The Albany Police Department also claimed in the last paragraph of the search warrant application: "The source of this information is known by members of this Department to be reliable and information given by this informant in the past has resulted in arrests and convictions." The actual informant was not known to "this Department." Rose and Daly testified that they could not say with certainty that information previously provided by the informant resulted in convictions or arrests, and Rose did not recall telling the APD that prior information from the informant did result in arrests and convictions. Only further discovery of the informant will disclose the truthfulness of this aspect of the warrant application.

Murray's attempt to cover the deception in the warrant application, which alleges that the APD had an informant whom they knew to be reliable, by stating that Rose was the "confidential reliable source", may make this allegation in the application technically "true" on its face, but it misleads the Magistrate, who requires a search warrant application premised upon personal knowledge. Rose had no personal knowledge of any of these events. All he knew was what the informant allegedly told him. This deception adds to the impression that the warrant application was a fabrication and was not designed to make a truthful presentation to the magistrate.

The warrant application was perjurious in other respects, as well. When defendants who prepared the search warrant application wrote "John Spearman was apprehended...while driving a stolen automobile", they knew the automobile was not stolen, but that it belonged to Mike Young.

Plaintiffs believe that defendants knew the description and license plate number of the car driven by Mike Young before Spearman's arrest, although they deny this knowledge. As stated in FBI document 100-24359-28, "The NYO (New York Office, FBI) has provided extensive information concerning Michael Young and his affiliation with the CWP to Albany during the course of this investigation." It is the fact that the car was reported stolen that was the pretext for stopping Spearman in the first place. If the police admitted they knew the car belonged to Young before it was stopped, their cause to stop Spearman as possessor of a stolen automobile would evaporate. The assertion in the warrant application that Spearman was driving "a stolen automobile" was more than an innocent misstatement, but part of an attempt to conceal illegal police conduct which plaintiffs assert continued with the search of Michelson's apartment based upon a perjured search warrant application.

The warrant application states that "At the time of the apprehension (of Spearman), a second individual, also in the car with Spearman, jumped from the car and escaped." This is untrue. Nobody else was in the car when it was stopped, according to the testimony of SUNYA Campus Officer Lascoe, APD Officer DePaulo and APD Officer Igoe.

Judge Miner in his July 25, 1984 Decision paid particular attention to the arrest of John Spearman and the alleged discovery of a gun and certain sticks in the car driven by Spearman, and to the Clara Satterfield conversation with Deputy Chief Reid. Both of these matters supposedly helped to

corroborate the reliability of the information provided by the informant.

The District Court's opinion stated:

> "A perusal of the search warrant application itself reveals that substantial and significant information justifying a search of the Michelson apartment was obtained by the authorities from sources other than the informant. The arrest of John Spearman, identified by the informer as a dangerous member of the Communist Workers Party and a temporary resident of the Michelson apartment, resulted in the seizure by Albany police officers of a handgun from Spearman's possession and two nightsticks from the trunk of the vehicle he was driving, prior to issuance of the warrant. The information furnished by the informer was corroborated further, according to defendants, by Clara Satterfield, who advised the police, prior to the search warrant application, that certain Party members previously named by the informer had disrupted a meeting called to plan peaceful protest activities. (A 84)

The search warrant application does not support the Court's conclusion that "substantial and significant information justifying a search of the Michelson apartment was obtained by the authorities from sources other than the informant."

With regard to the gun and the sticks allegedly found in Mike Young's car that was being driven by John Spearman, that discovery of weapons allegedly helps to establish that the informant was reliable when he informed Agent Rose that Spearman "was armed with both fire arms and other weaponry." (See warrant application). Without knowing what the informant actually said about Spearman being armed, it is not possible for plaintiffs or the Court to know if the gun allegedly found in the glove compartment of Young's car and the sticks in the trunk support the informant's reliability. For example, if the informant stated

that Spearman was driving his own car and it was full of weapons including shotguns, rifles, smoke bombs, but no handguns, the arrest of Spearman in Young's car with a single handgun in the glove compartment and sticks does not confirm the reliability of the informant, but instead throws doubt upon his reliability.

