allegations, but an aura of impending trouble was generated from law enforcement sources. (A 1141-1148, 230-231, 264-266, 363, 391, 392-394)

The Coalition, in private and in public, maintained that it was determined to conduct a peaceful vigil and organized parade marshals to help keep everything orderly. (A1142-1145) The demonstration that did take place included roughly 3,000 participants, and came off without any violence or difficulties whatsoever. (Dollard, A 1145, A 576)[2]

On September 21, 1981, the day before the rugby game and the demonstration, Michael Young and John Spearman came to Albany to participate in the Coalition's organizing efforts. (A 1058) Early in the evening on that date, they went to the Thruway Hyatt House, where the Springbok Team was staying and where a demonstration was planned. They were driving an automobile owned by Michael Young, which had been stolen in New York City and then recovered by Young, and for which a stolen vehicle

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2 On September 17, 1981, Governor Carey had been persuaded by the allegations of violence to call off the game at Bleeker Stadium. These allegations had been contributed to the State Police by the City Defendants based on information from the FBI. (A 264-266) Following that announcement, the sponsors of the rugby tour brought an action in Federal Court, alleging that they had a right to play the game and that the cancelling of the game was a deprivation of their First Amendment rights. An application for preliminary injunction was argued in front of Judge Munson on September 21, 1981 and he ruled on that date, after reviewing the State's report regarding allegations of violence, that there was not sufficient basis for cancelling the game and enjoined the State from so doing. The State immediately appealed to the Second Circuit and this Court ruled on the morning of September 22, 1981 that the game may be played. The Supreme Court denied a stay. Selfridge v. Carey, 522 F. Supp. 693 (N.D.N.Y. 1981), stay denied 660 F.2d 516 (2nd Cir. 1981)

report was still on file. (Reid A 563) At one point, Spearman let Young out of the car, while Spearman drove about, trying to find the demonstration. According to the decision of Judge John Clyne, the police at the State University of New York at Albany (SUNYA), which is across the road from the Hyatt House, had the Young car under surveillance, allegedly because they had been driving around the SUNY parking lot, did a check on the license plate, and found the stolen vehicle report. The car, driven by Spearman, after Young had been dropped off, was stopped by the SUNYA police. (A 279-280, 570-571)

The Albany police arrived on the scene and, according to Judge Clyne's decision, it was alleged that a gun was found in the vehicle's glove compartment. (A 280) Spearman was arrested and charged with unlawful possession of a firearm. After a jury trial on that charge, he was acquitted. (A 547) Michael Young had observed the police contact with John Spearman and had concealed himself, and then returned to the premises where he was staying by foot, namely Apartment 7-K at 400 Central Avenue, which is the Michelson apartment. (Young, A 602)

At about the same time as Spearman's arrest, FBI Agents Rose and Daly met with defendants Murray and Reid at the Hyatt House Restaurant. The purpose of that meeting was for Rose and Daly to convey to Murray and Reid urgent new information that they allegedly had received from their secret informant. Their secret informant allegedly had informed them that Spearman was in Albany and that he was armed and that he and other members of an elite group of the Communist Workers Party had brought explosives to the City and were planning to infiltrate the game and

set off smoke-bombs and shoot at police who tried to prevent them from stopping the games. (A 365-366, 408-417, 718-726, 854-861, 967-972, 979-989, 1011-1016) Again, all of this has been denied by the protest organizers.

Rose and Daly and the Albany police officers adjourned their meeting to police headquarters, where they spent the next few hours in concert with Assistant District Attorney Donnelly, allegedly securing additional information from the secret informant, prior to preparing a search warrant for Vera Michelson's apartment. Their stated purpose for the search was to discover explosives and other firearms that were in the apartment, and were going to be used to stop the game the following afternoon. (A 366-368, 420, 687-688, 726-738, 918, 992-997)

The text of the search warrant application follows:

> Detective John Tanchak, are police officers of the Albany Police Department, Albany, N.Y. does hereby make application for a search warrant pursuant to the provision of Article 690 of the Criminal Procedure Law and in connection therewith states as follows:
>
> First: There is reasonable cause to believe that certain property, to wit: smoke bombs, sticks, knives, rifles, shotguns, handguns and any other object which could be used as a weapon and any and all other contraband may be found in or upon the following designated or described place, vehicle or person, to wit: 400 Central Avenue, Albany, New York, 7th floor apartment rented by one Vera Michelson and known as no. 7K.
>
> Second: The following allegation of facts are submitted in support of the above statement: A confidential source has given to members of the Albany Police Department and the affiant information that one John Spearman, a member of the Communist Workers Party, has been engaged in activities in the Albany area relating to the disruption by violence of the rugby game scheduled to be played at Bleeker Stadium in the City of Albany on the 22nd day of September, 1981. That same source indicated that the apartment specified

