

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA . Criminal No. 1:16cr265
 .
 vs. . Alexandria, Virginia
 . March 10, 2017
 NICHOLAS YOUNG, . 9:01 a.m.
 .
 Defendant. .
 .

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT: JOHN T. GIBBS, AUSA
GORDON D. KROMBERG, AUSA
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ALSO PRESENT: SA NICHOLAS CASLEN

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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

P R O C E E D I N G S

(Defendant present.)

1
2
3 THE CLERK: Criminal Case 16-265, United States of
4 America v. Nicholas Young. Would counsel please note their
5 appearances for the record.

6 MR. KROMBERG: Good morning, Your Honor. Gordon
7 Kromberg, John Gibbs, and Evan Turgeon for the United States.
8 With us in front of the bar is FBI Special Agent Nicholas
9 Caslen.

10 THE COURT: Good morning.

11 MR. NICHOLAS SMITH: Good morning. Nick Smith on
12 behalf of defendant Nick Young. My cocounsel, David Smith, is
13 at a hearing in front of Judge Lee.

14 THE COURT: We're aware of that. He'll get here as
15 soon as he can.

16 All right, this matter comes before the Court on the
17 defendant's motion to suppress various items which the
18 defendant alleges were unconstitutionally seized from his
19 residence, backpack, pickup truck, and workplace.

20 Mr. Young, I want to hear from you first, and I want
21 to first of all chastise you because in your initial motion,
22 although you attached the search warrants and the search
23 warrant affidavits that were at issue, you did not include
24 among your attachments the criminal complaint affidavit, which
25 was extensively referenced and incorporated in all those search

1 warrant affidavits. That's part of the totality of the
2 information that was before the magistrate judge.

3 MR. NICHOLAS SMITH: Absolutely, Your Honor, and, in
4 fact, we -- the affidavit was incorporated by reference into
5 the warrants, and we extensively discussed that affidavit and
6 the fact --

7 THE COURT: Yeah, but you didn't include it, and it
8 clearly was a relevant piece of information. Now, of course,
9 the Court ultimately got it, but we had to go to the docket and
10 pull it. That should have been included in your materials,
11 because when the magistrate judge is issuing the affidavit --
12 issuing the warrant and he or she is reviewing the affidavit,
13 if the affidavit is incorporating another affidavit, the
14 magistrate judge also looks at that.

15 So the totality of the information in evaluating the
16 adequacy of probable cause is not just what was written in the
17 confines of the affidavit for the search warrant, but it
18 incorporates the affidavit for the complaint as well. That
19 should have been included with your packet of exhibits.

20 MR. NICHOLAS SMITH: We apologize for the omission,
21 Your Honor, and we absolutely agree with the Court that that
22 information should have been considered and was considered by
23 the magistrate. Our position is that taken in the totality of
24 the circumstances, all of the facts in that affidavit and the
25 special affidavits for the warrant applications do not

1 constitute probable cause to seize any of the objects under
2 consideration.

3 THE COURT: And I must tell you any commonsense
4 reading of the complaint in the context of -- especially in
5 context of what's added to in the search warrant affidavits,
6 there's tons of probable cause.

7 Go ahead.

8 MR. NICHOLAS SMITH: May I proceed with our argument?

9 THE COURT: Well, no, you're responding to the
10 Court's questions. Why do you think there is not adequate
11 probable cause to support the searches in this case?

12 MR. NICHOLAS SMITH: Okay. I'd like to take a step
13 back and --

14 THE COURT: No. No, you answer the Court's question.
15 Why do you think there is inadequate probable cause to support
16 the searches in this case?

17 MR. NICHOLAS SMITH: We believe there's inadequate
18 probable cause because the standard is whether there is
19 probable cause to establish that the items to be seized in the
20 warrant to satisfy the particularity requirement have to be
21 evidence of crimes or contraband. If you take a look at the
22 crimes that are alleged in the affidavit in support of the
23 complaint and the affidavits in support of the search warrants,
24 there is only one cognizable, actionable crime, which is the
25 provision of gift cards, alleged provision of gift cards to an

1 informant after a five-year investigation.

2 Now, there are other --

3 THE COURT: Wait. That statement in and of itself is
4 not accurate. That's not the crime. The crime is providing
5 material support to a terrorist organization, in this case
6 ISIS. Plus, as the government properly points out, there are
7 also references to obstruction of justice and clearly
8 statements -- making false statements to federal law
9 enforcement officers.