Agent Rose at his deposition stated that Spearman had in his custody "sticks, bombs, mace and other items." As with many details, agent Rose could not recall if he was told by the informant that these items were on Spearman's person, or in a vehicle, or how many firearms he possessed. He could not even recall initially if the informant said Spearman was carrying a handgun. Late in the deposition, agent Rose speculated that the informant said "handgun" but he could not really recall. Again, without an opportunity to review the information provided by the informant and to depose the informant it is not possible to impeach defendants' claim that they were justified to rely upon the informant's information because his information was reliable. In fact, his information may not have been corroborated by the alleged discovery of the gun and sticks.[9]

Further, Spearman and Young denied there was a gun in the Young car and a trial jury obviously believed them and acquitted

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[9] Agent Rose fails to recall much that is germane to this lawsuit. The extremely limited documentary disclosure allowed, as a result of the informant privilege, makes it impossible to refresh his recollection and to determine the truth with regard to this and other matters.

them of weapons possession charges. While, of course, this acquittal occurred months after the search of the Michelson apartment was conducted, the acquittal throws further doubt upon the allegation in the warrant application by Det. Tanchak that the gun was found. If no gun was in fact found in the car, the warrant application is that much less truthful, and the informant's reliability, which the gun supposedly supports, would suffer.

Even if the gun was found in Spearman's possession in the car, and even if Spearman was staying at the Michelson apartment, that does not give probable cause to search the apartment for an arsenal of weapons. At most, it may be some proof of the informant's reliability but it does not give grounds to believe there are weapons in Ms. Michelson's house.

With regard to the Satterfield conversation, the allegation in the warrant application that Michael Young and William Robinson disrupted a meeting of the NAACP and threatened her life, was apparently construed by Judge Miner as supporting the reliability of the informant's information as stated in the proceeding two (2) sentences: "This source indicated that other members of the Communist Workers Party accompanied Spearman to the Albany area and were also armed and intended to engage in violent activities to disrupt the rugby game and to engage in violence against the Albany Police Department. These members were identified as Michael Young and William Robinson."

Perhaps, had Mrs. Satterfield said to Deputy Chief Reid what is claimed,[10] her statement would corroborate the informant's reliability. But there is a more fundamental problem with these allegations attributed to the informant, Agent Rose denies that the source provided this information. If the informant did not mention Young and Robinson as being in Albany on September 21, 1981, armed, and intent upon violently disrupting the game, then Ms. Satterfield's telephone call allegedly naming <u>them</u> as disrupting a meeting and threatening her life corroborates nothing that the informant said.

Further, the Court's reliance upon defendant Reid's conversation with Clara Satterfield regarding alleged conduct by Mike Young and William Robinson at a meeting at the Urban League offices also is not information "justifying a search of the Michelson apartment". Even if these allegations in the search warrant were true, they do not establish the presence of contraband in Ms. Michelson's apartment.

There is <u>no</u> information in the search warrant application, other than from the informant, that justifies the search. It was an abuse of discretion for the District Court to rest its decision on any other premise.

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10 Mrs. Satterfield has denied the truth of these allegations, along with William Robinson and Peter Thierjung, who overheard the call to the police. Two police officers who attended the meeting say nothing about Young or about any disruption in their report.

The search warrant application is full of falsehoods and deceptions. Disclosure of the information from the informant will provide key evidence that the defendants did not have probable cause to search the Michelson apartment, that they conspired together to concoct the search warrant application to gain access to the apartment, to seize its occupants and to seize CWP materials that they believed would be found. Now they hide behind the "confidential reliable source," whomever he may be. Plaintiffs ask the Court not to permit this charade to continue.

The District Court's legal analysis also reveals that it grossly underestimated the essential importance of the informant to plaintiffs' case.

The District Court's opinion distinguishes this action from Hampton v. Hanrahan, 600 F. 2d 600 (7th Cir. 1979), rev'd on other grounds 446 U.S. 754 (1980) and Bergman v. United States, 565 F. Supp. 1353 (W.D. Mich. 1983). Both of those cases strongly support the disclosure of the informant in this action.

To read Hampton, pages 635 to 639, is as if to read about this action. In Hampton, the search warrant application was based upon information from an alleged informant. In Hampton, there was reason to doubt that the informant existed as claimed by Officer Groth or that he provided information as alleged in the search warrant application. The 7th Circuit analyzed the importance of the informant to Hampton's case in the following terms:

> If Groth did not have an informant, or his informant did not provide the information contained in the affidavit, or the informant was unreliable,

> the validity of the warrant would be in jeopardy and plaintiffs' Fourth Amendment violation claims would be strengthened. Further, plaintiffs contend that the search warrant was merely a pretext for the raid and that misrepresentations in the affidavit would constitute evidence of a conspiracy to violate the civil rights of the plaintiffs. If Groth did not receive the information contained in the affidavit from a reliable informant, this contention would be strengthened. Id. at 636

The Court recognized the importance of this discovery and ordered disclosure of the informant.

