DRAFT

January 11, 1982

Dear Friend:

The following is a questionnaire which we have prepared in relation to a lawsuit VM & AE plan to bring as a result of the search of Vera's apartment on September 22, 1981 and her and A's arrest.

We are seeking to determine if anyone other than V & A suffered any legally recognizable injury. Specifically, the law recognizes that police conduct, or rather misconduct can have a "chilling" effect on the exercise of every person's right to speak, associate and assemble freely. The basic question we pose to you is whether you have been "chilled" in any manner by the search of V's apartment, her & A's arrest, their imprisonment and their criminal prosecution. We assume you know that the charges were ultimately dismissed.

POINT IV. THE CAPITAL DISTRICT COALITION AGAINST APARTHEID AND RACISM HAS STANDING TO MAINTAIN THIS ACTION.

The Albany County Defendants have previously moved to dismiss this action on the ground that the Coalition lacks standing. This Court has denied that motion in an order dated February 4, 1983.

The present motion by the federal defendants is essentially identical. Rather than reiterating the argument made in the Coalition's Memorandum in opposition to the County's motion, the Coalition hereby submits that Memorandum in opposition to the present motion and asks the Court to consider the argument made in Point III of the prior Memorandum when ruling upon the instant motion.*

One assertation made in the federal motion papers which was not raised by the County defendants warrants a brief response. The Federal Defendants assert that the accusation by the Coalition of damage to reputation is deficient since it does no more than allege tortious conduct as distinct from a constitutional violation.

Reference to damage to the Coalition's "reputation" in the Complaint is found in paragraphs 2, 110 and 115. This reference is made in the context of describing the injury suffered by the Coalition and its members as a result of the constitutional violations perpertrated by the federal

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* Plaintiff assumes that Memorandum remains on file with the Court.

Miner's decision, therefore, apply with equal force to Judge McCurn's ruling. Based on the same record, both judges reached the same conclusion on the facts and law. For the reasons presented in plaintiffs' main Brief, both judges abused their discretion to the substantial prejudice of plaintiffs under the facts and circumstances of this case.

**POINT V: PLAINTIFFS HAVE MET THE REQUIREMENTS OF RULE 56(f) AND ARE ENTITLED TO REVERSAL OF THE SUMMARY JUDGMENT MOTION GRANTED IN FAVOR OF THE COUNTY DEFENDANTS IF THE PROTECTIVE ORDER IS VACATED.**

The county defendants argue in their Brief that plaintiffs have not met the requirements of Summary Judgment Rule 56(f) of the Federal Rules of Civil Procedure which states:

> WHEN AFFIDAVITS ARE UNAVAILABLE. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

In response to the county defendants' motion for summary judgment, plaintiffs did not merely invoke Rule 56(f), but presented a primary affidavit (A 660-670) and as exhibits or by reference various documents including official police records and the sworn testimony of defendants Donnelly and Dorfman to show the role of Dorfman and Donnelly in the violation of plaintiffs' rights. Plaintiffs also incorporated by reference other affidavits that had been filed previously or were being

filed simultaneously as part of their opposition to the federal defendants' summary judgment motion.

Plaintiffs' opposition to the county defendants' summary judgment motion presented evidence documenting the roles of Donnelly and Dorfman in what plaintiffs have alleged was a conspiracy to deprive them of their civil rights. Donnelly and Dorfman had key roles in that conspiracy in that Donnelly was instrumental in preparing the search warrant application, presenting it to the local magistrate, and participating in the search, and Dorfman recommended, successfully, that plaintiffs Michelson's and Estis' absolute right to bail be disregarded so that they could be held in custody and prevented from participating in the anti-apartheid demonstration.

Plaintiffs' opposing affidavit also reiterated their reason for not being able to present further proof as to the full dimensions of the conspiracy and the role of the county defendants because of the protective order that issued regarding the secret informant. The county defendants' Brief is written as if all plaintiffs seek to do is to depose the informant and, according to county defendants, he has nothing to say about Donnelly, Dorfman or Greenberg. Plaintiffs do not know what, if anything, the informant, himself, can say about these defendants and their roles in the events of September 1981. However, the protective order not only bars a deposition of the informant, it bars disclosure of any information that might tend to disclose the informant's identity. This restriction on disclosure has

led to the refusal of Donnelly to answer various questions at his deposition (A 921, 931-932, 936-937, 948-952) and has led to the withholding or redaction of a great volume of FBI documents. See Docket Nos. 108, 109, 110, 111, 113 (Informant File, 1 1/4" thick, with one-page references to many multi-page documents, and completely redacted) and 114. Those documents are the most comprehensive, contemporaneous records of events as they transpired from when the FBI first became involved in this situation in Albany in the Summer of 1981.