10 MR. NICHOLAS SMITH: Those are the statutes, Your
11 Honor, charged in the criminal complaint and the indictment.

12 THE COURT: Correct.

13 MR. NICHOLAS SMITH: And the factual predicate for
14 those statements is what constitutes the crime that's alleged
15 in the indictment. Now, even if we assume for the sake of
16 argument that it's the statute and not the facts as charged
17 that constitute the crime, there is no link in any of the
18 affidavits under the Court's consideration that the firearms
19 are evidence of that crime.

20 The affidavits state that all firearms and body armor
21 in the defendant's possession, regardless of whether it's
22 legally owned, are in their nature inherently related to a
23 statute. There's no legal support for that proposition.
24 There's no attempt in the affidavits to link legally owned
25 firearms to the crimes.

1 THE COURT: Well --

2 MR. NICHOLAS SMITH: That's the particularity
3 requirement.

4 THE COURT: The problem --

5 MR. NICHOLAS SMITH: That's what *Millender* holds.

6 THE COURT: The problem you've got with that argument
7 given the facts of this case -- now, *Millender* is, first of
8 all, it's a Ninth Circuit case. This is the Fourth Circuit.
9 The law is quite different in many respects in the Fourth
10 Circuit. But in *Millender*, the court had a very narrow reading
11 of probable cause under the facts of that particular case which
12 involved a specifically described shotgun.

13 That's not what you have here. You have all kinds of
14 references, and I'll just point a few of them out to you.
15 You've got Young telling the undercover that he aimed an
16 AK-47-style rifle out of a window of his residence once while
17 scanning for law enforcement. You've got Young sharing with
18 the UCO a method for smuggling firearms into this courthouse.
19 You've got statements to the -- that he made concerning
20 discussing marksmanship fundamentals with Amine El-Khalifi, who
21 was later arrested for attempting to detonate an IED at the
22 U.S. Capitol Building.

23 You've got the defendant telling the undercover that
24 he was stockpiling weapons and would use those weapons against
25 law enforcement personnel if they attempted to search his home.

1 You have evidence -- and this is not disputed by you-all --
2 that Young traveled to Libya in 2011, when he had body armor, a
3 Kevlar helmet, and several other military-style items with him;
4 that Young attended a weapons training event and had large
5 amounts of ammunition and four firearms ranging from an
6 Egyptian AK-47 to a .45 caliber pistol, and he stated that he
7 owned three more weapons; and he asked one of the cooperators
8 about the chemical components of gun powder, which led that
9 individual to believe that Young wanted to make something.

10 Now, that's not proof beyond a reasonable doubt, and
11 maybe not any of those are themselves specifically crimes, but
12 when a magistrate is issuing a warrant, it's a practical --
13 it's a reasonable, commonsense, practical exercise, and you're
14 looking at the relevance of the material that's being sought to
15 criminal activity described in the complaint, and if that's not
16 enough to allow for a search of any and all weapons and
17 firearms, I don't know what is. It's a very powerful
18 affidavit.

19 MR. NICHOLAS SMITH: We have two responses to those
20 statements, Your Honor. The first is that Your Honor will see
21 that those statements, alleged statements were made over five
22 years before the warrant --

23 THE COURT: What difference does that make?

24 MR. NICHOLAS SMITH: What difference does that make?
25 There's a timeliness consideration. Plenty of things happen in

1 the state of mind of someone in five years.

2 THE COURT: Yeah, but your client was involved with
3 the gift cards right up until the very last minutes.

4 MR. NICHOLAS SMITH: Your Honor, we respectfully
5 disagree and believe the gift cards have nothing -- the gift
6 cards are a nonviolent charged crime.

7 THE COURT: All right.

8 MR. NICHOLAS SMITH: The weapons -- and there's one
9 more point. If Your Honor looks at the *Mora* decision from the
10 Fourth Circuit that the Court cites, that decision indicates a
11 circumstance in which an immediate seizure of all firearms in
12 the defendant's possession is proper for public safety-related
13 reasons.

14 This is not a case where the government is arguing
15 that these weapons needed to be seized immediately in order to
16 protect law enforcement or the public.

