by  
15 Virginia Assistant Chief Medical Examiner Dr. James C. Beyer, who was also the autopsy doctor  
16 for Foster. Another copy of that National Archives version of the Haut Report is attached hereto  
17 as Exhibit 3.

18 Early last year I sued the OIC under the Freedom of Information Act for their copy of the  
19 Haut Report. In response to that lawsuit, the OIC gave me a copy of its copy of the Haut Report.  
20 A copy of the OIC’s copy of the Haut Report that the OIC gave me is attached hereto as Exhibit  
21 6.<sup>55</sup> The OIC’s copy of the Haut Report was certified as a true copy on January 30, 1995, by Dr.  
22 Beyer. Notice how the certified copy given to the OIC in January 1995 does not contain what  
23 appears to be remnants of a four-letter word in the front page section next to the word “HEAD”  
24 as does the National Archives copy. Therefore, the answer to the question of why Starr never  
25 mentioned the apparent alteration is that the January 30, 1995 certified copy of the Haut Report  
26 given by Dr. Beyer to the OIC was free of the “remnants” that are clearly visible on the  
27

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28 <sup>55</sup> The OIC also has filed a copy of its copy of the Haut Report with this court on or about  
January 9, 2001.

1 November 2, 1994 certified copy found in the National Archives.

2 Also earlier last year, Charles Smith, a citizen of Virginia, made a request under the  
3 Virginia Freedom of Information Act requesting an opportunity to view the original Haut Report  
4 so that he could see if correction fluid or tape had been used on the original and if so, what was  
5 underneath any such substance. He was not allowed to see the original version of the Haut  
6 Report and instead he was provided with copy of the report that was certified as true on March  
7 20, 2000 by the new Assistant Chief Medical Examiner, Frances P. Field. A copy of this most  
8 recently certified copy of the Haut Report, along with the accompanying cover letter and  
9 authenticating statements sent to Smith, is attached hereto as Exhibit 7. Notice how this March  
10 20, 2000 certified copy of the Haut Report has the apparent alteration on it.

11 Therefore, here are three certified copies of the same document, the Haut Report. One  
12 copy that ended up in the National Archives was certified on November 2, 1994. The second  
13 copy was certified on January 30, 1995 and given to Starr's OIC. The third copy was certified  
14 March 20, 2000 and given to Charles Smith. The first and third copies contain what appears to  
15 be an alteration that is improper. Only the second certified copy, the one given to the OIC, fails  
16 to show this apparent alteration, thereby raising the possibility that the copy given to the OIC  
17 was altered further, but done in such a manner as to be a "cleaner" alteration than appears on the  
18 other two certified copies.

19 This is very significant. Any such alteration is highly improper. A leading medical  
20 textbook states:

21 When you make a mistake on a chart, correct it promptly. Never erase,  
22 cover, completely scratch out, or otherwise obscure an erroneous entry  
23 because this may imply a coverup . . . Erasures or the use of correction fluid  
24 or heavy black ink to obliterate an error are red flags.

25 . . . .

26 When you make a mistake documenting on the medical record, correct it by  
27 drawing a single line through it and writing the words "mistaken entry"  
28 above or beside it. Follow these words with your initials and the date. If

1 appropriate, briefly explain the necessity for the correction. Make sure that  
2 the mistaken entry is still readable. This indicates that you're only trying to  
3 correct a mistake, not cover it up.<sup>56</sup>

4 The evidence is consistent with the following scenario. The original Haut Report is  
5 improperly altered with correction fluid or tape to conceal a four-letter word and replace it with  
6 the word "HEAD". The alteration is imperfect and leaves some remnants of the four-letter word.  
7 A copy of that imperfectly altered original is given to the Senate Whitewater Committee and it  
8 ends up in the National Archives. About two months later, in January 1995, Starr's OIC is given  
9 a copy of the Haut Report by the Virginia Office of Chief Medical Examiner. But this time  
10 when a photocopy of the original is made, somebody notices that the remnants of the improper  
11 alteration of the original are visible on the photocopy. This photocopy is altered with correction  
12 fluid or tape and another photocopy is made of that version. The result is a "clean" second-  
13 generation photocopy that does not show any "remnants" and that copy is certified on January  
14 30, 1995 by Dr. Beyer and given to the OIC. Or Dr. Beyer certified a version that contained the  
15 remnants again and somebody at the OIC made the further alteration to clean it up. In any case,  
16 in March 2000, a first generation copy is made by the Virginia Office of Chief Medical  
17 Examiner, showing the remnants and that copy is given to Charles Smith. Obviously, the truth  
18 may be something other than this scenario. But what else is consistent with the evidence and  
19 who is in a position to discover the truth?

