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APPEARANCES

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LARRY A. MACKEY, GEOFFREY S. MEARNES, and JAMIE

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General, 1961

ORENSTEIN, Special Attorneys to the U.S. Attorney

4

appearing

Stout Street, Suite 1200, Denver, Colorado, 80294,

5

for the plaintiff.

6

NEUREITER, and

MICHAEL E. TIGAR, RONALD G. WOODS, REID

7

Suite 1308,

JANE TIGAR, Attorneys at Law, 1120 Lincoln Street,

8

Nichols.

Denver, Colorado, 80203, appearing for Defendant

9

* * * * *

10

PROCEEDINGS

11

(In open court at 10 a.m.)

12

THE COURT: Be seated, please.

13

Good morning.

14 We're reconvened in 96-CR-68, United States
against
15 Terry Lynn Nichols, for continuation of yesterday's
hearing.

16 Appearances the same? Appear to be, yes.

17 MR. MACKEY: Yes, your Honor.

18 MR. TIGAR: Yes, your Honor.

19 THE COURT: Mr. Tigar, were you able to
interview
20 Agent McCoy?

21 OFFER OF PROOF RE TESTIMONY OF JACK McCOY

22 MR. TIGAR: Yes, your Honor. We were able to
23 interview Agent McCoy by conference telephone call and
confirm
24 that he was the Inspector in Place beginning sometime
after his
25 assignment to the OKBOMB Task Force which began on the
20th of

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1 April, 1995.

2 His recollection is that although he does not
remember
3 authorizing Ms. Babbit to put his initials on block
stamps, he
4 feels certain that some such authorization was given.
He
5 states that his initials are JSM, Jack S. McCoy, or

Jack Smith

has 6 McCoy; and although the only document the Government
his 7 produced has him as Jack McCoy, he says that had he put
whatever 8 initials on personally, he would have done it JSM, for
9 that's worth.

being 10 He was under the impression that the mail was
there had 11 collected pursuant to a subpoena. He had some idea
it 12 been a grand jury subpoena, but he said he didn't think
He was 13 would have happened without a subpoena or court order.
policies. 14 sure that it was in accordance with Bureau of Prisons

in 15 Mr. -- Agent White, who we saw, was the person
Denver. 16 charge of this, particularly when the office moved to
every other 17 Agent White and Inspector in Place McCoy would talk
discuss 18 week, perhaps oftener, and in those conversations would
it 19 the progress of the mail review, McCoy making sure that
20 indeed was going forward and being done.

to find 21 He thought that the purpose of the review was
might 22 out about additional associations and conspirators that

instance, a 23 be in the -- revealed in the correspondence. For
to 24 letter from Terry Nichols to Josh, he said you'd have
from 25 examine to see if there was a coded message being sent

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forth 1 Mr. Nichols to his son. Similarly, letters back and
looked at 2 between Mr. Nichols and Mr. Papovich would have to be
the 3 to see if messages were somehow being sent by means of
about 4 correspondence that would provide leads to the FBI
5 additional conspirators and additional involvement.

lead 6 His testimony is that he does not remember any
review. 7 having been pursued as a result of Mr. Nichols' mail

further, for 8 He made that distinction, and we didn't follow it
9 obvious reasons.

a 10 He states that the process was stopped because
sometime in 11 motion was filed by the defense which he puts at
continuing 12 1996, November, but he didn't see anything wrong in

though 13 to review the mail that had already been obtained, even
14 the process of collection had stopped.

15 I think that's a fair summary of what he had
to say.

16 Perhaps Government counsel would like to add.

17 MR. ORENSTEIN: It's essentially correct.

18 I think it's worth noting that in describing
his

19 meetings with Agent White, the biweekly meetings,
Inspector

20 McCoy noted that the prison mail review project was one
of any

21 number of projects and ongoing investigations that may
have

22 come up. He didn't say specifically that they
discussed the

23 prison mail review at every meeting.

24 With respect to looking at the letters of Josh
Nichols

25 or Mr. Papovich, that wasn't something he volunteered.

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1 Mr. Tigar asked him what would be the purpose
specifically in

2 looking at those letters, and he said, "Well, again,
there may

3 be a message about co-conspirators."

Inspector 4 And just one other clarification: As
this 5 White -- Inspector McCoy told Mr. Tigar, he was basing
time ago. 6 entirely on memory of events that had happened some
Agent 7 He has not had an opportunity to review, for instance,
accurate 8 Wech's memo to him regarding the documentation of the
9 authority; but other than that, I think we have an
10 report.

