

COPY

IN THE COURT OF COMMON PLEAS OF BLAIR COUNTY, PENNSYLVANIA
Criminal

COMMONWEALTH OF PENNSYLVANIA)
)
 v.) CP-07-CR-1272-2014
)
 JOSHUAA S. BRUBAKER)

Omnibus Pre-Trial Motion

TO THE HONORABLE JUDGES OF SAID COURT:

NOW COMES Joshua S. Brubaker, by and through his attorneys, Shubin Law Office, P.C., and states the following:

Introductory Statement

Believing that our country is in distress, that "our freedoms are taken away from us more and more every day," and particularly concerned about the treatment of Native Americans, Joshua Brubaker spray-painted the initials "A.I.M." on an American flag, then hung that flag upside-down on the side of his house. "A.I.M." stood for "American Indian Movement." A flag hung upside-down is a recognized sign of distress. Mr. Brubaker did this as an act of political protest. N.T. 6/3/14 at 19, 30, 70-72.

The police charged Mr. Brubaker criminally for this act of protest under 18 Pa.C.S. §2102, Desecration of Flag, and 18 Pa.C.S. §2103, Insults to National or Commonwealth Flag.

The present motion requests that this Court:

- Declare that 18 Pa.C.S. §2103 is unconstitutional on its face.
- Quash Count 1 of the Information because 18 Pa.C.S. §2103 has been unconstitutionally applied to Mr. Brubaker.
- Grant *habeas corpus* relief on Count 1 of the Information because Mr. Brubaker did not engage in "malicious" conduct toward a "displayed" flag.
- Quash Count 2 of the Information because 18 Pa.C.S. §2102 has been unconstitutionally applied to Mr. Brubaker.
- Grant *habeas corpus* relief on Count 2 of the Information because it is uncontroverted that Mr. Brubaker's conduct fell within that statute's exception for "any patriotic or political demonstration or decorations," 18 Pa.C.S. §2102(b)(4), and in any event the District Attorney failed to prove a violation of 18 Pa.C.S. §2102(b)(1).

A true and correct copy of the June 3, 2014, notes of testimony is attached to this Motion.

Statement of the Case

1. After reading of a court decision that eliminated the warrant requirement for an automobile search, Joshua Baker decided to hang an upside-down flag on the side of his house emblazoned with the initials "A.I.M.," standing for "American Indian Movement," an organization that he follows because of his Native American heritage.

2. Mr. Brubaker did this to express his belief that (i) "our country is in distress"; (ii) "our freedoms are taken away from us more and more every day"; and (iii) Native American peoples are being mistreated in the United States. N.T. 6/3/14 at 70-72.

3. Mr. Brubaker hung the flag upside down because such a display of the flag is a recognized sign of distress. N.T. 6/3/14 at 30, 70-72.

4. On May 13, 2014, police removed Mr. Brubaker's flag from the side of his house.

5. When Mr. Brubaker discovered that the flag had been removed, he went to the police station to report it stolen. N.T. 6/3/14 at 51.

6. During his visit to the police station, Mr. Brubaker learned that police had seized the flag because they believed that he had desecrated it. N.T. 6/3/14 at 51-52.

7. In response to the police claim of flag desecration, Mr. Brubaker explained that he had exhibited the flag upside-down as a symbol that the United States "was in distress," and that "A.I.M." stood for "American Indian Movement." N.T. 6/3/14 at 19, 53.

8. Following this encounter with the police, Mr. Brubaker provided them with copies of United States Supreme Court case law substantiating his claim that his display of the flag was constitutionally protected. N.T. 6/3/14 at 59.

9. Nonetheless, on May 14, 2014, police charged Mr. Brubaker with violating 18 Pa.C.S. §2102, Desecration of Flag, and 18 Pa.C.S. §2103, Insults to National or Commonwealth Flag, in a complaint filed by Assistant Allegheny Police Chief Leo Berg III.

10. At the preliminary hearing, Assistant Chief Berg explained his reasons for filing the charges in the following terms:

a. Mr. Brubaker had spray-painted the flag, and had done so "not even in a neat, orderly way," N.T. 6/3/14 at 55;

b. Mr. Brubaker had not "earned [the] privilege" to "utilize a United States symbol for his personal use," N.T. 6/3/14 at 56; and

c. the flag "wasn't even displayed ... patriotically. It wasn't displayed in an honorable way. It wasn't-- it wasn't done in a decent way." N.T. 6/3/14 at 60.

I.
Motion to Declare 18 Pa.C.S. 2103 Unconstitutional

11. The preceding paragraphs of this document are incorporated herein as though set forth verbatim and in their entirety.

12. Section 2103 of the Crimes Code makes it an offense to "maliciously take down, defile, injure, remove, or in any manner damage, insult, or destroy any American flag... which is displayed anywhere." 18 Pa.C.S. §2103.

13. Unlike 18 Pa.C.S. §2102, Section 2103 does not contain an exception for use of the flag for political purposes.

14. Section 2103-- a statute enacted in 1973 and never amended since-- violates the First Amendment to the United States Constitution as applied to the states by operation of the Fourteenth Amendment. *Texas v. Johnson*, 491 U.S. 397 (1989).

15. Section 2103 violates Article I, Section 7, of the Pennsylvania Constitution.

16. Section 2103 is facially overbroad because its constitutionally impermissible applications are substantial in relation to any legitimate applications.

17. Section 2103 fails to define its proscriptions with sufficient definiteness that an ordinary person can understand what conduct is prohibited. Moreover, Section 2103's wording encourages arbitrary and discriminatory enforcement. As such, Section 2103 is void-for-vagueness under the Fourteenth Amendment to the United States Constitution and Article I, Sections 1 and 9, of the Pennsylvania Constitution.

WHEREFORE, this Court should enter an Order declaring 18 Pa.C.S. § 2103 facially invalid under the First Amendment of the United States Constitution, Article I, Section 7, of the Pennsylvania Constitution, the Fourteenth Amendment to the United States Constitution, and

Article I, Sections 1 and 9, of the Pennsylvania Constitution. This Court should further enter an order quashing Count 1 as based on an unconstitutional statute.

II.
Motion to Quash Count 1
(Unconstitutional Application of 18 Pa.C.S. §2103)

18. The preceding paragraphs of this document are incorporated herein as though set forth verbatim and in their entirety.

19. Mr. Brubaker's act of hanging a flag upside-down with the American Indian Movement initials painted on it was an act of political speech and/or political expression, protected by the First Amendment to the United States Constitution as applied to the states by operation of the Fourteenth Amendment, and Article I, Section 7, of the Pennsylvania Constitution, as well as the rights guaranteed by Article I, Sections 1 and 2, of the Pennsylvania Constitution.

20. Mr. Brubaker's act of hanging a flag upside-down with the American Indian Movement initials on it was an act of personal expression protected by the First Amendment to the United States Constitution as applied to the states by operation of the Fourteenth Amendment, and Article I, Section 7, of the Pennsylvania Constitution as well as the rights guaranteed by Article I, Sections 1 and 2, of the Pennsylvania Constitution.

21. The police violated these rights by charging Mr. Brubaker under 18 Pa.C.S. §2103. *Texas v. Johnson*, 491 U.S. 397 (1989); *Commonwealth v. Bricker*, 666 A.2d 257 (Pa. 1995).

22. The police applied 18 Pa.C.S. §2103 to Mr. Brubaker in a discriminatory manner, in violation of the Fourteenth Amendment to the United States Constitution and Article I, Sections 1 and 9, of the Pennsylvania Constitution.

III.
Motion for Writ of Habeas Corpus
(Lack of *Prima Facie* Case on Count 1)

23. The preceding paragraphs of this document are incorporated herein as though set forth verbatim and in their entirety.

23. The District Attorney failed at the preliminary hearing to prove that Mr. Brubaker's use of the flag was "malicious" within the meaning of 18 Pa.C.S. §2103.

25. Moreover, Section 2103 is designed to punish, by its terms, conduct toward a flag that is in an existing condition of display. Thus, for example, the statute would criminalize the malicious "taking down" and destruction of a flag being displayed in front of a government building.

26. The notes of testimony of the preliminary hearing make it clear that anything Mr. Brubaker did to the flag *occurred before it was displayed*. It was, moreover, his own flag on his own property.

27. Accordingly, the District Attorney failed to prove at the preliminary hearing that Mr. Brubaker engaged in conduct toward a flag "which [was] displayed anywhere."

WHEREFORE, this Court should enter an order granting *habeas corpus* relief and dismissing Count 1 of the Information.

IV.
Motion to Quash Count 2
(Unconstitutional Application of 18 Pa.C.S. §2102)

28. The preceding paragraphs of this document are incorporated herein as though set forth verbatim and in their entirety.

29. By charging Mr. Brubaker under 18 Pa.C.S. §2102, the police violated Mr. Brubaker's rights to political and/or personal expression under the First Amendment to the United States Constitution as applied to the states by operation of the Fourteenth Amendment, and Article I, Section 7, of the Pennsylvania Constitution as well as the rights guaranteed by Article I, Sections 1 and 2, of the Pennsylvania Constitution. *Texas v. Johnson*, 491 U.S. 397 (1989); *Commonwealth v. Bricker*, 666 A.2d 257 (Pa. 1995).

30. The police applied 18 Pa.C.S. §2102 to Mr. Brubaker in a discriminatory manner, in violation of the Fourteenth Amendment to the United States Constitution and Article I, Section 9, of the Pennsylvania Constitution.

V.
Motion for Writ of Habeas Corpus
(Lack of Prima Facie Case on Count 2)

31. The preceding paragraphs of this document are incorporated herein as though set forth verbatim and in their entirety.

32. The notes of testimony of the preliminary hearing make it clear that Mr. Brubaker's use of the flag was political in purpose and intent.

33. Section 2103(b)(4) of the Crimes Code exempts from prosecution any use of the flag associated with "any patriotic or political demonstration or decorations."

34. The exception contained in 18 Pa.C.S. §2103(b)(4) negates any asserted *prima facie* violation of 18 Pa.C.S. §2103(a).

35. In any event, the District Attorney failed to prove at the preliminary hearing that Mr. Brubaker "publicly or privately mutilated, defaced, defiled, or trampled upon, or cast contempt in any manner upon any flag."

WHEREFORE, this Court should enter an order granting *habeas corpus* relief and dismissing Count 2 of the Information.

VI.
Motion to Suppress

36. The preceding paragraphs of this document are incorporated herein as though set forth verbatim and in their entirety.

37. The police lacked a warrant to seize the flag owned by Mr. Brubaker from premises owned or controlled by Mr. Brubaker.

