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5 Plaintiff/Appellant, in pro per

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8 UNITED STATES COURT OF APPEALS  
9 FOR THE NINTH CIRCUIT

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11 ALLAN J. FAVISH, ) No. 98-55594  
12 Plaintiff/Appellant, ) CV-97-1479 WDK (Ex)  
13 vs. )  
14 OFFICE OF INDEPENDENT )  
15 COUNSEL, )  
16 Defendant/Appellee )

17  
18 APPELLANT’S REPLY BRIEF  
19  
20

21 ARGUMENT

22 I. INTRODUCTION

23 The OIC says that the photographs at issue are “graphic, explicit,  
24 and extremely upsetting.”<sup>1</sup> While appellant does *not* concede this point,  
25 care should be taken to differentiate among the photos. One of them,  
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1 Appellee’s Brief at 18:11-12.

1 already published in *Time*,<sup>2</sup> only shows Mr. Foster's hand holding a gun  
2 and no other part of his body (except that which is covered by clothing).  
3 The other photos may show only small parts of his body, like a close-up  
4 of the side of his neck, without showing his face. Others may show  
5 much more detail of his face. Without seeing the photos, the court  
6 merely would be guessing about how "graphic, explicit, and extremely  
7 upsetting" any particular photo might be.

8       Moreover, the court should not assume that any of these photos  
9 show what one would expect from a .38 caliber high velocity gunshot  
10 into the mouth: massive amounts of blood coming out of the nose and  
11 mouth, broken teeth from the recoil of the gun, a significant hole in the  
12 back of the head with lots of blood, brain and bone spatter on the  
13 surrounding area.

14       One key point in this case is that there was no such evidence  
15 reported. The lead Park Police officer on the scene, John Rolla, testified  
16 about what he saw: "Basically pool of blood under his head, gun in his  
17 right hand, appeared to be a .38 caliber revolver, no sigh of a struggle,  
18 *no other obvious signs of trauma to the body.*"<sup>3</sup> Rolla wrote in his report  
19 on the night of the death that, "[t]here was no blood spatter on the plants  
20 or trees surrounding decedent's head."<sup>4</sup> Rolla testified he did not  
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24 <sup>2</sup> See *Time*, March 18, 1996, at 68 (exhibit 7). ER-6.

25 <sup>3</sup> Deposition of John C. Rolla In Re S. Res. 229, at 23:22 – 24:3 (July  
26 21, 1994), reprinted in S. Hrg. 103-889, vol. 1, at 380, 392 (exhibit 5, at  
27 99, 103) (emphasis added). ER-6.

28 <sup>4</sup> National Park Service Supplemental Criminal Incident Record of John  
Rolla, at 1 (July 21, 1993), reprinted in S. Hrg. 103-889, vol. 2, at 2123  
(exhibit 5, at 146). ER-6.

1 observe any “blowout” from the alleged bullet exit wound.<sup>5</sup> An FBI  
2 report of its interview of Dr. Donald Haut, who was present at the body  
3 site, says “no blood was recalled on the vegetation around the body.”<sup>6</sup>

4 When the OIC says the photos are “graphic, explicit, and  
5 extremely upsetting,” there is no specific description of what is  
6 graphically and explicitly shown. The OIC does not describe the  
7 physical damage to Mr. Foster, if any, depicted in the photos. Given the  
8 descriptions by Rolla and Haut, these photos show graphically and  
9 explicitly, a body “with no obvious signs of trauma” other than a pool of  
10 blood under the head.

11 If these photos show the lack of physical damage described by  
12 Rolla and Haut, then these photos constitute evidence against the use of  
13 a .38 caliber high velocity revolver bullet into the mouth, thereby  
14 contradicting the official government story, indicating corruption in  
15 federal law enforcement agencies and giving the public an extremely  
16 excellent reason for seeing these photos.

17 The OIC has little credibility on this issue since it also claimed that  
18 the photo of Mr. Foster’s eyeglasses on the ground fit the same  
19 description. That photo has since been released to appellant.

20 The OIC misstates appellant’s position when it says:

21 Favish never disputes the OIC’s objectively reasonable  
22 belief that release of these 10 photographs will cause an  
23 unwarranted invasion of Mr. Foster’s survivors’ privacy.

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24 <sup>5</sup> Deposition of John C. Rolla In Re S. Res. 229, at 24:9-14 (July 21,  
25 1994), reprinted in S. Hrg. 103-889, vol. 1, at 380, 392 (exhibit 5, at 99,  
26 103). ER-6.

27 <sup>6</sup> FBI FD-302 of Dr. Donald David Haut (interviewed on April 14, 1994;  
28 transcribed May 17, 1994), reprinted in S. Hrg. 103-889, vol. 2, at 1658  
(exhibit 5, at 143). ER-6.

1 Rather, he simply disputes the legal proposition that the  
2 Foster family's privacy is entitled to be balanced against  
3 the public interest in disclosure....<sup>7</sup>

4 This statement is not accurate. Appellant does believe that the  
5 Foster family's privacy is entitled to be balanced against the public  
6 interest in disclosure, but not in a case where the Foster family's privacy  
7 is not involved. It is not involved in this case. Even if it were, any  
8 invasion of that privacy interest by disclosure of one or more of the  
9 photographs, would not be "unwarranted" since the public's interest in  
10 ferreting out the government corruption that appears to exist here  
11 outweighs any such privacy interest.

12 The issue is not how Mr. Foster performed his job, as contended by  
13 the OIC,<sup>8</sup> but how the FBI, U.S. Park Police, U.S. Secret Service and the  
14 offices of Robert Fiske and Kenneth Starr performed their duties that is  
15 the issue. The public's interest in keeping these agencies free of  
16 corruption is paramount to any privacy interest that Mr. Foster's  
17 survivors may have.

18 The OIC's citation to a case where there was "no evidence" of  
19 government wrongdoing<sup>9</sup> is inapplicable to this case, where *the*  
20 *government's own investigative records from the FBI and Park Police*  
21 *are inconsistent with the official government reports that are supposedly*  
22 *based on those records. The OIC failed to provide any specific*  
23 *evidence-based answers to any of the detailed and documented questions*  
24 *asked by appellant regarding the shoddy and deceptive government*

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27 <sup>7</sup> Appellee's Brief, at 33:3-8.