11 THE COURT: Do you accept the supplementation?

12 MR. TIGAR: Yes, your Honor.

13 THE COURT: All right. Now, does that mean
that the 14 record on the subject motion to suppress is complete?
15 Evidentiary record, I mean.

16 MR. TIGAR: Yes, your Honor, except that in
talking to

17 Ms. Hasfjord this morning, we note that there were
several of 18 our exhibits, A through L, that we may not have offered
in 19 evidence. As I understand it, A, B and C are the
documents 20 that were attached to our initial motion and are
considered 21 part of the record.

22 THE COURT: Yes, that's correct.

23 MR. TIGAR: For the record, we reoffer D, E,

F, G, H,

24 I, J, K, and L, copies of each of which are in the
clerk's
25 custody.

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1 THE COURT: Is there objection to any of
those?

2 MR. ORENSTEIN: Judge, certainly I have no
objection

3 to the Court considering any of those. Some of it is

4 correspondence between counsel. I don't know that that
is

5 anything that the Court would want in the public
record; and

6 obviously much of it concerns Mr. Nichols' mail which
the Court

7 has kept sealed up to now, and we believe that's the

8 appropriate course.

9 MR. TIGAR: Yes, your Honor. By offering
them, we

10 offer them initially as sealed exhibits, and then
obviously

11 portions of them can be released to the public; and
that's

12 something that we'll have to do very shortly after this
hearing

13 is over.

14 THE COURT: All right. We'll take them as

sealed now.

15
respect to

MR. TIGAR: May I address the Court with

16 what we've seen?

17 THE COURT: Yes.

18
do?

MR. TIGAR: And what we request the Court to

19 THE COURT: Yes.

20 DEFENDANT'S ARGUMENT ON MOTION TO SUPPRESS

21
that we

MR. TIGAR: If your Honor please, the facts

22
very

developed in this hearing we respectfully submit are

23
reading

different from the impression that would be created by

24
the

the Government's response. At page 5 of that response,

25
as a

Court was told that the surveillance was discontinued

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says

1 result of an order issued by the Court; and Agent White

2 that it was a result of an order issued by the Court.

any

3 Agent Defenbaugh says, "No, we weren't getting

it"; but

4 investigative leads from this and therefore we stopped

5 in any case, the review process continued right through

January

6 of '97, even though that order had been issued in
November of 7 1996.

8 Agent White tells us that the contents were
not 9 included in the investigative database -- excuse me.

The 10 Government's response at page 6 tells us that contents
of the 11 letters are not included in the investigative database
for this 12 case.

13 Now, that's a very interesting representation,
and I

14 submit that it is fundamentally misleading. Exhibit H
is

15 our -- are faxes from Linda Vernon. She's an FBI agent
and one

16 of the people we deal with, the principal person we
deal with,

17 on these files. In looking at that fax, we can see
that there

18 were a number of files all in alphabetical order that
were

19 created; and of course, the contents of things referred
to in

20 these files are not contained in the investigative
database.

21 For instance, if I have a truck part, I don't
put that

22 in the investigative database. I can't get on my
computer and

23 have a piece of a truck come out of the screen at me.
What the
24 investigative database does is to make sure that
anybody who
25 wants to see an item of physical evidence is able to
find out

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1 where it was, to whom it was sent, by whom it was sent,
when it
2 was sent, who received it, and any other information
that the
3 investigative agent should wish to put in there.

4 The investigative use could not be clearer,
because
5 the pattern of events unfolds like this: Sometime in
the
6 summer of 1995, somebody decides they want to look at
this
7 mail. Mr. Baker identifies Donna Bucella as involved
in that
8 process. Now, the Court remembers Donna Bucella.
She's a
9 central character here. She's sent to Oklahoma City by
Janet
10 Reno personally to carry out certain tasks; and among
those
11 tasks is to say grace over the captivity of Marife
Nichols, to
12 help coordinate the investigation, to be the

representative

13 from Washington, and so on.

14 Donna Bucella's role in this is a little bit
shadowy,

15 but we're told by Mr. Baker that she must have been the
person

16 who talked to the Bureau of Prisons. We don't have the
Bureau

17 of Prisons' side of this, but we know that the next
document is

18 contained in Defense Exhibit E. It's that grand jury
subpoena;

19 and lo and behold, a special assistant United States
attorney

20 designated by the Attorney General, Mr. Mackey, issues
a grand

21 jury subpoena to go get those letters from the prison.

22 Now, early on, the prison letters are simply
collected

23 by agents who make an on-the-spot determination as to

24 investigative relevance. They're determining what has

25 significance, and that determination is made by these
agents.

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1 They bring these things back.

