

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

COMMONWEALTH OF PENNSYLVANI	(A)	
	)	
v.	)	CP-07-CR-1272-2014
JOSHUAA S. BRUBAKER	)	* e

### **Omnibus Pre-Trial Motion**

TO THE HONORABLE JUDGES OF SAID COURT:

NOW COMES Joshuaa 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,

Joshuaa 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, Joshuaa 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. <u>Motion to Quash Count 1</u> (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. <u>Motion for Writ of Habeas Corpus</u> (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. <u>Motion to Suppress</u>

- 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.

Andrew J. Shubin

Attorney I.D. No. 6326

Sean P. McGraw

Attorney I.D. No. 81584

333 South Allen Street State College, Pennsylvania 814.867.3115 814.867.8811 (fax)

Date: 8-7-14

Attorneys for Defendant Joshuaa Baker, on behalf of the American Civil Liberties Union.

COMMONWEALTH OF PENNSYLVANIA) CR-0000209-2014 JOSHUAA SHANE BRUBAKER **Original** PRELIMINARY HEARING REPRODUCTION OF THIS TRANSCRIPT IS PROHIBITED WITHOUT THE AUTHORIZATION OF THE CERTIFIED AGENCY. 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 ASAP COURT REPORTING
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APPEARANCES: 2 3 Appearing on behalf of the Commonwealth: 4 RICHARD A. CONSIGLIO, DISTRICT ATTORNEY 5 Blair County District Attorney's Office 6 423 Allegheny Street 7 8 Hollidaysburg, Pennsylvania 16648 9 10 Appearing on behalf of the Defendant: 11 ANDREW J. SHUBIN, ESQUIRE 12 - AND 13 SEAN McGRAW, ESQUIRE 14 Law Offices of Andrew J. Shubin 15 333 South Allen Street 16 State College, Pennsylvania 16801 17 18 19 20 21 22 23 24 25

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PROCEEDINGS 2 3 THE MAGISTERIAL DISTRICT JUSTICE: 4 This is a police criminal complaint, Commonwealth 5 of Pennsylvania versus Joshuaa S. Brubaker of ß 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. 22 111 23 111 24 111 25 111

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2 TONETTA MCFADDEN 3 the witness, having been duly sworn, testified on 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, A THE MAGISTERIAL DISTRICT JUSTICE: 10 Anatta? 11 MR. CONSIGLIO: Tonetta. 12 THE WITNESS: With a "T." 13 THE MAGISTERIAL DISTRICT JUSTICE: Oh, Tonetta. Spell that for me. 14 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. THE MAGISTERIAL DISTRICT JUSTICE: 22 23 E-N. I'm not doing well. 24 Your witness. 25 111

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

I was driving. 2 Okay. And when you were driving. 3 did you observe something that disturbed you? Yes, I did. I stopped at the stop 5 sign and I looked left and right, and I come around the corner to the right, and I seen a flag 6 upside down 8 ٥. Okav. Я A. I kind of seen red because I was mad because I'm an American veteran and I'm an 10 11 American Indian. My heritage -- my grandmother, my mother is full-blooded Indian. 12 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 Allegheny Township Police, and they told me they 16 17 would check into it. 18 Q. And what did you tell them, ma'am? 19 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 Okay. 24 MR. CONSIGLIO: Could I mark these 25 Commonwealth 1 and 22

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(Commonwealth Exhibit No. 1 marked 2 for identification, retained by the Court.) 3 (Commonwealth Exhibit No. 2 marked 4 for identification, retained by the Court.) 5 BY MR. CONSIGLIO: 6 Ma'am, take a look at, well, both 7 of them, No. 1 and No. 2, and just tell me what 8 those pieces of paper are, just the paper, not what's on them. 10 Α. It's a dishonor to our flag. 11 ٥ No. What are you looking at? 12 A. That's the house that I seen when I 13 came around the corner. 14 ٥ Let me make it simple. Are these 15 photographs? Are they copies of photographs? 16 A. Yes. 17 Q. All right. 18 A. Okav. 19 From that point on, could you tell ٥. 20 me what they show. 21 Α. They show the American flag. 22 ٥ Okay. And how is it displayed? 23 A. Upside down. 24 And what's displayed on it? 25 Α. A-I-M. I put it backwards. Sorry. BUCKLER & ASSOCIATES ASAP COURT REPORTING

That's okay. Now, are they both the same photograph except at different distances 2 3 from the subject? 5 ٥. Okay. And is this the В photograph -- I'm sorry. Is this the flag that you saw in the manner it was displayed? Α. Yes. 9 Okay. All right. So you called 10 the police the first time about it? 11 Α. Yes, I did. 12 And was that the last that you were 13 involved in, or the police were involved in, to 14 your knowledge? 16 Α. No. 1t was not. I called .. I 16 stopped the next day. 17 ٥. Okay. Well, was that just in the 18 travels or had you deliberately gone back there 19 again? 20 Α. It was just in the travels. 21 ٥. Okay. 22 And I just -- I don't know why I 23 went through that area, but I went through it again to see that -- see if the flag was removed, 24 25 because I was told that an officer would look

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11 1 into it. 2 ٥ Ckay. 3 Α. So I guess I went back to check, 4 and there it was. And I seen red again, so I 5 went into Allegheny Township this time. 6 ۵. Okay. I think you've already 7 mentioned this, but just for the record, so I 8 have it on there clearly, how would you describe я it, if you could -- and this is an easy thing --10 but how would you describe the level of your 11 offense at seeing this? 12 From 1 to 10, it was 10. 13 ۵. So you would say serious? 14 Yes 15 All right. What happened, if you 16 know, subsequent to that? Were you more involved 17 in it from there, or did you just let things go by the way the police took care of it? 18 19 Well, the second day when I went 20 in, checked, she said an officer would call me. 21 Q. Uh-buh. 22 Α. And then a buddy of mine called me 23 and told me it was in the paper. And then the 24 following day, Wednesday, Sergeant Berg called me and told me that they took down the flag. And I

thanked them. 2 MR. CONSIGLIO: Okay. That's all. 3 THE MAGISTERIAL DISTRICT JUSTICE: Your witness. 5 MR. McGRAW: If I may, Your Honor. 6 . . . 7 CROSS EXAMINATION 9 BY MR. McGRAW: 10 ٥. Ma'am, you testified that you're a 11 native American in part --12 A. Yes. 13 -- is that right? How are you 14 aware of your American heritage? 15 Α. My grandmother is full-blooded 16 Cherokee. 17 Q. You understand that the Native 18 Americans have had a difficult time throughout 19 their history --20 Α. Yes, I do. 21 ٥. -- correct? All right. Are you 22 aware that A-I-M stands for American Indian 23 Movement? 24 I did not until I was informed of 25 that.