> above was being used by John Spearman both as a residence and as a base to plan their activities in the Albany area relating to the rugby game. The source indicated that said John Spearman was in this area to coordinate the violent activity planned by the Communist Workers Party and was armed with both firearms and other weaponry. On September 21, 1981, said John Spearman was apprehended by members of the Albany Police Department while driving a stolen automobile. At the time of his arrest, Spearman had in his possession a loaded .38 handgun. At the time of that apprehension, a second individual, also in the car with Spearman, jumped from the car and escaped. On that same day, a search warrant was secured by members of the Albany Police Department for the vehicle occupied by Spearman and, in the trunk of said vehicle were found two (2) homemade sticks with black electrical tape wrapped around them. The apartment described above is believed to have a view or access to a view overlooking Bleeker Stadium. 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 are identified as Michael Young and William Robinson. At approximately 10:30 p.m. the Albany Police Department received a call from one Clara Satterfield, the head of the Albany NAACP, who indicated that the above named individuals had been in attendance at a meeting attended by that organization to coordinate peaceful protest activity and had disrupted it to the extent that she requested police protection from these individuals as her life had been threatened by them.
>
> 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. In addition the information given by this informant with respect to Spearman has been corroborated by his apprehension and his possession, at the time, of the weaponry specified. (A 110-112)

There are many deliberate falsehoods in the search warrant application. In brief, these falsehoods include:

a. None of the weapons listed in the Second paragraph were in the Michelson apartment.

b. No member of the Albany Police Department, including the affiant, John Tanchak, ever had any contact with the secret informant.

c. There were no plans to disrupt the rugby game by violence.

d. John Spearman was not armed.

e. The automobile in which John Spearman was arrested belonged to Michael Young and was not stolen.

f. No second individual jumped from the car and escaped when Spearman was arrested.

g. The informant did not provide information about Michael Young and William Robinson being in Albany with John Spearman to engage in violence.

h. Michael Young and William Robinson were not armed and did not plan violence against the Albany Police Department.

i. William Robinson is not a member of the Communist Workers Party and did not accompany John Spearman to Albany.

j. Clara Satterfield did not tell the Albany Police Department that William Robinson and Michael Young had disrupted a meeting and threatened her life.

k. The secret informant has not given information in the past to the Albany Police Department or the FBI that resulted in convictions and it is doubtful if the informant has ever provided information resulting in arrests.

The warrant application represents there was reasonable cause to believe there were smoke bombs, sticks, knives, rifles, shotguns, hand guns and other weapons in Michelson's apartment.

None of these things, and no other weapons, were found in her apartment. (Rose, A 765; Reid, A 1027) After failing to find the arsenal, the defendants did nothing to locate it elsewhere. (Rose, A 765-766) Assistant District Attorney Donnelly testified that the list of weapons in the warrant application came, verbatim, from the Penal Law (A 937-938, 944), rather than from any observations by the informant of weapons in the apartment, as Rose alleged in his deposition. (A 790-791). There never was an arsenal of weapons in the apartment. (Michelson, A 582-584; Estis, A 1072; Robinson, A 253)

400 Central Avenue is a high rise apartment house with a view of Bleeker Stadium and was used by the police authorities as a special lookout post. (A 584-599) Defendant Lieutenant Murray testified at his deposition that "400 Central was a concern to the entire Police Department." (A 973; Reid, A 1022-1025) The building was kept under surveillance on September 21, 1981, and it would have been extremely difficult to bring weapons in or leave with the arsenal described in the warrant application without being observed. (Michelson, A 582-585)

A further reason to doubt that the defendants ever had reason to believe that weapons were in the Michelson apartment, or any desire to take custody of them, is that vials of nitroglycerine were allegedly found in Michelson's freezer, but were not seized then nor at any time thereafter. (Rose, A 767-775, 778-780; Daly A 910-912)

The search warrant is deliberately false because no member of the APD, including the search warrant affiant Tanchak, ever

Informant not reliable

received any communication directly from the confidential source. Discovery has disclosed that the APD and Det. Tanchak had no confidential informant. (Murray, A 965-966, 998-1009; Tanchak, A 1104-1108; Rose, A 695-969)

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". Det. Tanchak admitted at the trial of Young and Spearman that he did not know the informant and did not know if the informant was reliable. (A 554)

Rose testified at his deposition that he could not say with certainty that information previously provided by the informant resulted in convictions or arrests, and he did not recall telling the APD that prior information from the informant did result in arrests and convictions. (A 817-818) Daly testified at his deposition that "I don't have any information pertaining to arrests or convictions pre-September 22nd, 1981, as applied to this source". (A 894) Later, he testified that information led to one arrest and he was uncertain about convictions. (A 916) The warrant application itself appears to be deliberately false when the informant is given credit for convictions, and may well be false regarding arrests.

With regard to the APD representing that they had an informant whom they knew to be reliable, defendant Murray sought to cover this falsehood by claiming at his deposition that the

"confidential reliable source" was meant as a reference to FBI Agent James Rose. (A 966) Agent Rose testified that he did not request this anonymity in the search warrant application (A 743-744), and that he thought the "confidential reliable source" in the warrant application meant the secret informant with whom he was in contact. (A 746-747) The only information Rose had is what the informant supposedly told him. (A 746-747)

Judge Miner, in his July 25, 1984 Order and Decision (A 74), 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.

