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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 ALLAN J. FAVISH,) Case No. CV-97-1479-WDK
12 Plaintiff,)
13 v.) REPLY IN SUPPORT OF MOTION FOR
OFFICE OF INDEPENDENT COUNSEL,) COURT TO COMPEL TESTIMONY
14 Defendant.) REGARDING ALLEGATIONS OF
15) ILLEGAL GOVERNMENT CONDUCT
16) REGARDING SUBJECT PHOTOGRAPHS
17) Date: February 12, 2001
Time: 3:00 p.m.
Place: 312 N. Spring St., L.A.,
CA, Rm. 1600
Judge: Hon. William Keller

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **1. INTRODUCTION**

3 The Office of Independent Counsel’s (“OIC”) opposition to the motion to compel
4 testimony from former OIC prosecutor Miquel Rodriguez and his former assistant Lucia
5 Rambusch is deeply flawed.

6 **2. MY REQUEST IS TIMELY**

7 The OIC states that the testimony should not be taken because my request is untimely.¹ It
8 is not untimely. It was not until July 12, 2000 that the Ninth Circuit ordered the OIC to produce
9 the 10 Polaroids of Vincent Foster’s body to this court for in camera review. The first hearing in
10 this court after that ruling was October 13, 2000. As set forth in my motion, I raised the issue at
11 that hearing. The court stated that it was premature to make the motion at that time and stated
12 that I should wait until after the court had seen the photos and made its ruling.

13 It would have been premature to make the motion any earlier than I did because the OIC
14 was not offering to show the photos to the public or to any court. As soon as it became clear that
15 the OIC would have to produce the original pristine Polaroids, I made the request. Even then,
16 the district court stated that it was premature. The OIC’s argument about timeliness must be
17 rejected.

18 **3. THE BOOK EXCERPTS ARE NOT HEARSAY**

19 The OIC states that the book excerpts I presented to the district court are inadmissible
20 hearsay.² However, for statements to be hearsay they must be offered to prove the truth of the
21 matters asserted in them.³ That is not the case here. I expressly stated that the excerpts were
22 being presented because I don’t know if the matters asserted in them are true. The reason for the
23 motion is to determine if they are true.

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26 _____
27 ¹ OIC Opposition at 1:1-18, 16:16-20.

28 ² OIC Opposition at 9:1-22.

³ *Gibbs v. State Farm Mut. Ins. Co.*, 544 F.2d 423, 428 (9th Cir. 1976) (letters admitted for the limited purpose of showing that State Farm had received them, but not admitted to show the truth of the matters asserted in them, did not contain hearsay); FRE 801(c).

1 The reason for the hearsay rule is to prevent a party from introducing out-of-court
2 statements to the trier of fact, asking that the statements be accepted as true, without giving the
3 opposing party on opportunity to cross-examine the person who made the out-of-court statement.
4 That is not the problem here. Again, this motion is requesting permission to obtain the testimony
5 of the two people who would have first-hand knowledge of the factual assertions made in the
6 book excerpts. I want Rodriguez and Rambusch to be asked questions under oath by all the
7 parties. The excerpts are not hearsay.

8 **4. THE BOOK EXCERPTS AND THE OTHER EVIDENCE PROVIDES**
9 **SUFFICIENT REASON TO COMPEL THE TESTIMONY**

10 The OIC states that before the testimony can be compelled, “Favish must demonstrate
11 there is a serious doubt about the OIC’s declarations which establish the Polaroids presented to
12 the Court in camera were in fact the agency records that Favish had requested.”⁴ Contrary to the
13 OIC’s assertion, the standard is not “serious doubt” as stated by the OIC. This court has more
14 discretion than that. As stated in my motion, in *Van Strum v. U.S. E.P.A.*, 680 F.Supp. 349
15 (D.Or. 1987), the FOIA requestor received documents from an anonymous source that according
16 to the court, “indicate that plaintiff may have a valid concern regarding the credibility of some
17 affidavit statements accompanying EPA’s motion for summary judgment.”⁵ The court held that
18 “plaintiff in this case has raised sufficient questions as to the integrity of the EPA affidavits to
19 warrant discovery.”⁶

20 Sufficient questions have been raised here. The unreliability of the Fiske and Starr
21 reports on the Foster death are established in my motion for summary adjudication, in my
22 appellate briefs and in my recently filed opposition to the OIC’s motion to alter the judgment.
23 The book excerpts are purportedly based on confidential sources within the government who
24 gave information to two reporters for major newspapers whose books were published by major
25 publishers. The excerpts discuss at least one of the photos being withheld. It is difficult to
26 imagine a more appropriate set of circumstances for compelling testimony in a FOIA case.