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٥. Okay. And you know that that is an HR. McGRAW: Nothing further. 2 organization that's been in existence for THE MAGISTERIAL DISTRICT JUSTICE: 2 3 40 years? 3 Anything further? 4 No, I did not. 4 MR. CONSIGLIO: No. 5 ٥. Okay. Do you dispute that that's 5 MR. SHUBIN: No. 8 the case? 6 THE MAGISTERIAL DISTRICT JUSTICE: 7 Α. 7 You can step down. Thank you. 8 Now, ma'am, you testified that you MR. CONSIGLIO: Officer Berg. я saw red. That means that you were angry, 9 10 correct? 10 ASSISTANT CHIEF LEO JOHN BERG, III, 11 Yes, I was. 11 the witness, having been duly sworn, testified on 12 ۵. Okay. Can you tell the Judge in a behalf of the Commonwealth as follows: 12 little more detail why you were angry. 13 13 THE MAGISTERIAL DISTRICT JUSTICE: 14 Because I'm a veteran, and I seen 14 Have a seat. 15 that flag. And I was overseas fighting for that 15 16 flag with my life. 16 DIRECT EXAMINATION 17 ٥. Okav. 17 . . . 18 A. And to see that in my own 18 BY MR. CONSIGLIO: 19 neighborhood? Huh-uh, it ain't going on. 19 Officer Berg, state your name for Q. Okay. You didn't like that? 20 the record, please. 21 No, I did not. 21 A. Leo John Berg, III. I'm the 22 ٥. You didn't like that form of 22 assistant chief of the Allegheny Township Police 23 expression, correct? 23 Department. 24 A. Correct. 24 Q. How long have you been a member, or 25 ۵. Ckay. Thank you. 25 an officer, let's say, of the Altoona -- of the BUCKLER & ASSOCIATES **BUCKLER & ASSOCIATES** ASAP COURT REPORTING ASAP COURT REPORTING

15 1 Allegheny Township Police? 2 A. Allegheny Township? 3 ٥. 4 I've been there, I'm working on 5 18 years. 6 ٥. Okay. And how long have you been 7 assistant chief? 8 For about a month. q Okay. And what -- let's say now ٥. 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? 18 Α. Yes. I did. 17 Q. And what was that? 18 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 ٥. Was that the lady that just 23 testified? 24 A. She did.

2 Would there be anything different 3 that you'd add to her testimony between your department and her? 5 8 Okay. Were you -- did you become Q. aware of the flag at that time, or had you already been aware of it? A. I had been aware of it of my own. 10 Okay. And in connection with your 11 department, where is this house and this display 12 of this flag located? 13 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 ۵. I'm not going to show them to you 19 again, but basically, how was the flag defaced? The flag was hanging upside down 21 with the letters A-I-M spray painted in white 22 across the entire flag. All right, that's what I wanted to 24 know. The pictures showed A-I-M, but didn't show what type of material was used to put it on the

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And did you hear her testimony?

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flag. He is. He's seated with his 2 But you say it was paint, white 2 attorneys. He has the black shirt --3 paint? 3 Q. 4 Α. It appeared to be paint. 4 -- and the tattoos on his arm. 5 ۵. When you got the first call from 5 And even though you chose to let Ms. McFadden, what did you do? 6 6 the matter go apparently before these calls, how 7 Δ. I did not immediately respond to 7 did you view the situation? 8 that. I -- I chose not to deal with it at that I thought it was very offensive. I A. point. I was hoping that it was just going to be thought it was harassment. 9 10 a temporary issue. 10 Q. Okay. And did you check into 11 Q. Okay. Then how did you deal with 11 Hr. Brubaker's background in this matter? the second call? 12 12 A. Yes. 13 A. Second call, I personally walked --13 ٥. And was that in response to your 14 let me back up. The first call, I walked out and 14 discussions with him? 15 took photographs of the flag the way it was 15 Prior to this, I believe it --16 presented. 16 MR. SHUBIN: Judge, I'm going to 17 ٥. And that's the one shown today? 17 object, because I'm not sure how -- or I don't 18 Α. That's the photographs that you believe that Mr. Brubaker's background would have 18 19 presented today. 19 any relevance to the Commonwealth's establishment 20 Q. Okay, Then what? 20 of the prima facte case. 21 The following day, when I received 21 HR. CONSIGLIO: Your Honor, I'm 22 the second complaint, I personally responded over 22 simply asking him -- I'm going to ask him, if 23 and attempted to make contact with the resident. 23 permitted, to check into his so-called political 24 who was later identified as Mr. Brubaker. 24 background in response to what Mr. Brubaker told 25 Is he in the courtroom today? 25 this officer. BUCKLER & ASSOCIATES BUCKLER & ASSOCIATES ASAP COURT REPORTING ASAP COURT REPORTING MR. SHUBIN: If it's limited to him you attempt to determine whether the American 2

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 Okav. BY MR. CONSIGLIO: 10 Q. Did you talk to Mr. Brubaker about 11 the situation? 12 A. Yes. 13 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? A. 16 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 The country was in distress. 21 All right. 22 And he also identified the flag 23 as -- the initials on the flag as the American 24 Indian Movement.

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Indian Movement is an organization? Well, at that point, I cautioned him. I told him that I really wanted to protect his rights and didn't want to discuss the matter with him. Q. Okay. Regardless, did you eventually check into --A. I had already seized the flag. I had already taken the actions that I was going to Q. Okay, fine. Did you look into the American Indian Movement --I did. Q. -- to determine if it was an organization? Α. There is an organization. Okay. And in light of what Mr. Brubaker told you, did you try to determine whether he was a member? I did. ۵. And is he? No, he is not.

Okay. And in response to that, did

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shall we call, criminal action in this matter?

