IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

NO. 83-2986

IN THE MATTER OF: A WITNESS BEFORE THE SPECIAL OCTOBER 1981 GRAND JURY, APPEAL OF: HAROLD MANNER and THE METABOLIC RESEARCH FOUNDATION, Appellants.	NO. 82-GJ-741 HON. FRANK J. McGARR APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISIO

BRIEF FOR APPELLANTS

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U.S.C.A. -- 7th Circuit
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IN THE MATTER OF: A WITNESS BEFORE THE SPECIAL OCTOBER 1981 GRAND JURY. APPEAL OF: HAROLD MANNER and THE METABOLIC RESEARCH FOUNDATION, Appellants.	NO. 82-GJ-741 Hon. Frank J. McGarr Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

CERTIFICATE OF INTEREST

The undersigned counsel of record for The Metabolic Research Foundation and Harold Manner, appellants, furnishes the following list in compliance with Circuit Rule 5(b):

(1) METABOLIC RESEARCH FOUNDATION and HAROLD MANNER.

(2) Not applicable.

(3) The only law firm whose partners or associates have appeared for the appellants in the District Court or are expected to appear for appellants in this Court is Dilling, Dilling and Gronek.

Dated: November 18, 1983

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JURISDICTIONAL SUMMARY

The Order of Judgment and Commitment (App.p.1) was entered by the district court on November 4, 1983. The jurisdiction of the lower court was invoked pursuant to 28 U.S.C. 1826. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

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STATEMENT OF THE CASE

This appeal concerns the right of the October 1981 Grand Jury to obtain from the Metabolic Research Foundation and Harold Manner all documents concerning or related to persons seeking referral or treatment from the Foundation or Harold Manner.

On June 7, 1982, a Grand Jury subpoena duces tecum for certain records of the Metabolic Research Foundation was issued for return before the Special October 1981 Grand Jury on July 6, 1982. The subpoena requested all documents related to:

1. Chiropractors or other persons to whom patients are referred by the Metabolic Research Foundation or Harold Manner;

2. Persons seeking information, referral or treatment from the Metabolic Research Foundation or Harold Manner; and

3. Donors to the Metabolic Research Foundation.

A Motion to Quash and Modify the Subpoena was filed on June 30, 1982. The district court ordered production of documents requested in paragraph 1 of the subpoena, but withheld ruling on production of documents requested in paragraphs 2 and 3 subject to briefing on the Motion to Quash. On December 2, 1982, the court issued a Memorandum Opinion and Order granting the Motion of Harold Manner and/or the Metabolic Research Foundation to quash paragraphs 2 and 3 of the subpoena duces tecum issued June 7, 1982.

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Subsequently the Government filed a Motion for Leave to File a Motion for Reconsideration of the Court's decision of December 2, 1982. On February 7, 1983, the district court entered a Memorandum Opinion and Order granting the Government's motion and ruling that the Foundation and Harold Manner need not respond to the Government's motion unless the Court found the Motion to Reconsider to warrant a response, at which time a minute order would issue granting respondents adequate time. On February 28, 1983, the Government filed its Motion for Reconsideration.

On March 4, 1983, the Court granted the Governnment's Motion for Reconsideration and issued a Memorandum Opinion and Order ruling that the subpoena was enforceable to the extent that it sought from the Foundation the identity of persons "who have been referred for treatment to the Foundation or who have received treatment from the Foundation." In all other respects, the Court's earlier decision was unaltered and other aspects of the subpoena remained quashed. This order was entered without affording the Foundation and Harold Manner an opportunity to respond to the Government's Motion for Reconsideration, as was specifically incorporated in the Court's February 7, 1983 opinion and order.

After disagreement between the parties as to the meaning of the March 4, 1983 order, on June 7, 1983, the Government filed a Motion re Clarification of the Court's Ruling of March 4, 1983. A reply to the Government's motion was filed on June 27,

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1983.