17 THE COURT: No. They were being seized as evidence
18 of criminal activity.

19 MR. NICHOLAS SMITH: As a part of an investigation
20 that went dormant for four years or more. Then later on --
21 this is why understanding the larger context of this
22 investigation is absolutely critical for this motion. More
23 than five years before the warrant affidavits were filed,
24 Nicholas Young was investigated for alleged links to terrorism.
25 During this entire investigation, Mr. Young remained on law

1 enforcement with the Washington Metro Transit Authority,
2 carrying a firearm as a part of his duties on the job. The
3 government knew about this. Nothing was done. No charges were
4 filed, he wasn't arrested, while carrying a weapon at work.

5 So jump forward five years. No charges are ever
6 levied against Mr. Young for those -- for any of these crimes
7 that are supposedly the ones that are linked to the firearms.

8 Take his trip to Libya. The government represents in
9 the affidavits to search the home that Mr. Young had terrorist
10 contacts and that traveled overseas to fight on behalf of
11 terrorist groups. That's false. That's a false
12 representation.

13 The terrorist groups that the government has to
14 allege in the statute for the affidavits is support for a
15 foreign terrorist organization. There's no factual support
16 before the Court that there is support for a foreign terrorist
17 organization.

18 THE COURT: All right, move on to your books and
19 papers argument. Again, you have argued that the warrants that
20 requested searches for any and all documents are themselves
21 overly broad. Again, there's plenty of probable cause to
22 support a search for those materials.

23 MR. NICHOLAS SMITH: The materials are untethered to
24 terrorism crimes. The documents -- several categories of the
25 documents and records authorized the government to seize all

1 lists of contacts with Nicholas Young, all documents related to
2 any service provider unconnected to a terrorism crime, all
3 electronic devices in his home that constitute any of those --
4 comprise any of those categories, and all documents related to
5 travel overseas and attempts to send money overseas.

6 If you read the government's opposition, there's no
7 attempt to link those categories of information to the specific
8 charged terrorism crime.

9 THE COURT: Well, now look. There were eight
10 specific items listed in the appendix for those search
11 warrants. They say, for example, all records and documents
12 that concern the international transfer of money or assets, or
13 the procurement of any item that may have been involved in or
14 in support of terrorist or violent acts.

15 That's narrow. That means if, you know, you're just
16 sending flowers internationally to somebody in England, that's
17 not going to get picked up.

18 The next one, all records and documents referring or
19 relating to identifiers or aliases of Nicholas Young. There's
20 nothing wrong with that.

21 All documents referring or relating to past travel or
22 planned travel by Young. Now, it's clear Young has traveled to
23 Libya. Plus, there are all those discussions with the
24 undercover about the undercover traveling to Turkey and how if
25 you travel with a group of tourists, you're less likely to be

1 picked up as somebody trying to get into Syria. So your client
2 has -- that's in the affidavit.

3 So each one of these categories of documents or
4 records which are sought, I find, are adequately narrowly
5 limited and linked to the types of crimes that are being
6 investigated and the probable cause that's in these affidavits.
7 You just don't have it.

8 MR. NICHOLAS SMITH: It seems like the Court is going
9 back to -- instead of the gift card crime as authorizing the
10 probable cause for all of these searches and seizures, it seems
11 that the Court is falling back on the what are called crimes in
12 the period between 2011 and, let's say, 2014, when the gift
13 card piece of the investigation began, but if you -- if the
14 Court is concerned about those charged crimes, the question one
15 has to ask is why did this investigation end? Why were these
16 so-called crimes never indicted and charged?

17 There's a tension here between saying those crimes
18 authorized these sweeping searches and seizures and saying
19 those crimes were never charged. The overall question is why
20 were they not charged?

21 THE COURT: Well, that's the kind of question in
22 these types of cases that's not appropriate. The only real
23 Fourth Amendment question in my view is whether or not the
24 issuing magistrate judges were presented with sufficient facts
25 to establish probable cause of specific criminal activity and

1 that the search warrants called for a search of items
2 reasonably expected to be related to that type of activity, and
3 I don't find anything in your pleadings other than one category
4 that creates an issue.

5 So let's move on to the argument you've made that the
6 seizure of Nazi paraphernalia and the Confederate flag was
7 beyond the scope of the warrants.