The District Court, in its Decision of July 25, 1984, distinguished Hampton from Michelson and held: "Moreover, there is no indication that the informant was a 'critical figure' in any conspiracy alleged by plaintiffs."

Plaintiffs are at a loss to comprehend the District Court's conclusion. This conclusion indicates that the Court abused its discretion in balancing the government's interest against the plaintiff's need to discover the informant. As stated before, there was no basis for a search of the Michelson apartment without the information from the informant, and if that information (if any) does not correspond to what defendants claim, as in Hampton, there is reason to believe that the search was a pretext to secure the arrest of Young, Estis, Michelson and others who might be in the apartment and to seize CWP literature for FBI perusal. The exact role of the informant cannot be known without deposing him, but to say that he was not a "critical figure" in the conspiracy is to close one's eyes to the importance of the informant in establishing the legality of the search. The District Court, unlike the District Court in

Hampton, may have conducted an in camera proceeding, but it does not follow automatically that the balance struck was a reasonable exercise of judicial discretion. To the contrary, the Court appears to have grossly undervalued the importance of the informant to plaintiffs' case.

The plaintiffs have made serious allegations of official misconduct. They have documented, to the extent known to them, the deceit that imbues the search warrant application. They have raised serious doubts about the informant's reliability (especially the absence of weapons from Michelson's apartment shortly after they were allegedly observed there by the informant), and even about Rose's credibility (especially, the conflict in testimony of defendants Donnelly and Rose about the source of the list of weapons, and Rose's testimony regarding the "vials of nitroglycerine in Michelson's refrigerator" that were not seized and the personal effects that were). As in Hampton, disclosure of the informant's identity is "essential to a just adjudication of appellants' claims." For the District Court to distinguish Hampton and conclude it does not support plaintiffs' request to discover the informant is a misapplication of this judicial precedent.

The District Court's decision distinguishing Bergman is equally misplaced. Again, the Court takes the position that unlike Bergman, the defendants had information other than from the informant. The information possessed by the defendants herein is totally collateral to the basic question of probable cause to search the Michelson apartment. The information in the

warrant other than from the informant is untrue. It is the informant exclusively who stands at the base of the pyramid. As with Bergman, the informant's information is the key to plaintiffs' claims. To them, this assertion is obvious. To the extent that the District Court's decision rests upon a different perception of the nature of their claims, that decision is an abuse of discretion in balancing the public interest in protecting the flow of information to law enforcement agencies against the litigants' need to discover the informant in order to achieve a fair determination of their claim.

What the District Court has done is not merely balance the law enforcement reliance upon secret informants against plaintiffs' need to discover the informant. The District Court has acted as trial jury and decided that the informant's information was true, or at least that the FBI was justified in believing it was true and conveying it to local law enforcement official. The District Court abused its discretion by rushing to judgment on the merits of these claims. "Our system of justice does not encompass ex parte determinations on the merits of cases in civil litigation." Kinoy v. Mitchell, 67 F.R.D. 1 (1975).

While the District Court Judge has conducted an in camera proceeding before granting a protective order, he does not have the same personal stake in this law suit as do plaintiffs. Judge Miner's opinion reveals that he examined witnesses, two FBI agents, and former Judge John Clyne from Albany County Court, who had conducted a suppression hearing in the Young and Spearman criminal case. The District Court Judge did not

interrogate the informant. All he did was take the word of the FBI contacts, whom plaintiffs believe have misrepresented the information, if any, that was provided by the informant. A District Court Judge can not be expected to conduct the inquiry necssary without the benefit of opposing counsel and the familiarity with the facts that they possess. In the end, even the District Court can be misled in the context of an in camera, ex parte proceeding. The result is that government power against which the Bill of Rights was enacted goes unchecked. Before the informant privilege is allowed to remove police conduct from the realm of public scrutiny, plaintiffs ask this Court to decide whether or not the District Court abused its discretion how it struck a balance between plaintiffs' essential need to discover the informant and the government's need to conceal his identity. At issue is the danger of the police using paid secret informants to transgress the rights of the citizenry, knowing that they can be reasonably assured that they will not have to account for their misconduct as they hide behind their confidential source.