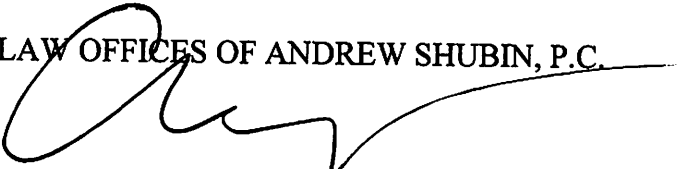
38. This seizure violated Mr. Brubaker's right to be free from unreasonable searches and seizures, guaranteed by the Fourth Amendment of the United States Constitution as applied to the states by operation of the Fourteenth Amendment, and Article I, Section 8, of the Pennsylvania Constitution.

WHEREFORE, the flag seized by police should be suppressed.


39. Defendant expressly reserves the right to supplement or amend this omnibus pretrial motion.

Respectfully submitted :

LAW OFFICES OF ANDREW SHUBIN, P.C.



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behalf of the American Civil Liberties Union.*

COMMONWEALTH OF PENNSYLVANIA
vs. CR-0000209-2014
JOSHUA SHANE BRUBAKER

Original

PRELIMINARY HEARING

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DATE: June 3, 2014
TIME: 2:38 p.m. - 3:57 p.m.
PLACE: District Magistrate
Steven D. Jackson
5929 California Avenue
Altoona, Pennsylvania
REPORTER: Susanna C. Englert
CSR 1951

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BUCKLER & ASSOCIATES
- AND -
ASAP COURT REPORTING

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- AND -
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BUCKLER & ASSOCIATES
- AND -
ASAP COURT REPORTING

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BUCKLER & ASSOCIATES
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ASAP COURT REPORTING

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BUCKLER & ASSOCIATES
- AND -
ASAP COURT REPORTING

1 PROCEEDINGS 5
2
3 THE MAGISTERIAL DISTRICT JUSTICE:
4 This is a police criminal complaint, Commonwealth
5 of Pennsylvania versus Joshua S. Brubaker of
6 Duncansville. For the record it's CR-209 of '14.
7 He's charged with one count of Section 2103,
8 insults to national Commonwealth flag, and one
9 count of 2102(a)(4), desecration of flag.
10 Do you need me to read the
11 complaint, sir?
12 MR. SHUBIN: No, we waive reading.
13 THE MAGISTERIAL DISTRICT JUSTICE:
14 Waive reading of the complaint, okay.
15 Any motions?
16 MR. SHUBIN: No, Judge.
17 THE MAGISTERIAL DISTRICT JUSTICE:
18 No motions, okay. All right.
19 Want to call your first witness?
20 MR. CONSIGLIO: Tonetta McFadden,
21 Your Honor.
22 ///
23 ///
24 ///
25 ///

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- AND -
ASAP COURT REPORTING

1 - - - 6
2 TONETTA McFADDEN,
3 the witness, having been duly sworn, testified on
4 behalf of the Commonwealth as follows:
5 THE MAGISTERIAL DISTRICT JUSTICE:
6 Have a seat and please speak into the microphone.
7 And you have to give me that name again.
8 MR. CONSIGLIO: Tonetta McFadden.
9 THE MAGISTERIAL DISTRICT JUSTICE:
10 Anetta?
11 MR. CONSIGLIO: Tonetta.
12 THE WITNESS: With a "T."
13 THE MAGISTERIAL DISTRICT JUSTICE:
14 Oh, Tonetta. Spell that for me.
15 THE WITNESS: T-O-N-E-T-T-A.
16 THE MAGISTERIAL DISTRICT JUSTICE:
17 And the last name again?
18 THE WITNESS: McFadden. M-C- --
19 THE MAGISTERIAL DISTRICT JUSTICE:
20 I got that. F-A-D-D-A-N?
21 THE WITNESS: E-N.
22 THE MAGISTERIAL DISTRICT JUSTICE:
23 E-N. I'm not doing well.
24 Your witness.
25 ///

BUCKLER & ASSOCIATES
- AND -
ASAP COURT REPORTING

1 - - - 7
2 DIRECT EXAMINATION
3
4 BY MR. CONSIGLIO:
5 Q. Ms. McFadden, just for the record,
6 would you state your name again?
7 A. Tonetta McFadden.
8 Q. And where do you live, ma'am?
9 A. On the Old Sixth Avenue Road,
10 Hixton, Duncansville.
11 Q. Okay. Do you know, or at least
12 aware of a fellow by the name of Joshua
13 Brubaker?
14 A. No, I --
15 Q. You're not, okay. Don't even know
16 him, that's fine.
17 Do you live anywhere near the
18 police station in Allegheny Township?
19 A. I go around there, yes.
20 Q. And on May the 12th 2014, were you
21 in that area?
22 A. Yes, I was.
23 Q. And at that point in time, how were
24 you in the area; were you driving, walking? What
25 were you doing?

BUCKLER & ASSOCIATES
- AND -
ASAP COURT REPORTING

1 A. I was driving. 8
2 Q. Okay. And when you were driving,
3 did you observe something that disturbed you?
4 A. Yes, I did. I stopped at the stop
5 sign and I looked left and right, and I come
6 around the corner to the right, and I seen a flag
7 upside down.
8 Q. Okay.
9 A. I kind of seen red because I was
10 mad because I'm an American veteran and I'm an
11 American Indian. My heritage -- my grandmother,
12 my mother is full-blooded Indian.
13 Q. Okay. And what, if anything, did
14 you do as a result of that?
15 A. I went home and I called the
16 Allegheny Township Police, and they told me they
17 would check into it.
18 Q. And what did you tell them, ma'am?
19 A. I seen an American flag hanging
20 upside down. I didn't like it. I'm a veteran.
21 And it had something written on it, but I wasn't
22 sure. I thought it said M-I-A.
23 Q. Okay.
24 MR. CONSIGLIO: Could I mark these
25 Commonwealth 1 and 2?

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(Commonwealth Exhibit No. 1 marked for identification, retained by the Court.)

(Commonwealth Exhibit No. 2 marked for identification, retained by the Court.)

BY MR. CONSIGLIO:

Q. Ma'am, take a look at, well, both of them, No. 1 and No. 2, and just tell me what those pieces of paper are, just the paper, not what's on them.

A. It's a dishonor to our flag.

Q. No. What are you looking at?

A. That's the house that I seen when I came around the corner.

Q. Let me make it simple. Are these photographs? Are they copies of photographs?

A. Yes.

Q. All right.

A. Okay.

Q. From that point on, could you tell me what they show.

A. They show the American flag.

Q. Okay. And how is it displayed?

A. Upside down.

Q. And what's displayed on it?

A. A-I-M. I put it backwards. Sorry.

Q. That's okay. Now, are they both the same photograph except at different distances from the subject?

A. Yes.

Q. Okay. And is this the photograph -- I'm sorry. Is this the flag that you saw in the manner it was displayed?

A. Yes.

Q. Okay. All right. So you called the police the first time about it?

A. Yes, I did.

Q. And was that the last that you were involved in, or the police were involved in, to your knowledge?

A. No, it was not. I called -- I stopped the next day.

Q. Okay. Well, was that just in the travels or had you deliberately gone back there again?

A. It was just in the travels.

Q. Okay.

A. And I just -- I don't know why I went through that area, but I went through it again to see that -- see if the flag was removed, because I was told that an officer would look

into it.

Q. Okay.

A. So I guess I went back to check, and there it was. And I seen red again, so I went into Allegheny Township this time.

Q. Okay. I think you've already mentioned this, but just for the record, so I have it on there clearly, how would you describe it, if you could -- and this is an easy thing -- but how would you describe the level of your offense at seeing this?

A. From 1 to 10, it was 10.

Q. So you would say serious?

A. Yes.

Q. All right. What happened, if you know, subsequent to that? Were you more involved in it from there, or did you just let things go by the way the police took care of it?

A. Well, the second day when I went in, checked, she said an officer would call me.

Q. Uh-huh.

A. And then a buddy of mine called me and told me it was in the paper. And then the following day, Wednesday, Sergeant Berg called me and told me that they took down the flag. And I

thanked them.

MR. CONSIGLIO: Okay. That's all.

THE MAGISTERIAL DISTRICT JUSTICE:

Your witness.

MR. McGRAW: If I may, Your Honor.

- - -

CROSS EXAMINATION

- - -

BY MR. McGRAW:

Q. Ma'am, you testified that you're a native American in part --

A. Yes.

Q. -- is that right? How are you aware of your American heritage?

A. My grandmother is full-blooded Cherokee.

Q. You understand that the Native Americans have had a difficult time throughout their history --

A. Yes, I do.

Q. -- correct? All right. Are you aware that A-I-M stands for American Indian Movement?

A. I did not until I was informed of that.

1 Q. Okay. And you know that that is an
2 organization that's been in existence for
3 40 years?

4 A. No, I did not.

5 Q. Okay. Do you dispute that that's
6 the case?

7 A. No.

8 Q. Now, ma'am, you testified that you
9 saw red. That means that you were angry,
10 correct?

11 A. Yes, I was.

12 Q. Okay. Can you tell the Judge in a
13 little more detail why you were angry.

14 A. Because I'm a veteran, and I seen
15 that flag. And I was overseas fighting for that
16 flag with my life.

17 Q. Okay.

18 A. And to see that in my own
19 neighborhood? Muh-uh, it ain't going on.

20 Q. Okay. You didn't like that?

21 A. No, I did not.

22 Q. You didn't like that form of
23 expression, correct?

24 A. Correct.

25 Q. Okay. Thank you.

1 MR. McGRAW: Nothing further.
2 THE MAGISTERIAL DISTRICT JUSTICE:
3 Anything further?

4 MR. CONSIGLIO: No.

5 MR. SHUBIN: No.

6 THE MAGISTERIAL DISTRICT JUSTICE:

7 You can step down. Thank you.

8 MR. CONSIGLIO: Officer Berg.

9 - - -
10 ASSISTANT CHIEF LEO JOHN BERG, III,

11 the witness, having been duly sworn, testified on
12 behalf of the Commonwealth as follows:

13 THE MAGISTERIAL DISTRICT JUSTICE:

14 Have a seat.

15 - - -
16 DIRECT EXAMINATION
17 - - -

18 BY MR. CONSIGLIO:

19 Q. Officer Berg, state your name for
20 the record, please.

21 A. Leo John Berg, III. I'm the
22 assistant chief of the Allegheny Township Police
23 Department.

24 Q. How long have you been a member, or
25 an officer, let's say, of the Altoona -- of the

1 Allegheny Township Police?

2 A. Allegheny Township?

3 Q. Yeah.

4 A. I've been there, I'm working on
5 18 years.

6 Q. Okay. And how long have you been
7 assistant chief?

8 A. For about a month.

9 Q. Okay. And what -- let's say now
10 and before, what would your duties be?

11 A. Regular patrol duties,
12 investigating crime, dealing with the public.

13 Q. In that capacity, do you receive,
14 let's say a notification of a problem on May
15 the 12th, 2014, in your area?

16 A. Yes, I did.

17 Q. And what was that?

18 A. I received a -- an individual
19 stopped at the station, or called the station,
20 and complained about the flag that was hanging
21 across the street.