8 MR. NICHOLAS SMITH: Correct.

9 THE COURT: All right. And, Mr. Kromberg, I want to
10 hear from you on that. You know, one of the things that, that
11 Mr. Smith has complained about is that he requested that you
12 under rule 12, you know, advise the defense as to what evidence
13 you were going to use, because obviously, if you're not going
14 to use a particular quantity of evidence that came from a
15 search warrant, there's no need to file a motion to suppress.

16 So I want to know about your approach to that.

17 MR. KROMBERG: Right. So when Mr. Smith asked for
18 that notification, I wasn't ready to provide it because I
19 didn't know, because we've been providing documents and
20 evidence in discovery to the Smiths of extensive evidence even
21 within the last two weeks, including evidence that we were
22 going to use.

23 We are now at a point where we can make decisions on
24 what we're going to use and what we're not going to use. The
25 Confederate flag, for example, with what's described as a dog

1 in the middle, it's a snarling dog with the words "Rebel Blood
2 in My Veins, Yankee Blood in My Yard."

3 So, so it's not just a Confederate flag, but we're
4 not going to use that because we now know. But at the time --
5 because remember, Judge, this is not an issue of is it a 403 --
6 is the probative value outweighed by the prejudicial value.
7 This is is it encompassed.

8 Well, we were talking, the warrant allowed us to
9 seize information about terrorist groups, so I'll pass up to
10 you -- in fact, I'm going to pass a book up to you if that's
11 okay, because it might make it easier than to pass up
12 individual documents.

13 The first document in the book, Judge, is a roster or
14 a contact list, so we -- that is included in the scope of the
15 attachment to the warrant because it has, it has contacts and
16 it also has aliases. If you look down to the fourth name on
17 the left-hand column --

18 MR. NICHOLAS SMITH: Your Honor, I have to object.
19 Were these exhibits submitted in connection already, or are
20 these just being filed for the first time?

21 THE COURT: They just were filed today, and I assume
22 these are materials that were seized from the defendant?

23 MR. KROMBERG: That's correct, Judge.

24 THE COURT: So these are among the items that you
25 want suppressed.

1 MR. NICHOLAS SMITH: Some of these do not relate to
2 Nazi memorabilia or the Confederate flag.

3 THE COURT: Well, we haven't heard what Mr. Kromberg
4 is doing with this yet, but I guess the first question,
5 Mr. Kromberg, are all ten of these items things that were
6 seized during these searches?

7 MR. KROMBERG: There is one page in here that I
8 downloaded from the Internet this week. Other than that, they
9 are all items that were seized from the defendant.

10 MR. NICHOLAS SMITH: Your Honor, this is a sandbag.
11 We didn't have any notice that the government would present
12 argument on the --

13 THE COURT: Well --

14 MR. NICHOLAS SMITH: -- collection of images which
15 it's curating right now.

16 THE COURT: But you made the issue -- you raised the
17 issue in your papers that the seizure, the agents' seizure of
18 Nazi-related paraphernalia was beyond the scope of the
19 warrants. I assume you've seen this stuff, right?

20 MR. NICHOLAS SMITH: This is a procedural objection
21 I'm raising right now.

22 THE COURT: I understand that.

23 MR. NICHOLAS SMITH: We've asked the government
24 innumerable times to tell us whether it would be using this
25 evidence. Not only has it refused to cobble together a

1 argument; it won't answer our e-mails about this question.

2 THE COURT: Mr. Smith, have a seat. Let me hear what
3 Mr. Kromberg has to say.

4 MR. KROMBERG: Your Honor, our position is that a
5 determination of whether individual items are within the scope
6 of the warrant should be held for later. If and when the
7 government says we're going to move to introduce it, then the
8 defense says, well, no, this is outside the scope.

9 At that point, the government would say, well, even
10 if it's outside the scope, it was within plain view.

11 So we -- I don't think it's appropriate to talk about
12 evidence in general categories, and what I'm trying to get to
13 now is to show why you can't do that very effectively, because
14 here is a document about Nazis that's also a contact list. So
15 do we count that as a document about Nazis, or do we count it
16 as a contact list? So that's the first page.

17 By the way, the second page is a redacted version
18 because the first page, obviously, has names and addresses of
19 people that perhaps should not be publicly filed.

20 THE COURT: All right.

21 MR. KROMBERG: But that's the significance of that.

22 It also has the -- if you notice on the first page,
23 it has the death's head logo at the top. So it's not just
24 Nazi; it's SS.

