Nos. 02-954, 02-409

IN THE

Supreme Court of the United States

02-954

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION,
Petitioner,
v.
ALLAN J. FAVISH et al.,
Respondent.

02-409

ALLAN J. FAVISH,
Petitioner,
v.
NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, ET AL.
Respondent.

After Decisions On Writs Of Certiorari
To The United States Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING BY ALLAN J. FAVISH

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INTRODUCTION

On March 30, 2004, this Court issued its opinion in *National Archives And Records Administration v. Allan J. Favish*, No. 02-954. On April 5, 2004, based on its opinion in No. 02-954, this Court denied a petition for writ of certiorari arising from the same case in *Allan J. Favish v. National Archives and Records Administration*, No. 02-409. By this petition I seek a rehearing from both decisions.

FALSE STATEMENTS ABOUT DATE OF LAWSUIT

On pages 2-3 of its opinion this Court made false statements about the circumstances under which my lawsuit originated to make it appear that I initiated this case only after a related case had been lost in which I was one of the attorneys for the losing party. Contrary to this Court's statements, the case of *Accuracy in Media v. National Park Service*, 194 F.3d 120 (D.C. Cir. 1999), was not "an earlier proceeding" to this case. My FOIA request and FOIA complaint were filed before AIM filed its FOIA request and complaint. As established in my complaint (Joint Appendix 38-52 (J.A.)), my FOIA request was filed January 6, 1997 (J.A. 40, 43) and my complaint was filed March 6, 1997 (J.A. 38 (erroneously states Mar. 5)); Excerpts of Record 741, 743 ("ER") (docket sheet from District Court states date complaint filed)). As established in AIM's complaint, which is a matter of public record, AIM's FOIA request was dated June 6, 1997 and its complaint was not filed until September 12, 1997. *See* http://www.allanfavish.com/aim_complaint.pdf. Contrary to this Court's statements, I *did not* file suit on behalf of AIM in the District Court in D.C., and the District Court in my FOIA case *never* dealt with the collateral estoppel issue because my complaint predated AIM's complaint.

The truth is that the collateral estoppel issue was raised for the first time on November 1, 1999 during oral argument before the Ninth Circuit in the first appeal of my case. At oral argument one of the judges wondered whether my work as an attorney representing AIM should preclude my right to

pursue my own case as a party. On November 16, 1999, my post-oral argument brief and declaration under penalty of perjury on the collateral estoppel issue was filed with the Ninth Circuit establishing that I did not become an employee of the law firm representing AIM until after it filed AIM's complaint. The Ninth Circuit resolved the issue in my favor. *See Favish v. OIC*, 217 F.3d 1168, 1171 (9th Cir. 2000).[1]

THIS COURT IGNORED THE EVIDENCE

This Court stated on page 15 of its opinion that the "Court of Appeals was correct . . . to recognize as significant the asserted public interest in uncovering deficiencies or misfeasance in the Government's investigations into Foster's death." But on page 17 of the opinion this Court stated its unsupported conclusion: "Favish has not produced any evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred to put the balance into play." This Court did not mention the evidence in the record establishing the following.

Regulatory Independent Counsel Robert Fiske failed to tell the public and Independent Counsel Kenneth Starr failed to tell the public and the three-judge panel about an FBI memo to the Director of the FBI, written two days after the death, stating that the shot was fired into Foster's mouth *without leaving an exit wound*, thereby directly contradicting Starr, Fiske and the official autopsy report which all concluded that there was an exit wound in the back of the head. *See* MB, at 33-34 ("MB").

Fiske failed to tell the public and Starr failed to tell the public and the three-judge panel that the medical report by Dr. Donald Haut, the only doctor to examine Foster at the

[1] Moreover, on or about November 4, 2002, the Solicitor General and his assistant counsel, Patricia A. Millett, filed a document with this Court falsely stating that my FOIA request was filed after the appellate decision in the *AIM* case. This falsehood also is stated by the DOJ on its website at http://www.usdoj.gov/oip/foiapost/2003foiapost17.htm. I filed a response with this Court on November 12, 2002 stating the correct facts.

park, reported a neck wound that officially did not exist. Moreover, certified copies of his report are not the same and appear to have been improperly altered by obliteration of a word rather than drawing a line through the word so it can still be read, as is standard practice for medical records. *See* MB, at 27-28.