At any point in time, did you take,

Δ I simply filed -with. 2 Q. Okav. 2 Now, in reading the charge, did you Α. .. the charges that I believe were 3 also read that there are certain exceptions to 4 appropriate. that charge? 5 Okay. And there are two charges 5 Α. I did. #41ad2 6 Q. And did you take note of Exception That's correct. Α. 7 No. 4, that there -- the exception is if the Okay. And one, I believe, 8 ۵. 8 statute -- I'm sorry. The statute does not apply 9 indicates that in fact 2202, entitled to any patriotic or political demonstration or "Desecration of the Flag," does in fact make it a 10 10 declaration? 11 crime to desecrate the flag, does it not? 11 Δ Yes, but I didn't see this as a 12 Α. It does 12 political statement. 13 Okay. 13 Q. Well, that was going to be my next By Pa statute it does. 14 14 question. What, in fact, did you see it -- I 15 Okay. And does the statute -- and 15 think you already mentioned -- but what did you 16 I realize this is available to the Magistrate, 16 888 this 987 17 but just for the record -- does the statute 17 A. I saw it as a desecration intended 18 indicate that a person is guilty of a third to harass and annoy is what I saw it as, for not 18 degree misdemeanor if he exposes to public view 19 19 only the Allegheny Township Police Department, any such marked or defiled flag? 20 20 for one. 21 Δ. It does. 21 ۵. Now, in connection with this 22 Q. And in your judgment, is this 22 matter, you also filed a second charge, insults 23 exactly what that did? 23 to the national -- or Commonwealth flag, No. 24 That's exactly what this did, why 24 2103 --25 he was charged with the charge he was charged 25 Α. Yes. BUCKLER & ASSOCIATES BUCKLER & ASSOCIATES ASAP COURT REPORTING ASAP COURT REPORTING 23 Q. .. of the same code? Assistant Chief Berg, my name is 2 Yes, I did. Α. 2

3 And did you -- you obviously read 4 that section and made the decision relative 5 thereto? Α. 7 Okay. And did you take note that a 8 person is guilty of a misdemeanor of the second я degree if he injures or in any manner damages. 10 insults, or destroys the American flag? 11 12 Did you take note that there are no 13 exceptions under that statute, that there are no 14 exceptions? 15 Α. 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 Officer Berg, is that how I should 24 refer to you as or assistant chief? Assistant chief.

Andy Shubin. I'm going to ask you a few 3 questions about your role in this. As I understand it, the Allegheny 5 Township Police Department is located directly across the street from where my client lives. Is 7 that right? A That's correct. а 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 Okay. So the Police Department is 14 one office in a municipal building? 15 Α. That's correct. 16 ٥. And would that be the center of 17 town essentially, if there is town? 18 Α. 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 Correct. 22 High-exposure area? 23 That's correct. 24 Q. So if somebody wanted to hang a 25 banner with a message of protest in your BUCKLER & ASSOCIATES

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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 -- and it's where lots of traffic ۵ 6 is. Is that right? 7 That's correct. 8 Now, I understand from your direct 9 that Ms. McFadden -- is it McFadden, Tonetta McEaddan? 10 11 A. That's correct. 12 Ckay -- that Ms. McFadden first 13 called the station on May 12th. Is that right? 14 Α. I'm not sure if she called or she stopped, but nevertheless, we did receive a 15 16 complaint specifically from her. 17 Understood. Did you receive a 18 complaint from anyone else, or just her? 19 Just her. 20 ٥. 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 extent that, I don't agree with this, but I would 25 BUCKLER & ASSOCIATES ASAP COURT REPORTING

defend his right to do it? 2 Α. Afterwards, not prior to, no. 3 Afterwards, okay. So when 4 Ms. McFadden reported it, you had already noticed 5 this flag, correct? I did. I did, as did others in our 6 Α. 7 department 8 ٥. Understood. And you tolerated it. Is that right? 10 A. 11 Q. And even though it was painful --12 Α. Yes 13 ٥ -- for you to see? 14 Absolutely. A. 15 ٥. You decided to leave it there. Is 16 that right? 17 Yes. A. 18 a 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 Not at that point. I did some 23 research. I went back and looked in the crimes 24 code. 25 ۵. And confirmed that Pennsylvania

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27 still had the statute? Α. That is correct. ٥. You weren't sure that it did. Is that right? A. I wasn't sure -- I knew that the section was there, but I didn't know the specifics of the section. Q. Understood. But do you recall from way back when, when the Supreme Court issued rulings back in the '80s and the '90s that permitted the flag burning, the Johnson case -do you remember that at that time? MR. CONSIGLIO: Objection, Your Honor. They do not apply to this statute. MR. SHUBIN: Actually, Judge --THE MAGISTERIAL DISTRICT JUSTICE: Well, go shead. We'll hear on it. MR. SHUBIN: It's not only a legal issue, it's a factual issue. The officer will testify that he was given copies of those cases by my client. MR. CONSIGLIO: The point is, Judge, this statute is Constitutional. It was

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unconstitutional movement regarding burning flags 2 has nothing to do with this statute. MR. SHUBIN: We disagree with that. We think --5 THE MAGISTERIAL DISTRICT JUSTICE: 6 I'm sure you do. 7 MR. SHUBIN: -- the statute is 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 this wasn't expressive conduct, political 11 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: But did you remember when you went 20 ٥. 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

held constitutional in the Bickers case by the

Supreme Court of this Commonwealth, so that this

with case law. 2 ٥. He presented that afterward, right? 3 A. Correct. 4 ٥. Okay. After you had already seized the flag? 6 A. That's correct. 7 ٥. I'm just wondering if you knew 8 about that stuff already, did you remember it? 9 I didn't. I'll be honest about it. Α. 10 I did not remember. 11 α. Ckay. 12 Α. I remember the section specific to 13 the Pennsylvania statues. 14 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 Do you recall how many days you and 19 your officers saw the flag flying there before 20 Ms. --21 I personally saw it for two days. 22 ٥ The 12th? 23 Right. I found out later that 24 other officers had noticed it over the weekend, but I personally did not see it. 25 **BUCKLER & ASSOCIATES** ASAP COURT REPORTING

30 And when you noticed it and 2 Mr. Consiglio showed you -- you've seen the 3 pictures -- the pictures that you took, it's upside down. Is that right? Α. Yes, 1t 1s. ۵. Were you in the military? Α. No. 8 But did you know at that point that Q. 9 an upside down flag symbolized -- was used as a 10 symbol of distress in the military and in other 11 traditions? 12 In extreme circumstances, I did 13 know that. Hanging the flag upside down is a 14 call of distress. 15 Were you aware that factions of the Q. 16 NRA called for flying flags upside down to show 17 distress over those sorts of issues, gun rights issues? Were you aware of that? 18 19 No, I was not. 20 ٥. 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 Were you aware that in Moon 25 Township, up near Pittsburgh, that an official in

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

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

THE MAGISTERIAL DISTRICT JUSTICE:

Ckay.

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

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

It's not the government's job; it

Okay.