20 Although the Virginia Office of the Chief Medical Examiner will not show the original to  
21 Charles Smith, it should show the original to the OIC. However there is no evidence that the  
22 OIC has asked to see the original. Apparently the OIC has no interest in learning whether it has  
23 been defrauded by the Virginia Office of the Chief Medical Examiner by being given a copy of  
24 the Haut Report that was improperly further altered so as to make the alteration completely  
25 "clean". Nor does the OIC apparently have an interest in learning whether the Senate  
26 Whitewater Committee also was defrauded with an imperfectly altered Haut Report.

27 Because the OIC has filed a copy of the January 30, 1995 certified copy of the Haut  
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<sup>56</sup> Mastering Documentation at 304-305 (Springhouse Corp., 2d ed. 1999).

1 Report with this court and because it appears that this copy may be even more fraudulent than  
2 the other two certified copies, the OIC should be especially concerned about possibly having  
3 filed a fraudulently altered document with this court. Even if the OIC is unconcerned about such  
4 a possibility, the court may be concerned. The court may wish to order the OIC to obtain the  
5 original version of the Haut Report from the Virginia Office of Chief Medical Examiner to  
6 determine what the truth is.

7 **4. THE OIC MISSTATES THE STANDARD REGARDING GOVERNMENT**  
8 **MISCONDUCT.**

9 The Ninth Circuit stated in this case:

10 Nothing in the statutory command conditions agency compliance on the  
11 requesting party showing that he has knowledge of misfeasance by the  
12 agency, although at times evidence of such knowledge has been referred to as  
13 enhancing the urgency of the request.<sup>57</sup>

14 Instead of relying on this statement, which governs this case, the OIC cites several cases  
15 from other circuits that have no application here. The OIC cites cases for the proposition that a  
16 FOIA requester must produce “compelling evidence that the agency denying the FOIA request is  
17 engaged in illegal activity . . . .”<sup>58</sup> However, that is not the standard in the Ninth Circuit. Indeed,  
18 it is an improper standard. Exemption 7(C) states that disclosure may be denied when it would  
19 lead to an “unwarranted” invasion of personal privacy.<sup>59</sup> The exemption does not say anything  
20 about having to produce “compelling evidence” in order to make the invasion “warranted” or  
21 that it must be evidence of “illegal activity” in order to make the invasion “warranted.” The  
22 Supreme Court says the FOIA’s exemptions must be narrowly construed to promote the FOIA’s  
23 purpose of government disclosure.<sup>60</sup> By imposing these additional burdens for those trying to  
24

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25 <sup>57</sup> *Favish v. Office of Independent Counsel*, 217 F.3d 1168, 1172-1173 (9<sup>th</sup> Cir. 2000) (citation  
26 omitted).

27 <sup>58</sup> OIC’s Motion to Alter at 19:11-19.

28 <sup>59</sup> *Favish v. Office of Independent Counsel*, 217 F.3d 1168, 1172 (9<sup>th</sup> Cir. 2000) (citing 5 U.S.C. §  
552(b)(7)(C))

<sup>60</sup> *Van Bourg, Allen, Weinberg & Roger v. National Labor Relations Board*, 751 F.2d 982, 984  
(9th Cir. 1985).

1 show that the public interest in disclosure of a particular document is paramount to the privacy  
2 interest of a single person or a few persons, the OIC and the misguided cases it cites are giving  
3 the privacy exemption a broad construction that has no basis in the statutory language or  
4 Congressional intent. The OIC and these cases do this without explaining why or how it is  
5 consistent with the FOIA as interpreted by the Supreme Court. Why require evidence of illegal  
6 activity when the public also has an interest in discovering negligent government activity?

7 The OIC cites *Silets v. U.S. Dep't of Justice*, 945 F.2d 227, 231 (7<sup>th</sup> Cir. 1991) for the  
8 proposition that “allegations of government ‘wrongdoing’ and ‘misconduct’ are insufficient to  
9 undermine the veracity of the agency’s Exemption 7(C) redactions.”<sup>61</sup> However, that proposition  
10 is not a rule. It is merely a description of what occurred in that case, which is far different from  
11 the solid factual showing made here that goes far beyond mere “allegations.”