2 Another interesting fact, of course, is that
although

3 the grand jury subpoena is executed and complied with

on the

4 1st of August and Mr. Nichols is indicted just nine
days later,

5 we don't have any record that that evidence was
actually put

6 before the grand jury. We are told from the witnesses
that

7 somebody named Wanda did actually present it, but it
really

8 doesn't look like they're trying to prepare to indict
somebody

9 when they're getting this material.

10 Regardless of the grand jury problem, the
collection

11 process continues; and it continues without what Agent
McCoy

12 said this morning he thought there was. He thought
there was a

13 subpoena or a court order. Well, there wasn't. They
kept

14 collecting it, and they started making these tally
sheets with

15 it. And that was simply these hash marks that were put
to

16 divide the mail into categories. Of all the documents
that

17 have been produced pursuant to the Court's order, those
have

18 never showed up.

19 Indeed, the universe of documents about how
these

20 things were handled that we do not have is quite --
perhaps

a lot. 21 more significant than what we do have, although we have

22 The hash mark sheets are missing.

23 To skip ahead, the charge-out sheets are
missing.

24 There is no way that anybody can tell who took these
things out

25 of the file, because anytime they were taken out and
brought

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1 back to somebody's desk, a slip is put in the file; but
after

2 it's returned, the slip is thrown in the trash. In the
trash.

3 There is no log-out sheet, no charge-out sheet. I
guess maybe

4 that's the way they keep all their files over there;
and if

5 somebody wants to take it out and make a copy, no
record is

6 ever made of that, let alone one that's made and then
destroyed

7 supposedly in the regular course of business.

8 This process of review continues, your Honor.
And the

9 Government's description of it is in the papers -- is
different

10 from what comes out on the stand. In March of 1996,
Agent

involved 11 White and Agent McCoy and Agent Baker -- they're all
Whoops, 12 in this -- make a decision. And that decision is,
better 13 we've got a lot of mail here; we want more, and we
14 figure out why we're getting it.

temporary 15 And so Donna Wech, who is brought in on
know 16 duty, who has no knowledge of the case -- she doesn't
curious 17 anything about grand jury subpoenas. She's given an
is not 18 assignment. And she's given an assignment in the most
told, 19 way, your Honor: Everything that happened in the past
Prisons in 20 given to her. It's like she's been blindfolded. She's
21 Call Mike Hood, the general counsel of the Bureau of
22 Dallas, and get some authority from him.

ever been 23 Well, there is no showing that Mike Hood had
counsel of 24 involved in this. There is no showing that general
this. 25 the Bureau of Prisons had ever been consulted about

the 1 Rather, she's told through a classic CYA memo to paper
2 file.

had 3 Well, the memo turns out to be worse than what
4 gone before, because the synopsis is that she's
supposed to get

5 some authorization to get the mail sent from or to the
prison;

6 and then, of course, it comes back and they're getting
both

7 mail to and from. The authorization falls far short,
and she

8 comes up with a statute. That's 552(a). Now, the
statute she

9 comes up with, she miscites. That should be 552(a)
without the

10 parentheses. It's that Privacy Act section.

District 11 And under the case of Doe vs. DiGenova in the

12 of Columbia and the case law supporting the section,
the

13 statute means what it says: The head of an agency can

14 authorize things to be done. There is no showing on
this

15 record that Mr. Freeh or Janet Reno authorized anything
to be

16 done under that statute or that they ever delegated the
power

17 to do so. No, indeed. This is all handled at the
lower level.

review 18 Once that paper record has been created, the

19 process takes on a different and, we submit, more
sinister
20 tone. We recall that the Behavioral Science Unit has
already
21 showed up. They know the Behavioral Science Unit is
here, your
22 Honor; and that really didn't click in my mind until I
was
23 looking at how the Behavioral Science Unit former
personnel
24 have been involved in another case that got some
publicity in
25 Denver. And then you read the book by this fellow
Douglas, and

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1 you see how useful it is to get this insight into the
2 personality of the defendant and his family. And then
it
3 clicked again, your Honor, because last August, I tried
a
4 court-martial, and the Government turned over the
journal of
5 the complaining witness in addition to the particular
parts
6 that supposedly supported her testimony. Well, armed
with
7 that, I think we had a very effective cross-
examination; and my
8 client, this Air Force major, was acquitted based on

showing

9 the personality of her accuser, who had accused her of
this
10 lesbian affair. So we know the significance of this
kind of
11 material.