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28 ⁴ OIC Opposition at 14:3-7.

⁵ *Van Strum* at 352.

1 The OIC states: “Even if the facts asserted by the books upon which Favish relies were
2 taken as true, they do not raise any substantial doubt that the OIC presented to the Court the
3 original agency records that Favish had requested.”⁷ To the contrary, if the facts stated in the
4 book excerpts are true, then there is no reason to trust the OIC and the FBI. Period. If the facts
5 stated in the book excerpts are true, is there any reason to believe that this court was shown the
6 original pristine photos or that any notations written on the backs of the photos are authentic?
7 How difficult would it have been for the OIC and FBI to present photos that were not the original
8 pristine photos. I don’t know if I would be able to tell an original Polaroid photo from a Polaroid
9 photo of that photo. I don’t know if the court is or was equipped to make any such
10 determination. I don’t know whether the OIC and FBI personnel involved in producing the
11 photos to this court can make that determination.

12 Moreover, in my recently filed opposition to the OIC’s motion to alter the judgment,
13 attached as exhibit 10, is a copy of a declaration by one of the book authors, Ambrose Evans-
14 Pritchard, in which he states, “I have seen the photograph showing an apparent neck wound to
15 Mr. Foster’s neck”

16 The OIC states that “Evans-Pritchard’s assertion that FBI agents hid evidence from one
17 of the prosecutors is simply untrue.”⁸ However, the OIC does not cite any evidence for this
18 factual assertion. The OIC cannot be allowed to state that the assertion is untrue, without citing
19 evidence, while it is trying to block the testimony of two people who presumably have first-hand
20 knowledge about whether the assertion is untrue.⁹

21 The OIC states that its report on the Foster death “dispels any notion that there was a
22 neck wound on Mr. Foster’s body.”¹⁰ The OIC cites its report in discussing the statements of two
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25 ⁶ *Id.*

26 ⁷ OIC Opposition at 15:12-15.

27 ⁸ OIC Opposition at 15:2-4.

28 ⁹ Given the public record of our former President’s veracity, and that of his administration generally, one wonders whether the OIC’s statement is true because it wasn’t FBI agents who hid the evidence, or because the evidence was hidden from more than one prosecutor. Whatever the truth is, the best way to find it is to compel the testimony that the OIC is trying to block.

¹⁰ OIC Opposition at 8:6-7.

1 paramedics, Mr. Gonzales and Mr. Arthur.¹¹ However, the OIC has not released transcripts of
2 those interviews so we cannot give that discussion any weight. This is especially true given the
3 OIC's discussion of the witness who supposedly was the first person to find Foster's body and
4 who testified that there was no gun in Foster's hand.¹² I have proven that the OIC's discussion of
5 that person's testimony is not trustworthy.¹³ Moreover, as stated at footnote 53 in my summary
6 adjudication motion in February 1998:

7 But even Starr's expert, Dr. Brian Blackbourne, said there was "dried blood" at
8 the neck location cited by Arthur. Starr Report, at 64 n. 188 (exhibit 4, at 67).

9 Starr failed to explain why Blackbourne's interpretation of a photo is more
10 reliable than Arthur's in-person 2-3 foot view from the body.

11 Starr's report stated that Blackbourne based this conclusion on his viewing of "autopsy
12 photographs" of the neck.¹⁴ Starr did not indicate whether Blackbourne was shown the Polaroid
13 of the neck taken at the park that is one of the subject photos in this lawsuit and if not, why not.

14 Starr's report provides this discussion of Blackbourne's finding:

15 Dr. Blackbourne stated that a mark on the side of the right upper neck, just
16 below the jawline, seen in autopsy photographs, represents small fragments of
17 dried blood and does not represent any form of injury. [citation to
18 Blackbourne's Report] Dr. Blackbourne based this conclusion upon his
19 "experience in many autopsies. Blood dries overnight, prior to the autopsy. If
20 one is not meticulous in washing the body prior to photographing it, small
21 portions of blood may remain adherent to the skin. This mark is composed of
22 two rectangular shaped dark spots approximately 2mm X 3 mm. These marks
23 have none of the features of a gunshot wound or other antemortem trauma."