On July 7, 1983, this Court entered an opinion and order requiring the Metabolic Research Foundation and Harold Manner to produce to the Special October 1981 Grand Jury the following documents: "Any and all documents concerning or related to persons seeking referral or treatment from Metabolic Research Foundation or Harold Manner, with the understanding that the term treatment includes but is not limited to examinations, tests, analysis, diagnosis, recommendations of diet, and recommendations and/or sale of drugs, vitamins, dietary supplements and other items and referral to doctors."

On October 31, 1983, a Joint Motion re Order of Civil Contempt Pursuant to Title 28 United States Code, Section 1826 was filed with the district court. On November 4, 1983, the Court entered its Order of Judgment and Commitment and granted bail pending the disposition of this appeal.

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STATEMENT OF FACTS

The Metabolic Research Foundation is an Illinois not-for-profit corporation with its principal offices in Glenview, Illinois. The views and objectives of the Foundation center around a belief in a holistic approach to health, through use of what could be termed as "metabolic therapy". Foundation activities include the dissemination of information regarding metabolic therapy as applied to the diseases of cancer and arthritis, as administered by physicians and other members of the healing arts across the United States and Canada. Application of metabolic and holistic therapy often involves the use of amygdalin (Laetrile),proteolytic enzymes, emulsified Vitamin A, and particular special dietary foods as accompanied by selective nutrition. (Affidavit of Harold Manner , App. 16-19)

Advocacy of use and opinions regarding metabolic therapy as an adjunct to treatment of cancer and arthritis is contrary to the views of the majority of the medical community and has been termed "unorthodox". The expression of views and opinions regarding these minority views has incurred wide-spread opposition and criticism on the part of organized medicine, the media and various governmental agencies. (Affidavit of Harold Manner)

Harold Manner, Ph. D. is the president of the Metabolic Research Foundation. He received his Bachelor of Science degree from John Carroll University in 1949; his Master of Science degree from Northwestern University in 1950 and his Ph. D. from Northwestern University in 1952. Dr. Manner was acting Chairman

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of the Department of Biology and Professor of Biology at Loyola University of Chicago from 1972 until 1982.

During the latter part of 1981 CBS News ran a series for approximately two weeks directed at the Foundation, its members, and aimed at the condemnation of the organization's views and opinions. Following the appearance of this television series, the Illinois Attorney General's Charitable Trust Division served a subpoena upon Harold Manner. In compliance with that subpoena, the Foundation produced thousands of pages of documents, including its financial records, but objected to the production of membership and donor lists. As an adjunct to the dissemination of information regarding metabolic therapy, the Foundation provides the names of doctors incorporating and applying the beliefs of the Foundation in their practice. To help defray the substantial costs incurred by the Foundation, it charges those persons requesting such information, and subsequently receiving treatment, the sum of $200.00. Of course, the treatment of any individual is left totally to the professional discretion of the treating physician and patient. Also, the payment for any services rendered by the treating physician is arranged and agreed upon between the doctor and the patient. The Foundation receives no funds whatsoever as a result of services provided by particular physicians.

On June 7, 1982, a Grand Jury subpoena duces tecum for certain records of the Foundation was issued by the Government. Following the entry of the March 4, 1983 and July 7, 1983 orders

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by the district court, and subsequent refusal of the Foundation and Harold Manner to provide the documents requested, Dr. Manner was held to be in contempt of court.

This appeal followed.

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ARGUMENT

I. FREEDOM OF ASSOCIATION

Freedom of association has always been a vital feature of American society. Associations advocating minority or unpopular views have been strenuously resisted at times by other private groups, or sought to be regulated or curbed by government authority.