The summary judgment rulings by Judge McCurn did not explain the basis for those rulings. In plaintiffs' view, summary judgment was granted in favor of these defendants when the protective order issued. It is only the informant, who, if compelled to testify truthfully, could reveal that it was not violence planned by the CWP, but a national security investigation of the CWP, combined with a high level of commitment to have this rugby game happen that resulted in the violation of plaintiffs' rights.

POINT II: SUMMARY JUDGMENT IN FAVOR OF APPELLEES OUGHT TO BE VACATED TO ALLOW DISCOVERY OF THE INFORMANT PURSUANT TO FRCP 56 (f).

When opposing the defendants' motions for summary judgment, plaintiffs have invoked the provisions of Federal Rules of Civil Procedure 56 (f) which authorizes denial or continuance of the motion to permit the opposing party to obtain further discovery to resist the motions. Plaintiffs have been denied discovery of the secret informant and have had summary judgment granted against them. Should this Court decide to vacate the protective order denying access to the informant's identity and allow discovery of the informant and information pertaining to him, plaintiffs request that the summary judgment motions entered herein in favor of Daly, Rose, County of Albany, Greenberg, Donnelly and Dorfman be vacated so that plaintiffs can engage in further discovery before having to answer a renewal of those motions should they be re-presented to the District Court. See Sam Wong & Son, Inc. v. N.Y. Mercantile Exchange, 735 F.2d 653, 678 (2d Cir. 1984); Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 445 (2d Cir. 1980); Wright, Miller & Kane, Federal Practice and Procedure Civil 2d §2741. The volume of materials that pertain to the informant and the circumstances surrounding the violation of plaintiffs' rights warrants allowing plaintiffs the opportunity to engage in further discovery with reference to all defendants before any summary judgment motions are allowed to stand.

CONCLUSION

Vera Michelson, Aaron Estis and the Capital District Coalition Against Apartheid and Racism request the Court of Appeals to vacate the July 25, 1984 and July 31, 1986 orders of Judges Miner and McCurn barring disclosure of the identity of the confidential informant, and direct that the identity of the informant and all information provided by him should be disclosed to plaintiffs.

Dated: November 11, 1988
Albany, New York

Respectfully submitted,

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88-6205

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 88-6205

VERA MICHELSON and CAPITAL DISTRICT COALITION AGAINST APARTHEID AND RACISM, by its Chairman, MICHAEL DOLLARD, AARON ESTIS,

Plaintiffs-Appellants,

-v-

PAUL DALY, Agent in Charge, FEDERAL BUREAU OF INVESTIGATION, JAMES J. ROSE, Special Agent, FEDERAL BUREAU OF INVESTIGATION, and OTHER UNKNOWN AGENTS OF THE FEDERAL BUREAU OF INVESTIGATION, UNKNOWN NEW YORK STATE POLICE OFFICERS, THE COUNTY OF ALBANY, ALBANY COUNTY DISTRICT ATTORNEY SOL GREENBERG, ALBANY COUNTY ASSISTANT DISTRICT ATTORNEY JOSEPH DONNELLY, ALBANY COUNTY ASSISTANT DISTRICT ATTORNEY JOHN DORFMAN, UNKNOWN OTHER ALBANY COUNTY DISTRICT ATTORNEYS, THE CITY OF ALBANY, THE CITY OF ALBANY POLICE CHIEF, THOMAS BURKE, THE CITY OF ALBANY ASSISTANT POLICE LIEUTENANT WILLIAM MURRAY, CITY OF ALBANY POLICE DETECTIVE JOHN TANCHAK, UNKNOWN OTHER CITY OF ALBANY POLICE OFFICERS,

Defendants,

PAUL DALY, Agent in Charge, JAMES J. ROSE, Special Agent, THE COUNTY OF ALBANY, ALBANY COUNTY DISTRICT ATTORNEY SOL GREENBERG, ALBANY COUNTY ASSISTANT DISTRICT ATTORNEY JOSEPH DONNELLY, ALBANY COUNTY ASSISTANT DISTRICT ATTORNEY JOHN DORFMAN,

Defendants-Appellees.