22 Q. Was that the lady that just
23 testified?

24 A. She did.

25 Q. And did you hear her testimony?

1 A. I did.

2 Q. Would there be anything different
3 that you'd add to her testimony between your
4 department and her?

5 A. No.

6 Q. Okay. Were you -- did you become
7 aware of the flag at that time, or had you
8 already been aware of it?

9 A. I had been aware of it of my own.

10 Q. Okay. And in connection with your
11 department, where is this house and this display
12 of this flag located?

13 A. Directly across the street from the
14 Allegheny Township Municipal Building.

15 Q. And we saw the photograph. Who
16 took that?

17 A. I took the photographs.

18 Q. I'm not going to show them to you
19 again, but basically, how was the flag defaced?

20 A. The flag was hanging upside down
21 with the letters A-I-M spray painted in white
22 across the entire flag.

23 Q. All right, that's what I wanted to
24 know. The pictures showed A-I-M, but didn't show
25 what type of material was used to put it on the

1 flag.

2 But you say it was paint, white
3 paint?

4 A. It appeared to be paint.

5 Q. When you got the first call from
6 Ms. McFadden, what did you do?

7 A. I did not immediately respond to
8 that. I -- I chose not to deal with it at that
9 point. I was hoping that it was just going to be
10 a temporary issue.

11 Q. Okay. Then how did you deal with
12 the second call?

13 A. Second call, I personally walked --
14 let me back up. The first call, I walked out and
15 took photographs of the flag the way it was
16 presented.

17 Q. And that's the one shown today?

18 A. That's the photographs that you
19 presented today.

20 Q. Okay. Then what?

21 A. The following day, when I received
22 the second complaint, I personally responded over
23 and attempted to make contact with the resident,
24 who was later identified as Mr. Brubaker.

25 Q. Is he in the courtroom today?

1 A. He is. He's seated with his
2 attorneys. He has the black shirt --

3 Q. Okay.

4 A. -- and the tattoos on his arm.

5 Q. And even though you chose to let
6 the matter go apparently before these calls, how
7 did you view the situation?

8 A. I thought it was very offensive. I
9 thought it was harassment.

10 Q. Okay. And did you check into
11 Mr. Brubaker's background in this matter?

12 A. Yes.

13 Q. And was that in response to your
14 discussions with him?

15 A. Prior to this, I believe it --

16 MR. SHUBIN: Judge, I'm going to
17 object, because I'm not sure how -- or I don't
18 believe that Mr. Brubaker's background would have
19 any relevance to the Commonwealth's establishment
20 of the prima facie case.

21 MR. CONSIGLIO: Your Honor, I'm
22 simply asking him -- I'm going to ask him, if
23 permitted, to check into his so-called political
24 background in response to what Mr. Brubaker told
25 this officer.

1 MR. SHUBIN: If it's limited to him
2 checking into his political background, I'm fine.

3 THE MAGISTERIAL DISTRICT JUSTICE:
4 Okay. Then continue.

5 MR. CONSIGLIO: Let's try it this
6 way. It might be easier.

7 THE MAGISTERIAL DISTRICT JUSTICE:
8 Okay.

9 BY MR. CONSIGLIO:

10 Q. Did you talk to Mr. Brubaker about
11 the situation?

12 A. Yes.

13 Q. Okay. And what did he tell you as
14 to why the flag was the way it is and why it was
15 located where it was?

16 A. Well, he explained himself that the
17 country was in distress, that's why the flag was
18 hanging upside down.

19 Q. The country was in distress?

20 A. The country was in distress.

21 Q. All right.

22 A. And he also identified the flag
23 as -- the initials on the flag as the American
24 Indian Movement.

25 Q. Okay. And in response to that, did

1 you attempt to determine whether the American
2 Indian Movement is an organization?

3 A. Well, at that point, I cautioned
4 him. I told him that I really wanted to protect
5 his rights and didn't want to discuss the matter
6 with him.

7 Q. Okay. Regardless, did you
8 eventually check into --

9 A. I had already seized the flag. I
10 had already taken the actions that I was going to
11 take.

12 Q. Okay, fine. Did you look into the
13 American Indian Movement --

14 A. I did.

15 Q. -- to determine if it was an
16 organization?

17 A. There is an organization.

18 Q. Okay. And in light of what
19 Mr. Brubaker told you, did you try to determine
20 whether he was a member?

21 A. I did.

22 Q. And is he?

23 A. No, he is not.

24 Q. At any point in time, did you take,
25 shall we call, criminal action in this matter?

1 A. I simply filed --

2 Q. Okay.

3 A. -- the charges that I believe were

4 appropriate.

5 Q. Okay. And there are two charges

6 filed?

7 A. That's correct.

8 Q. Okay. And one, I believe,

9 indicates that in fact 2202, entitled

10 "Desecration of the Flag," does in fact make it a

11 crime to desecrate the flag, does it not?

12 A. It does.

13 Q. Okay.

14 A. By Pa statute it does.

15 Q. Okay. And does the statute -- and

16 I realize this is available to the Magistrate,

17 but just for the record -- does the statute

18 indicate that a person is guilty of a third

19 degree misdemeanor if he exposes to public view

20 any such marked or defiled flag?

21 A. It does.

22 Q. And in your judgment, is this

23 exactly what that did?

24 A. That's exactly what this did, why

25 he was charged with the charge he was charged

1 with.

2 Q. Now, in reading the charge, did you

3 also read that there are certain exceptions to

4 that charge?

5 A. I did.

6 Q. And did you take note of Exception

7 No. 4, that there -- the exception is if the

8 statute -- I'm sorry. The statute does not apply

9 to any patriotic or political demonstration or

10 declaration?

11 A. Yes, but I didn't see this as a

12 political statement.

13 Q. Well, that was going to be my next

14 question. What, in fact, did you see it -- I

15 think you already mentioned -- but what did you

16 see this as?

17 A. I saw it as a desecration intended

18 to harass and annoy is what I saw it as, for not

19 only the Allegheny Township Police Department,

20 for one.

21 Q. Now, in connection with this

22 matter, you also filed a second charge, insults

23 to the national -- or Commonwealth flag, No.

24 2103 --

25 A. Yes.

1 Q. -- of the same code?

2 A. Yes, I did.

3 Q. And did you -- you obviously read

4 that section and made the decision relative

5 thereto?

6 A. I did.

7 Q. Okay. And did you take note that a

8 person is guilty of a misdemeanor of the second

9 degree if he injures or in any manner damages,

10 insults, or destroys the American flag?

11 A. I did.

12 Q. Did you take note that there are no

13 exceptions under that statute, that there are no

14 exceptions?

15 A. Clearly there are no exceptions to

16 that.

17 MR. CONSIGLIO: That's all I have,

18 Judge.

19 - - -

20 CROSS EXAMINATION

21 - - -

22 BY MR. SHUBIN:

23 Q. Officer Berg, is that how I should

24 refer to you as or assistant chief?

25 A. Assistant chief.

1 Q. Assistant Chief Berg, my name is

2 Andy Shubin. I'm going to ask you a few

3 questions about your role in this.

4 As I understand it, the Allegheny

5 Township Police Department is located directly

6 across the street from where my client lives. Is

7 that right?

8 A. That's correct.

9 Q. Okay. And it's in the township

10 municipal building. Is that right? Is the

11 Police Department in a municipal building?

12 A. That's correct, yes.

13 Q. Okay. So the Police Department is

14 one office in a municipal building?

15 A. That's correct.

16 Q. And would that be the center of

17 town essentially, if there is town?

18 A. I wouldn't say center of town, but

19 it's in a busy area of the township.

20 Q. A high-traffic area?

21 A. Correct.

22 Q. High-exposure area?

23 A. That's correct.

24 Q. So if somebody wanted to hang a

25 banner with a message of protest in your

1 township, this would be the place to do it
2 because this is across from the municipal
3 building and --

4 A. It would be in plain view.

5 Q. -- and it's where lots of traffic
6 is. Is that right?

7 A. That's correct.

8 Q. Now, I understand from your direct
9 that Ms. McFadden -- is it McFadden, Tonetta
10 McFadden?

11 A. That's correct.

12 Q. Okay -- that Ms. McFadden first
13 called the station on May 12th. Is that right?

14 A. I'm not sure if she called or she
15 stopped, but nevertheless, we did receive a
16 complaint specifically from her.

17 Q. Understood. Did you receive a
18 complaint from anyone else, or just her?

19 A. Just her.

20 Q. Okay. So -- and did you hear from
21 anyone else?

22 A. Yes. Other comments were made
23 about the flag.

24 Q. And were there comments made to the
25 extent that, I don't agree with this, but I would

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1 defend his right to do it?

2 A. Afterwards, not prior to, no.

3 Q. Afterwards, okay. So when

4 Ms. McFadden reported it, you had already noticed
5 this flag, correct?

6 A. I did. I did, as did others in our
7 department.

8 Q. Understood. And you tolerated it.
9 Is that right?

10 A. Correct.

11 Q. And even though it was painful --

12 A. Yes.

13 Q. -- for you to see?

14 A. Absolutely.

15 Q. You decided to leave it there. Is
16 that right?

17 A. Yes.

18 Q. And did you make a decision at that
19 point, before Ms. McFadden came in, that this was
20 illegal and you were going to prosecute this
21 case, or you were going to file --

22 A. Not at that point. I did some
23 research. I went back and looked in the crimes
24 code.

25 Q. And confirmed that Pennsylvania

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1 still had the statute?

2 A. That is correct.

3 Q. You weren't sure that it did. Is
4 that right?

5 A. I wasn't sure -- I knew that the
6 section was there, but I didn't know the
7 specifics of the section.

8 Q. Understood. But do you recall from
9 way back when, when the Supreme Court issued
10 rulings back in the '80s and the '90s that
11 permitted the flag burning, the Johnson case --
12 do you remember that at that time?

13 MR. CONSIGLIO: Objection,
14 Your Honor. They do not apply to this statute.

15 MR. SHUBIN: Actually, Judge --

16 THE MAGISTERIAL DISTRICT JUSTICE:
17 Well, go ahead. We'll hear on it.

18 MR. SHUBIN: It's not only a legal
19 issue, it's a factual issue. The officer will
20 testify that he was given copies of those cases
21 by my client.

22 MR. CONSIGLIO: The point is,
23 Judge, this statute is Constitutional. It was
24 held constitutional in the Bickers case by the
25 Supreme Court of this Commonwealth, so that this

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1 unconstitutional movement regarding burning flags
2 has nothing to do with this statute.

3 MR. SHUBIN: We disagree with that.

4 We think --

5 THE MAGISTERIAL DISTRICT JUSTICE:

6 I'm sure you do.

7 MR. SHUBIN: -- the statute is
8 Constitutionally dubious. I don't think you need
9 to reach that issue today; however, you do
10 need -- I believe that you do need to establish
11 this wasn't expressive conduct, political
12 conduct. It's a subsection, Subsection (b)(4),
13 which the District Attorney has already raised.
14 It's a part of this case. And I believe that
15 that is important here.