Starr failed to tell the public and the three-judge panel that the Park Police and the only medical doctor at the death scene, Dr. Haut, reported that they did not see any blood spatter on the vegetation that would have appeared behind Foster's head immediately after he allegedly shot himself while sitting up on the ground. *See* MB, at 19-20.

Starr failed to tell the public and the three-judge panel that the first person officially to see Foster's deceased body and who testified that he did not see any gun in Foster's hand, also testified that the "gun in hand" photo that was leaked to the media in 1994 did not depict what he saw. *See* MB, at 20-21.

The official death gun appears black. Foster's widow Lisa failed to identify the official death gun from a photograph nine days after the death, in part, because the gun was not silver, the color of a gun the Fosters owned. According to the FBI, Lisa was shown the official death gun in May 1994 and the FBI stated that she "believes that the gun found at Fort Marcy Park may be the silver gun which she brought up with her" from Arkansas. Despite the obvious invalidity of an identification of a black gun as being silver, and without stating the gun colors and other relevant background facts, Fiske reported that Lisa "stated that the gun looked similar to one that" Foster owned. *See* MB, at 22-25.

Starr failed to tell the public and the three-judge panel why Fiske did this. Starr failed to tell the public and the three-judge panel that one of Lisa's reasons for not identifying the gun in the photo shown to her nine days after the death was because it was not silver. Also absent from Starr's report is that the FBI expressly stated that Lisa

believed the gun shown to her in May 1994 was silver as it was being shown to her. *See* MB, at 22-25.

Starr failed to tell the public and the three-judge panel why Fiske's deputy, Roderick Lankler and Lisa's attorney, James Hamilton (who represented her in this case) and at least two FBI agents, apparently failed to note at the May 1994 interview that in their presence, Lisa described a black gun as being silver. *See* MB, at 22-25.

Starr failed to tell the public and the three-judge panel why Lisa reportedly identified a black gun as silver, *as it was being shown to her*, in May 1994. *See* MB, at 22-25.

Fiske failed to tell the public and Starr failed to tell the public and the three-judge panel that Foster's nephew, who was the surviving family member most familiar with the family's guns, could not identify the black official death gun, largely because of its color. *See* MB, at 27.

Fiske failed to tell the public and Starr failed to tell the public and the three-judge panel that then United States Park Police Chief Robert Langston made a false statement to the public when he stated at a press conference in August 1993 that the Foster family had identified the official death gun as one of Foster's guns. *See* MB, at 26-27.

Starr falsely implied that the Park Police observed the entire autopsy but Fiske failed to tell the public and Starr failed to tell the public and the three-judge panel that before the Park Police arrived, Foster's tongue and soft palate were removed by the autopsy doctor who violated policy by beginning the autopsy before arrival of the police. (The tongue and soft palate were significant because there is controversy over whether there was an entrance wound in Foster's neck that would have resulted in a bullet path through the tongue and soft palate.) *See* MB, at 28-29.

Starr failed to tell the public and the three-judge panel that three of the four witnesses who according to the Government, saw Foster's car in the parking lot between 4:30 p.m. and just before 6:00 p.m., after he was dead, reported seeing a car that was brown and did not report seeing a car

that was the color of Foster's car, gray. Although Starr accurately reported that the fourth of these witnesses reported seeing a brown car, Starr concluded that Foster's gray car was in the parking lot without explaining why all four of these witnesses reported seeing the same color car, brown, and did not report seeing a gray car. *See* MB, at 29-31.

Starr relied on Dr. Henry Lee's conclusion that Foster's clothes revealed no evidence that Foster's body had been dragged, without telling the public and the three-judge panel that this conclusion was worthless because the Park Police stated that they dragged Foster's body when it began to slide down the hill during an examination. *See* MB, at 31-32.