28 <sup>8</sup> Appellee's Brief, at 33:17 – 34:2.

<sup>9</sup> Appellee's Brief, at 35:13-18.

1 investigations of this death. You don't even have to be a lawyer to know  
2 what that silence means.

3 The OIC says the photos "do not show anything ... about how the  
4 OIC performed its statutory duties in investigating the death of Vincent  
5 Foster."<sup>10</sup> The public should not have to take the word of the OIC on  
6 this point given the deception, including critical omissions, in its report.  
7 As explained in appellant's opening brief, there is evidence of a neck  
8 wound on Mr. Foster as described by a paramedic and the Haut Report  
9 (which appears to have been improperly altered on its first page).<sup>11</sup> If  
10 any of these photos show a neck wound, the government story is  
11 exposed as a massive lie.

12 Other than citations to poorly reasoned cases that distort the law of  
13 privacy, the OIC failed to provide any reason why its new definition of  
14 "privacy" should replace the definition used by leading legal scholars  
15 and judges for decades.

## 16 II. THE GOVERNMENT INVESTIGATIONS OF THIS DEATH ARE

### 17 GROSSLY INCOMPLETE AND UNTRUSTWORTHY

#### 18 1. STARR FALSELY IMPLIED PARK POLICE OBSERVANCE OF 19 THE ENTIRE AUTOPSY AND FAILED TO IDENTIFY AN 20 AUTOPSY PARTICIPANT

21 Starr implied that the Park Police observed the *entire* autopsy when  
22 they did not do so. Starr said:

23 The autopsy occurred on July 21, 1993, in the presence of  
24 six persons. Dr. James Beyer, Deputy Chief Medical  
25 Examiner, of the Virginia Office of the Chief Medical  
26 Examiner, conducted the autopsy, aided by an assistant.

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28 <sup>10</sup> Appellee's Brief, at 37:13-16.

<sup>11</sup> Appellant's Opening Brief, at 32:7 – 33:12.

1 Park Police Sergeant Robert Rule and Officer James  
2 Morrissette observed the autopsy.[59] Park Police  
3 Identification Technicians Hill and Johnson took  
4 photographs at the autopsy and collected evidence such as  
5 clothing, blood samples, and hair samples.

6 ....

7 [59] Officer Morrissette's report on the autopsy states:  
8 "After briefing him with the available information  
9 surrounding the crime scene and the victim he started the  
10 autopsy on the victim." USPP Report (Morrissette) at 1.<sup>12</sup>

11 Starr definitely left the public with the mistaken impression that  
12 the four Park Police officers were with Dr. Beyer at the *beginning* of the  
13 autopsy. However, the evidence shows they were not with Dr. Beyer at  
14 the beginning of the autopsy. Contrary to Starr's implication, apparently  
15 Officer Morrissette mistakenly believed that the "autopsy" only meant  
16 an examination of the body that occurred after Dr. Beyer had already  
17 begun to alter the body. This is clear from the next sentence of Officer  
18 Morrissette's report, *a sentence Starr failed to quote*: "Prior to our  
19 arrival, the victim's tongue had been removed as well as parts of the soft  
20 tissue from the soft pallet [sic]."<sup>13</sup>

21 Apparently, Starr wants the public to believe that the Park Police  
22 officers were with Dr. Beyer at the beginning of the autopsy so he failed  
23 to tell the public that Officer Morrissette reported that Dr. Beyer  
24 removed Mr. Foster's tongue and parts of his soft palate *before* the Park  
25 Police arrived at the autopsy! This is a significant omission by Starr  
26 given that this is an autopsy of a man who was said to have pressed a

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27 <sup>12</sup> Starr Report, at 28-29 (exhibit 4, at 55-55A). ER-6.

28 <sup>13</sup> USPP Report (Morrissette) at 1, reprinted in S. Hrg. 103-889, vol. 2,  
at 2128 (exhibit 5, at 147). ER-6.

1 gun against his soft palate and pulled the trigger, leaving behind  
2 unresolved significant questions about neck wounds.

3 The omission is more significant given that Dr. Beyer violated  
4 policy by beginning the autopsy before the police arrived.<sup>14</sup> Starr failed  
5 to explain why Dr. Beyer violated that policy by conducting a significant  
6 portion of the autopsy before the Park Police arrived.

7 This crucial pre-Park Police part of the autopsy, where Mr.  
8 Foster's tongue and parts of his soft palate were removed, only was  
9 attended by Dr. Beyer and his "assistant." However, Starr never  
10 identified Dr. Beyer's "assistant" by name or company. Nowhere in the  
11 public record is this "assistant" identified. The closest we come is  
12 testimony from Park Police Officer Robert Rule, who indicates that Dr.  
13 Beyer did not want the identity of his "assistant" known.<sup>15</sup> According to  
14

15  
16 <sup>14</sup> Dr. Beyer's deposition says:

17 Q Doctor, did you personally make the determination that the  
18 Park Police should be present during the autopsy?

19 A That's a requirement of my office. Any time you have a  
20 gunshot wound and particularly one that might be of a  
21 suspicious character, the police have to be present during the  
22 autopsy. That holds true for all of the local jurisdictions,  
23 including the Park Police.

24 Q Is that a written policy?

25 A No. It's been a stated policy over the years. They're all  
26 aware of it

27 Deposition of James C. Beyer In Re S. Res. 229, at 36:16 – 37:3 (July  
28 13, 1994), reprinted in S. Hrg. 103-889, vol. 1, at 564, 582-83 (exhibit 5,  
at 109, 111-12). ER-6.

<sup>15</sup> Officer Rule's deposition says:

Q Do you remember any kind of conversations you had during  
the autopsy?