16 THE MAGISTERIAL DISTRICT JUSTICE:

17 I'll let you proceed.

18 MR. SHUBIN: Right.

19 BY MR. SHUBIN:

20 Q. But did you remember when you went
21 back to look at the books to see about the
22 statutes that the Supreme Court had issued,
23 rulings back in the '80s and '90s about flag
24 burning, flag desecration?

25 A. The -- your client did present me

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1 with case law.

2 Q. He presented that afterward, right?

3 A. Correct.

4 Q. Okay. After you had already seized
5 the flag?

6 A. That's correct.

7 Q. I'm just wondering if you knew
8 about that stuff already, did you remember it?

9 A. I didn't. I'll be honest about it.
10 I did not remember.

11 Q. Okay.

12 A. I remember the section specific to
13 the Pennsylvania statutes.

14 Q. Would it be fair to say that this
15 is the first time that you've ever used this
16 statute, Officer?

17 A. Yes, it is.

18 Q. Do you recall how many days you and
19 your officers saw the flag flying there before
20 Ma. --

21 A. I personally saw it for two days.

22 Q. The 12th?

23 A. Right. I found out later that
24 other officers had noticed it over the weekend,
25 but I personally did not see it.

1 Q. And when you noticed it and
2 Mr. Consiglio showed you -- you've seen the
3 pictures -- the pictures that you took, it's
4 upside down. Is that right?

5 A. Yes, it is.

6 Q. Were you in the military?

7 A. No.

8 Q. But did you know at that point that
9 an upside down flag symbolized -- was used as a
10 symbol of distress in the military and in other
11 traditions?

12 A. In extreme circumstances, I did
13 know that. Hanging the flag upside down is a
14 call of distress.

15 Q. Were you aware that factions of the
16 NRA called for flying flags upside down to show
17 distress over those sorts of issues, gun rights
18 issues? Were you aware of that?

19 A. No, I was not.

20 Q. That the Tea Party uses an upside
21 down flag to express it's discontent with the
22 national dialog? Were you aware of that?

23 A. I don't follow the Tea Party.

24 Q. Were you aware that in Moon
25 Township, up near Pittsburgh, that an official in

1 the Republican Party flew a flag upside down
2 immediately after Barack Obama was re-elected, to
3 express their discontent with how the country was
4 going?

5 MR. CONSIGLIO: Your Honor, you
6 ruled he can ask him questions. I haven't
7 objected because of that ruling, but it's just
8 completely irrelevant.

9 THE MAGISTERIAL DISTRICT JUSTICE:
10 Okay.

11 MR. CONSIGLIO: Has nothing to do
12 with this case. Whatever the Tea Party does,
13 whatever Barack Obama does, whatever whoever
14 does, it doesn't matter. Because they think they
15 can do this and they think it's distress does not
16 make it distress. It has nothing to do with this
17 case.

18 MR. SHUBIN: Judge, on the direct
19 exam, the District Attorney questioned Assistant
20 Chief Berg about whether he felt that this was
21 political in nature, whether he -- this was --
22 and this is the government -- the government's
23 decision to decide when we're speaking
24 politically, whether it's protected or not.

25 It's not the government's job; it

1 is your job. And so these are the kinds of
2 considerations that I think that the Court has to
3 decide. It is not -- that's the -- really the
4 difficulty with this case, which is why I think
5 ultimately this is a First Amendment case, but --
6 and Mr. Consiglio and the Assistant Chief are
7 very honest about it.

8 This is a situation where he saw --
9 I mean, I don't want to get into closing
10 arguments, but it is a part of my presentation.
11 He sees this message which he identifies as being
12 about the American Indian Movement and about
13 distress.

14 THE MAGISTERIAL DISTRICT JUSTICE:
15 Okay.

16 MR. SHUBIN: And he was asked to
17 make a determination as to whether this was
18 political. And he made a determination it
19 wasn't. And the question is whether the
20 Constitution gives the government that ability to
21 tell us what we can say and what we can think, or
22 whether it's the Court's ability and the
23 Constitution's role.

24 And so when I show people that --
25 when I'm showing the assistant chief this, it's

1 to show that this is a common -- you know, this
2 is a sign of distress. It is a common sign of
3 distress. And it's what people use
4 historically --

5 THE MAGISTERIAL DISTRICT JUSTICE:
6 Okay.

7 MR. SHUBIN: -- to show that.

8 MR. CONSIGLIO: Your Honor, that's
9 a nice speech, but I did not ask him that. I
10 asked him whether he read the statute and read
11 the exceptions. I didn't ask what other people
12 did, what other organizations did.

13 If they want to believe that this
14 is a sign of distress, that's their business.
15 Maybe they should be arrested. I'm simply saying
16 to you that this is irrelevant. No matter how
17 you cut it, it's irrelevant. If we're going to
18 go by the Rules of Court, then let's make --

19 THE MAGISTERIAL DISTRICT JUSTICE:
20 Well, for prima facie purposes, you already made
21 your point as far as the upside down flag is
22 concerned.

23 Can we move on from that point?

24 MR. SHUBIN: Yes, sir.

25 ///

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1 BY MR. SHUBIN:

2 Q. On the 12th you decide to take
3 photographs of the flag. Is that right?

4 A. That's correct.

5 Q. Potentially you -- the photographs
6 were potential -- were going to be potential
7 evidence in the case --

8 A. That's correct.

9 Q. -- is that correct?

10 A. Yes.

11 Q. You had still not made a decision
12 to prosecute?

13 A. That's correct.

14 Q. And then, when Ms. McFadden got --
15 you got word that Ms. McFadden complained that
16 she was offended by it. Is that right?

17 A. That's correct.

18 Q. Had you made the decision at that
19 point to initiate a prosecution, or were you
20 going to --

21 A. It was only after that that I made
22 my decision that I personally was going to take
23 action.

24 Q. Okay.

25 A. Not only to protect the community,

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1 not only for the sake of the community, but
2 Mr. Brubaker. If I'm offended, if a passing
3 motorist is offended, who's to say a radical
4 wouldn't have stopped and caused him bodily
5 injury, seeing something so offensive hanging on
6 his property --

7 Q. Right.

8 A. -- in public view.

9 Q. And a person might cause him harm
10 because they were offended by his speech, right?

11 A. They were offended by his
12 display -- disgraceful display of an American
13 symbol.

14 Q. Ms. McFadden, though, is the only
15 person that made the complaint. Is that right?

16 A. That's correct.

17 Q. Okay. So she made one complaint by
18 telephone, and then a second one --

19 A. Yes.

20 Q. -- she came in person?

21 A. She physically stopped at the
22 station and filed that complaint.

23 Q. And had you already decided, just
24 so I'm clear on the time line -- before she came
25 in the second time, had you already decided that

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1 you were not going to --

2 A. I did not.

3 Q. -- file the complaint?

4 A. Not until after she made the second
5 stop.

6 Q. Okay. And during the second stop,
7 what did she -- did she talk directly to you?

8 A. No, she talked to our staff
9 assistant.

10 Q. Are you aware of the contents of
11 her complaint?

12 A. Yes. The staff assistant advised
13 me that she was highly offended -- highly, highly
14 offended by what she saw displayed on
15 Mr. Brubaker's residence, that being the flag
16 turned upside down and spray painted --

17 Q. Understood.

18 A. -- with --

19 Q. And it was at that point that you
20 had decide to prosecute. Is that correct?

21 A. Correct.

22 Q. Now, when you made that decision to
23 prosecute, that was before you had walked across
24 the street to seize the flag. Is that fair?

25 A. Yes.

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1 Q. Okay.

2 A. Yes.

3 Q. So --

4 A. I did the research with regard to
5 the Pennsylvania statues.

6 Q. Understood.

7 A. And I believed that the sections of
8 the statue were specific to the crime that was
9 committed, in my opinion. Therefore, I took the
10 action that I felt was appropriate.

11 Q. All right. And so the decision to
12 initiate charging was taken before you seized the
13 flag, correct?

14 A. That's correct.

15 Q. And before you seized the flag, did
16 you do any research on what "A-I-M" meant?

17 A. I did not.

18 Q. Did you Google that?

19 A. I did not.

20 Q. -- did you have any idea what that
21 meant --

22 A. No.

23 Q. -- when you went over?

24 A. No.

25 Q. And how about the fact that there

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1 was an upside down flag, were you aware of this
2 tradition of --

3 A. As I explained to you, I was aware
4 of it, but that was under extreme duress, that's
5 when that flag is displayed upside down.

6 Q. Right. So that's when some --
7 someone is in extreme duress, or something is in
8 extreme duress?

9 A. That's my understanding.

10 Q. And were you aware whether or not,
11 when you decided to prosecute, whether
12 Mr. Brubaker believed that the country was in
13 extreme duress?

14 A. When he presented himself to our
15 station, he expressed that to me, that he
16 believed that the country was in distress. And I
17 clearly told him I disagreed with him.

18 Q. You disagree?

19 A. That's right.

20 Q. He felt that it was in distress,
21 though, correct?

22 A. That was his opinion.

23 Q. And he appeared to truly believe
24 that. Is that right?

25 A. I can't -- I can't speculate as

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1 to --

2 Q. Okay. But there was -- and you
3 truly believe that the country is not in a sort
4 of distress. Is that right?

5 A. I do not believe that.

6 Q. Okay. You had a difference of
7 beliefs there. Is that right?

8 A. That's correct.

9 Q. When you went over to seize the
10 flag, did you try to make contact with him first?

11 A. Yes, I did.

12 Q. What did you do to try to do that?

13 A. I knocked. I knocked very loudly.

14 Q. And there was no --

15 A. And announced my presence. And
16 there was no answer.

17 Q. And just to be clear, that flag was
18 on private property. Is that right?

19 A. It's on the front of his house,
20 yes.

21 Q. And you -- that flag also was his
22 flag. You're not claiming that he took that from
23 anywhere else?

24 A. I am not, no.

25 Q. So it is his flag, on private

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1 property. Is that right? And how many steps did
2 you have to take onto his property to get to the
3 flag?

4 A. There's a short distance between
5 the shoulder of the roadway and his front door.

6 Q. How was the flag affixed to the
7 house?

8 A. With four screws.

9 Q. And did you unscrew those screws?

10 A. I did not.

11 Q. So did you rip the flag?

12 A. Gently took it down. I removed it
13 gently so I didn't cause any further damage to
14 the flag --

15 Q. But --

16 A. -- than necessary.

17 Q. Okay. But when you removed it, did
18 you rip the -- did the flag rip, at least a
19 little bit, because it was screwed it?

20 A. I'm sure it did, but it already had
21 holes in it from where the screws were put
22 through it.

23 Q. Okay. Now, when you removed the
24 flag, did you have anybody's consent to remove
25 it?

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A. No, I did not.
MR. CONSIGLIO: Your Honor, I object.

THE MAGISTERIAL DISTRICT JUSTICE:
Hold on.