In the 1958 decision of NAACP v. Alabama ex rel. Patterson, 357 U. S. 449 (1958), the Supreme Court enunciated for the first time the constitutional doctrine known as the "right of association". In that case, the State of Alabama sought to compel production of NAACP membership lists in order to determine whether the organization was operating in Alabama in violation of a law requiring registration of foreign corporations doing business within the state. Mr. Justice Harlan, speaking for the Court, established the "right of association" in the following manner:

> "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly .... It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." (Page 460)

The Supreme Court has recognized that the disclosure of the identity of a group's members or contributors may have the practical effect of discouraging the exercise of the constitutionally-protected right of association. In

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NAACP v. Alabama, supra, 357 U.S. at 462, the Court states:

> "In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action ....
>
> "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one's association. .... Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."

Thus, governmental attempts to compel such disclosures have been subject to exacting scrutiny. Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 543 (1963); Bates v. Little Rock, 361 U.S. 516 (1960); and Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293 (1961).

Protection of the freedom of association applies to grand jury proceedings. In Bursey v. United States, 466 F. 2d 1059 (9th Cir. 1972), the court reversed the contempt conviction of two members of the Black Panther party. The grand jury was investigating an alleged threat on the President's life. The court held that the witnesses did not have to answer a number of questions which probed generally into the Party's organizational structure, operation and membership. The court stated that freedom of association was secured by the Constitution to "shelter all persons from unjustifiable government prying into

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their associations with lawful groups."

In order to warrant an intrusion into an organization's First Amendment associational freedoms, the government must show (1) a factual predicate demonstrating a compelling governmental interest, (2) a nexus between the information and the factual interest, and (3) a showing that the information cannot be obtained in a manner which would not require invasion of associational privileges. See NAACP v. Alabama, supra and Gibson v. Florida Legislative Investigation Committee, supra.

Providing the grand jury with all documents relating to those seeking the names of doctors incorporating metabolic therapy into their practice might induce members to withdraw and, most certainly, persuade others from seeking such information because of their fear of exposure. The Foundation's members include many doctors, nurses and others engaged in the healing arts whose employment might be terminated and their position in the "medical community" adversely affected should their membership in the Foundation be disclosed.

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II. WHETHER THE RIGHT OF ASSOCIATION APPLIES TO THOSE SEEKING INFORMATION, INCLUDING REFERRAL FOR TREATMENT TO MEDICAL PRACTITIONERS RECOMMENDED BY THE FOUNDATION

The district court on December 2, 1982 ruled that the names of individuals who sought information, referral or treatment from the Foundation were protected by the organization's associational rights. At pages 2 and 3, the court stated as follows:

> "The government responds that those persons seeking information, referral or treatment from Metabolic Research Foundation or Harold Manner are not members of an association and, therefore, the freedom of association cases do not enunciate a principle applicable here. The constitutional protection afforded individuals in their associations is broader than the concept of formal membership in an organization. The concept is indeed broad enough to apply to those persons who seek information, referral or treatment from Metabolic Research Foundation and, therefore, the patients of the Foundation, for purposes of this motion, are deemed to be members of a constituionally protected association."

Subsequently, on March 4, 1983, the lower court ruled the names of these individuals must be disclosed.

That the First Amendment protections go beyond the right to advocate and also encompasses the right to obtain services and referrals is well-established. Invasions,similar to the ones in the case at bar, were addressed by the court in the case of In re Verplank, 329 F. Supp. 433 (1971). In that case, the government's subpoena was quashed because it was inadequate in showing a compelling need for evidence concerning the "curious practice of certain'draft counsellors' to send or refer selective service registrants to particular dentists,

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physicians, psychiatrists and others for assistance in evading military service." The court held that First Amendment rights should prevail, and the subpoena to the custodian of records of the draft counselling center was quashed insofar as requiring production of records of counsellees or lists of physicians, dentists or psychiatrists to whom the counsellees had been referred.