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 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."

Besides Mrs. Satterfield denying she made the statements attributable to her, Agent Rose denies that the source provided

Rose - confused

this information. In particular, he denies that the informant ever mentioned the name William Robinson and cannot recall that the informant named Michael Young on the evening of September 21, 1981 as having been in Albany or with Spearman. (A 725, 748-752)

Mrs. Satterfield (A 251), William Robinson (A 252-253) and another witness, Peter Thierjung, who overheard the telephone call (A 254-255), have refuted the allegations about the telephone conservation as presented in the warrant application, denying that Young was at the NAACP meeting, denying the meeting was disrupted, and denying that Young or Robinson threatened Mrs. Satterfield's life.

In addition, two law enforcement officers were at the meeting referred to in the search warrant application. Mike Young was not identified as being present (although he was known to the police from his pre-rugby game television appearances), and no disruption is mentioned in the police memorandum. (A 560-562)

With regard to the gun allegedly found in the car driven by Spearman, he and Young testified at their criminal trial that there was no gun, and a jury acquitted them both of weapons possession charges. (Spearman A 246; Young, A 247)

Agent Rose testified at his deposition that Spearman had in his custody "sticks, bombs, mace and other items." (A 706-707) 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. (A 707) He could not even recall initially if the informant said Spearman

was carrying a handgun. (A 708) Late in the deposition, agent Rose speculated that the informant said "handgun" but he could not really recall. (A 795-796)

The warrant application was perjurious in other respects, as well. The warrant application states that John Spearman was driving a "stolen automobile." Defendants knew that Spearman and Young were associates. According to defendant Reid, defendants knew they were in Albany together, allegedly "engaged in a conspiracy to commit acts of violence at the demonstration." (A 563-564) Reid's report makes it clear that the defendants believed Young and Spearman were associated before the warrant application was prepared. The police also did a check of the license plate when Spearman was arrested and found that it belonged to Mike Young. (Tanchak, A 565-570)

Plaintiffs believe that defendants knew the description and license plate number of the car driven by Young before Spearman's arrest, although they deny this knowledge. (Rose, A 716-717) 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." (A 579) It is obvious from the records in this case that an automobile check is a very routine police procedure whenever any kind of investigation is being conducted. (A 390; Docket No. 183, July 1987 Cross Motion for Summary Judgment, Exhibit F to Michelson Affidavit)

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 also untrue. Nobody else was in the car when it was stopped. (SUNYA Campus Officer Lascoe, A 571; APD Officer DePaulo, A 75; and APD Officer Igoe, A 573)

The search warrant application was presented to a magistrate in Albany on the morning of September 22, 1981, and a search warrant was issued. At approximately 3:00 a.m., a posse of 12 to 15 non-uniformed law enforcement agents broke the chain lock on the Michelson apartment, and rushed in with handguns and shotguns drawn, causing a great commotion. (Estis, A 1061-1063) Michelson was forced to crawl out of her bedroom on her hands and knees with a shotgun pointed at her head. (Michelson, A 1041-1044) Michael Young and Aaron Estis, who were staying at the apartment, were immediately seized and removed from the apartment before any contraband was found. (Tanchak, A 1130) The apartment was thoroughly searched and left in a shambles. (Michelson, A 1054) Some firecrackers and a small amount of marijuana were found. (Tanchak, A 1118-1131) Michelson, Estis and Young were arrested and charged with possession of marijuana and firecrackers. (A 99, 1065)[3]

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[3] Tanchak, who was the arresting officer and who found the marijuana and firecrackers, testified at his deposition that the marijuana and firecrackers were found in a glass bowl on shelves located 4 to 6 feet from Estis' feet (while he was lying down sleeping). The marijuana was also inside colored transluscent plastic boxes. According to Tanchak, Estis was only arrested because he was in the same room with the marijuana and firecrackers. (A 1118-1131).

Despite repeated requests, Estis and Michelson were refused the opportunity to call an attorney after their arrests. (Michelson, A 1045-1047; Estis, A 1064-1065) Estis was told by a member of the APD at the police station in a sneering manner that Estis would not get a call for a while and would not be going to the demonstration. (Estis, A 1066) Since Michelson and Estis were charged with violation level charges of firecracker and marijuana possession, they had an absolute right to have bail set immediately. Criminal Procedure Law §§ 170.10 (7) and 530.20 (1). Instead, Assistant District Attorney Dorfman recommended no bail (Michelson, A 1047; Estis, A 1068; Dorfman, A 1081-1083) and, as a result, Ms. Michelson spent three (3) days in prison (Michelson, A 1052) and Mr. Estis spent six (6) days. (Estis, A 1071)

At the time of the search of the Michelson apartment, there were no weapons found, but the searchers proceeded to confiscate from the apartment various items belonging to Michelson and Estis, including reel-to-reel tapes, two personal telephone books and bills, and lists of organizational members both within the Coalition and other community groups. (A 97, 113-1/2)