MR. CONSIGLIO: It is clear that this flag is in plain view. Like any other contraband, it is subject to seizure if there is a crime committed, whether it's private property or not. Again, I don't know what the relevance is. It's no different than seizing drugs that are in plain view, or anything else.

This was the crime, and it is a matter of -- was a matter of when a subject of plain view, the police have a right to seize it. It's that simple. I don't know what the relevance is here.

THE MAGISTERIAL DISTRICT JUSTICE:
Sir?

MR. SHUBIN: Judge, I disagree. And essentially, that's putting the rabbit back into the hat. The Court decides. This is not a pile of cocaine. It is not a pile of marijuans, which is plainly contraband. This is, you know, an expression, a communication using an American

flag, which may or may not be illegal. It's -- that's what you decide. That's what the Court decides. That's a constitutional analysis.

So this is not the equivalent of a pound of heroin, where someone can seize it and it creates a danger just being there. This is an expression. It's a symbol. That's what it is.

THE MAGISTERIAL DISTRICT JUSTICE:
All right. Go on.

BY MR. SHUBIN:

Q. So you didn't have consent when you took it, correct?

A. I seized the flag, as plain view.

Q. Understood.

A. Under the Plain View Doctrine, it was a criminal act, and I seized the flag.

Q. Understood. You had a partner with you at the time when you --

A. I did indeed. And I expressed to him that it was in plain view and I was going to take it.

Q. Let me finish my questions before you answer. And I don't mean to step on you, either, but I want the court reporter to get everything.

A. Okay.

Q. So what was the name of your partner?

A. Steven Weyandt.

Q. And when you went and you seized the flag, did you make a decision at that point that you did not need to ask a magistrate for a warrant to seize it? Did you make that decision?

A. I did. It was in plain view, as I explained. It was a Plain View Doctrine. It was clearly in plain view.

Q. But had you completed an Affidavit of Probable Cause and applied for a warrant, would it have been before Judge Jackson?

A. Yes, it would have.

Q. What did you do with the flag when you seized it?

A. I folded it.

Q. Did you fold it at his house?

A. At his house, in front of his house.

Q. And then what?

A. I, together with Officer Weyandt, we folded that flag. And then we returned to the station with that flag, and it was labeled and

secured properly.

Q. Was that immediately when you got back to the station, you labeled it? Did you put it in --

A. Put in it an envelope.

Q. And did it go into some sort of an --

A. Yes.

Q. -- evidence safe? Is that right?

A. Yes.

Q. Did you bring the flag with you today?

A. I did not.

Q. Do you have a copy of the flag, post seizure?

A. I do not.

Q. Or a picture of it?

A. I do not. I have the picture as it was being displayed --

Q. Understood.

A. -- on the residence.

Q. Understood. Did you leave a property receipt or any other document at Mr. Brubaker's residence so that he would be aware --

1 A. No.

2 Q. -- let me just finish the question,
3 just for the court reporter -- so that he would
4 be aware that you had seized the flag?

5 A. I was paying attention to the
6 activity at the Brubaker residence, and when I
7 saw him walking to the station, I knew that he
8 was more than likely there to present himself for
9 a complaint about the flag.

10 Q. So your intention was to alert him.
11 If he didn't come in, you were going to alert him
12 that you had taken the flag?

13 A. That's correct.

14 Q. You saw him come in. Is that
15 right?

16 A. Yes.

17 Q. And at that point, did you become
18 aware that he had filed a stolen property report?

19 A. I had Officer Gunnett, C.D.
20 Gunnett, talk to him.

21 Q. Is he here today?

22 A. He is here today.

23 Q. Okay. And so did you tell the
24 officer that you had taken the flag?

25 A. I did.

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1 Q. Okay. So -- just so I understand
2 it, Mr. Brubaker comes in to report a stolen
3 flag, right?

4 A. That's correct.

5 Q. And he would have no idea that you
6 had taken that flag --

7 A. No.

8 Q. -- correct?

9 A. He did not.

10 Q. When he came in, you saw him come
11 in, correct?

12 A. Yes.

13 Q. You did not stop him and say, "I
14 have the flag," right?

15 A. At that point, I didn't have
16 contact with him.

17 Q. Okay. But you did tell another
18 officer, "Go speak to him. I have the flag.
19 Take a stolen property report." Is that right?

20 A. Yes, I did.

21 Q. Why? Why didn't you tell the
22 officer to tell Mr. Brubaker that you had taken
23 the flag? Why did you hide that ball?

24 A. No one hid the ball.

25 Q. Okay.

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1 A. No one hid the ball.

2 Q. All right.

3 A. I wanted a statement from the owner
4 of that flag, somebody declaring themselves to be
5 the owner of that specific flag.

6 Q. So in other words, your decision
7 was a tactical one, where if he came in and
8 reported this flag stolen, you would have an
9 admission that it was his flag?

10 A. That's correct.

11 Q. Okay. So it was a tactical
12 decision to sort of fool him that way. Is that
13 right?

14 A. No one fooled him. He came up
15 there -- in there to file a report --

16 Q. Okay.

17 A. -- with a government agency saying
18 that his property was missing from his residence.

19 Q. And to be clear, you knew that it
20 wasn't stolen, right?

21 A. Yes.

22 Q. All right. And -- but you let him
23 go through that anyway?

24 A. Yes, I did.

25 Q. In fact, encouraged it so that you

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1 could get tactically a statement where he would
2 admit ownership of that. Is that right?

3 A. That's correct.

4 MR. CONSIGLIO: Your Honor, I
5 object. It's clear --

6 MR. SHUBIN: I'm --

7 MR. CONSIGLIO: -- that an officer
8 can do exactly that, or worse in connection to,
9 if you want to use the word "trick" any
10 defendant.

11 THE MAGISTERIAL DISTRICT JUSTICE:
12 Okay.

13 MR. CONSIGLIO: And they don't even
14 to have tell them the truth if they don't want.
15 You know that. That's the law.

16 THE MAGISTERIAL DISTRICT JUSTICE:
17 Okay. You're finished, sir?

18 MR. SHUBIN: Judge, what makes this
19 squirrely is that, this is a case where --

20 THE MAGISTERIAL DISTRICT JUSTICE:
21 Is that an objection --

22 MR. CONSIGLIO: Yeah.

23 THE MAGISTERIAL DISTRICT JUSTICE:
24 -- or is that just a comment?

25 MR. SHUBIN: And just in response,

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1 this isn't like another case, because this is a
2 situation where there is a (b)(4) political
3 exception. And the officer needs to do something
4 to rule out that this is political expression.
5 All of the indications he has are that it could
6 very well be political expression. All right?

7 And so he gets -- a fellow comes in
8 to report a stolen flag, and he lets that -- he
9 lets that report -- he lets that report unfold
10 when -- you know, my point is, is that really
11 doing what you need to do to rule out that this
12 is political? It's subterfuge.

13 MR. CONSIGLIO: Your Honor, he has
14 the right to engage in subterfuge, and he has a
15 right to use tactical consideration to determine
16 if, in fact, this fellow is the defendant in the
17 first place.

18 MR. SHUBIN: And I'm not
19 arguing that.

20 MR. CONSIGLIO: It is like any
21 other case.

22 THE MAGISTERIAL DISTRICT JUSTICE:
23 And I would agree with that.

24 MR. SHUBIN: Okay.

25 ///

1 BY MR. SHUBIN:

2 Q. When Mr. Brubaker was finished
3 filling out the stolen property report, did you
4 see it? Did you get to look at it before you
5 spoke to him next?

6 A. I can't say for sure if it was
7 presented to me or not. I believe it was, but at
8 that point I asked Officer Gunnett to have him
9 wait, that I wanted to make -- I wanted to make
10 copies of the specific statute. Which I did.

11 Q. Understood.

12 A. I photocopied directly out of the
13 Pennsylvania Crimes Code and presented those
14 copies to Mr. Brubaker.

15 Q. Can you tell me what you learned
16 about what Mr. Brubaker told Officer Gunnett?

17 A. I have the written statement, if
18 that's what you're asking for.

19 Q. If you need it to refresh your
20 recollection, that's fine, you can feel free to
21 review it.

22 A. He specifically identified the flag
23 and how he had it positioned on his residence --

24 Q. Uh-huh.

25 A. -- in that statement.

1 Q. Did he tell -- did he say -- this
2 is a handwritten statement?

3 A. That's correct.

4 Q. All right. Did he say -- did
5 Mr. Brubaker tell Officer Gunnett, either orally
6 or in the statement, that A-I-M stood for
7 American Indian Movement or why he had hung the
8 flag upside down?

9 A. I think that's a question that you
10 would have to pose to Officer Gunnett.

11 Q. I don't know whether he's going to
12 testify. And I certainly can, if he does, if the
13 Commonwealth calls him to testify. But I'm
14 asking you. And if you don't know, that's fine.

15 A. I don't know.

16 Q. Okay. So when Mr. Brubaker was
17 leaving the station thinking that he had filed a
18 stolen property report because his flag was
19 stolen, at that point you stopped him?

20 A. That's correct.

21 Q. And did you ask him to wait for
22 you?

23 A. I had Officer Gunnett ask him to
24 wait, because I wanted to take the time to make
25 the copies and present them to him and advise him

1 that the flag was not stolen, that it was seized.

2 Q. Understood. So you went and got
3 the copies of the statute. Did you highlight
4 them, or in any way write on them, or just give
5 him basic copies from some source?

6 A. I believe I highlighted them, but I
7 can't be -- I can't remember for sure. I'm
8 pretty confident that I did.

9 Q. And when you gave him the copies of
10 those statutes --

11 A. He was advised at that point that
12 he was not under arrest and that he was free to
13 leave, but I was going to be filing charges,
14 criminal charges, against him for desecration of
15 the flag.

16 Q. And at that point did he tell you,
17 "Hey, I didn't mean to offend"?

18 A. He did.

19 Q. He told you, "I didn't mean to
20 offend" --

21 A. He did.

22 Q. -- right? And he apologized that
23 you were upset?

24 A. He did.

25 Q. Because you were visibly upset?

1 A. I was upset.

2 Q. This was an emotional thing for
3 you?

4 A. Absolutely.

5 Q. And he told you that the purpose of
6 him flying the flag upside down was to show that
7 he felt that the country was in distress?

8 A. That was his opinion. And I
9 expressed my opinion.

10 Q. Understood. You're having a
11 back-and-forth. He expressed his opinion of
12 distress, right?

13 A. Uh-huh.

14 Q. And that's why he had the flag
15 upside down. And you had a differing opinion,
16 right?

17 A. That's correct.

18 Q. Okay. And he also mentioned at
19 that point that he -- something about his Native
20 American interests and heritage and the
21 American -- that "A-I-M" stood for the American
22 Indian Movement. Is that accurate?

23 A. He did that, yes, he did.

24 Q. And you have no reason to believe
25 that he doesn't genuinely believe that the things

1 that he told you about being a native American.
2 Is that right?