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

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

THE MAGISTERIAL DISTRICT JUSTICE:

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

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

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to show that this is a common -- you know, this is a sign of distress. It is a common sign of distress. And it's what people use historically --THE MAGISTERIAL DISTRICT JUSTICE: Okav. MR. SHUBIN: -- to show that. MR. CONSIGLIO: Your Honor, that's a nice speech, but I did not ask him that. I asked him whether he read the statute and read the exceptions. I didn't ask what other people did, what other organizations did. If they want to believe that this is a sign of distress, that's their business. Maybe they should be arrested. I'm simply saying to you that this is irrelevant. No matter how you cut it, it's irrelevant. If we're going to go by the Rules of Court, then let's make --THE MAGISTERIAL DISTRICT JUSTICE: Well, for prima facte purposes, you already made your point as far as the upside down flag is concerned. Can we move on from that point? MR. SHUBIN: Yes, sir. 111

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2 ۵. On the 12th you decide to take 3 photographs of the flag. Is that right? 4 A. That's correct. 5 Potentially you -- the photographs 6 were potential .. were going to be potential 7 evidence in the case --R That's correct. Δ q ٥. -- is that correct? 10 Α. Yes. 11 ٥. You had still not made a decision 12 to prosecute? 13 That's correct. Α. 14 ٥. 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 That's correct. 18 Had you made the decision at that 19 point to initiate a prosecution, or were you 20 21 A. It was only after that that I made 22 my decision that I personally was going to take 23 24 Q. Okay. 25 A. Not only to protect the community. BUCKLER & ASSOCIATES

BY MR. SHUBIN:

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not only for the sake of the community, but Mr. Brubaker. If I'm offended, if a passing motorist is offended, who's to say a radical wouldn't have stopped and caused him bodily injury, seeing something so offensive hanging on his property .. ٥. Right. -- in public view. And a person might cause him harm Q. because they were offended by his speech, right? They were offended by his display -- disgraceful display of an American symbol. ٥ Ms. McFadden, though, is the only person that made the complaint. Is that right? A. That's correct. Okay. So she made one complaint by Q. telephone, and then a second one --A. Yes. Q. -- she came in person? A. She physically stopped at the station and filed that complaint. And had you already decided, just so I'm clear on the time line -- before she came

you were not going to --2 Α. I did not 3 -- file the complaint? 4 Not until after she made the second 5 stoo. 6 ٥. Okay. And during the second stop. 7 what did she -- did she talk directly to you? 8 No, she talked to our staff Α. 9 assistant. 10 ٥. Are you aware of the contents of 11 her complaint? 12 Α. 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 turned upside down and spray painted .. 16 17 ٥. Understood 18 Α. -- with --19 ٥. And it was at that point that you 20 had decide to prosecute. Is that correct? 21 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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in the second time, had you already decided that

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ο. Okav. was an upside down flag, were you aware of this 2 Α. Yes. 2 tradition of --3 ٥. So --3 Α. As I explained to you, I was aware Δ I did the research with regard to of it, but that was under extreme duress, that's 5 the Pennsylvania statues when that flag is displayed upside down. 6 Q. Understood. 8 Right. So that's when some --7 Δ And I believed that the sections of 7 someone is in extreme duress, or something is in 8 the statue were specific to the crime that was extreme duress? a committed, in my opinion. Therefore, I took the 9 That's my understanding. 10 action that I felt was appropriate. 10 And were you aware whether or not, 11 All right. And so the decision to 11 when you decided to prosecute, whether 12 initiate charging was taken before you seized the 12 Mr. Brubaker believed that the country was in 13 flag, correct? 13 extreme duress? 14 Α. That's correct. 14 When he presented himself to our 15 ٥. And before you seized the flag, did 15 station, he expressed that to me, that he 16 you do any research on what "A-I-M" meant? 16 believed that the country was in distress. And I 17 Α. I did not. 17 clearly told him I disagreed with him. 18 ٥. Did you Google that? 18 Q. You disagree? 19 Δ I did not 19 A. That's right. 20 ٥. -- did you have any idea what that 20 He felt that it was in distress. 21 meant --21 though, correct? 22 A. 22 Α. That was his opinion. 23 ۵ -- when you went over? 23 Q. And he appeared to truly believe 24 A. No. 24 that. Is that right? 25 Q. And how about the fact that there 25 I can't -- I can't speculate as Α. **BUCKLER & ASSOCIATES** BUCKLER & ASSOCIATES ASAP COURT REPORTING ASAP COURT REPORTING property. Is that right? And how many steps did 2 you have to take onto his property to get to the

2 Okay. But there was -- and you 3 truly believe that the country is not in a sort of distress. Is that right? 4 5 A. I do not believe that. 6 Okay. You had a difference of 7 beliefs there. Is that right? 8 A. That's correct. 9 When you went over to seize the 10 flag, did you try to make contact with him first? 11 A. Yes, I did. 12 ٥. What did you do to try to do that? 13 I knocked. I knocked very loudly. Α. 14 And there was no --15 And announced my presence. And 16 there was no answer 17 And just to be clear, that flag was on private property. Is that right? 18 19 It's on the front of his house, 20 VOS. 21 And you -- that flag also was his 22 flag. You're not claiming that he took that from 23 anywhere else? 24 Α. I am not. no.

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flag? There's a short distance between the shoulder of the roadway and his front door. How was the flag affixed to the house? With four screws. A. And did you unscrew those screws? I did not. So did you rip the flag? Gently took it down. I removed it gently so I didn't cause any further damage to the flac .. Q. But --Α. -- than necessary. Okay. But when you removed it, did you rip the -- did the flag rip, at least a little bit, because it was screwed it? I'm sure it did, but it already had holes in it from where the screws were put through 1t. Q. Okay. Now, when you removed the flag, did you have anybody's consent to remove