25 THE COURT: All right, go ahead.

1 MR. KROMBERG: And you'll also notice that the alias
2 used, the name used by Nicholas Young on the first page on the
3 fourth box is Storm Trooper Düsseldorf, Klaus Düsseldorf.
4 That's an alias. So it's not just a contact list. It's not
5 just a Nazi thing. It's an alias.

6 The -- on document 2, that is a page I downloaded
7 from the Internet this week. I went on LiveLeak, and I -- and
8 here is that Düsseldorf is accused by someone in Iraq of being
9 an ISIS supporter.

10 Now, again, this is not a matter -- this is not
11 seized from him. It's just the point of this Düsseldorf is not
12 just some Nazi thing. You go on farther in category 2, and
13 these are items that we provided to the defense that we -- that
14 were not seized from him but we provided to him in the
15 discovery as part of the government's investigation to show
16 that Düsseldorf is his identity. He was using the identity of
17 Düsseldorf to post pro-ISIS matters online.

18 He's saying he was entrapped. He's saying that the
19 government has to show he was predisposed. If he's using the
20 identity of Düsseldorf to post pro-ISIS videos, everything
21 about Düsseldorf is admissible.

22 And if you page through No. 2, these various items,
23 it will show that Düsseldorf is him, and it even has his
24 profile picture of a dog that he -- Mr. Charles, and the last
25 page is a seized photo that he had of -- that we seized of

1 Charles. And that's only to show that it's not just some other
2 Düsseldorf. This is this defendant posing as Düsseldorf
3 online, posting pro-ISIS videos, justifying the burning of the
4 Jordanian pilot, and saying that ISIS hasn't done anything
5 contrary to Islam.

6 Now, No. 3 is an item that was seized, Ku Klux Klan
7 stuff. Now, once we find Ku Klux Klan stuff, that has to do
8 with -- now, that's a terrorist group. It fits within the
9 rubric on the appendix to the affidavit of a terrorist group.
10 Once you find Ku Klux Klan stuff, and you find a book, which is
11 the second page on No. 3, the *Serpent's Walk*, that is published
12 by the National Alliance, it's a white supremacist organization
13 with the swastika on it, once you find that, that's part of a
14 terrorist group.

15 And once -- keep in mind -- go to No. 4. No. 4 is a
16 document seized from him where it says on the second page there
17 that the SS is the logo of white supremacist groups and
18 neo-Nazis. Third page is his book *The SS: Hitler's Instrument*
19 *of Terror*.

20 So in our view, I think the agents' view, they see a
21 book that says *Hitler's Instrument of Terror*, the attachment to
22 the warrant allows them to seize items that have to do with
23 terror groups, they seize his book, *Hitler's Instrument of*
24 *Terror: The SS*.

25 No. 5, him as Storm Trooper Klaus Düsseldorf, wearing

1 a death's head logo, in an SS uniform. Second page, same
2 thing: Storm Trooper Klaus Düsselkamp.

3 No. 6 is SS tie tack found in his car. This wasn't
4 something from way back in his youth. This was found in his
5 truck when his, when his truck was searched in August 2016.

6 Second page on No. 6, again, a death's head logo, SS.
7 That has to do with a terrorist group.

8 I could -- there's more, Judge. I could go on, but
9 in response to the question about Nazi stuff, I don't think we
10 can talk about Nazi stuff generally because I bet you there is
11 some Nazi stuff that maybe is not necessarily included within
12 the ambit of the warrant, but individual Nazi things that we
13 have found and we plan to use was found with -- excuse me, was
14 within the warrant not only because it has to do with a
15 terrorist group but because it has to do with him having a
16 firearm.

17 For example, I think -- I have a picture of -- if you
18 go to No. --

19 THE COURT: It was 4 or 5, I think. In the uniform?

20 MR. KROMBERG: Right. Okay. Turn to No. 10 for a
21 moment. Now, 10, Storm Trooper Düsselkamp with the SS logo on
22 it in front of the swastika flag; No. 11 -- excuse me, next
23 page is he's there in Muslim garb. Now the -- and the page
24 after that, in Muslim garb with a rifle.