12 The OIC cites *Hunt v. FBI*, 972 F.2d 286, 289-90 (9<sup>th</sup> Cir. 1992) for the proposition that  
13 “where there is no evidence that . . . there was wrongdoing on the part of a government  
14 employee the public interest is diminished.”<sup>62</sup> However, here there is evidence of government  
15 wrongdoing, that is at least negligent, if not intentional. The OIC also cites *Schiffer v. FBI*, 78  
16 F.3d 1405, 1410 (9<sup>th</sup> Cir. 1996) where the court said there was “no evidence suggesting that the  
17 FBI engaged in any wrongdoing.”<sup>63</sup> However, here there is plenty of evidence suggesting that  
18 the government engaged in either negligent or intentional wrongdoing.

19 The OIC cites *Wichlacz v. U.S. Dep't of Interior*, 938 F. Supp. 325, 333 (E.D.Va. 1996)  
20 and states that the court in that case rejected “a similar claim of ‘public interest’ under  
21 Exemption 7(C) based upon allegations of cover-up and conspiracy in the multiple investigations  
22 of Mr. Foster’s death.”<sup>64</sup> The OIC is being highly misleading here because the plaintiff in that  
23 case failed to make the detailed factual demonstration of the significant distortions and omissions  
24 in the Fiske report that I have made here and did not make any showing about the Starr report  
25 because it had not yet been made public.

26 \_\_\_\_\_  
27 <sup>61</sup> OIC’s Motion to Alter at 19:21-24.

28 <sup>62</sup> OIC’s Motion to Alter at 19:25-27.

<sup>63</sup> OIC’s Motion to Alter at 19:28 – 20:4.

<sup>64</sup> OIC’s Motion to Alter at 20:13-17.

1 **5. THE PUBLIC BENEFIT TO BE OBTAINED BY RELEASE OF THE PHOTOS.**

2 Although the OIC quotes many cases, the Ninth Circuit ruled in this case that the district  
3 court is “to balance the effect of . . . [the photos’] release on the privacy of the Foster family  
4 against the public benefit to be obtained by their release.”<sup>65</sup>

5 **A. The Privacy Of The Foster Family.**

6 Only two members of Foster’s family have submitted declarations and are seeking to stop  
7 release of the photos, his former wife, Ms. Moody, and one of his sisters, Ms. Anthony. Foster  
8 had another sister, Sharon Bowman.<sup>66</sup> He also had three children.<sup>67</sup> When Foster died in 1993,  
9 the youngest of the children was about 17 years of age.<sup>68</sup> Therefore, all of his children are now  
10 adults approximately in their mid-twenties. Additionally, Ms. Anthony refers in her declaration  
11 to Foster’s “86 year old mother.” Although it is understandable that the family may feel it is too  
12 much of an imposition to have the elderly mother bothered with formally being represented in  
13 these legal proceedings, it is less understandable why the other sister and the adult children are  
14 not formally objecting to the release of the photos.

15 Additionally, the declarations of Ms. Anthony and Ms. Moody do not contain the  
16 verifying language set forth in 28 U.S.C. § 1746, which states that the verifying language should  
17 be “in substantially the following form”:

18 (1) If executed without the United States: “I declare (or certify, verify, or  
19 state) under penalty of perjury under the laws of the United States of America  
20 that the foregoing is true and correct.

21 Executed on (date). (Signature)”.

22 (2) If executed within the United States, its territories, possessions, or  
23 commonwealths: “I declare (or certify, verify, or state) under penalty of  
24 perjury that the foregoing is true and correct.

25  
26 \_\_\_\_\_  
27 <sup>65</sup> *Favish v. Office of Independent Counsel*, 217 F.3d 1168, 1174 (9<sup>th</sup> Cir. 2000).

28 <sup>66</sup> Starr Report at 17, 82 (exhibit 2).

<sup>67</sup> Starr Report at 17 (exhibit 2).

<sup>68</sup> Deposition of Park Police Captain Charles Hume In Re S. Res. 229, at 94:17-18 (July 22, 1994), reprinted in S. Hrg. 103-889, vol. 1, at 697, 744 (exhibit 1).

1 Executed on (date). (Signature)".

2 Ms. Anthony's declaration states "I declare that the foregoing is true." This is followed  
3 by the date and place of signature and her signature. Ms. Moody's declaration does not contain  
4 any verifying language, just the place and date of signature and her signature.