So it is his flag, on private

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No. I did not. 2 MR. CONSIGLIO: Your Honor, I 3 object. THE MAGISTERIAL DISTRICT JUSTICE: Hold on. 6 MR. CONSIGLIO: It is clear that 7 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 9 or not. Again, I don't know what the relevance 10 11 is. It's no different than seizing drugs that are in plain view, or anything else. 12 13 This was the crime, and it is a 14 matter of -- was a matter of when a subject of 15 plain view, the police have a right to seize it. 16 It's that simple. I don't know what the 17 relevance is here 18 THE MAGISTERIAL DISTRICT JUSTICE: 19 Sira 20 MR. SHUBIN: Judge, I disagree. 21 And essentially, that's putting the rabbit back 22 into the hat. The Court decides. This is not a pile of cocaine. It is not a pile of marijuans, 23 24 which is plainly contraband. This is, you know, an expression, a communication using an American 25 BUCKLER & ASSOCIATES ASAP COURT REPORTING

flag, which may or may not be illegal. It's .. 2 that's what you decide. That's what the Court decides. That's a constitutional analysis. So this is not the equivalent of a 5 pound of heroin, where someone can seize it and it creates a danger just being there. This is an 7 expression. It's a symbol. That's what it is. 8 THE MAGISTERIAL DISTRICT JUSTICE: 9 All right. Go on 10 BY MR. SHURIN: 11 So you didn't have consent when you 12 took it, correct? 13 I seized the flag, as plain view. Α. 14 ٥. Understood 15 A. Under the Plain View Doctrine, it 16 was a criminal act, and I seized the flag. 17 Understood. You had a partner with Q. 18 you at the time when you --19 Α. I did indeed. And I expressed to him that it was in plain view and I was going to 20 21 tako it. 22 Let me finish my questions before 23 you answer. And I don't mean to step on you, 24 either, but I want the court reporter to get 25 everything.

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43 A. Okav. 2 ٥. So what was the name of your 3 partner? 4 A. Steven Wevendt 5 ٥. And when you went and you seized 6 the flag, did you make a decision at that point 7 that you did not need to ask a magistrate for a warrant to seize it? Did you make that decision? 9 I did. It was in plain view, as I explained. It was a Plain View Doctrine. It was 10 11 clearly in plain view. 12 ٥. But had you completed an Affidavit 13 of Probable Cause and applied for a warrant, would it have been before Judge Jackson? 14 15 Yes, it would have, 16 Q. What did you do with the flag when 17 you seized it? 18 I folded it. 19 ٥. Did you fold it at his house? 20 Α. At his house, in front of his 21 house. 22 Q. And then what? 23 A. I, together with Officer Wayandt, we folded that flag. And then we returned to the 24 25 station with that flag, and it was labeled and

secured properly. 1 2 Was that immediately when you got back to the station, you labeled it? Did you put 3 it in ... A. Put in it an envelope. Q. And did it go into some sort of 7 an --8 A. ٥. -- evidence safe? Is that right? 10 A. Yes. 11 Did you bring the flag with you 12 today? 13 I did not. A. 14 Q. Do you have a copy of the flag, 15 post seizure? 16 Α. I do not. 17 ٥. Or a picture of it? 18 I do not. I have the picture as it 19 was being displayed --20 ٥. Understood. 21 Α. .. on the residence. 22 ٥. Understood. Did you leave a 23 property receipt or any other document at 24 Mr. Brubaker's residence so that he would be 25 aware --

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1 Α. No. Okay. So -- just so I understand -- let me just finish the question. 2 Q. 2 it, Mr. Brubaker comes in to report a stolen 3 just for the court reporter -- so that he would 3 flag, right? be aware that you had seized the flag? 4 4 Α. That's correct. 5 I was paying attention to the 5 Q. And he would have no idea that you 6 activity at the Brubaker residence, and when I 6 had taken that flag --7 saw him walking to the station, I knew that he 7 A. was more than likely there to present himself for 8 Q. -- correct? a complaint about the flag. 9 He did not. Α. 10 ٥. So your intention was to alert him. 10 ۵ When he came in, you saw him come 11 If he didn't come in, you were going to alert him 11 in. correct? 12 that you had taken the flag? 12 A. 13 That's correct. 13 You did not stop him and say, "I Q. 14 ٥. You saw him come in. Is that 14 have the flag," right? 15 right? 15 Α. At that point, I didn't have 16 A. Yes. 16 contact with him. 17 ٥. And at that point, did you become 17 ٥. Okay. But you did tell another aware that he had filed a stolen property report? 18 officer, "Go speak to him. I have the flag. 18 19 I had Officer Gunnett, C.D. 19 Take a stolen property report." Is that right? 20 Gunnett, talk to him. 20 A. Yes, I did. 21 Q. Is he here today? 21 Why? Why didn't you tell the 22 Α. He is here today. 22 officer to tell Mr. Brubaker that you had taken 23 Okay. And so did you tell the ٥. 23 the flag? Why did you hide that ball? 24 officer that you had taken the flag? 24 No one hid the ball. Α. 25 Α. I did. 25 ٥. Okav. BUCKLER & ASSOCIATES BUCKLER & ASSOCIATES ASAP COURT REPORTING ASAP COURT REPORTING 47 No one hid the ball. Α. 1 could get tactically a statement where he would 2 All right. 2 admit ownership of that. Is that right? 3 I wanted a statement from the owner 3 A. That's correct. 4 of that flag, somebody declaring themselves to be 4 MR. CONSIGLIO: Your Honor, I 5 the owner of that specific flag. 5 object. It's clear --

So in other words, your decision 7 was a tactical one, where if he came in and reported this flag stolen, you would have an 8 9 admission that it was his flag? 10 That's correct. 11 Okay. So it was a tactical 12 decision to sort of fool him that way. Is that 13 right? 14 No one fooled him. He came up Α. 15 there -- in there to file a report --16 ٥. Okay. 17 -- with a government agency saying A. 18 that his property was missing from his residence. 19 ٥. And to be clear, you know that it 20 wasn't stolen, right? 21 A. 22 ٥. All right. And -- but you let him 23 go through that anyway? 24 A. Yes. I did.

In fact, encouraged it so that you

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в MR. SHUBIN: I'm --7 MR. CONSIGLIO: -- that an officer can do exactly that, or worse in connection to, if you want to use the word "trick" any 9 10 defendant. 11 THE MAGISTERIAL DISTRICT JUSTICE: 12 13 MR. CONSIGLIO: And they don't even to have tell them the truth if they don't want. 14 15 You know that. That's the law. THE MAGISTERIAL DISTRICT JUSTICE: 16 17 Okay. You're finished, sir? 18 MR. SHUBIN: Judge, what makes this 19 squirrelly is that, this is a case where --20 THE MAGISTERIAL DISTRICT JUSTICE: 21 Is that an objection --22 MR. CONSIGLIO: Yeah. THE MAGISTERIAL DISTRICT JUSTICE: 23 24 -- or is that just a comment? 25 MR. SHUBIN: And just in response,

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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 to rule out that this is political expression. 5 All of the indications he has are that it could 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 lets that report -- he lets that report unfold when -- you know, my point is, is that really doing what you need to do to rule out that this is political? It's subterfuge. MR. CONSIGLIO: Your Honor, he has the right to engage in subterfuge, and he has a right to use tactical consideration to determine if, in fact, this fellow is the defendant in the first place. MR. SHUBIN: And I'm not arguing that. MR. CONSIGLIO: It is like any other case. THE MAGISTERIAL DISTRICT JUSTICE: And I would agree with that. MR. SHUBIN: Okay. 111 BUCKLER & ASSOCIATES