Starr implied that the reason for the lack of readable x-rays of Foster is that the x-ray machine was not functioning properly. However, Starr failed to tell the public and the three-judge panel that the records show that the first service call for the x-ray machine was made *more than three months after* Foster's death. Also, if the machine was not functioning properly on July 20, 1993, Starr failed to explain why another machine was not used to take x-rays of Foster, a very high Government official, or why there are no records showing a service call for the machine at that time. *See* MB, at 37-40.[2]

This Court's unsupported conclusion about the lack of evidence is even more incredible in light of the fact that Justice Scalia thought at least one of these pieces of evidence was so significant that he asked a question about it at oral argument. He asked Lisa's attorney James Hamilton about the Haut Report's apparent alteration and its statement about a neck wound. Hamilton replied that Starr "answered the question" about the Haut Report in his report on the Foster death. However minutes later I told this Court during oral argument that Hamilton's response was "not true" because

[2] The citations in my merits brief to the addendum to my opening brief in the second appeal to the Ninth Circuit should have been to the addendum to my reply/answering brief in that appeal.

Starr never discussed in his report on the Foster death the apparent alteration in the Haut Report or its statement about a neck wound. *See* Transcript of Oral Argument, at 20-21 & 34-35.

Moreover, this Court failed to discuss *a declaration under penalty of perjury* by investigative journalist Ambrose Evans-Pritchard stating that he has seen a photograph of what appears to be a wound in Foster's neck: "I have seen the photograph showing an apparent neck wound to Foster's neck . . . ." ER 601, 656, 662.

FALSE DESCRIPTION OF GOV'T INVESTIGATIONS

Contrary to this Court's statements on pages 2 & 16 of its opinion, the evidence established that no Congressional Committee conducted an investigation of whether Foster was murdered or committed suicide at the park. On page 46 of the transcript of the oral argument, I referred this Court to the pages of the record that establish this fact. The evidence established that the Senate Banking Committee's "investigation" into the Foster death was limited to the issue of whether the United States Park Police's investigation was proper. The Banking Committee did not conduct an investigation to determine whether Foster was murdered or committed suicide in the park. This point was stated expressly by the Senators themselves. ER 602-09.

No committee in the House of Representatives conducted an investigation of Foster's death. Rather, only a single Congressman wrote a six-page "Summary Report" of his investigation into the death. ER 277, 288. That report does not answer the questions I raised in this case. Moreover, the Park Police, FBI and Independent Counsel investigations were permeated with FBI agents. ER 133, 166, 287, 302, 350, 351, 357. This Court did not address the conflict of interest inherent in the Fiske and Starr offices using FBI agents to investigate the FBI's investigation.

IGNORING AND DISTORTING THE LAW

This Court held that when Congress used the word "privacy" in 1966 in the FOIA and again in amending the

FOIA in 1974, it intended a definition that allowed for a person to have a privacy interest in a document that does not contain any information about the person in the document. In support of its position, this Court cited non-FOIA cases dealing with the definition of "privacy" and concluded that Congress in 1966 and 1974 must have intended for "privacy" as used in the FOIA to have the same meaning as expressed in those non-FOIA cases. At pages 10-11 of its opinion, this Court stated: "We can assume Congress legislated against this background of law, scholarship, and history when it enacted FOIA and when it amended Exemption 7(C) to extend its terms."

However, only two of the cases cited by this Court predated 1966 and 1974 when Congress enacted the FOIA and added the privacy exemption to Exemption 7(C). Therefore, among the cases cited by this Court only these two cases could have influenced Congress and played a role in shaping its intent regarding the meaning of "privacy" as used in the FOIA. These two cases are a New York state case, *Schuyler v. Curtis*, 147 N. Y. 434, 447, 42 N. E. 22, 25 (1895) and a Georgia state case, *Bazemore v. Savannah Hospital*, 171 Ga. 257, 155 S. E. 194 (1930). Both of these cases defined "privacy" so as to allow people to claim a privacy interest in documents that contained information about their deceased relatives, but no information about them.

Yet this Court failed to cite two federal court cases that surveyed the case law regarding this "survivor privacy" theory in 1969, virtually contemporaneously with enactment of the FOIA and its amendment in 1974. I cited both federal cases during oral argument, as established on page 31 of the transcript. These two cases established that the cases endorsing this "survivor privacy" theory were an aberrational minority of cases that should be rejected. The most logical assumption is that Congress intended the word "privacy" to mean what the overwhelming majority of cases had said it means, as opposed to what an aberrational minority of cases

had said it means. These two federal cases are *Cordell v. Detective Publications*, 419 F.2d 989 (6th Cir. 1969) and *Young v. That Was The Week That Was*, 312 F. Supp. 1337 (N.D. Ohio 1969).