5 The declarations of Ms. Anthony and Ms. Moody speak about media attention that would  
6 be so undesirable. Not mentioned in the declarations is that Ms. Moody gave an extensive  
7 interview to The New Yorker magazine in 1995 that resulted in an article filled with quotes from  
8 her in its September 11, 1995 issue.<sup>69</sup> Contrary to the impression left by her declaration, she has  
9 been a willing participant in the public discussion about one of the most controversial deaths of a  
10 public official in history. Now she is trying to block release of evidence that could end the  
11 controversy, with a claim that she wants the public discussion to end.

12 She has every right to control her contacts with the media. If her New Yorker interview  
13 was her only media presentation, and that's what she wants, that is her decision and it should be  
14 respected. Obviously, any rude interruptions by media personnel who refuse to take "no" for an  
15 answer should be condemned.

16 The declarations discuss how the photos might be disseminated in the media. It is  
17 unlikely that the declarants will be in a situation where they will have to see any of these photos  
18 for any period of time longer than it takes to turn their head or hit a T.V. remote control clicker.  
19 This does not mean that they won't experience an invasion of their memory of Foster, should  
20 such exposure occur, but it does mean that any such exposure will be extremely brief.

21 **B. The Public Benefit To Be Obtained By Release Of The Photos.**

22 All 10 of the photos should be released, in part because there is no privacy interest at  
23 stake here. However, the Ninth Circuit has decided otherwise and presently we are bound by  
24 that determination. That issue may be resolved someday by the United States Supreme Court.<sup>70</sup>  
25 This court's decision to withhold 5 of the 10 photos will be appealed.

26 \_\_\_\_\_  
27 <sup>69</sup> Peter J. Boyer, *Life After Vince*, The New Yorker at 54 (Sep. 11, 1995) (exhibit 8 contains the  
28 first page of that article)

<sup>70</sup> I disagree with the Ninth Circuit's privacy analysis because the United States Supreme Court  
has defined privacy as the right to control information about yourself and did not describe it in

1 This court's decision regarding the 5 photos ordered to be released should not be  
2 changed. As demonstrated above, the OIC does not dispute the facts showing that the Fiske and  
3 Starr reports are untrustworthy. Yet, the OIC continues to defend these reports. The OIC's  
4 position in this litigation does not give the impression that it is concerned about a thorough  
5 investigation. This is especially clear because it appears that the OIC itself may have been  
6 defrauded by the Virginia Office of Chief Medical Examiner and the OIC may have presented a  
7 fraudulent document to this court that the OIC can verify, but refuses to do so.

8 Foster was a high government official and his death was investigated by other  
9 government officials. The public has a right to know if its government has erroneously labeled a  
10 homicide as a suicide, or labeled a suicide in some other location as a suicide in the park.  
11 Whether such an error was done negligently or intentionally, the public has a supreme interest in  
12 discovering the truth about what its government did.

13 When the integrity of the federal government's law enforcement power evaporates, so  
14 does America. When that integrity is shown to be as degraded as it is in this case, the invasion of  
15 the declarants' memories that might occur should the declarants be briefly exposed to the photos  
16 or to media rudeness, cannot trump the interest of 280 million other Americans who need to  
17 know what their government is up to in this case.

18 Media scrutiny normally is to be expected when there is evidence of government

19  
20 terms that would encompass a right to be free from media intrusion that affects your memories of  
somebody else.

21 The Ninth Circuit's definition of privacy is inconsistent with the basic purpose of the FOIA,  
22 which is to provide a check against government corruption. In a death case, the more the  
23 documents indicate the possibility of government corruption, the more likely it is that the media  
24 will take action that may affect the survivors' memories of the deceased. Under the Ninth  
25 Circuit's definition, the greater the corruption, the greater the reason to keep the documents from  
26 the public. There is no evidence in the legislative history of the FOIA indicating that its drafters  
27 intended that the documents in a government death investigation most revealing of government  
28 corruption are the documents that deserve the most protection from public disclosure because  
they also would be the documents most likely to cause the media to affect the survivors'  
memories of the deceased.

Additionally, the Ninth Circuit's definition provides an incentive for government officials who  
may wish to keep evidence of corrupt government death investigations secret, to intimidate

1 negligence or obstruction of justice. The purpose of the FOIA is to help discover such evidence.  
2 To argue that evidence should be withheld because it might cause media scrutiny, is to argue that  
3 the precise kind of evidence the FOIA was designed to uncover, should remain secret. Such an  
4 argument is inconsistent with the FOIA.