1 Dr. Beyer, this assistant was *not* a pathologist who worked in Dr.  
2 Beyer's office.<sup>16</sup>

3 Starr also failed to explain why Dr. Beyer testified that he did not  
4 discuss the case with anybody when it is obvious he must have had such  
5 discussions with his mysterious "assistant."<sup>17</sup>

6  
7  
8 A One. I asked just the name of his assistant and Dr. Byers [sic]  
9 is kind of an older guy and very experienced and he put me in  
10 my place very quickly, he says you are dealing with me here,  
11 you don't need his name.

12 Deposition of Sergeant Robert Allen Rule In Re S. Res. 229, at 62:13-20  
13 (July 26, 1994), reprinted in S. Hrg. 103-889, vol. 1, at 1270, 1301  
14 (exhibit 5, at 127-28). ER-6.

15 <sup>16</sup> Dr. Beyer's deposition says:

16 Q As the deputy chief medical examiner, are there other medical  
17 personnel that work under you?

18 A I have an associate pathologist who works with me.

19 Q Who is that?

20 A Dr. Francis Field, F-i-e-l-d.

21 ....

22 Q Did Dr. Field participate in this autopsy in any way?

23 A No.

24 ....

25 Q So it could be – how many pathologists are there in your  
26 office?

27 A Two counting myself.

28 Q And the other being Dr. Field?

A That's correct.

Deposition of James C. Beyer In Re S. Res. 229, at 19:15 – 20:5, 35:4-8  
(July 13, 1994), reprinted in S. Hrg. 103-889, vol. 1, at 564, 574, 582  
(exhibit 5, 109-11). ER-6.

<sup>17</sup> Dr. Beyer's deposition says:

1 Who was Dr. Beyer's "assistant" who helped him with the crucial  
2 removal of Mr. Foster's tongue and parts of his soft palate in violation of  
3 policy before the Park Police arrived at the autopsy? Why was Dr.  
4 Beyer so reluctant to identify his "assistant" to Sgt. Rule? Why did Starr  
5 fail to identify this "assistant" while identifying the other five people  
6 present for later portions of the autopsy? Why did Dr. Beyer testify  
7 under oath that he did not have discussions about the case with anybody  
8 when it is clear that he must have had discussions about the case with  
9 this "assistant"? Why did Starr fail to explain Dr. Beyer's testimony on  
10 this point?

11 2. STARR FAILED TO EXPLAIN HOW DR. LEE FOUND  
12 "POSSIBLE" BLOODSTAINS IN POLAROIDS WHEN NOBODY AT  
13 THE DEATH SCENE SAW SUCH BLOODSTAINS

14 Starr cited Dr. Henry Lee's alleged discovery of "possible"  
15 bloodstains on vegetation, allegedly apparent in photos of the body site,  
16 without mentioning that among those who viewed Mr. Foster's body in  
17 the park, none reported seeing blood, brain or bone spatter on vegetation  
18 near Mr. Foster's body.

19 This lack of blood, brain and bone spatter in the park is significant.  
20 The explosion of a gunshot propels gas and a bullet from the barrel of a  
21 gun at supersonic speed. In a death caused by a point blank shot into the  
22

23 Q Is there anybody, anyone else in your office who you  
24 discussed this case with or may have helped you in typing the  
25 autopsy report or preparing the autopsy report?

26 A Well, the report is typed by our staff. Other than that, I have  
no discussion with anybody else.

27 Deposition of James C. Beyer In Re S. Res. 229, at 19:10-14 (July 13,  
28 1994), reprinted in S. Hrg. 103-889, vol. 1, at 564, 574 (exhibit 5, at  
109-10). ER-6.

1 mouth by a .38 caliber high velocity bullet,<sup>18</sup> common sense says that  
2 brain, blood and bone is going to be ejected from the exit wound onto  
3 nearby surroundings.

4 In a section entitled, "Possible Bloodstains on Vegetation at  
5 Scene," Starr said:

6 Dr. Lee stated that one photograph of the scene "shows  
7 a view of the vegetation in the areas where Mr. Foster's  
8 body was found. Reddish-brown, blood-like stains can be  
9 seen on several leaves of the vegetation in this area." [170]  
10 He also noted that "[a] close-up view of some of these  
11 blood-like stains can be seen in [a separate]  
12 photograph." [171]

13 ....

14 [171] ... Dr. Lee said that "[i]f these stains are, in fact,  
15 blood spatters, this finding is consistent with the shot  
16 having been fired at the location where Mr. Foster's body  
17 was found."<sup>19</sup>

18 But Starr failed to tell the public that the lead Park Police officer  
19 on the scene, John Rolla, wrote in his report on the night of the death  
20 that, "[t]here was no blood spatter on the plants or trees surrounding  
21 decedent's head."<sup>20</sup> Starr also failed to tell the public that during an FBI  
22 interview of Dr. Haut, who was present at the body site, "no blood was  
23 recalled on the vegetation around the body."<sup>21</sup> Starr failed to tell the

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24 <sup>18</sup> Starr Report, at 38 (exhibit 4, at 62). ER-6.

25 <sup>19</sup> Starr Report, at 59 (exhibit 4, at 66). ER-6.

26 <sup>20</sup> National Park Service Supplemental Criminal Incident Record of John  
27 Rolla, at 1 (July 21, 1993), reprinted in S. Hrg. 103-889, vol. 2, at 2123  
28 (exhibit 5, at 146). ER-6.

<sup>21</sup> FBI FD-302 of Dr. Donald David Haut (interviewed on April 14,  
1994; transcribed May 17, 1994), reprinted in S. Hrg. 103-889, vol. 2, at  
1658 (exhibit 5, at 143). ER-6.

1 public that Rolla testified he did not observe any “blowout” from the  
2 alleged bullet exit wound.<sup>22</sup> Starr also failed to tell the public that Lee’s  
3 reliance on the Polaroids is highly questionable given the reported low  
4 capacity of the Polaroids to accurately depict blood, as described under  
5 oath by Rolla.<sup>23</sup> Thus, Starr failed to tell the public about evidence that  
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8 <sup>22</sup> Rolla testified:

9 I looked at the back of his head, and I was wearing gloves, I  
10 probed his head and I could feel – what I felt in his head was  
11 mushy here. I did not, you know, there was hair, blood and  
12 other matter there, and I did not observe any blowout, like his  
13 brains had been blown out all over the place. It just appeared it  
14 was mushy there.