25 The interesting thing about that is the metadata from

1 the first page on No. 10 is January 28, 2006. The metadata for
2 the second two pages is February 2, 2006. So there's not only
3 a similarity in ideology about certain parts of the ideology,
4 but chronologically, this was happening at the very same time.

5 So you go back to No. 2, one of the pages on No. 2,
6 he's being -- Düsselkamp is being accused on LiveLeak of being
7 a Muslim-Nazi scum. Now, whether or not that's true, I don't
8 know the answer to that, but the point is that the Nazi stuff
9 in this case is very much related to the, to the ISIS stuff.

10 For example, take a look at No. 9 -- I'm sorry,
11 No. 8, No. 8. No. 8 looks like a World War II propaganda
12 poster, and you think, well, that's just historical, but then
13 look at the date: 1939 to 2004. I don't know if the Court
14 speaks German, I had to get this translated, but it says, "The
15 Alliance 1939 to 2004. The Worldwide Association of Islamists
16 and Nazis."

17 Well, all of a sudden, you're beginning to think,
18 well, wait a minute now. Is there something else going on
19 here?

20 If you look at -- let's see here -- I was supposedly
21 going in order, but I guess I didn't -- the individual on the
22 second page of No. 8 is, on the left is Amin Haj Husayni, who
23 is -- Mohammad Amin al-Husayni, who is the second page on
24 No. 8, which is Nicholas Young's Facebook page. It's a "like."
25 He likes Mohammad Amin al-Husayni. That's the individual

1 depicted in the Alliance photo.

2 And the next page, third page, that's another photo
3 of Mohammad Haj al-Husayni, also known as the Mufti of
4 Jerusalem during World War II for his alliance with Hitler,
5 that was taken from his computer.

6 Go on to No. 9, that is the Mufti of Jerusalem
7 meeting with Hitler. Second page of No. 9 is Hitler.

8 These -- without going over these things item by
9 item, you cannot make a call that, oh, Nazi memorabilia or Nazi
10 paraphernalia is outside the scope of the warrant. Some of
11 it's within the scope of the warrant, some of it may be outside
12 the scope of the warrant, but on the other hand, it's a
13 terrorist organization, and it's related to Storm Trooper Klaus
14 Düsselkamp.

15 Then if we go down that road, Judge, of trying to
16 determine item by item, we have to talk about plain view. If
17 the agents were there lawfully and they see a portrait of
18 Hitler, which is on No. 9, page 2, well, is that -- is the
19 incriminating nature of the portrait of Hitler plainly
20 apparent?

21 Well, in this case, the evidence will be, and the
22 agents knew this because it was on tape, when Mr. Young went to
23 the Kinko's to set up an e-mail account with the CHS before the
24 CHS was going allegedly to Syria, they were setting up the
25 e-mail accounts, they had to put in contact information, this

1 defendant said, "Hey, I'm going to use Hitler's birthday."

2 CHS -- the CHS says, "Yes, here's a recording of when
3 we're talking about getting the e-mail account set up, and the
4 guy who said he was going to use Hitler's birthday" -- and, in
5 fact, the records do show 4-20-89, Hitler's birthday -- of
6 course, it was 1889, not 1989 -- but that was what was used to
7 set up the essakobayashi e-mail account used by this defendant,
8 well, this portrait of Hitler is good corroboration for when
9 then CHS says, "It was that man right there who I went with to
10 the Kinko's."

11 So my point is, Judge, every one of these items can
12 only be figured out whether it's admissible or not, and 403
13 analysis, 404 analysis, and predisposition relevance, that can
14 only be done item by item once, once we say what we're going to
15 use, but as a category for within the warrant or without the
16 warrant, it's within the warrant, but even if it wasn't within
17 the warrant, you can't look at it -- we can't make
18 determinations on whether they're within the warrant or without
19 the warrant at this point.

20 There are other exhibits in here which I might have
21 missed, but I think Your Honor has the picture of what was
22 going on here.

23 (Mr. David Smith present.)

24 THE COURT: Well, I think -- I think you're wrong on
25 one point, Mr. Kromberg, and that is, the Court, when it's

1 evaluating a motion to suppress, doesn't wait until the trial.
2 You do it in the context of what's within the four corners of
3 the affidavit, what are the reasonable inferences that can be
4 drawn from what's within the four corners of the affidavit, and
5 at this point, I'm satisfied that these affidavits were more
6 than sufficient to allow for the seizure of any information or
7 materials that could be arguably related to terrorist activity.