5 This court ruled: “In this case, the appellate court appears to have defined the zone of  
6 privacy protection as those photographs that are ‘graphic, explicit and extremely upsetting.’ See  
7 the decision at page 1174.”<sup>71</sup> The OIC argues that the appellate court did not set this as the  
8 standard for determining whether there was a privacy interest that could justify withholding  
9 information under the FOIA.<sup>72</sup>

10 While not free from doubt, the district court’s interpretation of the appellate court’s  
11 opinion does seem correct. The “graphic, explicit and extremely upsetting” standard is the only  
12 standard that is described by the appellate court other than the extremely general language about  
13 a FOIA release that would “violate” a person’s “memory of the deceased loved one” or  
14 constitute an “invasion” of “the survivor’s memory of the beloved dead.”<sup>73</sup> Given that any  
15 document released about a person under the FOIA can affect the memory of that person held by  
16 that person’s survivors, the OIC’s interpretation would make every FOIA case involving  
17 information about a deceased person a “privacy” case under the appellate court’s new definition  
18 of privacy. It is highly unlikely that the appellate court intended to make such a broad new  
19 addition to the privacy exemption that could threaten what would otherwise be legitimate  
20 disclosures. It is much more likely that the appellate court intended to limit the reach of its new  
21 expansion of the privacy exemption to those cases where the threshold standard has been  
22 achieved, i.e., that the information is “graphic, explicit and extremely upsetting.”

23 In any case, the analysis below does not depend on whether the photos are deemed  
24 “graphic, explicit and extremely upsetting.” The public’s interest in disclosure is paramount to  
25

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26 surviving family members into expressing dissatisfaction with potential media interest in  
27 disclosure of the documents.

28 <sup>71</sup> *Favish v. OIC*, CV 97-1479 WDK, Civil Minutes – General at 1, filed Jan. 11, 2001, entered  
Jan. 12, 2001 (summary judgment ruling).

<sup>72</sup> OIC’s Motion to Alter at 3-4.

1 any privacy interest of the survivors in preserving their memories of Foster, no matter what  
2 standard is used.

3 **i) The Leaked Gun-In-Hand Photo.**

4 This court ordered that the photo entitled “1 – Right hand showing gun & thumb in  
5 guard” should be released.<sup>74</sup> This is the only photo that the Ninth Circuit has seen a copy of and  
6 stated that it was not “graphic, explicit, and extremely upsetting.”<sup>75</sup> Therefore, any argument to  
7 the contrary must be rejected.

8 The original of this photo is important because there is controversy about why the gun  
9 would have remained in Foster’s hand had he shot himself. Both Fiske and Starr said that the  
10 gun remained in his hand because Foster’s thumb was trapped and compressed between the  
11 trigger and the trigger guard of the gun.<sup>76</sup> The publicly available “leaked” copy of the photo is  
12 too degraded to make a definitive evaluation of whether Foster’s thumb was extended through  
13 the trigger area past the joint on his thumb to cause the gun to stay in his hand. The original of  
14 this photo would provide a much better view of his thumb and the trigger area.

15 Also, common sense tells us that the explosion of supersonic gasses from a .38 high  
16 velocity gunshot into the mouth is likely to cause a “blowback” of blood and other organic  
17 matter out of the mouth and onto Foster’s gun, hand and sleeve. Indeed, Starr quotes Dr. Henry  
18 Lee as saying that he examined the photos taken at the park and found “blood spatters” on  
19 Foster’s hands and shirt.<sup>77</sup> Starr quotes Lee as saying that this “backspatter” is typical.<sup>78</sup> The  
20 original photo will allow the public to see if there is any such backspatter.

21 There is also a question about why the gun appears to be partially lodged under Foster’s  
22 leg. If he shot himself with that gun how did it get under his leg? The original photo will  
23  
24

25 <sup>73</sup> *Favish v. Office of Independent Counsel*, 217 F.3d 1168, 1173 (9<sup>th</sup> Cir. 2000).

26 <sup>74</sup> *Favish v. OIC*, CV 97-1479 WDK, Civil Minutes – General at 2, filed Jan. 11, 2001, entered  
27 Jan. 12, 2001 (summary judgment ruling).

28 <sup>75</sup> *Favish v. Office of Independent Counsel*, 217 F.3d 1168, 1174 (9<sup>th</sup> Cir. 2000).

<sup>76</sup> S. Hrg. 103-889 at 181, 229 (exhibit 1); Starr Report at 43 (exhibit 2).

<sup>77</sup> Starr Report at 47 (exhibit 2).

<sup>78</sup> Starr Report at 47 (exhibit 2).

1 provide a more detailed view and allow a better evaluation of whether the gun is lodged under  
2 his leg.