In plaintiffs' view, the sequence of events, including the search, arrest, denial of access to any attorney, denial of bail and confinement during the demonstration, and the additional facts that have been developed through discovery give a solid basis to believe that a joint effort including federal, county and Albany police officials was in operation on the night of September 21, 1981, and that the paper record of that joint effort will disclose further the role of the Albany County District Attorney, Sol Greenberg, and Assistant District Attorneys Donnelly and Dorfman. Those documents may reveal why Donnelly was part of the search party and reviewed documents brought to him in the apartment. Was he acting on behalf of Rose and Daly, who were conducting a CWP investigation and wanted the materials in the apartment examined as part of that investigation? (Rose, A 754-756) Donnelly denies he authorized the removal of any documents (A 959-960), but they were removed. The informant documents, plaintiffs believe, will disclose Donnelly's role in toto.

Dorfman claims he made his bail recommendation on his own initiative. The informant documents may well reveal a plan in place to detain persons arrested pursuant to the search warrant, at least until after the demonstration ended. With the great volume of federal documents generated, it is entirely likely that the essential role of the District Attorney's Office in the scenario will be discussed in those memoranda. It is not unreasonable to believe that the FBI has kept records of its transaction that may implicate it and its co-conspirators in unconstitutional activities. See Hampton v. Hanrahan, supra, 600 F.2d at 608-609 ("Perhaps the most damning evidence indicating the COINTELPRO was intended to do much more than simply 'prevent violence' comes from the files of the FBI itself.")

Contrary to county defendants' claim in their brief, plaintiffs do not have to make a detailed showing of what facts further disclosure would reveal in order to invoke Rule 56(f). Wright, Miller & Kane, Federal Practice & Procedure Civil, 2d §2740. Plaintiffs have presented competent affidavits in opposition to the motion, as required by Rule 56(f). They have also explained why they cannot provide more proof due to the restriction on discovery. Should this Court conclude that the District Court abused its discretion to the substantial prejudice of plaintiffs by protecting the informant's identity, it would be premature to allow the county defendants to escape liability without allowing full disclosure of all relevant

factual materials. Plaintiffs have been conscientious in seeking to secure that material. They would complete the deposition of Donnelly if the protective order was lifted and, perhaps, interrogate District Attorney Greenberg, should the informant documents warrant such an inquiry. Plaintiffs have stated in the papers opposing the summary judgment motion (A 664-665) that the conspiracy that they allege to have occurred could not have involved the District Attorney's office without Greenberg's concurrence. This is an assertion based on logic; plaintiffs have readily acknowledged that, at present, they have no proof to connect Greenberg directly to the conspiracy. (A 665)

Plaintiffs ask that they be allowed further discovery against all county defendants in the event the protective order is vacated or modified before summary judgment in favor of those defendants is allowed to stand. While there has been much attempt at discovery, plaintiffs' efforts to probe the truth of the events that underlie this action have been thwarted at every turn by the informant privilege. If this Court is persuaded to reverse the protective order, plaintiffs ask that all the parties be returned to the District Court, where discovery can be completed and the full scope of the concerted law enforcement conduct in derogation of plaintiffs' rights can be delineated.

## CONCLUSION

Plaintiffs have sought to discover the informant's identity, not out of any idle curiosity, but because they want to question him to determine the truth about the defendants' conduct toward the Coalition and the inhabitants of Apartment 7K at 3:00 a.m. on September 22, 1981. The federal defendants want to characterize plaintiffs' side of the balance to be struck in determining the appropriateness of the protective order as mere allegations in a lawsuit. (See Brief for Appellees Paul Daly and James Rose, pps. 34 and 45.) They fail to recognize the constitutional rights at stake. They fail to recognize that 42 U.S.C. §1983 gives citizens such as plaintiffs the right and obligation to defend the Constitution against those persons in office in our government who transgress the constitutional limits placed upon their power.

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: December 22, 1988
Albany, New York

Respectfully submitted,

Lanny Earl Walter

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