15 Deposition of John C. Rolla In Re S. Res. 229, at 24:9-14 (July 21,  
16 1994), reprinted in S. Hrg. 103-889, vol. 1, at 380, 392 (exhibit 5, at 99,  
103). ER-6.

17 <sup>23</sup> Rolla’s deposition says:

18 Q What was the quality of the pictures?

19 A I think the Polaroids were fine.

20 Q Dark, light?

21 A I mean, Polaroid-quality photos are not as good as 35s as far  
22 as clarity. The color of a Polaroid is not exact. Like, the plants  
23 that are green do not look exactly green. The color was not  
24 exact on the Polaroids, but as far as being able to see what is  
25 there, you could, but, again, the blood was not very visible on  
26 the ground in the Polaroid photos.

27 Q Do you recall taking a specific picture of the pooled blood  
28 that had been under his head?

A I don’t recall that. I recall taking a picture of his head and  
around it, and I recall looking at the Polaroid and not being able  
to see the blood very well at all...

....

1 creates significant doubt about Lee's extremely weak conclusion of  
2 "possible" bloodstains.

3 The public and independent experts should be allowed to look at  
4 these Polaroids to see if Lee's "possible" blood stains are really what  
5 Starr wants us to believe they are. Failure to allow this public oversight  
6 would be like allowing Lee to testify at the O.J. trial without having to  
7 be cross-examined and without any rebuttal witnesses challenging his  
8 testimony about mysterious footprints.

9 3. STARR FAILED TO EXPLAIN WHY THE PARK POLICE CHIEF  
10 TOLD THE PUBLIC A FALSE STORY THAT THE FAMILY  
11 IDENTIFIED THE BLACK OFFICIAL DEATH GUN

12 At a press conference on August 10, 1993, the Chief of the U.S.  
13 Park Police, Robert Langston, falsely told the public that the official  
14 death gun had been identified by the Foster family as one of Mr. Foster's  
15 guns. Starr failed to explain why Chief Langston made this untrue  
16 statement to the public. The press conference was given by Philip B.  
17 Heymann, then Deputy Attorney General, Robert Bryant, then Special  
18

19 Q Did you see any 8-by-10 photographs when you were with  
20 the FBI?

21 A Yes. They had taken photographs of the Polaroids and blown  
22 the photos up, I think.

23 Q What kind of quality were those photographs?

24 A Well, they did a great job, but they were basically  
25 photographs of the Polaroid and, again, colors – you can't make  
26 the color any better than it is. The color is what it is in the  
27 Polaroid photographs, but I think overall the clarity was pretty  
28 good.

1 Agent in Charge of the Washington, D.C., Metropolitan Field Office of  
2 the FBI<sup>24</sup> and Chief Langston. Here is an excerpt:

3 Q Can you tell us anything about the origin of the gun, or  
4 have you traced the gun?

5 CHIEF LANGSTON: The gun has a serial number on it,  
6 and if you're familiar with a Colt weapon, there are  
7 normally two numbers on each Colt weapon. One is  
8 called the serial number and one is called the butt  
9 number.<sup>25</sup> There was some confusion that there may be  
10 two guns on the scene. There's not a matched pair that  
11 we know of. A photograph of that gun was sent to the

12 Deposition of John C. Rolla In Re S. Res. 229, at 92:18 – 93:11, 95:5-14  
13 (July 21, 1994), reprinted in S. Hrg. 103-889, vol. 1, at 380, 426-28  
14 (exhibit 5, at 99, 106-08). ER-6.

15 <sup>24</sup> Robert Bryant was subsequently promoted to Deputy Director of the  
16 FBI, the No. 2 post in the agency. See Tammy M. Smith, *FBI Selects*  
17 *Deputy Director*, Sun Herald (Biloxi, Miss.), Oct. 2, 1997, at A3 (exhibit  
18 9). ER-6. Did Director Louis Freeh believe that Bryant did a swell job  
19 on the Foster case, including Bryant's failure to correct Langston's  
20 untrue statement to the press? Contrary to popular belief, FBI  
21 involvement in the original investigation was substantial: "There came a  
22 time when I determined that they [DOJ & FBI] were calling a lot of  
23 shots, setting up a lot of protocols." Deposition of Robert H. Hines In  
24 Re S. Res. 229, at 5:20 – 6:12, 90:3-7 (July 21, 1994), reprinted in S.  
25 Hrg. 103-889, vol. 1, at 1179, 1182, 1224 (Commander of USPP Office  
26 of Special Services) (exhibit 5, at 124-26). ER-6.

27 <sup>25</sup> This is untrue. The official death gun had two serial numbers, which  
28 is not how the gun was originally manufactured. In June 1994, even  
Robert Fiske had to conclude that the gun "contained two different serial  
numbers, indicating that it was assembled with parts from two different  
guns." Report of the Independent Counsel In Re Vincent W. Foster, Jr.  
(Fiske Report), at 38, reprinted at S. Hrg. 103-889, vol. 1, 181, 213  
(exhibit 5, at 83, 86). ER-6.

1 family in Arkansas to see if that was part of the father's  
2 collection. Evidently the father had died and had a gun  
3 collection. It was a 1912 Army Colt special.<sup>26</sup> It was not  
4 traceable. It was not registered. It was not registered here  
5 in the District of Columbia, nor was it registered in  
6 Arkansas. The gun was similar to that in his father's  
7 collection. It was identified by a sister who looked at the  
8 photograph and said that is similar to the weapon that was  
9 in her father's collection. There were some ornate swirls  
10 on the handle of the Colt. She identified that that was the  
11 same. And – but nowhere does that serial number come  
12 back to any one that we can recognize.

13 Q Can you tell us, did he have the gun in the White  
14 House or did he go someplace else to pick up the gun?

15 CHIEF LANGSTON: We cannot trace that.

16 . . . .