3 ii) **The Photograph Entitled “3 – VF’s body looking down from top of**  
4 **berm”.**

5 This court ordered that the photo entitled “3 – VF’s body looking down from top of  
6 berm” should be released.<sup>79</sup> In its motion, the OIC states that this photo shows “blood stains  
7 and/or blood” and that “Mr. Foster’s face is clearly visible . . . .”<sup>80</sup> Starr discussed blood draining  
8 from Foster’s “right nostril” and “right side of the mouth”<sup>81</sup> Starr also discussed “a blood  
9 transfer stain in the area of the right side of the face” that Lee allegedly concluded was made  
10 when Foster’s “head made contact with the right shoulder at some point before the Polaroids  
11 were taken.”<sup>82</sup> Neither Fiske or Starr was able to definitively state how Foster’s head made  
12 contact with his right shoulder and then returned to a straight-up position to leave the contact  
13 stain on his cheek. Starr implied that the blood on Foster’s right shoulder came from the blood  
14 draining from the nostril and mouth.<sup>83</sup> However, Starr was unable to explain how this happened  
15 and could only speculate about who might have moved Foster head.<sup>84</sup> Thus Starr implied that the  
16 blood draining from the nostril and mouth came first and then stained the shoulder.

17 However, newly released evidence from Dr. Henry Lee’s report for Starr demonstrates  
18 that Starr’s implied scenario did not happen. The new evidence raises questions about whether  
19 the head was moved more than once and whether the blood on the shoulder initially came from a  
20 neck wound, not the mouth, and whether somebody tried to conceal the blood flow from the neck  
21 by tilting the head to spill blood from the mouth over the right side of the neck.

22 According to Lee’s report: “A portion of the blood trail from Mr. Foster’s mouth appears  
23 to have been deposited on top of the transfer pattern after his face was separated from the  
24

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25 <sup>79</sup> *Favish v. OIC*, CV 97-1479 WDK, Civil Minutes – General at 1, filed Jan. 11, 2001, entered  
26 Jan. 12, 2001 (summary judgment ruling).

27 <sup>80</sup> OIC’s Motion to Alter at 4:7-10.

28 <sup>81</sup> Starr Report at 64 (exhibit 2).

<sup>82</sup> Starr Report at 66 (exhibit 2).

<sup>83</sup> Starr Report at 63-66 (exhibit 2).

<sup>84</sup> Starr Report at 66 n. 191 (exhibit 2).

1 shoulder region.”<sup>85</sup> Starr failed to tell this to the public. Starr led the public to believe that blood  
2 drained from Foster’s nostril and mouth and stained his shoulder. Then, Starr implies, some  
3 unknown person tilted Foster’s head so that the right cheek touched the blood on the shoulder  
4 and then that person moved Foster’s head off the shoulder back to the straight-up position,  
5 leaving the contact stain on the cheek.

6 Starr did not tell the public that Lee states that *after* this contact stain was made, more  
7 blood drained from Foster’s mouth. How could more blood have drained from Foster’s mouth at  
8 that point, unless somebody tilted his head again? Presumably his heart had long since stopped  
9 beating and at least some of the blood had already drained from his mouth to stain the shoulder.  
10 There is no report of him being alive when his head was moved to make the contact stain.

11 Starr does not tell us what caused the flow of blood out of Foster’s mouth that is  
12 described by Lee as going on top of the transfer stain on Foster’s cheek. Given Starr’s failure to  
13 explain this second blood flow, to fit the facts reported by Lee, and still maintain that there was  
14 no neck wound, it appears that one has to assume that the head was moved for a second time.  
15 This second movement means that after whomever moved Foster’s head the first time, someone  
16 (who presumably had no business moving the head of a man known to be dead at a crime scene)  
17 moved the head with the result that blood streamed down the right side of the head and onto the  
18 neck and shoulder. Therefore, assuming no neck wound, as the government contends, we now  
19 have possible evidence for a second movement of Foster’s head that Starr failed to report.

20 This leaves the American public in a position of having to make educated guesses with  
21 insufficient evidence about what happened. The public should not have to do that. One educated  
22 guess is that the shoulder became stained with blood that was draining from a right-side neck  
23 wound (that officially did not exist). Then some unknown person moved Foster’s head, causing  
24 the right cheek to touch the bloodstained right shoulder, thereby creating the contact stain on the  
25 right cheek, and then moved his head back to the straight-up position. Subsequently, somebody  
26 moved Foster’s head for a second time to the right in order to spill some blood that was collected  
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28 <sup>85</sup> Lee Report at 17 (exhibit 9). This report was recently released, with redactions, to Accuracy in  
Media as a result of its FOIA lawsuit. *See* Declaration of John Clarke.