12 March, and

13 They're they don't just make these hash marks, your Honor.
14 using it in an investigative way, and these stamps show
the
15 picture. First, it's indexed. Now, by "indexed," that
means,
16 your Honor, that the illegally obtained material is now
not

17 are there just sitting in a file. The fruits of the illegality
18 in a database to be retrieved by anybody. An FBI agent
on the
19 street who has access to this database -- and we've
shown now

20 wherever it that from as far away as Council Grove, Iowa, or
21 was in Iowa this person was, you can get access, you
can

22 Robert interrogate the database, and you'll find out that

23 find Papovich has been interviewed, there are 302's. You'll

24 letters to that Robert Papovich is in a YY file as having sent

25 Terry Nichols and received letters from Terry Nichols,

and

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can call 1 you'll find out other related information so that you
to be 2 up and get this stuff. It's just sitting there waiting
3 used.

continues; 4 This process of indexing, of serializing,

Government says 5 and special agents are used to do it. Now, the

8 of 6 that the rotor entered information -- this is paragraph

I put -- 7 the first affirmation from Agent White; and the reason

I 8 I don't usually put letters from Government counsel in.

of 9 don't think that's right. But, of course, the last one

Agent 10 those, Agent L, contains yet another ammendation of

speaking 11 White's version of events, so Government counsel is

significance. 12 for him. That's why they have evidentiary

information in 13 Agent White says the rotor would enter

investigative 14 a file which was not part of the FBI central

15 database. It's just not true. The information on
these
16 indices is available to other agents in the field.
Maybe they
17 have to have some kind of access, maybe they have to
have some
18 kind of permission; but this information is available.

19 So what we have is a pattern of the Government
20 collecting information. And it's authorized at the
beginning
21 by Donna Bucella and this group that have shown this
22 extraordinary interest. They round up Lana Padilla and
Josh
23 Nichols and hold them for days. They round up Marife
Nichols;
24 they hold her for days. They round up James Nichols
and indict
25 him and have a grand jury about him; get the family,
get the

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1 insights, probe the relationships, get the BSU involved
at an
2 early point, and then use the material or have it
available to
3 be used.

4 Now, in this process, the Government says, as
the
5 Court pointed out to me in argument, "Hey, no harm, no
foul."

6 The Government counsel says, "We didn't use it, and we
don't
7 know of anybody else who did."
8 What a classic way to try to prove it. Agent
White
9 says in his affidavit and then repeats here, "I talked
to all
10 the agents that worked on this project, and none of
them
11 actually went out and did any leads as a result of it;
and
12 therefore, now we can be satisfied." And the
Government
13 lawyers come in and say, "Well, we didn't use it."
14 Well, then the answer is what's it -- what's
it doing
15 there? In the first place, they can't prove that it
wasn't
16 used; that it hasn't been made part of some lawyer's
file; that
17 it hasn't been made part of some agent's file; that
it's not a
18 part of a file of a group of information; that when the
19 Government sits down and says should we call Marife
Nichols as
20 a witness, or how are we going to cross-examine her,
when
21 they're having a big meeting around a table, they can't
meet
22 any burden that they might have to show that that
information
23 didn't get into the hands of somebody who is going to

be

24 talking about how to skin that particular cat, how to
25 interrogate that particular witness, because although a
couple

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1 of agents said that the files are locked, Ms. Schultz
said that
2 the files are locked but they're open during the day.
And we
3 saw this sloppy method.

4 So White talks only about the agents under his
control
5 and doesn't go any further. The Government lawyers
have no way
6 of knowing how their colleagues are using it; and the
7 Government's exhibit therefore -- their Government's
Exhibit 5
8 that says we didn't go out and interview anybody for
the first
9 time based on this material, not that they didn't
interview
10 anybody that was mentioned after they got it. Column
-- that
11 column doesn't show it. That really doesn't cut it,
because it
12 doesn't show that somebody hasn't already appropriated
the
13 information to have it ready to be used.

14 So what's the remedy? Well, we're a little
bit like
15 the homeowner who comes home at night and sees the
burglar in
16 the front room with all of the stuff. We caught him,
your
17 Honor. And the real question is, Did you have a
confederate to
18 whom you passed the things outside? I mean, how do I
know that
19 I've recovered everything?

20 And so we think the remedy is as follows:
First, we
21 ask the Court to determine that the surveillance was
unlawful.
22 Second, we ask the Court to direct the Government to
send to
23 all entities in the Department of Justice a letter
stating that
24 the Court has determined that this mail cover was
unlawful and
25 directing them to search their files for all records
that bear

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1 the case designator for this case, the suffix -- and
the suffix
2 YY and that those records to the extent they exist or
are found
3 anywhere in the Department of Justice be sent --
removed from

the 4 the files and sent to the Clerk of Court and held in
5 custody of the Court.