17 Q Can you tell us whether or not – in other words, was it  
18 believed that he had that gun? Does the family think that  
19 that gun had been in Vince Foster's possession?

20 CHIEF LANGSTON: Yes.<sup>27</sup>

21 When Langston made these statements on August 10, 1993, Lisa  
22 Foster had failed to identify the black official death gun, in part, because  
23 it was the wrong color and Mr. Foster's sister, Sharon Bowman had  
24 failed to give a credible identification of the official death gun. By

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25 <sup>26</sup> It was probably a 1913 model gun, since records show the guns  
26 belonging to the two serial numbers were first sold in late 1913. *See*  
27 *Starr Report*, at 37-38 (exhibit 4, at 61-62). ER-6.

28 <sup>27</sup> Press Conference With: Philip B. Heymann, Deputy Attorney  
General; Robert Langston, Chief, US Park Police; Robert Bryant,  
Special Agent in Charge of the Washington Metropolitan Field Office,  
FBI; Subject: Report on Death of Vincent Foster, Former Dep. Asst. to  
the President, US Justice Department (August 10, 1993), reprinted in S.  
Hrg. 103-889, vol. 2, at 2464, 2479 (exhibit 5, at 158-59). ER-6.

1 August 10, 1993, *nobody* in the Foster family had identified the official  
2 death gun as one previously belonging to Mr. Foster.

3 According to Starr, on July 29, 1993, nine days after the death,  
4 Lisa "was shown a photograph of the gun retrieved from the scene and,  
5 according to the Park Police interview report, was unable to identify it  
6 from the photograph."<sup>28</sup> According to the Park Police interview notes,  
7 one reason she was unable to identify it was because she was expecting  
8 to see a "silver" gun.<sup>29</sup> There is no public report of Lisa identifying the  
9 black official death gun by August 10, 1993.

10 Langston said a photograph of the official death gun was sent to  
11 the family and that it "was identified by a sister who looked at the  
12 photograph and said that is similar to the weapon that was in her father's  
13 collection. There were some ornate swirls on the handle of the Colt.  
14 She identified that that was the same."<sup>30</sup>

15 However, by August 10, 1993, the sister to whom Langston is  
16 referring, Sharon Bowman, *did not* identify the gun as one previously  
17 owned by Mr. Foster. Starr's account of this episode is accurate, but  
18 only up to a point.<sup>31</sup> Contrary to Langston's public comments, there is  
19

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20 <sup>28</sup> Starr Report, at 81 (exhibit 4, at 73). ER-6.

21 <sup>29</sup> S. Hrg. 103-889, vol. 2, at 2227 (exhibit 5, at 149). ER-6. The Park  
22 Police's handwritten interview notes say: "Not the gun she thought it  
23 must be. Silver six gun, large barrel." *Id.*

24 <sup>30</sup> Press Conference, *supra* note 27, reprinted in S. Hrg. 103-889, vol. 2,  
25 at 2464, 2479 (exhibit 5, at 158-59). ER-6.

26 <sup>31</sup> Starr said, "During the 1993 Park Police investigation, John Sloan, a  
27 family friend of the Fosters, wrote a letter to Captain Hume of the Park  
28 Police, stating that he had shown Sharon Bowman a photograph of the  
gun. According to the letter, Ms. Bowman stated that it 'looked like a  
gun she had seen in her father's collection,' and particularly pointed out

1 no mention of Ms. Bowman describing anything about the gun in the  
2 photograph as “ornate.” Nor is there anything in the public record  
3 indicating that any “wavelike detailing at the base of the grip”  
4 differentiates the gun from others.

5 Most importantly, Langston’s comments ignored another portion  
6 of Sloan’s account of Sharon Bowman’s comments about the  
7 photograph. According to Sloan’s letter, “I asked if she remembered  
8 any other features. She did not.”<sup>32</sup> So as far as Langston knew on  
9 August 10, 1993, Sharon Bowman did not even remember the color of  
10 the gun as a feature she remembered seeing. Naturally, both Starr and  
11 Fiske failed to mention this additional portion of Sloan’s letter.

12 Why did Park Police Chief Langston falsely state on August 10,  
13 1993, that the Foster family had identified the official death gun as one  
14 previously belonging to Mr. Foster? Why did Starr fail to explain why  
15 Langston did this? Why did Robert Bryant of the FBI allow Langston to  
16 deceive the public?

17 4. STARR FAILED TO REPORT TESTIMONY THAT FOSTER’S  
18 BODY WAS FOUND WITHOUT A GUN NEAR IT AND THE FBI  
19 LIED TO A WITNESS

20 The first person who officially found Mr. Foster’s body said that  
21 contrary to the official government story, there was no gun in Mr.  
22

23 the “‘wavelike’ detailing at the base of the grip.’” Starr Report, at 82-83  
24 (exhibit 4, at 74-75). ER-6. The letter from Sloan to Hume that is  
25 quoted by Starr is at S. Hrg. 103-889, vol. 2, at 2169 (exhibit 5, at 148)  
26 (ER-6) & 2436 (Joseph Declaration, Ex. II, at OIC Bates # 40-41) (ER-  
27 4).

28 <sup>32</sup> Letter from John Sloan to Captain Charles W. Hume (undated, but  
presumably prior to August 10, 1993), reprinted in S. Hrg. 103-889, vol.  
2, at 2169 (exhibit 5, at 148). ER-6.

1 Foster's hand. In trying to explain away this witnesses' story, Starr  
2 omitted significant testimony by this witness. Starr also failed to explain  
3 why he used a statement from this witness that the witness said was  
4 based on a false representation by the FBI.

5 Starr's identification for "the individual who first saw Mr. Foster's  
6 body" is "C5"<sup>33</sup> in order to maintain the witnesses' privacy.<sup>34</sup> Starr  
7 concluded that "C5 simply did not see the gun that was in Mr. Foster's  
8 hand."<sup>35</sup> The only statement of C5 that Starr presented is "a statement  
9 attributed to him [C5] in an interview report that 'there was extreme  
10 dense and heavy foliage in the area and in close proximity to the body,  
11 and the possibility does exist that there was a gun on rear of hand that he  
12 might not have seen.'"<sup>36</sup> Thus, Starr led the public to believe that C5  
13 said that if there was a gun on the rear of Mr. Foster's hand, then it is  
14 possible he did not see the gun.