8 And although whether or not the American Nazi party
9 is officially designated as a terrorist organization, there
10 certainly is enough evidence in my view to find that it would
11 be reasonable to deem it to be sufficiently terroristic in its
12 orientation and philosophy that it would have entitled a law
13 enforcement officer to seize any materials related to it under
14 the warrants as they were issued. So for these reasons, I'm
15 denying the defendant's motion to suppress.

16 I do agree that there are potential 404 -- 403 issues
17 here because the potential prejudicial impact may outweigh the
18 probative value especially given all the other evidence that
19 you appear to have based upon what's in the affidavit, but
20 we'll face that issue when we come to it.

21 But your motions are denied, Mr. Young -- Mr. Smith,
22 sorry, and we're going to proceed. I want to take care of one
23 logistical matter with this case as well.

24 MR. NICHOLAS SMITH: May I just make some points on
25 the record on some of the factual representations of

1 Mr. Kromberg?

2 THE COURT: Very briefly.

3 MR. NICHOLAS SMITH: So these exhibits were not in
4 the opposition papers. Mr. Young was faulted for not attaching
5 some exhibits that were on the docket sheet. These exhibits
6 submitted were, were nowhere to be found, the arguments were
7 nowhere to be found in the opposition papers.

8 Mr. Kromberg made an argument that the plain view
9 might justify the seizure of these Nazi materials even though
10 the warrants plainly did not authorize their seizure. However,
11 FBI 302 documents submitted in discovery show that the agents
12 themselves did not believe that the warrant authorized the
13 seizure of these documents. They had to call Gordon Kromberg,
14 who authorized them to seize the Nazi materials.

15 The standard for plain view is whether the materials
16 were incriminatory on their face, immediately apparent. The
17 very fact that the agents did not know whether they were
18 incriminating on their face suggests they were not.

19 The Nazi -- we don't believe it's necessary to
20 address why these Nazi materials were where they are, but we
21 would like to note for the record that Mr. Young has been
22 participating in world war reenactments for many years. Many
23 of the individuals listed in these documents participated in
24 war reenactments.

25 There was materials found in Mr. Young's office that

1 did not relate to the Nazis but were war memorabilia. These
2 items were selectively not chosen, which colors what the
3 significance of these materials certainly --

4 THE COURT: I think the argument on that could be
5 that shows the discretion the officers were making, in fact,
6 that they were not taking everything related to World War II;
7 they were taking everything that they understood were related
8 to potential terrorist activities.

9 MR. NICHOLAS SMITH: And we would note that there are
10 documents in the record from the FBI indicating the agents
11 themselves did not believe that these materials were
12 incriminating immediately apparently, which vitiates the plain
13 view argument.

14 THE COURT: All right. Well, you've made your
15 record, but I'm not satisfied, and so as I said, I'm denying
16 the motions to suppress.

17 I am concerned about keeping this case on track. We
18 don't yet have a trial date, and I think we held that up
19 because of some discovery and other types of issues.

20 Mr. Kromberg, do you expect at this point to meet the
21 deadline on the FISA information? Do you have any sense?

22 MR. KROMBERG: Yes, we do expect to meet the deadline
23 on FISA information.

24 THE COURT: Excellent. All right, so once I have
25 that for in camera review, once that's been evaluated, is there

1 any reason at that point we can't set a trial date?

2 MR. KROMBERG: I would think that that would be the
3 time to have a motions date and a trial date set at that point,
4 Judge.

5 THE COURT: All right, that's fine. So as soon as I
6 get that material, we can start moving this case along.

7 Anything further before we recess for the ten o'clock
8 docket?

9 MR. KROMBERG: First, I would like to apologize for
10 missing the deadline myself. I know that although the
11 defendant wasn't prejudiced, the Court was prejudiced by having
12 less time to analyze things, and for that I do apologize, and
13 it will not happen again.

14 THE COURT: All right, that's fine.

15 All right, we'll recess court until ten o'clock.

16 (Which were all the proceedings
17 had at this time.)

18

19 CERTIFICATE OF THE REPORTER

20 I certify that the foregoing is a correct transcript of
21 the record of proceedings in the above-entitled matter.

22

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24

25

/s/

Anneliese J. Thomson