6 In that way, we can ensure that no further
7 dissemination takes place. That's going to mean they
would 8 have to strip their indices of all of these indications
so that 9 the next time somebody wants to know about Bob
Papovich, all 10 they're going to see is the FBI 302 about Bob Papovich
or 11 perhaps the reciprocal discovery that's been furnished
about 12 that or other lawfully obtained material.

13 The second part of it is that we believe and
we 14 understand that we do have a prospective burden here.
Now, for 15 that purpose, we've cited Nardone and Wong Sun. I
think 16 another analogy is to the Kastigar-type purification
that has 17 to be done when use immunity has been granted to be
somebody, 18 and of course the D.C. Circuit's opinions in the Oliver
North 19 case show how difficult a job that can be.

20 At trial, when the Government seeks to prove
anything 21 that's covered by the subject of these letters, we
understand

22 that we will have a burden to object at that time,
should we
23 wish to do so; and at that point, Government counsel
would be
24 able to cite to the Court an independent source for the
line of
25 inquiry they wish to pursue or the particular
evidentiary

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1 gambit that they would like to play.
2 In that way, we can be assured at the trial by
making
3 appropriate objections that our record is protected.
That will
4 be our burden. That's not something we're asking the
Court to
5 do, simply asking the Court to acknowledge that that is
our
6 burden and that that's the procedure that would have to
be
7 followed.

8 THE COURT: What would be an example of that?
What do
9 you have in mind when you say if it were evidence
covered by
10 this material? You know, I don't know what all this
material
11 is.

an 12 MR. TIGAR: I can give your Honor a simple --
don't 13 example; and it will be slightly fictitious because I
Government 14 want to reveal what's in there; but suppose that the
15 has Joshua Nichols on the stand and Government counsel,
Well, now, 16 examining or cross-examining Joshua Nichols, says,
went deer 17 Mr. Nichols, isn't it a fact that you and your father
18 hunting on such and such a date?

19 THE COURT: I see.

20 MR. TIGAR: At that point, I'd say, Wait a
minute, I 21 have a letter here and it's got some recollections of
that and 22 a picture, and so forth and so on; and Government
counsel says, 23 No, no, no, we got that from Lana Padilla. I wouldn't
do it in 24 the presence of the jury or make it obvious or
interrupt the 25 flow of the trial, but it would be our duty to make
that

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1 objection; and then they'd have to say, This is why I
have it, 2 and your Honor would say yea or nay.

3 That -- there is a -- an example of that
process or
4 how it works to the -- and the Government wins is in
the Bobby
5 Baker case, in the second installment of that, which is
in 430
6 F.2d. Government counsel had cross-examined Mr. Baker
about a
7 meeting he had in Las Vegas on the way back from having
8 delivered some money on behalf of Senator Kerr to some
savings
9 and loan executives. Well, the Government had a bug
that had
10 picked up Baker in Las Vegas, and the allegation was
that
11 Government counsel could cross-examine Mr. Baker
because they
12 knew he was in Las Vegas because they had a bug there
on some
13 Las Vegas types and that's the way they knew it.
14 Government counsel said at the post-trial
hearing --
15 because this was not known at the time of the trial.
16 Government counsel said, No, no, no, we had an
independent
17 source for that. We had travel agency tickets that
showed that
18 Mr. Baker had stopped in Las Vegas on the way back; and
with
19 that, Judge Gasch was satisfied, okay, that's an
independent
20 source. And the D.C. Circuit in 430 F.2d says yes,

they've

21 satisfied their burden. But that's an example of how
that

22 would work, an example of what our burden is.

23 That's the relief that we seek.

24 Now, I don't want to get ahead of myself; but
the

25 Government asks the question, Well, what can we do with
this?

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1 Well, if Mr. Nichols takes the stand and says something

2 inconsistent with a statement he's made before, even
one

3 illegally obtained by the Government, they have the
right to

4 impeach with it under the Fourth Amendment cases. And
I'm sure

5 there is a mechanism to satisfy that.

6 The other question the Government counsel
posed is,

7 Well, suppose we took the letters and gave them to some
expert

8 for the defense, such as a psychiatrist or
psychologist, to

9 look at them for the insights they provide into Mr.
Nichols'

10 love for his children. Would the letters then be
producible?