1 in the mouth out the right side of the mouth to cover the blood trail that was coming from the  
2 neck and make it appear that all the blood was originating from the mouth, and none from the  
3 neck.

4         Such an educated guess is consistent with something else Lee stated that Starr did not tell  
5 the public: “A pool of blood appears to be directly under the right side of his neck and shoulder  
6 region.”<sup>86</sup> As seen in the motion that I filed to compel the testimony of former OIC prosecutor  
7 Miquel Rodriguez and his former assistant Lucia Rambusch, the neck wound controversy is  
8 substantial. Indeed, one of the authors of the books quoted in that motion, Ambrose Evans-  
9 Pritchard, filed a declaration in another federal case stating, “I have seen the photograph showing  
10 an apparent neck wound to Mr. Foster’s neck . . . .”<sup>87</sup>

11         Unfortunately, the public is left to this sort of educated guessing because the government  
12 has not dealt with the public honestly. We know that Lee told Starr that the contact stain was  
13 created before the blood trail from the mouth, implying that they were caused by two separate  
14 events. We know that Starr failed to tell this to the public. We also know that neither Lee or  
15 Starr offer any explanation of how this happened.

16         The public must see these photos so that the public can provide the careful analysis that  
17 the government failed to provide. Perhaps the photos will show whether the amount of blood  
18 that pooled under the right side of the neck and shoulder region, as reported by Lee and  
19 concealed by Starr, is too great to have come from the mouth, thus indicating it came from the  
20 neck.

21         We are dealing with a mystery. By nature, we don’t know all the answers. We don’t  
22 even know all the right questions to ask. Some people can have the answer right in front of them  
23 and they still don’t see it. Others can put the pieces of a puzzle together faster and more  
24 accurately than we can dream of doing ourselves. The court is put in a difficult position. It must  
25 evaluate these issues without the benefit of guidance from the combined wisdom and knowledge  
26 of people who have studied this matter as much as the publicly available information will allow.

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27  
28 <sup>86</sup> Lee Report at 17 (exhibit 9).

1 I have benefited from that knowledge and wisdom, but I am limited in my own capacities and the  
2 amount of time I can devote to this. Public release will allow some in the public to see things  
3 that won't occur to the court or to me. Public release to this "group mind" is the only way to  
4 ensure that these photos are given the scrutiny they deserve.

5 Additionally, if this photo shows the gun, then it might provide more information about  
6 how Foster's thumb was set in the trigger and whether the gun was under the leg.

7 **iii) The Photograph Entitled "5 – VF's body – focusing on the Rt. side**  
8 **shoulder/arm"**.

9 This court ordered that the photo entitled "5 – VF's body – focusing on the Rt. side  
10 shoulder/arm" should be released.<sup>88</sup> In its motion, the OIC states that this photo shows "blood  
11 stains and/or blood . . . ."<sup>89</sup> The same arguments made for the photos discussed above apply  
12 here.

13 **iv) The Photograph Entitled "4 – VF's body focusing on right side and**  
14 **arm"**.

15 This court ordered that the photo entitled "4 – VF's body focusing on right side and arm"  
16 should be released.<sup>90</sup> In its motion, the OIC states that this photo shows "blood stains and/or  
17 blood . . . ."<sup>91</sup> The same arguments made for the photos discussed above apply here.

18 **v) The Photograph Entitled "5 – VF's body – focus on top of head thru**  
19 **heavy foliage"**.

20 This court ordered that the photo entitled "5 – VF's body – focus on top of head thru  
21 heavy foliage" should be released.<sup>92</sup> In its motion, the OIC states that in this photo "Mr. Foster's  
22

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23 <sup>87</sup> Exhibit 10, *see* Declaration of John Clarke. The court is requested to take judicial notice of  
24 this exhibit pursuant to Federal Rule of Evidence 201 because it was filed in a federal court case.

25 <sup>88</sup> *Favish v. OIC*, CV 97-1479 WDK, Civil Minutes – General at 1, filed Jan. 11, 2001, entered  
26 Jan. 12, 2001 (summary judgment ruling).

27 <sup>89</sup> OIC's Motion to Alter at 4:9-11.

28 <sup>90</sup> *Favish v. OIC*, CV 97-1479 WDK, Civil Minutes – General at 2, filed Jan. 11, 2001, entered  
Jan. 12, 2001 (summary judgment ruling).