3 A. I don't understand the question.

4 Q. All right. Chuck that. It was
5 inartful. I apologize.

6 You testified on direct that he --
7 that you do not believe that he is a member of
8 the American Indian Movement. Is that right?

9 A. Yeah. I pulled up their website --

10 Q. Uh-huh.

11 A. -- and discovered that he was not a
12 member.

13 Q. They list them --

14 A. They list the story specifically
15 with regard to the flag disgrace.

16 Q. So after the fact, you looked, you
17 saw a newspaper report that said that he wasn't a
18 member. Is that right?

19 A. Yes, that's correct.

20 Q. All right?

21 A. I printed a copy of that report.

22 Q. Understood. But at the time, you
23 didn't know whether he was a member or not?

24 A. No. I didn't feel it was relevant.

25 Q. And you didn't feel it was

1 relevant, right, because these were just views.
2 His membership didn't matter. Is that right?

3 A. I didn't believe that had anything
4 to do with the desecration of the flag.

5 Q. Okay.

6 A. The fact that it was hanging upside
7 down didn't matter. What mattered was the fact
8 that he painted, not even in a neat, orderly way,
9 he spray painted --

10 Q. "A-I-M"?

11 A. -- "A-I-M" across the entire flag,
12 desecrating the flag.

13 Q. And it didn't matter to you what
14 A-I-M stood for?

15 A. It didn't matter.

16 Q. It's just the actual use of the
17 flag, writing on it, changing its appearance
18 that, in your mind, was a violation of the
19 statute, correct?

20 A. There was some other factors that
21 were taken into consideration, as well.

22 Q. Can you explain those to me?

23 A. He's declared himself to be a
24 sovereign citizen. He presented papers in
25 December declaring his sovereign citizenship.

1 Q. Okay. So he --

2 A. He wants -- he wants to be
3 protected by the Constitution of the United
4 States, but he doesn't want to follow the laws
5 that govern, local laws, state laws, or federal
6 laws, that govern the rest of us law abiding
7 citizens. And he still wants the opportunity to
8 utilize a United States symbol for his personal
9 use. I don't believe he earned that privilege.

10 Q. But we have -- you've taken an oath
11 to defend the Constitution?

12 A. I have.

13 Q. Okay. And the Constitution
14 includes free speech, even speech that you don't
15 like, right?

16 A. That's correct.

17 Q. Understood. Now, my understanding
18 from your testimony earlier is that you found it
19 problematic and a violation of the statute that
20 he simply had written initials on the flag. Is
21 that right?

22 A. Not only just to write the initials
23 on the flag, but the fact that it's a United
24 States symbol, belongs to everybody.

25 Q. Understood.

1 A. It belongs to everybody. It's not
2 for his use, especially when he's declared
3 himself a sovereign citizen. That's --

4 MR. SHUBIN: May I approach?

5 THE MAGISTERIAL DISTRICT JUSTICE:

6 Go ahead.

7 BY MR. SHUBIN:

8 Q. Sir, I'm showing you a picture of
9 Sarah Palin at a rally with the words "Tea Party"
10 written on a American Flag.

11 A. That's a political view. That is
12 clearly a political view.

13 Q. So this would not, in your view, be
14 objectionable, correct?

15 A. No, it's not.

16 Q. So the initials A-I-M, which you
17 learned were in reference to the American Indian
18 Movement, are not okay, but if I am Sarah Palin
19 and I have "Tea Party" written on the flag,
20 that's okay?

21 A. It's respectfully written.

22 Q. Respectfully?

23 A. And respectfully displayed.

24 Q. Okay. And so that's the -- that's
25 the touchstone, in your mind, is whether you've

1 determined it's respectful or not.

2 A. He changed the value of the flag
3 for him, compared to the law abiding citizens of
4 the United States, in my opinion.

5 Q. So the next day, after he left, he
6 came back to the station and he provided you with
7 copies of two Supreme Court cases. Is that
8 right?

9 A. He did.

10 Q. That was Eichman and Johnson. Is
11 that right?

12 A. Yes, that's correct.

13 Q. And do you still have copies of
14 what he provided you?

15 A. I do.

16 Q. Okay. And he at that point --
17 again, he spoke to you and he said, "Look, the
18 reason I did this wasn't to offend" --

19 A. And at that point I advised him
20 that he did have his rights to be concerned
21 about, and I told him I was not going to further
22 discuss the matter with him.

23 Q. But the rights that you meant were
24 his Miranda rights?

25 A. That is correct.

1 Q. Understood. But when he came in at
2 that point -- and he did ask you to reconsider.
3 Is that right?

4 A. Yes, he did.

5 Q. And he showed you these Supreme
6 Court cases which he felt gave him the right to
7 use the flag to express his views. Is that
8 right?

9 A. He did that, absolutely.

10 Q. Okay. And did you review those
11 cases?

12 A. I did.

13 Q. Okay. And one moment. And he
14 apologized, and said, "I didn't mean to offend
15 you. I didn't mean to upset you." Is that
16 right?

17 A. That's right.

18 Q. I wonder if you could tell me what
19 steps you took during this investigation to rule
20 out that this was in fact -- at least he believed
21 that he was making a political speech -- that
22 this was a political expression?

23 A. I didn't believe that I needed to
24 do any further investigation with regard to
25 whether this was political, or whether this was

1 just a way to harass and annoy and desecrate a
2 flag and do it to insult the nation.

3 Q. So --

4 A. That was my position on it. He
5 spray painted it. It wasn't even displayed -- it
6 wasn't displayed patriotically. It wasn't
7 displayed in an honorable way. It wasn't -- it
8 wasn't done in a decent way.

9 Q. How would -- are there any -- do
10 you have any rules or policies or regulations, or
11 any guideline that's not your own, but that tells
12 you what's respectful, that tells us as a society
13 what is respectful, what is political, what is
14 tactful versus -- or is this a personal decision
15 that you made?

16 A. It's human. I mean, it's -- you
17 know, it's -- I thought I was doing the right
18 thing.

19 Q. Understood.

20 A. Okay. I believed that I was doing
21 the right thing for not only myself, but for
22 those that were offended by it, by our community,
23 by the state, and by the government. I believed
24 that I was doing the right thing. And to protect
25 the defendant himself.

1 Q. From someone --

2 A. From somebody that would have
3 possibly assaulted him. And I told him that.

4 Q. But no one ever threatened, as far
5 as you know?

6 A. No, they did not.

7 Q. Understood.

8 MR. SHUBIN: I have nothing
9 further.

10 - - -
11 REDIRECT EXAMINATION
12 - - -

13 BY MR. CONSIGLIO:

14 Q. You were asked about whether you
15 did anything to determine whether he was sincere
16 or whether he was just giving you some excuse
17 relative to his conduct. Is that correct?

18 A. Yes.

19 Q. Did you make any determinations
20 after he brought you -- strike that.

21 Did he bring you things regarding
22 sovereign citizen theory?

23 A. Yes, he did.

24 Q. And did he bring you documentation
25 relative to what sovereign citizenship was?

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1 A. Yes, he did.

2 Q. And does that include that all
3 aspects of the government do not apply to him?

4 A. No, it didn't specifically say that
5 "all."

6 Q. Okay. Well, how did it say it?

7 A. It specifically said he didn't need
8 a driver's license, for one.

9 Q. Okay. I know it said a lot of
10 different things.

11 A. Uh-huh.

12 Q. All right. Let me show you.

13 MR. SHUBIN: May I see what
14 you're --

15 Judge, I would object on the basis
16 of relevance.

17 MR. CONSIGLIO: Your Honor, this
18 defendant gave this to this officer. He was
19 asked whether he did anything to determine
20 whether or not he was, quote, sincere about his
21 excuse for what he did. And I simply am going to
22 show him what this fellow presented to him, which
23 indicates on it that sovereign citizens believe
24 that most, or all aspects, of the government do
25 not apply to them.

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1 Now, does that -- I'm simply going
2 to ask him whether that affects his ability or
3 his decision in determining whether this guy was
4 sincere or not. And it clearly does.

5 MR. SHUBIN: Sincerity of belief is
6 not at all an issue. It's expressive conduct.
7 The Constitution doesn't delve -- doesn't require
8 factfinders to figure out whether or not they --
9 someone believes them truly, madly, deeply, or a
10 little bit. It decides whether or not someone,
11 for instance, is trying to send a message by
12 using expressive conduct by using --

13 MR. CONSIGLIO: Your Honor --

14 MR. SHUBIN: -- a flag.

15 MR. CONSIGLIO: Your Honor --

16 MR. SHUBIN: Not --

17 THE MAGISTERIAL DISTRICT JUSTICE:
18 Yes?

19 MR. CONSIGLIO: Yeah. The point
20 is, he, as part of his central theme, is that
21 this fellow was sincere and didn't commit a crime
22 because it's sincere political whatever.

23 The point is, he is a person that
24 doesn't believe in the laws at all. That allows
25 this fellow to make a determination if that's

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1 what he's saying he should have done as to
2 whether he has any belief in what this guy's
3 saying is the truth.

4 Defendants make excuses up all the
5 time. They come to court and lie on the stand.
6 The fact that he said it -- and whoever believes
7 it, one way or the other, depends on the jury
8 basically, not him, or him, or you.

9 But if he's going to ask, "Why did
10 you do this, or "Why did you believe that," or
11 "Did you think this guy was sincere," and he has
12 a reason not to believe it, then I have a right
13 to question him about it.

14 MR. SHUBIN: Judge, it's not
15 relevant at all. The Commonwealth has to prove
16 at a prima facie level that this was not
17 political speech. It doesn't matter what is in
18 his head or in his heart, whether a political
19 protestor would use a flag to send a message is
20 protected. It's under (b)(4). That's the
21 exception.

22 There's -- the record's undisputed
23 in that fact, in that regard. He was sending a
24 message.

25 MR. CONSIGLIO: That's what he

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1 says.

2 MR. SHUBIN: That's --

3 MR. CONSIGLIO: Now, that's a
4 matter for the jury.

5 MR. SHUBIN: That's actually part
6 of the prima facie matter under the (b)(4),
7 whether the exception applies.

8 MR. CONSIGLIO: That's right. And
9 it's not for him to say, "Well, my guy said I was
10 doing this, so that means the case is out." What
11 it means is -- and he asked him, "Did you make
12 any determination as to whether he was being
13 sincere." And I am asking him whether this
14 document that he gave him impacted upon that
15 decision. He asked the question. He opened the
16 door.

17 THE MAGISTERIAL DISTRICT JUSTICE:
18 I understand that. And I will allow you to
19 follow through with that question.

20 (Commonwealth Exhibit No. 3 marked
21 for identification, retained by the Court.)

22 BY MR. CONSIGLIO:

23 Q. Let me show you the first page of
24 Commonwealth's No. 3.

25 A. This is a copy that I printed.

1 Q. Okay.

2 A. And it clearly states in there that
3 under sovereign citizens, they don't -- they
4 don't believe that they're under any authority
5 other than God.