15 But Starr failed to tell the public that one of the death-scene  
16 Polaroids shows Mr. Foster's right hand and gun in a position that  
17 eliminates the possibility of there having been "a gun on rear of hand"  
18 that went unseen by C5, because the gun in the photo is *not* on the rear  
19 of Mr. Foster's hand! This Polaroid shows Mr. Foster's gun-hand palm  
20 *down*, while C5 said the hand was palm *up* and empty. This Polaroid  
21 shows the black official death gun underneath the palm of Mr. Foster's  
22 right hand with the rear of Mr. Foster's hand facing up.<sup>37</sup> In this  
23 Polaroid, the gun *is not* on the rear of the hand nor out of sight or

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25 <sup>33</sup> Starr Report, at 77 (exhibit 4, at 71). ER-6.

26 <sup>34</sup> *Id.*, at 20 n. 31 (exhibit 4, at 49). ER-6.

27 <sup>35</sup> *Id.*, at 77 (exhibit 4, at 71). ER-6.

28 <sup>36</sup> *Id.*

<sup>37</sup> *See Time*, March 18, 1996, at 68 (exhibit 7). ER-6.

1 significantly concealed by Mr. Foster's hand. The gun is in a position  
2 where C5 could not have missed it if it was there when he saw Mr.  
3 Foster's body. This means that the only possible condition which C5  
4 agreed would account for his not seeing the gun, is a condition that did  
5 not occur!

6 According to C5, the FBI lied to him in order to get him to admit  
7 that he could have missed seeing the gun. C5, or CW (Confidential  
8 Witness), as Fiske called him,<sup>38</sup> made this point clear in a deposition he  
9 gave to three U.S. Congressmen in which he discussed this Polaroid.  
10 CW testified he saw Mr. Foster's "hands both palms up" with "no gun in  
11 his hand."<sup>39</sup> CW testified the FBI agents told him the gun was "partially  
12 obscured by the back of his [Foster's] hand" and that "[b]ased on their  
13 explanation of how the gun was being held" he "conceded" that he  
14 "could have missed seeing it."<sup>40</sup> CW testified that he asked the FBI  
15 agents to let him "see the picture" of Mr. Foster's hand that, according to  
16 the FBI, did not show a gun in it, but that the FBI refused to let him see  
17 it.<sup>41</sup> CW testified that the FBI "led me to believe that the hands were up  
18  
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20 <sup>38</sup> Report of the Independent Counsel In Re Vincent W. Foster, Jr. (June  
21 30, 1994) (Fiske Report), at 29, reprinted in S. Hrg. 103-889, vol. 1, at  
22 181, 204 (exhibit 5, at 83, 85). ER-6.

23 <sup>39</sup> Statement for the Record Under Oath of Confidential Witness (CW)  
24 In Regard to Discovery of Vince Foster's Body on July 20, 1993, at 4:12  
25 – 5:5 (July 28, 1994), reprinted in S. Hrg. 103-889, vol. 2, at 2659, 2660  
26 (exhibit 5, at 160-61). ER-6.

27 <sup>40</sup> *Id.*, at 2:8 – 3:3 (July 28, 1994), reprinted in S. Hrg. 103-889, vol. 2, at  
28 2659, 2660 (exhibit 5, at 160-61). ER-6.

<sup>41</sup> *Id.*, at 8:1 – 9:12 (July 28, 1994), reprinted in S. Hrg. 103-889, vol. 2,  
at 2659, 2660-2661 (exhibit 5, at 160-62). ER-6. When CW was shown

1 and that gun was concealed on other side.”<sup>42</sup> CW was sure that Mr.  
2 Foster’s hands were palms up without a gun.<sup>43</sup>

3 Starr concluded that C5 (CW) simply missed seeing a gun in Mr.  
4 Foster’s hand. Starr based this on a statement by C5 that C5 said was  
5 based on a false representation by the FBI. Starr failed to tell the public  
6 what C5 said under oath to three U.S. Congressmen after seeing the gun-  
7 in-hand photo and Starr failed to explain why he relied upon a statement  
8 by C5 that C5 said was based on a false representation by the FBI. What  
9 else did Starr fail to tell the public?

10  
11  
12 the “gun-in-hand” picture and asked if he had ever seen it before, the  
following occurred:

13 CW: I had never seen that picture until the congressman handed  
14 it to me. Mr. Liddy had told me that that picture had been  
15 published somewhere but I had never saw it or I would have  
16 probably been – know I would have been screaming.

17 CONGRESSMAN MICA: Do you think that’s a picture of what  
you saw?

18 CW: That is not a picture of what I saw. The man’s palms were  
19 straight up.

20 *Id.*

21 <sup>42</sup> *Id.*, at 14:10 – 16:3 (July 28, 1994), reprinted in S. Hrg. 103-889, vol.  
2, at 2659, 2662 (exhibit 5, at 160, 163). ER-6.

22 <sup>43</sup> *Id.*, at 43:8-14 (July 28, 1994), reprinted in S. Hrg. 103-889, vol. 2, at  
23 2659, 2666 (exhibit 5, at 160, 165). ER-6. CW’s deposition says:

24 CONGRESSMAN MICA: How sure are you that the palms  
25 were up?

26 CW: As sure as I’m standing right here. I am absolutely and  
27 totally unequivocally, the palms were up. I looked at both  
28 palms. There was nothing in his hands. I didn’t look at one and  
assume the other. I looked at both of them.

*Id.*

1 5. STARR FAILED TO EXPLAIN WHY WITNESSES DID NOT SEE  
2 FOSTER’S GRAY CAR IN THE PARKING LOT WHEN FOSTER  
3 WAS ALLEGEDLY DEAD IN THE PARK

4 Although the best evidence is that Mr. Foster was dead by 4:00  
5 p.m., Fort Marcy Park witnesses who saw the parking lot between 4:00  
6 p.m., and when the body was found just before 6:00 p.m., failed to see  
7 Mr. Foster’s car. Starr failed to explain why these witnesses failed to  
8 see Mr. Foster’s car at a time when allegedly he was dead in the park  
9 after allegedly having driven himself to the park.