The City police claimed the documents were seized in order to verify the owner of the premises (Tanchak, A 437-443), even though they knew Vera Michelson was the tenant in Apartment 7K. (Murray, A 969-970) Discovery has revealed that the true reason the documents and other items were seized was part of the FBI's domestic security investigation of the CWP. (A 373-376; Daly, A 321) Agent Rose briefed the officers who conducted the search

(Donnelly, A 951-954); he participated in the search "to determine if there was any evidentiary material that had a direct bearing on the Communist Workers Party violence and the bombing that occurred earlier that evening in Schenectady (Rose, A 754-756);[4] he observed the search in progress (Rose, A 757); and he took the items that were seized by the APD to his office for some days to review (Rose, A 342-343, 829). The inventory return on the search never mentioned the many items removed from the Michelson apartment. (A 446)

As a result of these events, Michelson, Estis and the Coalition commenced the present action.

LEGAL ARGUMENT

POINT I: THE DISTRICT COURT ABUSED ITS DISCRETION TO THE SUBSTANTIAL PREJUDICE OF APPELLANTS BY ISSUING A PROTECTIVE ORDER BARRING DISCLOSURE OF A CONFIDENTIAL INFORMANT OF THE FEDERAL BUREAU OF INVESTIGATION.

This Court is being asked to determine whether or not the District Court abused its discretion to the substantial prejudice of plaintiffs by barring disclosure of a secret informant's identity so that he might be deposed and the documents pertaining to him revealed. Such disclosure will

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4 Some unknown person exploded a bomb at the officers of the Eastern Rugby Union in Schenectady at about 2:00 a.m. on September 22, 1981. Neither the plaintiffs, the CWP, Young, Spearman or anyone associated with the Coalition has been connected to that bombing.

expose the conspiracy to deprive plaintiffs of their civil rights and allow them to prepare their case for trial.

Judge Roger J. Miner rendered a decision on July 25, 1984, 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) that prohibited the disclosure of the informant's identity.[5]

Pursuant to Judge Miner's Order, plaintiffs conducted depositions of Daly and Rose and made various demands to produce documents. (A 189 and A 208) After the initial round of responses to the document demands and deposition questions, plaintiffs moved before Judge Miner to request further discovery pursuant to his direction that information furnished by the informant be disclosed. Judge Miner ordered some further limited discovery (A 69), but in large measure, the exception that the identity of the informant not be disclosed swallowed the rule that information provided by the informant be disclosed, and many lines of questioning at the Rose and Daly depositions were barred and hundreds of pages of documents were produced that were completely blank. (Docket No. 105, the Informant file) It is because plaintiffs sincerely believe that

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5 "... the Court will direct that all information furnished to the authorities by the informer be disclosed to the plaintiffs except for any matters tending to reveal the informer's identity .... The motion seeks an order of protection in the context of the general procedural provisions relating to discovery, Fed. R. Civ. P. 26, and is granted only to the extent that the disclosure of the identity of the confidential informant through any discovery device shall be prohibited."
(A 86-86)

THE Decision for NO access

defendants are hiding, behind the informant privilege, their joint conduct in violation of plaintiffs' constitutional rights, that they ask this Court to review the denial of full disclosure of the secret informant.

The decision of Judge Miner presents the District Court's rationale for its ruling and will be the focus of plaintiffs' abuse of discretion argument. In a brief Decision and Order issued by Judge McCurn on July 31, 1986, he refused to vacate Judge Miner's Order. Judge McCurn reviewed the record made by Judge Miner; he did not conduct his own *in camera* hearing; and he did not detail the reasons for his decision. (A 66)

Judge Miner balanced various factors in reaching his conclusion: the safety of the informant, public interest in confidentiality, needs of effective law enforcement, and the plaintiffs' need for the informant's identity and information to support their claims that there was lack of probable cause to believe that there were armaments in the apartment, that the search warrant was deliberately concocted to gain access to the apartment and that defendants distributed untrue and unfounded information relating to planned violence to dissuade persons from participating in the protest action. (A 81-82) This balancing of interests has been sanctioned by this Court in many decisions. Most often, the issue arises in the criminal context. For example: *United States* v. *Russotti*, 746 F.2d 945 (2nd Cir. 1984); *United States* v. *Lilla*, 699 F.2d 99 (2nd Cir. 1983); *United States* v. *Manley*, 632 F.2d 978 (2nd Cir. 1980); *United States* v. *Tucker*, 380 F.2d 206 (2d Cir. 1967); and *United*

States v. Robinson, 325 F.2d 391 (2d Cir. 1963). While discovery of the informant is usually (but not always) denied, these cases recognize a principle that is applicable to the present appeal. As stated by Judge Lumbard in United States v. Tucker, supra, 380 F.2d at 211:

> It would seem therefore that if any rule requiring disclosure might be extracted from the language of Roviaro, [v. United States, 353 U.S. 53 (1957)] it would be that disclosure would be required only where independent evidence was so insubstantial that in essence "the existence depends solely upon the reliability of an informer * * *." United States v. Elgisser, [334 F.2d 103, 110, (2d Cir.), cert. denied sub. nom. Gladstein v. United States, 379 U.S. 879 (1964)]

this is why we need informant

Judge Miskill in United States v. Manley, supra, 632 F.2d at 985, recognized that "the most persuasive case for disclosure is where the examination of the informant is necessary to vindicate a defense on the merits and where withholding of the informant will thereby compromise the truth-finding function of the trial."