11 Now, I'm a little bit offended by that
suggestion,
12 which is why we don't -- can't announce agreement about
it.
13 It's like catching a guy with your TV set and taking it
back
14 from him and he says, Gee, I was going to watch the
Dave
15 Letterman show tonight; how am I going to be able to do
that?
16 But passing that for the moment, the discovery
17 obligations we may have and how they relate to the
Government
18 becoming aware of potential discovery through a Fourth
19 Amendment violation is something on which I don't know
any case
20 law. I'm not asking your Honor to decide it now. I
think
21 sufficient unto the day is the purification of the
taint
22 thereof. But our request for relief is clear. It
seems to me
23 they should be told to purge their files and that we
should
24 have this procedure for objecting in the future.
25 THE COURT: So the necessary predicate to
that, of

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1 course, is a finding that what was done here violated a

privacy

2 right protected by the Constitution.

3 MR. TIGAR: That's correct, your Honor. I'm
prepared

4 to argue that further, if the Court wishes. I think
it's

5 discussed quite thoroughly in the papers.

6 THE COURT: Now, it isn't necessary -- You
know, the

7 way we approached this was to take what happened to
this

8 material first.

9 MR. TIGAR: Yes, your Honor.

10 THE COURT: To see whether it has an effect.
And for

11 that, we did not -- I asked you not to call the Bureau
of

12 Prisons people. It seems to me that the legal issue is
13 presented without the need to call the Bureau of

Prisons

14 people. Would you agree?

15 MR. TIGAR: Yes. I agree with that, your
Honor. It

16 seems to us that the statutory authorization argument
the

17 Government tried to run simply doesn't work; that the
grand

18 jury subpoena would only at most cover the first batch
of mail

19 that was obtained. And even then, there is a grand
jury abuse

20 argument, since we've never seen, although we're
supposed to
21 get, grand jury testimony, any idea that that ever got
to the
22 grand jury. And then we're right down here on the
First
23 Amendment/Fourth Amendment issue that has been
presented to the
24 Court.

25 And I'm willing to answer any questions that
the Court

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1 has about that, but it seems to us that the only cases
the
2 Government has been able to come up with, as I pointed
out the
3 last time, are (1) cases talking about the privacy of
the cell,
4 which is not what we have here; and (2) cases involving
5 convicted felons; that is to say, the line of authority
that
6 begins with Stroud vs. United States. And that
authority,
7 which they say is adopted by the Tenth Circuit,
certainly is
8 but only to the extent of saying that a convicted
felon's
9 correspondence can be reviewed.

10 All of the administrative justifications that

the

11 Government cites are administrative justifications
having to do

12 with prison security and not with the creation of this
kind of

13 a file and this use for investigative purposes.

14 THE COURT: There is in this record, as I
remember,

15 some acknowledgement papers signed by Mr. Nichols, and
the

16 Government makes a kind of waiver or implied-consent or
17 express-consent, I guess, argument based upon those
documents.

18 I can't remember with respect to Mr. Nichols whether
there is

19 one from El Reno and Englewood, or --

20 MR. TIGAR: Your Honor, this is a form that --
there

21 are actually two arguments, one based on a form and the
other

22 based on Mr. May's affidavit; and if we're going to get
into

23 what the intent and the purpose of that is and how it
was

24 explained to him, then we would have to have prison
officials

25 here.

1 But what Mr. Nichols says is that he wants to
receive
2 his general correspondence. He understands the Bureau
of
3 Prisons may open and read same.

4 Now, that is -- and Mr. May then says in his
5 affidavit, oh, it's also our practice, yes, he has to
furnish
6 to us his outgoing correspondence unsealed.

7 Now, we -- Mr. Woods and I had a conversation
with
8 Mr. May, and he said just the opposite; you know, that
the
9 opposite was their policy: they didn't have a policy of
reading
10 the contents of outgoing correspondence. But be that
as it
11 may, let's take the Government's allegations for what
they are.

12 And as I say, if it becomes important to your Honor,
then we
13 would want a hearing on it.

14 The authorization to the Bureau of Prisons for
prison
15 security purposes to look at incoming mail doesn't have
16 anything to do with the investigative use of that mail
by the
17 FBI to attempt to obtain a conviction and a death
penalty.

18 Those are very, very different things, the point being
that the
19 general rule is the First and Fourth Amendment right to

the

20 privacy of communications. Exceptions to those rules
are, as
21 the Supreme Court's cases indicate, few, narrow,
precise,
22 tailored, and so on.

23 And Mr. Nichols' consent, even if we take it
to the
24 full extent that the Government argues, is not a
generalized
25 waiver of his First and Fourth Amendment protections.
And even

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1 the Government -- one more thing, your Honor. The
Government
2 cites a couple of pieces of his correspondence in which
he says
3 maybe this mail is going to be read. I dealt with that
4 earlier, but it's interesting that those references are
the
5 prison people might be reading this.