At page 437, the court stated as follows:

> "It would appear that First Amendment activities are involved in the operation of the McAlister Center. All citizens have a right to receive accurate, up-to-date information concerning the selective service system and army induction procedures, as well as a right to associate in order to obtain such information. See, NAACP v. Alabama, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958). Consequently, there is nothing inherently sinister in the efforts of the McAlister Center to collect and disseminate that material. This court also recognizes that in order for the Center to give valid advice to registrants, it must first obtain personal information from them. The possibility that such information will be revealed indiscriminately could certainly deter many registrants from seeking or receiving information from the Center.
>
> ....
>
> "The Supreme Court has considered conflicts between investigatory needs and First Amendment freedoms on several occasions .... Where encroachment upon these freedoms is a threat, the court has imposed upon the Government the burden of demonstrating an 'adequate foundation' or 'compelling need' for the information sought. In Caldwell v. United States, 434 F. 2d 1081, (9th Cir. 1970), the Court of Appeals imposed a similar burden with respect to grand jury testimony which threatened to hinder the exercise of First Amendment freedoms."

The court then went on to hold, at page 438, that the government had neither advanced a foundation nor demonstrated a compelling need for the information sought in the subpoena.

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As to the right of the Foundation and its members to protect from disclosure the names of individuals seeking advice from it, this issue was addressed not only in In re Verplank, above, but also in Griswold v. Connecticut, 381 U. S. 479 (1965). In Griswold, certain physicians were arrested because they gave information and medical advice to married persons as to the means of preventing conception. For this service, fees were usually charged, although some couples were serviced free. The court allowed the physicians to raise not only their own rights, but also gave them standing to raise the constitutional rights of the married they counseled.

In discussing the scope of the First and Fourteenth Amendments, the court stated, at page 514, as follows:

> "In NAACP v. Alabama, 357 US 449, 462, 2 L. Ed. 1488, 1499, 78 S. Ct. 1163, we protected the 'freedom to associate and privacy in one's associations,' noting that freedom of association was a peripheral First Amendment right. Disclosure of membership lists of a constitutionally valid association, we held, as invalid 'as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association.' Ibid. In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected form of 'association' that are not political in the customary sense, but pertain to the social, legal, and economic benefit of members.
>
> ....
>
> "The right of 'association,' like the right of belief (Board of Education v. Barnette, 319 U.S. 624, 87 L. Ed 1628, 63 S. Ct. 1178, 147 ALR 674) is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.

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"The foregoing cases suggested that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance ... Various guarantees create zones of privacy."

The inclusion in the First Amendment protection of an association's right to channel individuals to members or other persons who share the association's views was discussed in Railroad Trainmen v. Virginia Bar, 377 U.S. 1 (1964). In that case, the Supreme Court ruled improper an injunction issued by a state court prohibiting as "unlawful solicitation of litigation" and the "unauthorized practice of law", labor union recommendations to injured members for obtaining legal assistance before settling claims, also recommending specific lawyers to handle such claims, as infringing rights guaranteed by the First and Fourteenth Amendments.

In discussing whether the union practice of providing both advice and referrals was within the rights of the association, the Supreme Court at pages 5 and 6 stated as follows:

"The result of the plan, the Brotherhood admits, is to channel legal employment to the particular lawyers approved by the Brotherhood as legally and morally competent to handle injury claims for members and their families. It is the injunction against this particular practice which the Brotherhood, of behalf of its members, contends denies them rights guaranteed by the First and Fourteenth Amendments. We agree with this contention.

"It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and the Federal Employers' Liability Act, statutory rights which would be vain and futile if the workers could not talk together freely as to the best course to follow. The right of members to consult with each other in a fraternal organization necessarily includes

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the right to select a spokesman from their number who could be expected to give the wisest counsel. That is the role played by the members who carry out the legal aid program. And the right of the workers personally or through a special department of their Brotherhood to advise concerning the need for legal assistance - and, most importantly, what lawyer a member could confidently rely on - is an inseparable part of this constitutionally guaranteed right to assist and advise each other."