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BY MR. SHUBIN: 2 ۵ When Mr. Brubaker was finished 3 filling out the stolen property report, did you see it? Did you get to look at it before you spoke to him next? A. I can't say for sure if it was presented to me or not. I believe it was, but at that point I asked Officer Gunnett to have him wait, that I wanted to make -- I wanted to make 10 copies of the specific statute. Which I did. 11 ۵. Understood. 12 A. I photocopied directly out of the Pennsylvania Crimes Code and presented those 13 14 copies to Mr. Brubaker. 15 Q. Can you tell me what you learned 16 about what Mr. Brubaker told Officer Gunnett? 17 Δ I have the written statement, if 18 that's what you're asking for. 19 ۵. 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 ۵. Uh-huh. 25 A. -- in that statement.

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٥. Did he tell -- did he say -- this 2 is a handwritten statement? 3 That's correct. Α. 4 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 American Indian Hovement or why he had hung the flag upside down? 9 I think that's a question that you A. 10 would have to pose to Officer Gunnett. 11 ٥. I don't know whether he's going to 12 testify. And I certainly can, if he does, if the Commonwealth calls him to testify. But I'm 13 14 asking you. And if you don't know, that's fine. 15 I don't know. A. 16 Okay. So when Mr. Brubaker was 17 leaving the station thinking that he had filed a 18 stolen property report because his flag was stolen, at that point you stopped him? 19 20 Α. That's correct. 21 Q. And did you ask him to wait for 22 vou? 23 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

that the flag was not stolen, that it was seized. 1 2 Q. Understood. So you went and got 3 the copies of the statute. Did you highlight them, or in any way write on them, or just give 5 him basic copies from some source? R I believe I highlighted them, but I 7 can't be -- I can't remember for sure. I'm pretty confident that I did. ۵. And when you gave him the copies of 10 those statutes --11 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 the flag. 15 16 ٥. And at that point did he tell you, 17 "Hey, I didn't mean to offend"? 18 Α. He did. 19 ٥. He told you, "I didn't mean to offend" --20 21 Α. He did. 22 Q. -- right? And he apologized that 23 you were upset? 24 A. He d1d. 25 Because you were visibly upset?

I was upset. 1 that he told you about being a native American. 2 Q. This was an emotional thing for 2 Is that right? you? 3 3 I don't understand the question. 4 Α. Absolutely. 4 All right. Chuck that. It was 5 ۵. And he told you that the purpose of 5 inartful. I apologize. him flying the flag upside down was to show that 6 You testified on direct that he --7 he felt that the country was in distress? that you do not believe that he is a member of That was his opinion. And I 8 Α. the American Indian Movement. Is that right? 9 expressed my opinion. Α. Yeah. I pulled up their website .. 10 Understood. You're having a 10 ٥. Uh-huh back-and-forth. He expressed his opinion of 11 11 -- and discovered that he was not a 12 distress, right? 12 member. 13 A. Uh-huh. 13 ٥. They list them .. 14 ٥. And that's why he had the flag 14 Α. They list the story specifically 15 upside down. And you had a differing opinion, 15 with regard to the flag disgrace. 16 right? 16 Q. So after the fact, you looked, you 17 A. That's correct. 17 saw a newspaper report that said that he wasn't a 18 Q. Okay. And he also mentioned at 18 member. Is that right? 19 that point that he -- something about his Native 19 A. Yes, that's correct. American interests and heritage and the 20 20 Q. All right? 21 American -- that "A-I-M" stood for the American 21 I printed a copy of that report. 22 Indian Movement. Is that accurate? 22 Understood. But at the time, you 23 A. He did that, yes, he did. 23 didn't know whether he was a member or not? 24 And you have no reason to believe 24 No. I didn't feel it was relevant. 25 that he doesn't genuinely believe that the things 25 Q. And you didn't feel it was BUCKLER & ASSOCIATES BUCKLER & ASSOCIATES ASAP COURT REPORTING ASAP COURT REPORTING 1 relevant, right, because these were just views. 58 Okay. So he --2 His membership didn't matter. Is that right? 2 He wants -- he wants to be 3 A. I didn't believe that had anything 3 protected by the Constitution of the United 4 to do with the desecration of the flag. States, but he doesn't want to follow the laws 5 Q. Okay. that govern, local laws, state laws, or federal 5 8 The fact that it was hanging upside laws, that govern the rest of us law abiding 7 down didn't matter. What mattered was the fact 7 citizens. And he still wants the opportunity to that he painted, not even in a neat, orderly way, utilize a United States symbol for his personal 9 he spray painted -use. I don't believe he earned that privilege. 10 Q. 10 But we have -- you've taken an oath 11 -- "A-I-M" across the entire flag. A. 11 to defend the Constitution? 12 desecrating the flag. 12 Δ. I have. 13 ٥. And it didn't matter to you what 13 Q. Okay. And the Constitution 14 A-I-M stood for? 14 includes free speech, even speech that you don't 15 Α. It didn't matter. 15 like, right? 16 Q. It's just the actual use of the 16 That's correct. 17 flag, writing on it, changing its appearance 17 Understood. Now, my understanding 18 that, in your mind, was a violation of the from your testimony earlier is that you found it 18 19 statute, correct? 19 problematic and a violation of the statute that 20 Δ There was some other factors that 20 he simply had written initials on the flag. Is 21 were taken into consideration, as well. 21 that right? 22 Q. Can you explain those to me? 22 Not only just to write the initials 23 He's declared himself to be a 23 on the flag, but the fact that it's a United 24 sovereign citizen. He presented papers in 24 States symbol, belongs to everybody. December declaring his sovereign citizenship. 25 

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Understood.