10 Mr. Foster was probably dead by 4:00 p.m.<sup>44</sup> A Park Police officer  
11 who attended a portion of the autopsy wrote that the autopsy doctor  
12 “stated that it appeared that the victim had eaten a ‘large’ meal which he  
13 believed to have occurred within 2-3 hours prior to death.”<sup>45</sup> Mr.  
14 Foster’s last known meal was his lunch, which he ate between noon and  
15 1:00 p.m.<sup>46</sup> He then left his White House office at 1:00 p.m.<sup>47</sup> Given  
16 the meal time of 2-3 hours before death, this puts the latest time of death  
17 at 3:00 p.m. to 4:00 p.m. Paramedic George Gonzales, who arrived at  
18 the park at about 6:10 p.m.,<sup>48</sup> testified that Mr. Foster had been dead  
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21

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22 <sup>44</sup> Neither Fiske or Starr provided a time of death more specific than  
23 between 1:00 p.m. and shortly before 6:00 p.m.

24 <sup>45</sup> USPP Report (Morrissette) at 1, reprinted in S. Hrg. 103-889, vol. 2,  
25 at 2128 (exhibit 5, at 147). ER-6.

26 <sup>46</sup> Report of the Independent Counsel In Re Vincent W. Foster, Jr. (June  
27 30, 1994) (Fiske Report), at 26, reprinted in S. Hrg. 103-889, vol. 1, at  
28 181, 201 (exhibit 5, at 83, 84). ER-6.

<sup>47</sup> *Id.*

<sup>48</sup> Starr Report, at 23 (exhibit 4, at 52). ER-6.

1 about 2-4 hours,<sup>49</sup> thus putting the death between 2:10 p.m. and 4:10  
2 p.m. John Rolla, the lead Park Police officer on the scene, said his “best  
3 guess” is that Mr. Foster “was dead between two or three hours” and that  
4 his inspection of the body “led me to believe that he [Foster] hadn’t been  
5 there more than a couple of hours.”<sup>50</sup> Accordingly, the most likely time  
6 of death is between 3:00 and 4:00 p.m., and there is no reason to think  
7 Mr. Foster was alive as late as 4:30 p.m.

8 Therefore, parking lot witnesses between 4:30 p.m., and just before  
9 6:00 p.m., should have seen Mr. Foster’s car in the parking lot; but they  
10 did not.

11 Starr correctly noted that Mr. Foster’s car was a gray Honda  
12 Accord,<sup>51</sup> but failed to explain that the parking lot witnesses between  
13 4:30 p.m., and just before 6:00 p.m., did not see Mr. Foster’s car.

14 Starr described a witness he called C2, who entered the parking lot  
15 at 4:30 p.m.<sup>52</sup> Starr said C2 “saw one unoccupied car, which he

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17 <sup>49</sup> Deposition of George O. Gonzalez, Jr., In Re S. Res. 229, at 32:12-14  
18 (citing his EMS Incident Report (29:3 – 30:7, attached to his deposition  
19 as exhibit 4)) (July 20, 1994), reprinted in S. Hrg. 103-889, vol. 1, at  
20 979, 994-995, 1050, 1052 (exhibit 5, at 119-21, 122A, 123A). ER-6.

21 <sup>50</sup> Deposition of John C. Rolla In Re S. Res. 229, at 20:19-20, 21:9-10,  
22 86:2-4 (July 21, 1994), reprinted in S. Hrg. 103-889, vol. 1, at 380, 390-  
23 91, 423 (exhibit 5, at 99, 101-02, 104). ER-6.

24 <sup>51</sup> Starr Report, at 18, 21 n. 32, 26, 68 (exhibit 4, at 48, 50, 53, 68). ER-  
25 6.

26 <sup>52</sup> Starr Report, at 21 (exhibit 4, at 50). ER-6. This witness is Patrick  
27 Knowlton, whose attorney prepared a rebuttal to Starr’s Report that the  
28 Special Division of the D.C. Court of Appeals ordered to be included in  
an appendix to Starr’s Report. See exhibit 10 (3<sup>rd</sup> letter in appendix).  
ER-6. Knowlton is suing FBI agents and others alleging violation of 42  
U.S.C. § 1985 (conspiracy to interfere with civil rights by intimidating a

1 described as a ‘rust brown colored car with Arkansas license plates.’”<sup>53</sup>  
2 Starr said that C2 was in the park just long enough to urinate<sup>54</sup> and  
3 “would appear to have left the park before”<sup>55</sup> the next official witnesses  
4 arrived at 5:00 p.m. Starr never expressly said that C2 saw a gray  
5 Honda Accord in the lot.

6 Starr said that “[a] man (C3) and woman (C4) pulled into the Fort  
7 Marcy parking area in C4’s white Nissan at about 5:00 p.m. and were  
8 still at Fort Marcy when police and rescue personnel arrived shortly after  
9 6:00 p.m.”<sup>56</sup> Starr failed to report the color of the only car they reported  
10 seeing in the parking lot that was not theirs. The likely reason why Starr  
11 failed to report the color of the car these two witnesses reported seeing is  
12 that the color they reported was the same as that reported by C2—brown  
13 (not Mr. Foster’s gray car)! The FBI reported that C3 said the color of  
14 the car he saw was “brownish in color,” “brown” and “brown.”<sup>57</sup> The  
15 FBI reported that C4 said the color of the car she saw was “tan or

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21 federal witness from testifying freely, fully, and truthfully), in  
22 connection with the OIC’s Foster investigation. *See Knowlton v.*  
23 *Bransford, et al.*, CIV 96-2467 (JGP) (D.D.C., filed Oct. 25, 1996).

24 <sup>53</sup> Starr Report, at 21 (exhibit 4, at 50). ER-6.