On Appeal From the United States District Court
for the Northern District of New York

REPLY BRIEF FOR APPELLANTS

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STATEMENT OF FACTS
IN REPLY TO COUNTY DEFENDANTS

The Brief of the County defendants seeks to minimize the roles of defendants Donnelly and Dorfman, Assistant District Attorneys in Albany County, in the events that underlie this lawsuit. County defendant Donnelly was actively involved with defendants Murray, Reid, Rose, Daly and Tanchak in preparing the search warrant application that was composed over a course of some hours on the night of September 21, 1981 at the detective offices of the Albany Police Department. (Donnelly, A 917-950, Tanchak A 1100-1115, Murray A 991-997)[1] More specifically, Donnelly elicited information from defendant Rose to use in preparation of the warrant (Donnelly, A 931-932); he requested the presence of Captain Dale to gain further information about Ms. Satterfield's telephone conversation which is referred to in the warrant application, although falsely described, (Donnelly, A 933-936); he was present at police headquarters while the alleged investigation by the secret informant was still in process (Donnelly, A 920-921); he was the person responsible for briefing defendant Tanchak who signed the search warrant application (Donnelly, A 948-950), and he typed the warrant application (A 918). Donnelly also presented the warrant

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[1] All such references are to the Joint Appendix. If a name precedes the page number, the reference is to an excerpt from that defendant's deposition.

application with defendant Tanchak to the Albany Police Court Judge (Tanchak, Docket No. 86, p. 83).[2]

Donnelly, along with Rose, Reid, Murray and Tanchak, and other law enforcement agents, executed the search warrant by entering and searching the Michelson apartment in the early morning hours of September 21-22, 1981 (Donnelly; A 959-960, Rose, A 756-764; and Tanchak, A 1112-1113), and in the process, intimidated plaintiffs by shouting and screaming, pointing shotguns and other weapons at them, rifling the house, and leaving it in a total shambles. (Michelson, A 1041-1044, 1054; Estis, A 1061-1063) Donnelly admits he reviewed personal papers found in the apartment. (Donnelly, A 959-960)

The search party arrested the three occupants of the apartment, Vera Michelson, Aaron Estis and Michael Young.

At arraignment, later that morning, plaintiffs Michelson and Estis were denied bail on the recommendation of Assistant District Attorney Dorfman, even though they had an absolute

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2 There was no criminal prosecution pending against plaintiffs Michelson and Estis, while Donnelly was busily typing the search warrant application at police headquarters, and prior to its execution. He has only qualified immunity for his conduct. See Powers v. Coe, 728 F.2d 97 (2d Cir. 1984), and Taylor v. Kavanaugh, 640 F.2d 450, 453 (2d Cir. 1981). The issue of prosecutorial immunity is discussed in Point III of the Memorandum of Law of Plaintiffs Michelson and Coalition in Opposition to All Defendants' Motions for Summary Judgment and In Support of Plaintiff Michelson's Motion for Summary Judgment (Docket No. 187). The issue is not addressed herein because it is not argued in the County defendants' brief.

right to bail. (Michelson, A 1047; Estis, A 1068; Dorfman, A 1081) The right to bail is guaranteed for a violation by CPL §§170.10(7) and 530.20(1).

Dorfman was an experienced Assistant District Attorney who had worked in Police Court from January 1, 1975 to September 22, 1981, the date in question. (Dorfman, A 1094) He knew or should have known that bail was an absolute right of defendants charged only with violations.

Dorfman admits he was handed the Informations which charged plaintiffs Estis and Michelson with violating Penal Law §§ 221.05 and 270.00-2(b)(i), both violations. (Dorfman, A 1078) Copies of the two Informations appear in the Appendix at pages 679-680. The District Attorney's office in Albany Police Court did have a copy of the Penal Law (Dorfman, A 1095), which discloses that these charges are violations.

Dorfman admits that he was motivated by the surrounding circumstances and was recommending a sort of preventive detention to prevent Michelson, in particular, from being involved in further activities regarding ~~the anti-apar~~theid protest. (Dorfman, A 1082-1083)

Plaintiffs Michelson and Estis were remanded to the Albany County Jail and were prevented from participating in the anti-apartheid protest activities and demonstration scheduled for September 22, 1981. (Michelson, A 1047-1051; Estis, A 1070)

Two days after Michelson's arrest, when she was brought on a bail application before County Court Judge Harris, Donnelly,

representing the State, recommended high bail on the grounds that there were other charges pending against Michelson. No charges had been filed and no proof of any such other crimes was ever produced. Judge Harris released Michelson on her own recognizance on September 24, 1981. (Michelson, A 1052-1054) Estis was released on bail on Monday, September, 28, 1981. (Estis, A 1071)

LEGAL ARGUMENT

POINT I: PLAINTIFFS DO NOT SEEK DISCLOSURE OF THE SECRET INFORMANT MERELY TO CHALLENGE THE CREDIBILITY OF THE FEDERAL DEFENDANTS.