6 Q. And --

7 A. As --

8 Q. In light of the question you were
9 asked on cross, did that have any bearing on your
10 decision --

11 A. Absolutely.

12 Q. -- that you were not satisfied that
13 he was using this as a political demonstration?

14 A. Absolutely. Absolutely. That was
15 my entire reasoning for doing what I did.

16 MR. CONSIGLIO: That's all.

17 THE MAGISTERIAL DISTRICT JUSTICE:
18 Go ahead.

19 - - -
20 RECROSS EXAMINATION
21 - - -

22 BY MR. SHUBIN:

23 Q. So as I understand it, in
24 December of 2013 -- is that right?

25 A. That's correct.

1 Q. -- he, Mr. Brubaker, provided you
2 with a document, is it -- it's a Constitutional
3 driver's license, is that what it is?

4 A. I believe that's what it was.

5 Q. Okay.

6 A. It declares him specifically as a
7 sovereign citizen.

8 Q. A sovereign citizen?

9 A. Yes.

10 Q. So he told you, this was a message
11 he was giving you, that he felt that he was a
12 sovereign citizen and he didn't believe that
13 certain laws apply to him. Is that right?

14 A. That's correct.

15 Q. Okay. That's the expression you
16 don't agree with, right? It's something that you
17 found problematic, as I --

18 A. I do. I do.

19 Q. All right. But you also understand
20 that the First Amendment requires that you
21 tolerate problematic, offensive speech, right?

22 A. And I do.

23 Q. Okay. Understood. Not when it
24 comes to the flag?

25 A. There has to be exceptions to every

1 rule.

2 Q. Understood.

3 THE MAGISTERIAL DISTRICT JUSTICE:
4 Do you have anything further?

5 MR. CONSIGLIO: No, I'm done.

6 THE MAGISTERIAL DISTRICT JUSTICE:
7 Anything further, gentlemen, for this witness?

8 MR. SHUBIN: We're done with this
9 witness, Your Honor.

10 THE MAGISTERIAL DISTRICT JUSTICE:
11 Okay. You may step down.

12 MR. CONSIGLIO: We rest, Judge.

13 THE MAGISTERIAL DISTRICT JUSTICE:
14 Okay.

15 MR. SHUBIN: May we have a minute?

16 THE MAGISTERIAL DISTRICT JUSTICE:
17 You may.

18 (Break taken in the proceeding.)

19 MR. MCGRAW: Your Honor, the
20 defense calls Joshua Brubaker.

21 ///

22 ///

23 ///

24 ///

25 ///

JOSHUA SHANE BRUBAKER,

the witness, having been duly sworn, testified on behalf of the defense as follows:

THE MAGISTERIAL DISTRICT JUSTICE:

Have a seat. Speak into the mic, please.

DIRECT EXAMINATION

BY MR. McGRAW:

Q. Sir, could you tell us your name?

A. Joshua Shane Brubaker.

Q. All right. And where do you live, sir?

A. I live at 3132 Colonial Drive, Duncansville, Pennsylvania.

Q. How long have you lived there?

A. I lived there and the house next door, which is my mother's, since 1991.

Q. Who do you live there with?

A. I -- at the residence I live at now, I live with my wife and our three kids.

Q. All right. Now, Mr. Brubaker, you do not dispute that you hung the flag in the manner depicted, correct?

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A. Correct.

Q. I would like you to tell the Judge in as much detail why you did that.

A. Basically, I believe in the week or two prior to that, there was two Supreme Court rulings of Pennsylvania giving police officers the right to search a car with no warrant and also to search a house with extenuating circumstances with no warrant.

At the same time, during the past, I would say year or two, I've been following different factions of AIM. There are multiple for different -- different tribes in different states.

Q. Let me interrupt you there. You referenced the term "AIM." What does that stand for?

A. AIM stands for American Indian Movement.

Q. All right. And how long has that movement been in existence, to your knowledge?

A. To my knowledge, since the late '60s, early '70s.

Q. Okay. Continue, please.

A. And I've kept up with them through

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social media. I was adopted as a child, which luckily I was adopted into a great household. But with limited knowledge of my birth father, which I do know was part Native American. He was Sioux. Ever since I was a kid, I've always tried to follow that path.

When I was 18, I had Indian For Freedom tattooed on the back. I have a tattoo behind my ear signifying that I'm a husband to a Native American woman. It's something that I hold dear to me. It's important for who I am and what I am.

And I saw stories of native kids being taken out of their homes and adopted out, specifically to non-native homes, which goes against South Dakota's foster practices and laws.

I also saw the Keystone pipeline was going to go through Indian territory and that Wounded Knee was up for sale, commercial. And you can post stuff on Facebook all you want, your voice does not get heard.

I hung the flag outside of my house on the outside and put "AIM" on it specifically so that people would see it and it would make them think, maybe have them Google what AIM is

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about, or what the upside down flag is about.

I believe that our country is in distress. Our freedoms are taken away from us more and more every day. And there's people -- most of us just sit by and let it go and hope that it doesn't involve us by coming to our door.

And I just wanted to show my kids that when you believe in something so strongly, you have to take a stance, no matter whether it's popular or unpopular. It's what's right in your own mind and it's what you have to do. And that is why I did it. No other reason.

Q. Thank you, Joshua.

MR. McGRAW: No further questions.

CROSS EXAMINATION

BY MR. CONSIGLIO:

Q. Are you a sovereign citizen?

A. No. Never claimed to be.

Q. Never claimed. Why did you give those papers to this officer?

A. I didn't give them to him. I gave them to the chief. And when I did --

Q. All right.

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1 A. -- I respectfully -- because of my
 2 relationship with them, which I've always been
 3 respectful in dealings with them before, always
 4 been courteous, respectful, polite, I gave it to
 5 him to explain to him that I just came across it
 6 and I'd kind of like to get his understanding of
 7 it, because by Constitution, by Supreme Court
 8 rulings, it was determined that we don't need a
 9 license, registration, or inspection to drive a
 10 vehicle.

11 And I said to him, I said, my
 12 vehicles are insured and licensed, and I wasn't
 13 planning on driving without it, but I kind of
 14 wanted to see what they had to say about it. I
 15 mean, they are officers of the law. I thought,
 16 if I have a question about something, they're
 17 right across the street, I should be able to talk
 18 to them about it and ask them.

19 (Commonwealth Exhibit No. 4 marked
 20 for identification, retained by the Court.)
 21 BY MR. CONSIGLIO:
 22 Q. Let me show you No. 4. Do you
 23 recognize that?
 24 A. Yes.
 25 Q. Is that what you gave either this

1 officer or a member of his department?
 2 A. Correct. I gave this to the chief.
 3 Q. And does that say, or does that not
 4 say, that you are certified as a sovereign
 5 citizen?
 6 A. It does say that.
 7 Q. But how come you just said under
 8 oath that you weren't?
 9 A. Because, as I explained, whenever I
 10 took it over, I spoke politely with the chief and
 11 explained to him that I just came across it, I
 12 would like to kind of get his understanding of it
 13 as to whether it was legal or not, because I
 14 didn't want to just go out and drive with no
 15 license, no plate, no nothing and get pulled
 16 over, try to use this, because I didn't know if
 17 it was legal or not. Because it cites case law
 18 in it from the Supreme Court. And he never got
 19 back to me.
 20 Q. Sir, you just gave a little speech
 21 about how come you put this sign up --
 22 A. Correct.
 23 Q. -- under oath.
 24 A. Correct.
 25 Q. But you also said under oath that

1 you're not a sovereign citizen, of which you are.
 2 A. Whether I'm a sovereign citizen or
 3 not --
 4 MR. McGRAW: Objection.
 5 THE MAGISTERIAL DISTRICT JUSTICE:
 6 Sustained. Sustained.
 7 THE WITNESS: Whether I'm a
 8 sovereign citizen or not --
 9 MR. McGRAW: Mr. Brubaker, you
 10 don't have to answer that.
 11 THE MAGISTERIAL DISTRICT JUSTICE:
 12 Hold on.
 13 MR. CONSIGLIO: I have no further
 14 questions.
 15 THE WITNESS: I would like to
 16 answer, though.
 17 MR. McGRAW: Shut up.
 18 THE MAGISTERIAL DISTRICT JUSTICE:
 19 Follow the advice of your attorney.
 20 Anything further?
 21 MR. CONSIGLIO: No.
 22 THE MAGISTERIAL DISTRICT JUSTICE:
 23 Gentlemen?
 24 MR. McGRAW: Nothing further,
 25 Your Honor.

1 THE MAGISTERIAL DISTRICT JUSTICE:
 2 Okay. You can step down.
 3 MR. SHUBIN: We have no further
 4 evidence, Judge.
 5 THE MAGISTERIAL DISTRICT JUSTICE:
 6 Okay. Closing?
 7 - - -
 8 CLOSING ARGUMENT
 9 - - -
 10 MR. SHUBIN: Judge, we're asking
 11 the Court, and we think the circumstances compel
 12 the Court, to dismiss both of these charges.
 13 Pennsylvania's flag desecration law is Vietnam
 14 era. It's over 40 years old, Judge.
 15 Since those laws were passed, the
 16 Supreme Court has examined the constitutionality
 17 of statutes that criminalize expression using the
 18 flag. In both cases, the Supreme Court said, no,
 19 it's illegal, First Amendment protection, period,
 20 the end. That's what the Supreme Court of the
 21 United States has said.
 22 Pennsylvania has looked at this --
 23 has looked at flag burning -- or flag
 24 desecration, to my knowledge, only a couple of
 25 times, and in both of those cases, Pennsylvania

1 courts have said that any expressive conduct
2 cannot be criminalized.

3 One case, which is the one that the
4 District Attorney raised, was a case, I believe,
5 where somebody used an American flag as a
6 doormat. Expressive -- there was nothing
7 remotely political about it, but it was still
8 expressive conduct. It was considered artistic
9 expression, using it as a doormat.

10 Expression using a flag, in my
11 view, is inherently political and protected.
12 That's a constitutional, sort of a lofty
13 Constitutional principle. The Court needs to go
14 there to resolve this case. However, the
15 Pennsylvania Court has -- the Pennsylvania and
16 the Supreme Court has decided, yeah, expressive
17 conduct cannot be criminalized.

18 Just three days ago, Judge, three
19 days ago, in Snyder v The City of Cape Girardeau,
20 the Eighth Circuit issued a decision invalidating
21 Missouri's flag desecration statute and said that
22 beginning in 1974, with Spence, culminating in
23 1989 and 1990 with Texas v Johnson and U.S. v
24 Fichman, the cases that Officer Berg recognizes
25 my client gave him to review, the Supreme Court

1 has clearly established that the First Amendment
2 prohibits the prosecution of an individual for
3 using an American flag to express an opinion.