<sup>91</sup> OIC's Motion to Alter at 4:9-11.

<sup>92</sup> *Favish v. OIC*, CV 97-1479 WDK, Civil Minutes – General at 2, filed Jan. 11, 2001, entered  
Jan. 12, 2001 (summary judgment ruling).

1 face is clearly visible . . . .”<sup>93</sup> The same arguments made for the photos discussed above apply  
2 here.

3 **6. THE ORIGINAL PRISTINE PHOTOS MUST BE AVAILABLE FOR PUBLIC**  
4 **INSPECTION AND COPYING.**

5 5 U.S.C. § 552(a)(2) says that federal agencies “shall make [certain records] available for  
6 public *inspection* and copying” and § 552(a)(3) says that with regard to records not covered by  
7 subsections (a)(1) & (a)(2), agencies “shall make the records promptly available to any person . .  
8 . in any form or format requested by the person if the record is readily reproducible by the  
9 agency in that form or format.”<sup>94</sup>

10 No matter what government agency has possession of the original pristine photos ordered  
11 released, those photos should be available to the public for inspection and copying. The public  
12 has a statutory right to see the originals. If members of the public, after being allowed to inspect  
13 the originals, desire a color photocopy, they should be allowed to have it made by the  
14 government agency or they should be allowed to supply the agency with the equipment to make  
15 the copy. Whatever the FOIA and its regulations say about the burden of paying the costs for  
16 this process should govern.

17 Given that these documents are color photos, it must be recognized that any photocopy of  
18 a photograph will produce a copy that is at least slightly degraded from the original. It should be  
19 up to the member of the public desiring a copy as to whether that copy should be made by a color  
20 photocopier or a scanner. A scanner connected to a laptop computer is less bulky than a color  
21 photocopier. A scanner, if operated correctly, will produce a more authentic reproduction of the  
22 information in the original photo than that produced by a color photocopier.

23 Given the nature of the controversy about Foster’s death, especially the controversy over  
24 whether an enhanced version of an original photo of his neck would show a neck wound, it is  
25 essential that the public be able to make digital scans of these photos. This should be done in the  
26 presence of the requester, if the requester so desires. The government agency should physically  
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28 <sup>93</sup> OIC’s Motion to Alter at 4:7-9.

<sup>94</sup> Emphasis added.

1 handle the photographs at all times. Members of the public should not be allowed to touch them.  
2 If the requestor supplies his own scanner or photocopier, then government agency personnel  
3 should be the ones to physically place the original photos on the scanner or photocopier glass and  
4 remove it.<sup>95</sup>

5 **7. CONCLUSION.**

6 The five photos that the court ordered to be released, should be released.

7  
8 Dated: February 15, 2001

9 \_\_\_\_\_  
10 Allan J. Favish  
11 In pro se  
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27 \_\_\_\_\_  
28 <sup>95</sup> At the time I received my color photocopies of the other photos in this case, I did not need the level of accuracy a scanner would provide, so I did not request that I be allowed to see the originals or scan them.







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 February 15, 2001, I served the document entitled OPPOSITION TO MOTIONS TO  
5 ALTER OR AMEND JUDGMENT; POINTS AND AUTHORITIES; DECLARATIONS OF  
6 ALLAN J. FAVISH, CHARLES SMITH & JOHN CLARKE, by placing a true copy thereof  
7 enclosed in a sealed envelope addressed to each of those identified in the service list, below.

7 **(XX) BY MAIL**

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

9 **( ) BY PERSONAL SERVICE**

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

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

14 \_\_\_\_\_  
Allan J. Favish

15 **SERVICE LIST**

|   |   |
|---|---|
| 17 Ms. Jan L. Luymes<br>18 Assistant U.S. Attorney<br>19 U.S. Department of Justice<br>411 W. 4th St., Suite 8000<br>Santa Ana, CA 92701-4599 | Attorney for defendant Office of<br>Independent Counsel                                   |
| 20 G. Andrew Lundberg<br>21 Belinda S. Lee<br>22 Latham & Watkins<br>633 West Fifth Street, Suite 4000<br>Los Angeles, CA 90071-2007          | Attorney for defendants-in-intervention<br>Sheila Foster Anthony and Lisa Foster<br>Moody |
| 23 James Hamilton<br>24 Swidler, Berlin, Shereff & Friedman<br>25 3000 K. Street, N.W., Suite 300<br>Washington, D.C. 20007                   | Attorney for defendants-in-intervention<br>Sheila Foster Anthony and Lisa Foster<br>Moody |

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27  
28