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 So sheed BY MR. SHUBIN: Sir, I'm showing you a picture of 8 a Sarah Palin at a rally with the words "Tea Party" 10 written on a American Flag. 11 That's a political view. That is 12 clearly a political view. 13 So this would not, in your view, be 14 objectionable, correct? 15 A. No, it's not. 16 So the initials A-I-M, which you Tearned were in reference to the American Indian 17 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 ٥. Respectfully? 23 And respectfully displayed. A. 24 Okay. And so that's the -- that's 25 the touchstone, in your mind, is whether you've BUCKLER & ASSOCIATES ASAP COURT REPORTING

determined it's respectful or not. 2 He changed the value of the flag 3 for him, compared to the law abiding citizens of the United States, in my opinion. 4 5 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 right? 9 Α. He did 10 ٥. That was Eichman and Johnson. Is 11 that right? 12 Α. Yes, that's correct. 13 ٥. And do you still have copies of 14 what he provided you? 15 Α. 16 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 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. BUCKLER & ASSOCIATES

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Understood. But when he came in at that point -- and he did ask you to reconsider. Is that right? A. Yes, he did. And he showed you these Supreme Court cases which he felt gave him the right to use the flag to express his views. Is that right? Α. He did that, absolutely. ۵. Okay. And did you review those cases? I did. A. Okay. And one moment. And he apologized, and said, "I didn't mean to offend you. I didn't mean to upset you." Is that right? A. That's right. I wonder if you could tell me what steps you took during this investigation to rule out that this was in fact -- at least he believed that he was making a political speech -- that this was a political expression? A. I didn't believe that I needed to

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

Q. So --

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

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

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

Q. Understood.

A. Okay. I believed that I was doing the right thing for not only myself, but for those that were offended by it, by our community, by the state, and by the government. I believed that I was doing the right thing. And to protect the defendent himself.

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whether this was political, or whether this was

do any further investigation with regard to

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n From someone --From somebody that would have Α. possibly assaulted him. And I told him that. But no one ever threatened, as far as you know? R A. No. they did not. ٥. Understood. MR. SHUBIN: I have nothing further. REDIRECT EXAMINATION BY MR. CONSIGLIO: ٥. You were asked about whether you did anything to determine whether he was sincere or whether he was just giving you some excuso relative to his conduct. Is that correct? Δ. Vaa Did you make any determinations after he brought you -- strike that. Did he bring you things regarding sovereign citizen theory? Yes, he did. ۵. And did he bring you documentation relative to what sovereign citizenship was? **BUCKLER & ASSOCIATES** ASAP COURT REPORTING

A. Yes, he did.
Q. And does that include that all aspects of the government do not apply to him?
A. No, it didn't specifically say that "all."
Q. Okay. Well, how did it say it?
A. It specifically said he didn't need a driver's license, for one.
Q. Okay. I know it said a lot of different things.

A. Uh-huh.

Q. All right. Let me show you.

HR. SHUBIN: May I see what
you're --

Judge, I would object on the basis of relevance.

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

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to ask him whether that effects his ability or his decision in determining whether this guy was sincere or not. And it clearly does.

MR. SHUBIN: Sincerity of belief is not at all an issue. It's expressive conduct.

The Constitution doesn't delve -- doesn't require factfinders to figure out whether or not they -- someone believes them truly, madly, deeply, or a little bit. It decides whether or not someone, for instance, is trying to send a message by using expressive conduct by using -
MR. CONSIGLIO: Your Honor -
MR. SHUBIN: -- a flag.

MR. CONSIGLIO: Your Honor --

Now, does that -- I'm simply going

MR. SHUBIN: Not --

THE MAGISTERIAL DISTRICT JUSTICE:

Yes?

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

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

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

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

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

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

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

MR. CONSIGLIO: That's what he

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says. Q. Okay. 2 MR. SHUBIN: That's --2 And it clearly states in there that A. 3 MR. CONSIGLIO: Now, that's a 3 under sovereign citizens, they don't -- they 4 matter for the jury. 4 don't believe that they're under any authority MR. SHUBIN: That's actually part 5 5 other than God of the prima facie metter under the (b)(4). ٥. And .. whether the exception applies. 7 As --Α. MR. CONSIGLIO: That's right. And 8 In light of the question you were it's not for him to say, "Well, my guy said I was 9 asked on cross, did that have any bearing on your doing this, so that means the case is out." What 10 10 decision ... 11 it means is -- and he asked him, "Did you make 11 A. Absolutely. 12 any determination as to whether he was being 12 -- that you were not satisfied that 13 sincere." And I am asking him whether this 13 he was using this as a political demonstration? 14 document that he gave him impacted upon that 14 A. Absolutely. Absolutely. That was 15 decision. He asked the question. He opened the 15 my entire reasoning for doing what I did. 16 16 MR. CONSIGLIO: That's all. 17 THE MAGISTERIAL DISTRICT JUSTICE: 17 THE MAGISTERIAL DISTRICT JUSTICE: 18 I understand that. And I will allow you to 18 Go ahead. follow through with that question. 19 19 (Commonwealth Exhibit No. 3 marked 20 20 RECROSS EXAMINATION 21 for identification, retained by the Court.) 21 22 BY MR. CONSIGITO: 22 BY MR. SHURTH. 23 Q. Let me show you the first page of 23 Q. So as I understand it, in 24 Commonwealth's No. 3. 24 December of 2013 -- is that right? 25 This is a copy that I printed. 25 A. That's correct. BUCKLER & ASSOCIATES BUCKLER & ASSOCIATES ASAP COURT REPORTING ASAP COURT REPORTING

with a document, is it -- it's a Constitutional driver's license, is that what it is? I believe that's what it was. A. Okav. It declares him specifically as a sovereign citizen. ۵. A sovereign citizen? Yes. Α. So he told you, this was a message he was giving you, that he felt that he was a sovereign citizen and he didn't believe that certain laws apply to him. Is that right? That's correct. ٥. Ckay. That's the expression you don't agree with, right? It's something that you found problematic, as I --I do. I do. All right. But you also understand that the First Amendment requires that you tolerate problematic, offensive speech, right?

-- he, Mr. Brubaker, provided you

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comes to the flag?

And I do.

2 ۵. 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? 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 Okav. 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 Joshuaa Brubaker. 21 111 22 111 23 111 24 111 25 111

rule.

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Okay. Understood. Not when it

There has to be exceptions to every

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2 JOSHUAA SHANE BRUBAKER. 3 the witness, having been duly sworn, testified on 4 behalf of the defense as follows: 5 THE MAGISTERIAL DISTRICT JUSTICE: 6 Have a seat. Speak into the mic, please. 7 . . . 8 DIRECT EXAMINATION q 10 BY MR. McGRAW: 11 ٥. Sir, could you tell us your name? 12 Α. Joshuaa Shane Brubaker. 13 All right. And where do you live. 14 s1r2 15 Δ I live at 3132 Colonial Drive 16 Duncansville, Pennsylvania, 17 How long have you lived there? 18 I lived there and the house next 19 door, which is my mother's, since 1991. 20 ٥. Who do you live there with? 21 I -- at the residence I live at 22 now, I live with my wife and our three kids. 23 Q. All right. Now, Mr. Brubaker, you

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do not dispute that you hung the flag in the

manner depicted, correct?