These principles are reflected in the civil context.

> Where the identification of an informer or the production of his communications is essential to a fair determination of the issue in the case, the privilege cannot be invoked. Citations omitted. In Re United States, 565 F.2d 19, 22-23 (2d Cir. 1977).

Plaintiffs will discuss the factors considered by Judge Miner in reaching his conclusion. They do so from the perspective that in this case, the informant alone supports the search warrant, and that disclosure "is essential to a fair determination of the issue in the case., Id at 22-23 and is necessary to the truth-finding process.

Plaintiffs are at a distinct disadvantage in addressing the "safety of the informant" factor. The District Court did not question the informant, himself, to try to assess this factor through personal contact. Plaintiffs have no knowledge of whom the informant is, although they have reason to wonder if he is a law enforcement officer with an agency other than the FBI. Since he was reactivated on FBI initiative, he is not merely a private citizen who came forth on his own initiative as a public spirited person. He is a professional informant who was paid for his services. Plaintiffs, who are ignorant of the substance of the *in camera* hearing, have no way of knowing what consideration, if any, the District Court gave to these "safety" factors.

Proving the negative, that the informant is in no danger whatsoever, is a burden of proof that plaintiffs cannot possibly carry. Defendants do not assert that the informant is in danger from plaintiffs, directly. The danger, if any exists, stems from other sources over which they have no control.

Without knowledge of the specific sources of danger, plaintiffs are at an even greater loss to answer those allegations. They did try to give Judge Miner some reference point by which to question whatever allegations of danger from the CWP that might have been presented to him. Agent Rose in his moving papers (A 269, Paragraph 11) quotes some bloated rhetoric from the "Workers Viewpoint," the official publication of the Communist Workers Party. A belief in the value of the "overthrow of this rotten capitalist system by violent force" to "establish a

socialist system" does not prove that the Communist Workers Party would use immediate violent means against an informant.

Defendant Rose, in paragraph 12 of the same affidavit states:

> I have been advised by FBI Headquarters that numerous weapons have been confiscated from or seen in the possession of CWP members since 1979, including a machine gun on a tripod, fragmentary hand grenades, molotov cocktails, pipebombs, clubs, mace, wooden batons, and approximately 18 additional different hand guns and rifles.

Who possessed these weapons? Were the possessors informants for the government? How is it known they are members of the CWP? Are they members now? When were the weapons seen or confiscated? Were the weapons possessed legally or illegally? Were they functional? Was there ammunition? Where were the weapons located? Is this information about armaments as good as (or rather, as bad as) the information provided about armaments in the Michelson's apartment? Defendant Rose's affidavit is very general and does not relate these weapons to any danger to the informant herein in time or place.

Paragraph 13 of Rose's affidavit states:

> "I have been advised by FBI Headquarters that there is evidence that the CWP has engaged in and planned violence in the past including the fire-bombings of banks in New York City and the planned bombing of a commercial firm in San Diego, and a violent confrontation with members of the NYC Police Department during the Democratic National Convention of 1980."

Again, what is this evidence? When did these events occur? Who was involved? Are they members of the CWP? Are they in custody? Have they been convicted? What is the present attitude of the CWP toward these people?

Plaintiffs believe Rose's reference to "the planned bombing of a commercial firm in San Diego" refers to criminal charges filed against CWP members and/or associates employed at NASCO in San Diego. At these criminal trials, an informant, Ramon Barton, testified against the defendants. This informant's name was disclosed in the national press. (A 315) Nothing in Rose's affidavit suggests that Mr. Barton has been threatened or his life endangered by members of the CWP. If the CWP has a history of endangering informants, surely the FBI must have some concrete details. Without more specific information, it is impossible to draw a line from these general allegations to the danger allegedly faced by the informant in this case. Plaintiffs do not know the degree to which Judge Miner probed these issues in weighing the "safety" factor.

Whether or not the District Court abused its discretion in giving too much weight to the "safety" factor is ultimately an issue that plaintiffs cannot address. There do exist witness safety programs to protect informants, but whether that is appropriate under the circumstances of this informant, they cannot venture to state. Fears of retaliation will never be entirely laid to rest. If they are given too much weight, there is nothing that can tip the balance in the direction of disclosure.

Public interest in maintaining the confidentiality of the informant is the second factor considered by the District Court. The cases recognize that the public does have an interest in encouraging the reporting of criminal activity and

that such reporters ought to be protected from adverse consequences. If, however, for example, the secret informant is a New York City policeman, the importance of this factor is less. It is a policeman's job to discover and report criminal activity and, unfortunately, to incur some risk in doing so. The "public interest" principle is a general principle with which plaintiffs do not disagree. But without access to information about its application to this informant, plaintiffs are, again, at a loss to know if the District Court abused its discretion in giving this factor too much weight.