On page 10 of its opinion, this Court cited the Restatement of Torts in support of it holding that a person can have a privacy interest in a document that has no information about the person in the document. This Court implied that the Restatement of Torts endorses its definition of privacy that the Court ascribed to the 1966 Congress. But that is not the case and this Court's description of the Restatement section to which it referred was false.

This Court stated: "Restatement (Second) of Torts §652D, p. 387 (1977) (recognizing that publication of a photograph of a deceased infant--a hypothetical 'child with two heads'--over the objection of the mother would result in an 'inva[sion]' of the mother's 'privacy')." This makes it appear that the Restatement takes the position that the mother has a privacy interest in a document that has no information about her in it, the photograph of her child. But the Restatement does not endorse such a position. Instead, Restatement (Second) of Torts §652D states:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
> (a) would be highly offensive to a reasonable person, and
> (b) is not of legitimate concern to the public.

This rule does not endorse the proposition that a person has a privacy interest in a document that does not contain any information about the person.

The Restatement follows its sections, like Section 652D, with illustrations that help explain the respective sections. This Court's parenthetical comment about this Restatement section inaccurately paraphrased Illustration no. 7 to the

section. The full text of Illustration no. 7 to Section 652D states:

> A gives birth to a child with two heads, which immediately dies. A reporter from B Newspaper asks A's permission to photograph the body of the child, which is refused. The reporter then bribes hospital attendants to permit him, against A's orders, to take the photograph, which is published in B Newspaper with an account of the facts, naming A. B has invaded A's privacy.

Therefore, Illustration no. 7 includes the vital fact that B Newspaper published "an account of the facts, naming A." This fact was essential to making B Newspaper's conduct a violation of A's privacy because this fact established that information about A was disclosed. Thus, A, the mother, had her privacy violated because information about her was disclosed by B, the newspaper. This Court omitted this essential fact from its description of Restatement section 652D and thereby implied that the section recognized that a person can have a privacy interest in a document that does not contain information about the person. That implication is false. Restatement section 652D does not support this Court's position.

IGNORING REDACTION OF THE PHOTOGRAPHS

The FOIA states: "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). This Court held on pages 9-10 of its opinion that the privacy interest it found was based on "the right of family members to direct and control disposition of the body of the deceased and to limit attempts to exploit pictures of the deceased family member's remains for public purposes" and "a family's control over the body and death images of the deceased. . . ." Therefore, the Government has no right to withhold those portions of the

photographs that do not show the body. This issue is raised on page 47 of my brief, but this Court ignored the issue.

IGNORING THE "DERIVATIVE USE" ISSUE

On page 8 of its opinion this Court described the privacy of the Foster family members it was protecting as their right "to secure their own refuge from a sensation-seeking culture for their own peace of mind and tranquility. . . ." This Court then relied upon a declaration by Sheila Foster Anthony, one of his sisters, who stated that "that the family had been harassed by, and deluged with requests from, '[p]olitical and commercial opportunists' who sought to profit from Foster's suicide." This Court cited Sheila's claim that disclosure would cause "intense scrutiny by the media" that would lead to "unsavory and distasteful media coverage." Thus, this Court based its decision on Sheila's description of what disclosure might lead to, not the information that disclosure would reveal.

As I stated on page 48 of the transcript of the oral argument, this contradicts Justice Scalia's concurrence in *Dept. of State v. Ray*, 502 U.S. 164 (1991), a case that dealt with the word "privacy" and the word "constitute" as used in the FOIA's Exemption 6, but equally applicable to Exemption 7(C). Justice Scalia stated that "consideration of derivative uses . . . to establish an invasion of privacy, is impermissible" because the FOIA does not say that the Exemption applies "whenever disclosure would '*cause,*' '*produce,*' or '*lead to*' a clearly unwarranted invasion of personal privacy" but "whether 'disclosure' would '*constitute* a clearly unwarranted invasion of personal privacy' (emphasis added);" and therefore "it is unavoidable that the focus . . . must be solely upon what the requested information *reveals*, not upon what it might lead to." *Ray*, at 180.

CONCLUSION

Rehearing should be granted.

Respectfully submitted.

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CERTIFICATE OF COUNSEL

I, Allan J. Favish, petitioner and counsel for petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

April __, 2004

_____
Allan J. Favish