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A. Correct

I would like you to tell the Judge ۵ in as much detail why you did that.

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.

- Let me interrupt you there. You ٥. referenced the term "AIM." What does that stand form?
- A. AIM stands for American Indian Movement.
- All right. And how long has that movement been in existence, to your knowledge?
- To my knowledge, since the late A. '60s, early '70s.
  - ٥. Okay. Continue, please.
  - 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 cutside 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.

Thank you, Joshuas.

MR. McGRAW: No further questions.

CROSS EXAMINATION - - -

BY MR. CONSIGLIO:

- ٥. Are you a sovereign citizen?
- Α. No. Never claimed to be.
- Never claimed. Why did you give those papers to this officer?
- I didn't give them to him. I gave them to the chief. And when I did --
  - All right.

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-- I respectfully -- because of my relationship with them, which I've always been respectful in dealings with them before, always been courteous, respectful, polite, I gave it to him to explain to him that I just came across it and I'd kind of like to get his understanding of it, because by Constitution, by Supreme Court rulings, it was determined that we don't need a license, registration, or inspection to drive a vehicle. And I said to him. I said my vehicles are insured and licensed, and I wasn't planning on driving without it, but I kind of wanted to see what they had to say about it. I mean, they are officers of the law. I thought, if I have a question about something, they're right across the street, I should be able to talk to them about it and ask them.

 $\label{eq:commonwealth} \begin{tabular}{ll} (Commonwealth Exhibit No. 4 marked for identification, retained by the Court.) \\ BY MR. CONSIGLIO: \end{tabular}$ 

- Q. Let me show you No. 4. Do you recognize that?
  - A. Yes.

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Q. Is that what you gave either this

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officer or a member of his department? 2 Correct. I gave this to the chief. 3 And does that say, or does that not 4 say, that you are certified as a sovereign citizen? в It does say that ٥. But how come you just said under 8 oath that you weren't? 9 Α. 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 ٥. Sir, you just gave a little speech about how come you put this sign up --21 22 Δ Correct 23 ٥. -- under oath. 24 Correct. 25 ٥. But you also said under oath that

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you're not a sovereign citizen, of which you are. 2 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 ... 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.

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THE MAGISTERIAL DISTRICT JUSTICE: Okay. You can step down. MR. SHUBIN: We have no further evidence. Judge. THE MAGISTERIAL DISTRICT JUSTICE: Okay. Closing? CLOSING ARGUMENT MR. SHUBIN: Judge, we're asking the Court, and we think the circumstances compel the Court, to dismiss both of these charges. Pennsylvania's flag desecration law is Vietnam era. It's over 40 years old, Judge. Since those laws were passed, the Supreme Court has examined the constitutionality of statutes that criminalize expression using the flag. In both cases, the Supreme Court said, no, it's illegal, First Amendment protection, period. the end. That's what the Supreme Court of the United States has said. Pennsylvania has looked at this .. has looked at flag burning -- or flag

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desecration, to my knowledge, only a couple of

times, and in both of those cases, Pennsylvania

courts have said that any expressive conduct

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

Expression using a flag, in my view, is inherently political and protected.

That's a constitutional, sort of a lofty

Constitutional principle. The Court needs to go there to resolve this case. However, the Pennsylvania Court has -- the Pennsylvania and the Supreme Court has decided, yeah, expressive conduct cannot be criminalized.

Just three days ago, Judge, three days ago, in <u>Snyder v The City of Cape Girardeau</u>, the Eighth Circuit issued a decision invalidating Missouri's flag desecration statute and said that beginning in 1974, with Spence, culminating in 1989 and 1990 with <u>Texas v Johnson</u> and <u>U.S. v</u>
<u>Eichman</u>, the cases that Officer Berg recognizes my client gave him to review, the Supreme Court

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

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

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

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

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

Flew it upside down with American Indian Movement initials right on there.

Political. I mean, it is by definition what he did, political. And put it there, and the officer went and seized it, without even undertaking an analysis of whether, in fact, this was political. He was offended. Somebody had done something to the flag. And he was very honest about it. And I give him credit for that. I understand how difficult it was and how heartfelt all of this is.

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

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

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

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

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BUCKLER & ASSOCIATES - AND . ASAP COURT REPORTING So when we were talking about 2102 specifically, we're talking about a statute that by its terms requires that there be some rule out that this was political. It's an exception to a prosecution here. You cannot prosecute someone for expression that could be political.

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

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

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

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

BUCKLER & ASSOCIATES - AND -ASAP COURT REPORTING "Tea Party" wasn't defiling, but what my client did, expressing the political message, was defiling, even if you give them it was defiling, the Court has to find the Commonwealth has the burden of proving that he did this maliciously, with an intent to injure people. And the only evidence of intent is what the officer honestly reported my client told him at the time, which was, "I was doing this because I felt the country's in distress."

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

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

In this case, the Commonwealth, the

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

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

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

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

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

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

THE MAGISTERIAL DISTRICT JUSTICE:

Okay.

CLOSING ARGUMENT

HR. CONSIGLIO: Judge, the case that he cites, <u>Commonwealth v Bickers</u>, that case involved a display of the American flag inside a house, not a public display of the American flag. That case clearly indicated that the -- that the law that we're talking about, as far as 2102

goes, is constitutional. And I don't think there's any dispute about that.

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

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

And what evidence do you have that

Right.

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

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

And how does that apply on this?

That applies upon whether or not he actually
is -- at the time he hung the flag, was he making
a political demonstration or if he just did it to

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

 $\label{eq:themospherical} \mbox{The Magisterial District Justice:} \\ \mbox{I understand.}$ 

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

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THE MAGISTERIAL DISTRICT JUSTICE:

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

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

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

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

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

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

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

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

Now, if you feel that they're right

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#### 90 CERTIFICATE 2 3 I hereby certify that the proceedings 4 and evidence are contained fully and accurately 5 in the notes taken by me at the hearing of the 6 within cause and that this is a true and correct 7 transcript of the same. Surana C. Ergert 8 а SUSANNA C. ENGLERT, Notary Public Certified Shorthand Reporter 10 11 12 COMMONWEALTH OF PENNSYLVANIA Notated Seel Susanna C. Drylett, Notary Public City of Altoma, Mair County 13 14 May 9, 2018 15 16 17 18 19 20 21 22 23 24

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BUCKLER & ASSOCIATES ASAP COURT REPORTING

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

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