6 So we say, No waiver.

7 THE COURT: All right. Mr. Orenstein?

8 PLAINTIFF'S ARGUMENT ON MOTION TO SUPPRESS

9 MR. ORENSTEIN: Thank you, your Honor.

10 Your Honor, as I understood the purpose of
this

11 hearing, it was an exercise essentially in
practicality, which
12 was Mr. Nichols, seven months after receiving discovery
of the
13 fact that the Government had prison mail obtained from
him from
14 the BOP, was complaining that it was in some way
15 unconstitutional for the Government to have it or to
use it.
16 And the Court quite properly said, Well, let's look at
the
17 question of is there anything to suppress. Has there
been any
18 link from the collection and review of the mail to the
evidence
19 that's going to be presented against Terry Nichols?

20 And I think that the facts shown at this
hearing have
21 been that there is no link. There is no road that
starts at
22 the prison mailbox and ends at the jury box.

23 The people who have seen the mail and who have
been
24 involved in the review process have been here, and
they've told
25 the Court what they did and with whom they shared the
results

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1 of their investigation; and absent any such link, I'm

not sure

2 that there is any basis for the relief that counsel is
asking.

3 THE COURT: Well, there is the prospective
relief.

4 MR. ORENSTEIN: The prospective relief is a
question

5 that still exists; and as the Court asked yesterday,
What does

6 the Government plan to do with it? The answer is
nothing.

7 THE COURT: How about destroying it?

8 MR. ORENSTEIN: We could destroy it; but then
as

9 counsel acknowledges, there are potentially situations
where it

10 would be appropriate to cross-examine defense witnesses
if

11 there is inconsistent matter contained in the mail. So

12 certainly for purposes of that, destruction would, you
know --

13 you know, would make that impossible.

14 THE COURT: Well, how will you know without
going

15 through this mail that the potential is there for

16 cross-examination? Take the illustration that Mr.
Tigar gave.

17 MR. ORENSTEIN: I'm sure that as responsible
counsel,

18 they would bring to our attention that there is
something, you

19 know -- a witness that they have put on has said

something

20 that, based on documents that they know about, is
simply not

21 true.

22 THE COURT: Well, that's a different -- that's
a

23 different matter.

24 MR. ORENSTEIN: Then we would have the
opportunity and

25 ability to cross-examine on the basis of that. But
certainly,

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1 we are not going to be sitting here with a box of mail
in the

2 off chance that one of these witnesses testifies and
then go

3 looking through it to see, well, what can we use in
there to

4 cross-examine. We don't seek permission to do that,
and we

5 have no intention to do that.

6 THE COURT: That doesn't seem to me to really
answer

7 the question of why don't you just destroy it, because
counsel

8 would be providing you, as you said, with copies of
that which

9 is appropriately to be given in the event of a witness'

10 testifying falsely or something of that nature.

11 MR. ORENSTEIN: Judge, in principle, I don't
see any

12 problem with that. As an alternative --

13 THE COURT: I'm not asking in principle. I'm
asking

14 about it: Will you do it?

15 MR. ORENSTEIN: I would suggest this as an
16 alternative, because in case there is a subsequent
question

17 about what there was in the files, I think one way to
make sure

18 that that question can be answered later if it ever
arises is

19 instead of simply destroying the matter, to seal up
what we

20 have and -- this is essentially it in a different form
than the

21 way it exists in our files -- but this amount of
material, seal

22 it up and provide it to the Court. And that way, if
there is

23 ever further reason to review it, it's there to
examine, to see

24 what was in our files. And it's clearly not available
to the

25 Government to use in its case in chief and in cross-
examining

1 witnesses.

2 THE COURT: So you would bring the file
cabinet over
3 here?

4 MR. ORENSTEIN: Not the file cabinet. We
would
5 remove --

6 THE COURT: Well, I mean the material.

7 MR. ORENSTEIN: And as you can see, the
material is
8 not voluminous. It's a stack about a foot high,
perhaps.

9 THE COURT: All right. So that leaves you
with what's
10 in the database that identifies, which is, I guess,
pretty much
11 what's in these exhibits.

12 MR. ORENSTEIN: Exactly. If you look at
what's in
13 those exhibits, it really doesn't enable anyone to
pursue any
14 examination based on the contents of the prison mail.
It

15 simply says that this person wrote to or received from
16 Mr. Nichols a letter. And I don't see how that fact
itself can

17 advance an investigation or be used as evidence against
18 Mr. Nichols or serve as the basis for cross-
examination.