Contrary to the federal defendants' argument on page 35 of their Brief, plaintiffs' entire reason for wanting disclosure of the informant is not merely to test the credibility of the federal defendants. Plaintiffs do believe that disclosure of the informant and information that has been withheld, because it may disclose the informant's identity, will contradict the assertions made by the federal defendants to defend their conduct, but more importantly, the informant and the contemporaneous documents generated by the defendants that have been protected from disclosure will reveal the true state of knowledge of the defendants, will demonstrate that no probable cause existed to search the Michelson apartment, that no true basis existed for the claims of violence attributed by the federal defendants to the CWP and, by association, to plaintiffs, and will reveal the scope of the conspiracy to undermine the demonstration, and to seize people and papers

found in Apartment 7K.

The federal defendants cite United States v. Russotti, 746 F.2d 945, 950 (2d Cir. 1984) for the proposition that disclosure of an informant to challenge the credibility of a witness is not sufficient ground to order disclosure. (Brief of Appellees, p. 35) In Russotti, a police witness refused to identify his informants. On the government's motion, the testimony of the witness was stricken. Upon cross-examination, the defendants elicited the informants' identities. When the witness refused to publicly identify his informants, he was held in contempt. This Court reversed the contempt ruling. It found that the identity of the informants was only sought to challenge the police witness' credibility; that the information from the informants was not key to any of the charges against the defendants; and it was not needed to rebut any damaging evidence against the defendants. Id at 950.

The informant herein stands in an entirely different place than the informants in Russotti. The secret informant and his information are key to defendants' justification for their actions, and will reveal the true nature and scope of the conspiracy against plaintiffs. In Hampton v. Hanrahan, 600 F.2d 600, 637-638, (7th Cir. 1979) rev'd on other grounds 446 U.S. 754 (1980), the Court of Appeals ordered disclosure of a secret informant both because it might impeach a police defendant's credibility and because it would help to define the conspiracy and particularly, the role of the FBI. Disclosure of the

informant herein will serve similar purposes. It is not merely sought to impeach the credibility of the FBI defendants. The informant is central, not collateral, to the claims made by plaintiffs and Russotti has no precedential value for the present appeal.

POINT II: PLAINTIFFS ARE NOT GUILTY OF MERE SPECULATION WHEN THEY ASSERT THE IMPORTANCE TO THEIR CASE OF THE INFORMANT AND INFORMATION PERTAINING TO HIM AND HIS ROLE IN THIS MATTER.

Defendants claim that plaintiffs' efforts to discover the informant and the documentary proof related to and by him is mere speculation that that information would help their case. (Brief of Appellees, p. 36). Among other definitions, speculation is defined in Webster's Third New International Dictionary, (Unabridged) at page 2189 as "reasoning or theorizing about a matter that transcends experience and does not admit of demonstration: reasoning a priori." Plaintiffs' experience and the facts they have discovered gives them solid reason to conclude (rather than to speculate) that the informant was not reliable and/or was not the source of information attributed to him.

The federal defendants claim the informant reported that the CWP was armed and was planning violence at the rugby game. Plaintiffs know that the principles, including the CWP, acting through Michael Young, deny any violent effort to stop the game was planned. Plaintiffs know that the in camera evidence of violence presented to Judge Munson by Governor Carey, from FBI sources, to justify Carey's cancellation of the game was

"woefully inadequate." Selfridge v. Carey, 522 F.Supp. 693, 696 (N.D.N.Y., 1981). According to the newspaper reports, the Klu Klux Klan, which was to be one of the targets of CWP violence, had not planned to attend the game. Plaintiffs know that former Police Chief Thomas Burke never credited the allegations of violence disseminated by the FBI. (Burke, A 1028-1034).