There is another "public interest" factor that plaintiffs believe ought also to be integrated into the balance that is being struck. The members of the Coalition and the thousands of people in Albany who supported the Coalition's organizing efforts, and all persons under the jurisdiction of the U.S. Constitution have an interest in preserving a free and open society. They have an interest in being free to engage in political activity, to form coalitions with others who share their abhorrence for apartheid and other evils, to provide temporary accommodations for out-of-town allies, and to share, publicly and vocally, their views about apartheid, racism and other issues of great concern, without risking a 3:00 a.m. police raid with guns drawn that endangered the lives of these citizens, without being prevented from calling a lawyer, without being denied bail, without being held in jail for days, and without being prevented from participating in protest activities that they have worked so diligently to organize. Michelson and

Estis were not armed, were not violent, and broke no law which justified subjecting them to this treatment. This all transpired because of the secret informant. There is a public interest in not having a secret police operation that can trample these rights and then hide behind the informant and never have to justify its conduct in an open public forum.

In Woods v. Breier, 54 F.R.D. 7, (E.D. Wisc. 1972), Chief Judge Reynolds was asked to bar disclosure of internal investigative police reports. While disclosure of an informant was not an issue, the Judge clearly defines the public policy favoring access to confidential police information:

> "The principle favoring full access by the courts and litigants to relevant information, in the absence of strong competing considerations, is an important foundation for the achievement of justice by the courts in individual lawsuits. This principle is national policy of high rank, wholeheartedly endorsed and furthered by Congress. In the absence of a specific prohibition against disclosure in judicial proceedings, such as Congress set forth in some statutes, clear and strong indication is required before it may be implied that the policy of prohibition is of such force as to dominate the broad objective of doing justice." [Freeman v. Seligson, 132 U.S. Appd. D.C. 56, 405 F.2d 1326, 1348 (1968)]
>
> The second public policy that is challenged by this motion for suppression is that reflected in §1983 itself. "Its purpose is plain from the title of the legislation, 'An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes.' 17 Stat. 13." [Monroe v. Pape, 365 U.S. 167, 171 (1961)] But it is the manner of enforcement which gives §1983 its unique importance, for enforcement is placed in the hands of the people. Each citizen "acts as a private attorney general who 'takes on the mantle of the sovereign;'" [Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 715 (7th Cir. 1969)] guarding for all of us the individual liberties enunciated in the Constitution. Section 1983 represents a balancing feature in our governmental structure whereby individual citizens are

> encouraged to police those who are charged with policing us all. Thus, it is of special import that suits brought under this statute be resolved by a determination of the truth, rather than by a determination that the truth shall remain hidden. Wood v. Breier, supra, 54 F.R.D. at 10-11.

The "public interest" in having secret informants cuts two ways. Plaintiffs believe that the District Court has abused its discretion in not giving sufficient weight to the public interest that does not favor making constitutional rights subordinate to secret police work.

"Needs of effective law enforcement" is the third factor weighed by the District Court. Again, as a general principal, informants may serve a useful purpose and it is impossible to argue to the contrary. When applied to the events in August and September, 1981, in Albany, New York, plaintiffs question whether the informant served any legitimate law enforcement purpose. Was there ever any plan to violently stop the rugby game? Plaintiffs assert that there never was such a plan and the informant and/or his FBI contacts including Rose and Daly concocted the tales of violence. There is nothing legitimate about such a tactic. The Albany Police stopped John Spearman and allegedly seized a gun located in Michael Young's car, without any help from the informant. No arsenal of weapons was found at the Michelson apartment, although their presence was alleged by Rose to have been observed there, and lack of police initiative in seizing the so-called vials of nitroglycerine or pursuing any other effort to find this "arsenal" raises serious doubts that it ever existed, or was ever thought to exist by defendants, or was ever the target of the search. The secret

informant's information led to the arrest of three people: Michelson and Estis, against whom the charges were dismissed, rather than to allow the Albany Police Court Judge to conduct a suppression hearing;[6] and Michael Young, who was acquitted of gun possession. Use of the secret informant was effective in taking innocent protestors off the street and gaining access to the private papers of Michelson and Estis and the Coalition, as part of the FBI's national security investigation of the CWP, but the informant was totally ineffective in accomplishing any legitimate law enforcement purpose.

Whether or not the in camera hearing conducted by Judge Miner adequately explored the need for an informant in this case in order for there to be an effective law enforcement effort, plaintiffs do not know. If only the general principle is weighed, rather than considering its application to the particular facts, then concealment of the informant will almost invariably result. In conducting its review of the District Court's ruling, plaintiffs ask that the Court analyze the in camera proceeding to determine if the District Court abused its discretion by failing to give careful consideration to whether

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6 The Albany County District Attorney sought to consolidate the suppression hearing in the violation case filed against Michelson and Estis for possession of less than 7/8 ounce of marijuana and some firecrackers with the gun possession charges pending in County Court against Spearman and Young. Michelson and Estis sued Judge John Clyne of the Albany County Court, and secured a writ of prohibition from the Third Department Appellate Division to prevent the consolidation. Matter of Michelson v. Clyne, 84 A.D. 2d 883 (1981). (A 673) Immediately thereafter, the charges against Michelson and Estis were dismissed on the motion of the District Attorney (A 674-677).

or not the goal of effective law enforcement was served by the secret informant in this case.