25 <sup>54</sup> Starr Report, at 21-22 (exhibit 4, 50-51). ER-6.

26 <sup>55</sup> Starr Report, at 90 n. 275 (exhibit 4, at 78). ER-6.

27 <sup>56</sup> Starr Report, at 22 (exhibit 4, at 51). ER-6.

28 <sup>57</sup> FBI FD-302 Report of Interview with [Name Redacted] (C3)  
(interview on April 5, 1994), reprinted in S. Hrg. 103-889, vol. 2, at  
1474-75 (exhibit 5, at 131-32). ER-6.

1 dark.”<sup>58</sup> Starr never expressly said that C3 or C4 saw a gray car in the  
2 lot.<sup>59</sup>

3 Starr said that another witness (C5) drove into the parking lot  
4 while C3 and C4 were at the park,<sup>60</sup> but left before 6:00 p.m.<sup>61</sup> Starr  
5 failed to report the color of the car (that was not C3 and C4’s car) that  
6 C5 reported seeing in the parking lot. The likely reason why Starr failed  
7 to report the color of the car C5 reported seeing is that the color he  
8 reported was the same as that reported by C2, C3 and C4—brown! C5  
9 described this vehicle as “possibly light blue or tan” in his first FBI  
10 interview.<sup>62</sup> In his second FBI interview, he described the vehicle as  
11 “light tan or light brown.”<sup>63</sup> In his testimony to the three Congressmen  
12 he described the vehicle he had seen as “light brown or cream  
13  
14

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15 <sup>58</sup> FBI FD-302 Report of Interview with [Name Redacted] (C4)  
16 (interview on April 7, 1994), reprinted in S. Hrg. 103-889, vol. 2, at  
17 1470 (exhibit 5, at 130). ER-6.

18 <sup>59</sup> However, Starr said that “[a]ccording to the reports of their interviews  
19 at the scene on July 20, 1993, C3 and C4 did not see anyone in or  
20 touching Mr. Foster’s car.” Starr Report, at 69 n. 199 (exhibit 4, at 69).  
21 ER-6. By this, Starr implied that Foster’s car was in the lot for these  
22 witnesses to see. But the evidence shows that Foster’s car was not in the  
23 lot for these witnesses to see prior to 6:00 p.m. Therefore, Starr implied  
24 something that is false.

25 <sup>60</sup> Starr Report, at 22 (exhibit 4, at 51). ER-6.

26 <sup>61</sup> Starr Report, at 22-23 (exhibit 4, at 51-52). ER-6.

27 <sup>62</sup> FBI FD-302 Report of Interview with [Name Redacted] (C5)  
28 (interview on April 14, 1994), reprinted in S. Hrg. 103-889, vol. 2, at  
1514-15 (exhibit 5, at 133-34). ER-6.

<sup>63</sup> FBI FD-302 Report of Interview with [Name Redacted] (C5)  
(interview on April 15, 1994), reprinted in S. Hrg. 103-889, vol. 2, at  
1543-44 (exhibit 5, at 135-36). ER-6.

1 colored,"<sup>64</sup> and as "brown or cream colored."<sup>65</sup> Starr never expressly  
2 said that C5 saw a gray car in the lot.

3 Even paramedic George Gonzalez, one of the first trained  
4 observers on the scene, who arrived in the parking lot at 6:10 p.m.,<sup>66</sup>  
5 wrote within a day that he saw a brown Honda, without reporting any  
6 gray car.<sup>67</sup>

7 Therefore, Starr failed to tell the public that the witnesses in the  
8 parking lot between 4:30 p.m. and just before 6:00 p.m., who should  
9 have seen Mr. Foster's gray car in the parking lot according to the  
10 government's story, did not report seeing a gray car, but instead reported  
11 seeing a *brown* car! Starr failed to explain why these witnesses did not  
12 report seeing Mr. Foster's gray car at a time when the government story  
13 has Mr. Foster already dead in the park after having driven himself there  
14 in his gray car.

15 Both Starr and Fiske fail to explore this issue. Both Starr and  
16 Fiske fail to describe any search for a brown car, as reportedly seen by  
17 C2, C3, C4, C5 and Paramedic Gonzalez. Both Starr and Fiske fail to  
18 explain who owned any such brown car. Both Starr and Fiske fail to  
19 assert that C2, C3, C4, C5 and Paramedic Gonzalez must be mistaken  
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21 <sup>64</sup> Statement for the Record Under Oath of Confidential Witness (CW)  
22 In Regard to Discovery of Vince Foster's Body on July 20, 1993, at  
23 38:10-11 (July 28, 1994), reprinted in S. Hrg. 103-889, vol. 2, at 2659,  
24 2665 (exhibit 5, at 160, 164). ER-6.

25 <sup>65</sup> *Id.*

26 <sup>66</sup> Starr Report, at 23 (exhibit 4, at 52). ER-6.

27 <sup>67</sup> Deposition of George O. Gonzalez, Jr., In Re S. Res. 229, at 94:3-8  
28 (citing his EMS Incident Report (29:3 – 30:7, (attached to his deposition  
as exhibit 4)) (July 20, 1994), reprinted in S. Hrg. 103-889, vol. 1, at  
979, 994, 1026, 1051 (exhibit 5, at 119-20, 122-23). ER-6.

1 about the color of car they reported seeing. Both Starr and Fiske simply  
2 act as if there is no problem with these eyewitness reports of a car that  
3 was brown, not gray. Inspector Clouseau could not have done worse.

4 CONCLUSION

5 The photos should be released.

6 CERTIFICATE OF COMPLIANCE

7 The text of this brief is double spaced. The text of this brief is  
8 proportionately spaced, using Times New Roman typeface, 16 point.  
9 The text of this brief contains less than 7,000 words, after making the  
10 exclusions allowed pursuant to Circuit Rule 32(e)(3). The brief averages  
11 less than 280 words per page.

12  
13 Dated: August 23, 1998

14 \_\_\_\_\_  
15 Allan J. Favish  
16 Plaintiff/Appellant, in pro per  
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