Plaintiffs further know that John Spearman and Michael Young and William Robinson were not armed and, certainly, had no arsenal of weapons, as Rose claims the informant reported. No effort was made to find an arsenal of bombs and weapons, supposedly in CWP control, once the people and papers in Apartment 7K were seized. Plaintiffs know that the arsenal which Rose claims the informant saw in Michelson's apartment was never there. And plaintiffs know that the nitroglycerine that Rose says he saw in the apartment was never seized by any law enforcement officials, which puts in doubt both Rose's credibility and the defendants' true purpose for breaking into the Michelson apartment in the first place.

Plaintiffs also know the allegations about the reliability of the informant based on having provided prior information that led to convictions and arrests is, at best, doubtful. Plaintiffs know that most of the allegations in the search warrant application that did not depend upon the informant were false. Plaintiffs know their arrests and detention were

unjustified,[3] that they were refused the opportunity to place a telephone call to secure legal help, and that they were denied bail on the recommendation of defendant Dorfman, despite an absolute right to bail for the violation charges for which they were arrested.

In addition, personal papers and items were seized from the Michelson apartment that had absolutely nothing to do with the search for weapons that was authorized. Plaintiffs know they were prevented from joining the anti-apartheid demonstration by being locked in jail for a number of days. Their experience teaches plaintiffs that unconstitutional police conduct was unfolding in September 1981, through the manipulation of a secret informant, and that they were the victims of that conduct.

Plaintiffs do not merely speculate when they assert that the informant and the great volume of information that has been withheld, because it may reveal his identity, ought to disclose a conspiracy behind these events in derrogation of their

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3 Michelson was admittedly the owner of a few firecrackers and a tiny amount of marijuana. While arrest for these violations is authorized, Criminal Procedure Law §140.10, issuance of an appearance ticket and posting of bail at the police station, not to exceed $100.00, is also authorized, Criminal Procedure Law §§ 150.20 and 150.30(2)(d), and is the usual procedure. Estis was arrested for merely being in the same room with the contraband. Probable cause to arrest does not exist under those circumstances. See Docket No. 169, Estis' Memorandum of Law in Support of Motion for Summary Judgment.

constitutional rights. Experience informs plaintiffs' judgment that lifting the informant privilege will disclose that Rose and Daly knew or should have known that no arsenal of weapons was located in the Michelson apartment, that no probable cause existed to justify the search warrant, and that the CWP never planned to stop the rugby game using violent means or any unlawful means.

Defendants cite three cases for the proposition that mere speculation is not enough to overcome the informant privilege.[4] In Ortega and Moreno, the informer was not central to the criminal transaction being prosecuted. Both courts found disclosure of the informant unwarranted, although they both acknowledge that a different result might be reached if "the informer could give testimony relevant to or essential to a fair determination of any of the issues in the case." United States v. Ortega, supra, 471 F.2d at 1359.

The informant herein is absolutely central to what has transpired and to whether or not violations of plaintiffs' rights have occurred. While plaintiffs cannot know all they might discover by this Court reversing the protective order, it is much more than mere speculation to think he has information

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4 In Re United States, 565 F.2d 19 (2d Cir. 1977); United States v. Ortega, 471 F.2d 1350, 1359 (2d Cir. 1972), cert. denied, 411 U.S. 948 (1973); and United States v. Moreno, 588 F.2d 490, 494 (5th Cir. 1979)

key to the events which interfered with the Coalition's organizing efforts and which led to the illegal search and seizure of plaintiffs Michelson and Estis.

The federal defendants also refer to In Re United States. That case, in itself, does not take the position that the need for disclosure of informants used by the FBI against the Socialist Workers Party was mere speculation. As Judge Greisa's lengthy opinion in Socialist Workers Party v. Attorney General of the United States, 642 F.Supp. 1357, 1377-1383 (S.D.N.Y. 1986) demonstrates, use of informants by the FBI was central to the FBI's efforts to disrupt the organizing efforts of the Socialist Workers Party. In Re United States articulates many general principles about disclosure of confidential informants, including the principle that "mere speculation" is not enough to require disclosure, In Re United States, supra, 565 F.2d at 23, and cites two cases in support of that proposition, United States v. Prueitt, 540 F.2d 995, 1003 (9th Cir., 1976) and United States v. D'Amato, 493 F.2d 359, 366 (2d Cir., 1974). In both of these cases, the role of the informant in the criminal transaction was, again, only incidental to the subject of the criminal transactions. The need to identify the informant was not essential to the defense of the charges being made. The remoteness or speculative importance of the informant in these various cases has no relevance to the present action. The secret informant used by the FBI in this case was at the core of the constitutional violations. His concealment bars plaintiffs from presenting their case.