The final factor considered by the District Court was the plaintiffs' need for the informant's identity and information to support their claims. Judge Miner did acknowledge that disclosure may be warranted under certain circumstances:

> Accordingly, the privilege will be unavailing where disclosure would be "relevant and helpful" to an accused in a criminal case, and it also will yield when it is "essential" to the fair determination of the issues in a civil action." (Emphasis added) (A 82)

Disclosure of the informant herein is "essential" to a fair determination of the issues presented in this lawsuit, and to prohibit that disclosure in this case is an abuse of discretion that prejudices plaintiffs to the point that they have no case remaining, without disclosure of the secret informant.[7]

Plaintiffs do not challenge the summary judgment rulings on this appeal if the District Court's ruling upon the confidential

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[7] When Judge McCurn granted summary judgment in favor of all defendants except three City police officials, as a practical matter, Michelson was left with the single issue that her personal effects were removed from her apartment by these officials as part of a general search that went far beyond the scope of the search warrant. The Coalition and Estis had this same claim to a lesser degree since most of the materials belonged to Michelson. Estis also had the claim that his arrest was illegal. Michelson acknowledged at her deposition that the marijuana and firecrackers belonged to her. These claims were settled with the City defendants for a monetary award. The remaining claims of Michelson, Estis and the Coalition that allege a conspiracy to violate their First Amendment rights and to violate their Fourth Amendment right to be free from unreasonable search have been thwarted by the protective order ruling in the District Court.

informant remains undisturbed. Without the informant and the documents that his activity allegedly engendered, plaintiffs do not believe that they could establish the truth of the allegations that they have made in good faith based upon the events that transpired of which they do have knowledge.

Plaintiffs have alleged a course of police conduct that was led by the Federal Bureau of Investigation and which rests squarely on the shoulders of the secret informant and what Rose and Daly claim he reported to them. Unfortunately, the FBI has proven itself capable of great deceit and chicanery in conducting its self-righteous domestic security investigation. See Socialist Workers Party (SWP) v. Attorney General of the United States, 642 F. Supp. 1357 (S.D.N.Y. 1986). In particular, Judge Griesa's lengthy opinion documents the corrupt use of secret informants, Id at 1377-1383, and covert disruption to try to alienate the SWP from other groups, Id at 1384-1389. The FBI also resorted to the provocation of violence to achieve its goal of discrediting the SWP. For example:

> The next FBI effort involved an anti-war parade in New York City that took place on April 5, 1969. This parade was jointly sponsored by the SWP, YSA and SMC. Since it was to involve both civilians and military personnel, the sponsors of the parade regarded it as particularly important to keep the parade peaceful, so as not to draw the military personnel into trouble with the law. Just before the parade the FBI's New York office distributed an anonymous leaflet entitled "notes from the Sand Castle" (the latter term being slang for Columbia University), accusing the "SWP-YSA-SMC coalition" of cowardice in not being willing to fight the "pigs" (police) and to accumulate "battle wounds." The FBI's expressed purpose in creating the leaflet was to "disrupt plans for the demonstration and create ill-will between SWP-YSA and other participating non-Trotskyist groups and individuals." The evidence shows that this communication created difficulties in managing the march.

Similar tactics were afoot in Albany, New York in the late summer of 1981. In August and September, the secret informant allegedly conveyed information about alleged plans for violence being prepared by the CWP to stop the rugby game. It is these alleged plans for violence that were communicated to the Albany City Police and State Police and that contributed to Governor Carey's cancellation of the game on September 17, 1981. The lawsuit that was brought by the American sponsors of the game led to a ruling by Judge Munson that "the factual evidence supposedly substantiating the Governor's determination is woefully inadequate," Selfridge v. Carey, 522 F. Supp. 693, 696 (N.D.N.Y. 1981), stay denied 660 F.2d 516 (2d Cir. 1981) and did not warrant cancellation of the game. It is plaintiffs' belief and allegation that the FBI knew or should have know that these reports of violence allegedly communicated by the secret informant (if not created by Rose and Daly) were untrue and unsubstantiated. Instead, the FBI touted its reliable source and generated an aura of violence with the goal of discouraging the kind of mass demonstration that might actually prevent the game from happening. The game had been cancelled in New York City, Chicago and Rochester, and the supporters of the tour did not want the Albany game cancelled, as well. The full extent of this FBI strategy has remained concealed behind the secret informant.

In the context of this larger game plan, the FBI had a strategy of discrediting the CWP, seizing literature and documents that may pertain to its national domestic security

investigation of the CWP, and removing from the demonstration individuals whom they considered most capable of encouraging the protestors to be assertive (this does not mean violent) in urging the game's cancellation. In particular, the focus was on Michael Young and John Spearman, who were thought to be members of the CWP, and Vera Michelson, a longtime vocal civil rights activist in the City of Albany. Aaron Estis happened to be at the wrong place at the wrong time.