At pages 7 and 8, the court went on to discuss the right of association as including advice and referrals as follows:

"Only last Term we had occasion to consider an earlier attempt by Virginia to enjoin the National Association for the Advancement of Colored People from advising prospective litigants to seek the assistance of particular attorneys. In fact, in that case, unlike this one, the attorneys were actually employed by the association which recommended them, and recommendations were made even to nonmembers. NAACP v. Button, supra. .... We hold that the First and Fourteenth Amendments protect the right of the members through their Brotherhood to maintain and carry out their plan for advising workers who are injured to obtain legal advice and for recommending specific lawyers."

Thus, it is clear that included in the First Amendment associational right is not only the right of advocacy, but also the right to refer persons to those who share the association's views. A person who believes in the Foundation's medical concepts would find that belief of little value if they could not also know who would provide them with the type of treatment advocated. And to expose those who seek the treatment to government harassment would have a chilling effect on their desire to pursue their treatment of choice.

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III. THE GOVERNMENT HAS FAILED TO DEMONSTRATE A COMPELLING STATE INTEREST SUFFICIENT TO WARRANT PRODUCTION OF THE DOCUMENTS SOUGHT

In the March 4, 1983 opinion and order the district court concluded that there were "persons who paid money to the Foundation for drugs", and that the Foundation was engaged in furnishing services "in the form of diets, a regimen of drugs, laboratory tests, and referrals and visits to doctors." This conclusion is apparently based upon the government's memorandum and four affidavits.

In accordance with this factual predicate, the court ordered the Foundation and Harold Manner "to produce the records revealing the identities of persons seeking treatment or receiving treatment from the Metabolic Research Foundation or Harold Manner." In response to this order the Foundation and Harold Manner did not produce any documents because neither Manner nor the Foundation were engaged in treating individuals or supplying drugs.

In response to the government's motion for clarification, the court altered its previous ruling by requiring the submission of all documents relating to the referral to doctors of individuals seeking health practitioners incorporating metabolic therapies in their practice. The factual predicate outlined in the March 4, 1983 Order does not form an adequate basis for the expanded ruling entered on July 7, 1983.

The compelling need and factual predicate upon which the court relies in ordering the enforcement of the subpoena appears to be that (1) the Foundation falsely asserts that metabolic

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therapies aid in the treatment of cancer, (2) Dr. Manner via the Foundation treats patients, (3) the Foundation is engaged in the distribution of drugs, and (4) the Foundation furnishes laboratory tests. Obviously, the unpopular or minority views advocated by an association cannot serve as the basis for invading that association's First Amendment freedoms. Also, there is no mention in the affidavits supplied by the government of any instance whereby the Foundation sold drugs or furnished laboratory tests. Compelling the Foundation to provide documents relating to these activities resulted in the transmittal of no documents whatsoever.

Therefore, the only remaining foundation for the government's need for the information seems to be its view that Harold Manner treats cancer patients. Not only is this view unsupported and even contradicted by the affidavits submitted, but even more importantly, the individual actions of Harold Manner do not form a factual predicate for securing the names of patients of the individuals seeking the names of medical practitioners who advocate and use metabolic therapy. Moreover, engaging in the practice of medicine is an area that has always been left to the jurisdiction of particular states rather than the federal government.

The affidavits submitted by the government fail to disclose that any funds whatsoever were paid either to Harold Manner or the Metabolic Research Foundation by any person. Also, each affidavit discloses that the individuals were referred to metabolic practitioners and were not treated by Harold Manner.

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In fact, the affidavit of Rose Plecki discloses that Harold Manner told her that he "was not a medical doctor" and "could not treat" her husband. The affidavit of Francesca Cardinallo indicates that she never even met with Harold Manner, but, rather, spoke to him while he was on a television show and subsequently conversed with him on the telephone. The remainder of the Cardinallo affidavit relays information regarding her experiences with Edward Karp.