POINT III: THE DISTRICT COURT'S FAILURE IN HAMPTON v. HANRAHAN TO CONDUCT AN IN CAMERA PROCEEDING DOES NOT DIMINISH THE PRECEDENTIAL VALUE OF THE SEVENTH CIRCUIT'S DECISION ORDERING DISCLOSURE OF THE SECRET INFORMANT.

The federal defendants seek to distinguish Hampton v. Hanrahan, 600 F.2d 600, (7th Cir. 1979), rev'd on other grounds 446 U.S. 754 (1980) from the present action on the basis that, unlike Judge Miner herein, the District Court in Hampton conducted no in camera balancing of the factors to be weighed before protecting or disclosing a secret informant. The conclusion that defendants wish to draw from this distinction is that had the District Court in Hampton conducted a full in camera hearing, the Seventh Circuit would not have reversed the lower court's protective order. The decision of the Seventh Circuit does not support this conclusion. Judge Miner, in his decision granting a protective order, asserted that the Seventh Circuit in Hampton found it "significant" that the District Court did not conduct an in camera proceeding. (A 85) While the Seventh Circuit explicitly considered a remand to the District Court for it to apply the proper balancing test, Id at 637, the Court of Appeals did not consider a remand so "significant" so as to prevent it from applying the balancing test on its own. The Court of Appeals in Hampton recognized the public interest in protecting an informant, but found the informant essential to a fair determination of the plaintiffs' claims.

As in Hampton, the informant herein was critical to the validity of the search warrant. If the information attributed to the secret informant is false, and Rose and Daly knew or should have known it was false, the probable cause for the search warrant evaporates, and the conspiracy to gain access to the Michelson apartment, to seize its inhabitants, and to seize CWP literature found therein will be fully exposed. Whether the informant is a party to the conspiracy or has been used by the defendants, he is a critical figure to the conduct of defendants' conspiracy to violate plaintiffs' rights. The Seventh Circuit recognized the essential character of the informant's role in the Hampton case and refused to allow the search for truth to be hidden behind the informant privilege.

> This case, in which plaintiffs have alleged gross misconduct by federal and state law enforcement officials and have presented serious evidence to support these claims, is of paramount significance. There is a serious factual controversy focusing on the existence or identity of Groth's informant, and a resolution of this controversy is essential to a just adjudication of plaintiffs' claims. Thus, we conclude that the public's interest in encouraging the flow of information to law enforcement officials cannot prevail in this case, and that Groth must disclose the identity of his informant. In order to minimize both the risks to this particular informant and any adverse effects on law enforcement generally, we suggest that the appropriate parties move at the retrial for a protective order to set the terms of this disclosure. Id at 637.

The Seventh Circuit recognized that the District Court could impose certain procedures to govern the disclosure of the informant's identity, but the balance of competing factors required disclosure.

The federal defendants are misguided in trying to distinguish Hampton and the District Court herein abused its discretion by trying to distinguish rather than by following the Hampton precedent.

POINT IV: PLAINTIFFS HAVE APPEALED THE PROTECTIVE ORDERS ISSUED BY JUDGE MINER AND JUDGE McCURN.

Plaintiffs focused their abuse of discretion argument upon Judge Miner's decision because he explained the reasons for his decision in a written opinion. (A 74-87). Michelson v. Daly, 590 F.Supp. 261 (N.D.N.Y., 1984), appeal dismissed on procedural grounds sub. nom. Estis v. Daly, 755 F.2d 913 (2d Cir. 1985). Defendants argue that both judges must be found to have abused their discretion. Plaintiffs appealed from the decisions of both judges and have requested reversal of both of their decisions. In the case of Judge McCurn, he issued a one paragraph decision and order in which he stated that Judge Miner struck a proper balance, and nothing had changed to upset that balance. In substance, Judge McCurn adopted what Judge Miner had done with reference to considering the facts and the law that were found by Judge Miner to justify the protective order. To the extent that Judge Miner is found to have abused his discretion, Judge McCurn, who travelled the same route, must be found to have abused his discretion. Judge McCurn gives no independent or additional reasons for refusing to vacate the protective order. Plaintiffs' arguments addressed to Judge