With this scheme in mind, FBI Agents Rose and Daly called a meeting with APD members Murray and Reid at the Thruway Hyatt House to claim that they had disturbing new information from their informant about weapons and explosives being brought to Albany to stop the rugby game. This meeting adjourned to the police station where, during the next three or four hours, a search warrant was composed with the aid of Joseph Donnelly, Assistant District Attorney.

The search warrant that was issued by Albany Police Court in the early morning hours of September 22, 1981 was based on an application that was deliberately perjured by its authors, Rose, Daly, Reid, Murray, Tanchak and Donnelly.

The warrant application finds:

> "There is reasonable cause to believe that certain property, to wit: smoke bombs, sticks, knives, rifles, shotguns, handguns and any other object which could be used as a weapon and any and all other contraband may be found in or upon the following designated or described place, vehicle or person, to wit: 400 Central Avenue, Albany, New York, 7the floor apartment rented by one Vera Michelson and known as No. 7K."

The facts upon which this conclusion is based depend entirely upon the secret informant. If you remove from the application all of the allegations attributable to the confidential source, the application would read as follows:

> "On September 21, 1981, said John Spearman was apprehended by members of the Albany Police Department while driving a stolen automobile. At the time of his arrest, Spearman had in his possession a loaded .38 handgun. At the time of that apprehension, a second individual, also in the car with Spearman, jumped from the car and escaped. On that same day, a search warrant was secured by members of the Albany Police Department for the vehicle occupied by Spearman and, in the trunk of said vehicle were found two (2) homemade sticks with black electrical tape wrapped around them. The apartment described above is believed to have a view or access to a view overlooking Bleeker Stadium. At approximately 10:30 p.m. the Albany Police Department received a call from one Clara Satterfield, the head of the Albany NAACP, who indicated that the above named individuals had been in attendance at a meeting attended by that organization to coordinate peaceful protest activity and had disrupted it to the extent that she requested police protection from these individuals as her life had been threatened by them.

Obviously, these "facts"[8] do not give probable cause to believe an arsenal is in Apartment 7K. The factual basis for probable cause that is attributable to the secret informant reads as follows:

> "A confidential source has given to members of the Albany Police Department and the affiant information that one John Spearman, a member of the Communist Workers Party, has been engaged in activities in the Albany area relating to the disruption by violence of the rugby game scheduled to be played at Bleeker Stadium in the City of Albany on the 22nd day of September, 1981. That same source indicated that the apartment specified above was being used by John Spearman both as a

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8 "Facts" is in quote because these allegations are almost totally false, as discussed below.

> residence and as a base to plan their activities in the Albany area relating to the rugby game. The source indicated that said John Spearman was in this area to coordinate the violent activity planned by the Communist Workers Party and was armed with both firearms and other weaponry. 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 are identified as Michael Young and William Robinson.

This comparison makes it obvious that the information from the informant was essential to establishing probable cause to search the Michelson apartment. If Michelson and Estis are not allowed to get behind the bald-faced allegations of Agent Rose which he attributes to the confidential source, their illegal search claim and their conspiracy claims cannot proceed. The need for the informant's identity and information in order to support plaintiffs' claims (the 4th factor in the balance) is apparent.

Plaintiffs have presented as much evidence as they can as to why the search warrant application is false. They have substantiated those allegations with proof through affidavits and contradictory police records that most of the application is false and was done in a knowingly false manner.

The warrant application represents there was reasonable cause to believe there were smoke bombs, sticks, knives, rifles, shotguns, and hand guns in plaintiff Michelson's apartment. None of these things, and no other weapons, were found in her apartment. If the defendants were so persuaded by the reliable informant that this arsenal was in Albany in the custody of the CWP and was going to be used the next day to injure people at

the rugby game, why did they do nothing to locate it after it failed to turn up in the Michelson apartment? Perhaps, Assistant District Attorney Donnelly was more truthful than agent Rose when he testified that the list came from Penal Law Article 265, rather than from any observations by the informant as Rose alleges. Donnelly's testimony directly contradicts the FBI's claim that arms were seen in the apartment and thereby undercuts the essence of the application to search Michelson's apartment, to wit, that the informant saw the laundry list of weapons inside the apartment. The armaments were never in the apartment and had they ever been there, they could not have been removed before the search occurred without being observed by the police who considered 400 Central Avenue, a high rise building with a view of Bleeker Stadium, of "concern to the entire Police Department." (Murray, A 973) Plaintiffs cannot impeach Rose's claim about armaments being observed in the apartment without deposing the informant and discovering all the information he actually provided.

When plaintiffs first read the search warrant application, they thought that the Albany Police Department (APD), and in particular, defendant John Tanchak, the detective who signed the application, had a secret informant. The application says: "a confidential reliable source has given to members of the Albany Police Department and the affiant information...." Discovery has disclosed that the APD and Det. Tanchak had no confidential informant.