The Paulette Peters affidavit discloses that she spoke briefly with Dr. Manner following a seminar that she attended. He suggested that she contact Dr. Davis at the American International Hospital in Zion, Illinois to discuss her son's illness. Mrs. Peters never placed her son under the care of Dr. Davis, but, rather, chose to follow the advice of an individual named Jerry Phillips, who has no association with Harold Manner or the Metabolic Research Foundation.

The government has failed to demonstrate a compelling need for the particular information it seeks, i.e., names of all persons who have been referred to medical practitioners. If the district court concluded that the government should be entitled to additional information, it should have required that it first exhaust the existing materials supplied to it before it required disclosure of information infringing on the Foundation's associational rights.

The Foundation has already produced its complete list of

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individuals who employ metabolic principles in their practice. Through this list the government could obtain information on where they may have ordered the vitamins and drugs they prescribe for metabolic therapy and who received remuneration for these products and medical services. These medical practitioners can testify whether Harold Manner was the individual who "treated" his various patients. Furthermore, as to the drug issue, Nutri-Dyn, the company which provided various products to patients, can provide information on whom they supplied, who provided payment, and whether Harold Manner or the Foundation received any rebates. In short, the government does not need to harass all persons who requested information from the Foundation concerning metabolic therapy and the availability to them of metabolic therapists.

As previously discussed, the government's burden is to show not only a nexus between the information and the factual interest, but also that the information cannot be obtained in a manner which would avoid invasion of associational privileges. The government has totally failed to meet this requirement.

If the purpose of the government's inquiry is simply to determine whether the Foundation or Harold Manner "treats" cancer patients, it has already been provided adequate documents to afford it the information it seeks. However, if the government seeks to curtail the advocacy of information and views concerning metabolic therapy, because in its view it is not a valid belief, then the list of patients referred to practitioners

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of the therapy would most assuredly assist in achieving that goal.

CONCLUSION

For the reasons stated, Plaintiffs respectfully urge this court to reverse the decision of the court below.

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A P P E N D I X

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF HARCLD MANNER AND THE METABOLIC RESEARCH FOUNDATION WITNESS BEFORE THE SPECIAL OCTOBER 1981 GRAND JURY	NO. 82 GJ 741

ORDER OF JUDGMENT AND COMMITMENT

On the Joint Motion re Order of Civil Contempt, pursuant to Title 28, United States Code, Section 1826 filed by the United States of America by Dan K. Webb, United States Attorney for the Northern District of Illinois on behalf of the Special October 1981 Grand Jury, and by Harold Manner and the Metabolic Research Foundation, by their attorneys, Dilling, Dilling and Gronek;

This Court having heretofore ruled on a Motion to Quash a Subpoena of June 7, 1982, which Motion was made by Harold Manner and the Metabolic Research Foundation, after briefing by the parties, and having ordered production of documents in an order of March 4, 1983, further clarified by an order of July 7, 1983;

This Court being further advised by stipulation of the parties that Harold Manner, President, Representative and Custodian of Records of Metabolic Research Foundation, has refused and will continue to refuse to produce documents to the Special October 1981 Grand Jury, which production was ordered by this Court in its order of July 7, 1983;

It is adjudged that Harold Manner, President, Representative

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and Custodian of Records of Metabolic Research Foundation, is in direct and continuing contempt of this Court for his failure to obey the order of this Court dated July 7, 1983;

IT IS THEREFORE ORDERED that Harold Manner, President, Representative and Custodian of Records of Metabolic Research Foundation, be and hereby is committed to the custody of the United States Marshal for the Northern District of Illinois until such time as he shall obey said Order.

IT IS FURTHER ORDERED that upon the filing of a Notice of Appeal from this Order, bail pending the disposition of such appeal in the amount of $4,500.00 own recognizance is hereby granted.

ENTER:

UNITED STATES DISTRICT COURT JUDGE

Dated at Chicago, Illinois
this day of

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