24 [citation to Blackbourne's Report]¹⁵

26 ¹¹ OIC Opposition at 8:11-20.

27 ¹² See Opposition to OIC's Motion to Alter Judgment at 8:18 – 9:20.

28 ¹³ *Id.*

¹⁴ Starr Report at 64 n. 188.

¹⁵ *Id.*

1 Therefore, according to Blackbourne, it appears that the other blood that was on Foster's
2 neck and face was washed off at the autopsy, but the little spots of blood that were not washed
3 off just happen to coincide with the location of the wound that Mr. Arthur reportedly saw at the
4 park before the autopsy and that is described in the book excerpts discussing the neck photo
5 taken at the park. That is quite a coincidence. Why would the blood that didn't get washed off
6 be at the same spot described by Mr. Arthur and supposedly depicted in a blow-up of the neck
7 photo taken at the park? Why would the dried blood at that precise location be so stubborn if it
8 was merely the result of draining from Foster's mouth or nose down his cheek to his neck when
9 apparently the rest of the blood in that drainage track was not so stubborn and washed off? Starr
10 did not explain.

11 Nor does Starr explain whether Blackbourne saw any enhanced versions of the autopsy
12 neck photos. Would an enhanced version of the autopsy neck photos show any wounds? Given
13 the coincidence reported above, it would be grossly incompetent for the OIC not to have shown
14 Blackbourne enhanced versions of the autopsy neck photos so that he could better determine if
15 there was a neck wound.

16 The testimony sought here is directly related to the OIC's search for the photographs that
17 are the subject of my FOIA request. There is a significant issue here of whether the OIC
18 searched for and retrieved the original pristine photos and whether the original pristine photos
19 were shown to this court. Indeed, if the book excerpts are true, then some people in the OIC and
20 the FBI, in late 1994 and early 1995, failed to retrieve and produce the original pristine neck
21 photo to Rodriguez.

22 The OIC states that "this Court has no jurisdiction to determine how Mr. Foster was shot,
23 where he was shot, or whether allegations set forth in two books are 'true' or false, particularly
24 when the allegations in the excerpts are irrelevant."¹⁶ I am not asking the court to make any such
25 determinations. I am asking the court to rule that these allegations, under these unique
26 circumstances, require that the testimony be taken from these two people in order to insure the
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28 ¹⁶ OIC Opposition at 12 n. 4.

1 integrity of the OIC's search for and production of, what has been represented as the original
2 pristine photos.

3 Of course the allegations in the books are relevant. They allege a deliberate failure to
4 produce the original pristine neck photo to one of the OIC's own prosecutors at the time. If
5 somebody was willing to do that, it is circumstantial evidence that they would be willing to
6 tamper with the original photo and allow the same deception to be perpetrated upon a court and
7 the public.

8 **5. CONCLUSION**

9 The testimony should be allowed.

10 Dated: February 24, 2001

11 _____
12 Allan J. Favish
13 In pro se

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 24, 2001, I served the document entitled REPLY IN SUPPORT OF
5 MOTION FOR COURT TO COMPEL TESTIMONY REGARDING ALLEGATIONS OF
6 ILLEGAL GOVERNMENT CONDUCT REGARDING SUBJECT PHOTOGRAPHS, by
7 placing a true copy thereof enclosed in a sealed envelope addressed to each of those identified in
8 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 February 24, 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>Attorney for defendant Office of Independent Counsel</p>
<p>25 G. Andrew Lundberg 26 Belinda S. Lee 27 Latham & Watkins 28 633 West Fifth Street, Suite 4000 Los Angeles, CA 90071-2007</p>	<p>Attorney for defendants-in-intervention Sheila Foster Anthony and Lisa Foster Moody</p>
<p>James Hamilton Swidler, Berlin, Shereff & Friedman 3000 K. Street, N.W., Suite 300 Washington, D.C. 20007</p>	<p>Attorney for defendants-in-intervention Sheila Foster Anthony and Lisa Foster Moody</p>