4 There is no dispute in this case.
5 This record is crystal clear, no dispute, that he
6 was trying to express an opinion. I don't
7 believe there's any dispute that that opinion was
8 a political opinion about the American Indian
9 Movement, what happened, what's happening with
10 American Indian children and native lands, his
11 feeling that the country is in distress. The
12 officer agrees that that's what he was told.

13 Now, the officer didn't feel that
14 the expression was respectful, he was
15 uncomfortable with it. He may not even have felt
16 that my client truly believed those things.
17 However, the fact that it was expression and that
18 it was political in nature, I believe is beyond
19 dispute. There is no dispute in that regard.

20 Clearly the government doesn't like
21 what he had to say. But the government can't
22 tell us what to say. That's the First Amendment.
23 Right? We can say whatever we want to if we're
24 saying it peacefully. And using the potent
25 symbol of a flag is exactly what the Supreme

1 Court recognized when we're talking about the
2 First Amendment.

3 He flew his flag on his -- he
4 posted his flag on his property in a manner in
5 which he wanted to express an opinion, in a
6 peaceful way, upside down, to show distress that
7 he felt that -- and whether he truly believed it
8 or not, irrelevant. Expression, that was his
9 expression. That's what he was trying to
10 communicate.

11 Flew it upside down with American
12 Indian Movement initials right on there.
13 Political. I mean, it is by definition what he
14 did, political. And put it there, and the
15 officer went and seized it, without even
16 undertaking an analysis of whether, in fact, this
17 was political. He was offended. Somebody had
18 done something to the flag. And he was very
19 honest about it. And I give him credit for that.
20 I understand how difficult it was and how
21 heartfelt all of this is.

22 That's what the First Amendment is
23 all about. We don't need protection respectfully
24 for speech that we agree. We need the First
25 Amendment for speech that makes us uncomfortable.

1 That's the beauty of our Constitution. That's
2 what makes us American. This is bedrock,
3 foundational American, you know -- this is what
4 makes us the greatest country in the world, is
5 that we believe in that.

6 We believe that speech, however
7 ugly it is, however potent it is, we're going to
8 protect it. That's what the military -- many
9 members of the military say over and over again,
10 "I don't agree with it, I'm offended by it, but I
11 would -- I'm fighting for your right to say it."

12 And that's what this is, where the
13 rubber meets the road, Judge. Right here. It's
14 a fascinating issue, but it's one that's
15 critically important, because this is -- if the
16 government gets to decide, which is what I
17 believe the Commonwealth's position is, whether
18 they think it's real political or good politics
19 or bad politics -- like this Sarah Palin and the
20 Tea Party, that was an okay thing. He didn't
21 have a problem with that. But he did have a
22 problem with my client and the A-I-M. That is
23 just completely unreal, and very offensive to the
24 notion of what the First Amendment is supposed to
25 be all about.

1 So when we were talking about 2102
2 specifically, we're talking about a statute that
3 by its terms requires that there be some rule out
4 that this was political. It's an exception to a
5 prosecution here. You cannot prosecute someone
6 for expression that could be political.

7 Now, I believe the Pennsylvania
8 courts have expanded that for any kind of
9 expression, but an exception for any kind of
10 expression, but this was political. So I don't
11 think we need to go there, and there's really no
12 question that it was political.

13 So under 2102, the Commonwealth has
14 not met a prima facie case, constitutional or not
15 constitutional because we have political speech
16 squarely, and it falls within (b)(4).

17 And as the officer conceded, he
18 felt he didn't need to do anything to determine
19 whether it was political. And that's just wrong.
20 Respectfully, that's just wrong.

21 When we get to 2103, we get --
22 there is a requirement that the speech -- that
23 the defilement -- I'm assuming they're saying
24 that defiling a flag, but I think that that's an
25 unwieldy circumstance, because this writing

1 "Tea Party" wasn't defiling, but what my client
2 did, expressing the political message, was
3 defiling, even if you give them it was defiling,
4 the Court has to find the Commonwealth has the
5 burden of proving that he did this maliciously,
6 with an intent to injure people. And the only
7 evidence of intent is what the officer honestly
8 reported my client told him at the time, which
9 was, "I was doing this because I felt the
10 country's in distress."

11 They argued about it. That's the
12 beauty of the First Amendment. A police
13 officer -- that's the beauty of it. They argued,
14 they disagreed. The First Amendment allows for
15 that without criminalizing the guy who doesn't
16 have the badge. Right? He has an opinion, the
17 Commonwealth has an opinion, and citizens have an
18 opinion.

19 We need to be able to express that
20 without fear that the person with the badge gets
21 to decide whether our opinion is a good one, a
22 healthy one, a respectful one. Right? And so
23 the Commonwealth has the duty of proving his
24 purpose was malicious.

25 In this case, the Commonwealth, the

1 offense, the entirety of the evidence that his
2 purpose was political, was to communicate a
3 message. He apologized for offending anyone,
4 this wasn't his intention. There is no evidence
5 to dispute that.

6 It's not a strict liability statute.
7 The flag is not presented in a way that makes me
8 comfortable and, therefore, it's a violation of
9 the Constitution. If so, right, we would -- how
10 many politicians would we throw in jail for using
11 a flag in a disingenuous way?

12 When I was researching this case, I
13 saw pictures of bikinis that were made with
14 American flags. I saw condoms that had -- that
15 were American flag condoms. There are commercial
16 depictions of the flag every day which are, in my
17 view, not respectful. But you know what? I --
18 that's not -- the First Amendment allows it. And
19 that's clear.

20 Judge, I think that the best way --
21 or the way I understand this, on this case, and
22 the way I understand the difficulties inherent
23 when you have something so emotional and so
24 potent and so potentially derisive when you're
25 talking about speech is how Justice Brennan

1 described it when he was writing for the Supreme
2 Court majority in Texas v Johnson. And he said,
3 "We do not consecrate the flag by punishing its
4 desecration, for in doing so, we dilute the
5 freedom that this cherished emblem represents."

6 Judge, I would ask that you dismiss
7 both these charges. I think that you have to do
8 it, not only under straight prima facie analysis,
9 but also the constitutional principles involved.

10 THE MAGISTERIAL DISTRICT JUSTICE:

11 Okay.

12 - - -
13 CLOSING ARGUMENT
14 - - -

15 MR. CONSIGLIO: Judge, the case
16 that he cites, Commonwealth v Bickers, that case
17 involved a display of the American flag inside a
18 house, not a public display of the American flag.
19 That case clearly indicated that the -- that the
20 law that we're talking about, as far as 2102
21 goes, is constitutional. And I don't think
22 there's any dispute about that.

23 It gets down to the point of
24 whether or not this was a matter that the
25 individual used this flag as a matter of

1 harassment. The fact that somebody comes in and
2 says, "Hey, well, I didn't do it that way. I'm
3 sorry now that I've been arrested," has no
4 bearing on it. People come into court every day
5 and tell you that there's some reason for why
6 they did what they did. And if it's one person's
7 word against another, that's for a jury to
8 decide. Does he -- does the jury believe that
9 he's telling the truth or not?

10 And what evidence do you have that
11 he's not, well, basically he claims that he is
12 this, that, and the other thing, yet he's not a
13 member of AIM and he is what they call a
14 sovereign citizen, Judge. A sovereign citizen
15 does not adhere to laws of the United States.
16 It's that simple.

17 And why is that important? Not
18 because the -- this is a law or that's a law, or
19 he doesn't drive without a license, it's because
20 those people do not adhere to laws, period. They
21 do not adhere to this statute.

22 And how does that apply on this?
23 That applies upon whether or not he actually
24 is -- at the time he hung the flag, was he making
25 a political demonstration or if he just did it to

1 harass people. And that's the purpose. And
2 that's the reason, and that's the significance of
3 being what they call a sovereign citizen.

4 Judge, I've prosecuted three
5 sovereign citizens in the last three years and
6 convicted them of crimes that they said they
7 can't be convicted of. They ranged from driving,
8 to resisting arrest, to whatever. And that's the
9 problem with people that do things like this.
10 They do something that's illegal, that's against
11 the law, then they fall back on what they want to
12 call their constitutional rights. That's a made
13 up excuse. That's a made up defense. That's
14 what he can say because I want to say it. That's
15 not for this Court to decide. The truth is,
16 Judge, this Court has no obligation whatever to
17 listen to any of his testimony. This is a
18 preliminary hearing.

19 THE MAGISTERIAL DISTRICT JUSTICE:

20 I understand.

21 MR. CONSIGLIO: Only the testimony
22 of the Commonwealth is what you consider in light
23 of that, most favorable to them. That's what a
24 hearing does. You know that. I don't have to
25 tell you that.

1 THE MAGISTERIAL DISTRICT JUSTICE:

2 Right.

3 MR. CONSIGLIO: But this particular
4 case, Judge, indicated that if you are not
5 involved in a political demonstration -- and
6 that's the difference between those flags with
7 whatever's on it. I don't know if I agree with
8 that or not -- but these are clearly political.
9 This is not necessarily political or anything.
10 He says the United States is in distress. What
11 distress?

12 He says that he doesn't like that
13 the Indian movement is not being treated
14 properly. Hey, you know what? It's not. It
15 never was. If there's anything that the United
16 States is more guilty of more than any other type
17 of prejudice or whatever, it's against the
18 Indians.

19 But that's not what this is about.
20 This is about that he wants to denigrate the
21 flag, and then he wants to use an excuse, "Well
22 it's a demonstration." Well, there's no proof
23 that he's saying that except for his word.

24 Yet the Commonwealth has proven to
25 you that he put this flag in public, right across

1 from the police station. People have complained
2 about it, and not just because they don't like
3 it, they have reason to complain about it,
4 because it's not just a flag sitting there that
5 somebody doesn't like, it's turned upside down
6 and it's spray painted.

7 Do any of those flags -- if that's
8 relevant, which I honestly don't think it is, but
9 if he's going to bring it up, take a look at
10 those flags, see if any look like what he did to
11 this flag. There is a big difference, Judge.

12 And yeah, right, I don't like what
13 he did. And maybe I don't like what they did.
14 But I -- people have lived and died, millions of
15 people, for that flag. And somebody comes along
16 and says, "Hey, we think we can do what we want,
17 and the Supreme Court agrees with it." Well,
18 that's fine. I can't dispute that the Supreme
19 Court says you can do things to the flag that I
20 have no idea why they'd make that ruling.

21 Nevertheless, the point here is
22 that this statute, read the terms of it, it fits.
23 And 2103 fits even more, where there are no
24 exceptions.

25 Now, if you feel that they're right

IN THE COURT OF COMMON PLEAS OF BLAIR COUNTY, PENNSYLVANIA
Criminal

COMMONWEALTH OF PENNSYLVANIA)
)
v.) No. CP-07-CR-1272-2014
)
JOSHUA BRUBAKER)

CERTIFICATE OF SERVICE


I hereby certify that I am this day causing the foregoing document to be served upon the following person(s) in the manner indicated below, which service satisfies the requirements of Pa.R.Crim.P. 576:

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