19 Certainly, the -- if there is cross-examination of a
defense

because 20 witness based on that fact, it will have to be obvious,
a letter 21 the premise of the question would be, Didn't you write
22 dated such and such; didn't you receive a letter?
of the 23 Absent having information about the contents
without 24 letter, there would be no way to ask the question
25 revealing that that's the source.

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1 So I think that would be easily monitored.
2 Counsel has asked for a ruling on the
legality. It 3 was and remains to be our position that we were not
burglars, 4 as Mr. Tigar has called us. Mr. Nichols executed a
consent 5 form to have the Bureau of Prisons read his incoming
mail. He 6 was knowingly giving his outgoing mail to prison staff
7 unsealed.
8 THE COURT: But there is nothing to suggest
that he 9 was aware that it would be going over to the FBI.
10 MR. ORENSTEIN: No. No, and I'm not
suggesting that.

analysis 11 But I think the starting point of a Fourth Amendment

certainly 12 is reasonable expectation of privacy at all; and he

letter to 13 didn't have an expectation that if he was writing a

to see 14 or receiving from a friend that no one else was going

15 it. And I talk about the implication of privacy --

an 16 THE COURT: Well, you know, I think there is

decide 17 interesting legal problem here; but we're not here to

to 18 interesting problems, we're here to try and get a case

19 trial.

20 MR. ORENSTEIN: Exactly.

this from 21 THE COURT: And that's why I've approached

it, and 22 the standpoint of what you say is the practicalities of

resolve 23 my understanding now is that the Government's offer to

it up 24 this problem is to bring that material in here and seal

includes 25 in the clerk's office, I guess; and that, of course,

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1 the -- what we have here already under seal, that which

you've

2 been exposed to in this format.

to some

3 MR. ORENSTEIN: I personally have been exposed

only in

4 few of the letters. I haven't read many of them and

the

5 connection with the preparation of this motion. I know

at all

6 other prosecutors have been careful not to look at it

7 for the very reason that --

already

8 THE COURT: And I have as well, as I've

in there

9 announced on this record. I don't want to know what's

course of

10 other than what's been called to my attention in the

11 the hearing.

assure the

12 MR. ORENSTEIN: Right. And I can certainly

examining any of

13 Court that I won't be -- I doubt I'll be cross-

certainly

14 the witnesses that Mr. Tigar has mentioned. I

in those

15 wouldn't take what limited knowledge I have of what's

anyone

16 letters, to the extent I've read any, to share with

17 else.

resolves the

18 So I think this is easily cabined off and

19 practical question that the Court has: Has anything

been done

20 with this to date that's going to affect Mr. Nichols'
trial?

21 No. Will anything be done in the future? We've come
up with a

22 proposal that I think takes care of that possibility.
And on

23 the basis of that, I would ask that the Court deny Mr.
Nichols'

24 motion for suppression. He hasn't identified anything
to be

25 suppressed or for the other forms of relief that he
identified

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1 this morning.

2 THE COURT: All right. Thank you.

3 Mr. Tigar, your response?

4 DEFENDANT'S REBUTTAL ARGUMENT ON MOTION TO
SUPPRESS

5 MR. TIGAR: Your Honor, I'd like to start
briefly with

6 this idea of expectation of privacy. That is such a
difficult

7 concept. In Smith vs. Maryland at 442 U.S. 735 at 740,

8 footnote 5, the Supreme Court made clear that
expectation of

9 privacy is not subjective. It's a thing that judges
are

10 supposed to protect; that is, if the FBI announced that
11 tomorrow morning we're going to search the house of
every
12 American with red hair, all Americans with red hair
would not
13 have an expectation of privacy on the morrow. But they
would
14 have a constitutionally protectable expectation of
privacy
15 because the Fourth Amendment says so.

16 But let me get down to the practicalities. It
is not
17 true, as Government counsel says, that it would be
obvious that
18 the letters are being used to cross-examine somebody
because
19 the cross-examiner would say, Didn't you send or
receive a
20 letter?

21 Another example: We talked yesterday about
this
22 Mr. Bennett that they were so worried about. Now, Mr.
Bennett
23 happens to be a well-known tax protester. He goes
around
24 filing, in his own case and others, pro se documents.
That's a
25 matter of public knowledge. Now, I don't want to get
into the

1 content of what Mr. Bennett sent to Mr. Nichols or the
2 references -- and that Mr. Papovich had and the
telephone
3 conversation; but the Court, based on motions now
before the
4 Court, can well imagine a scenario in which the
Government
5 would attempt to put tax protester associations and
ideology
6 into issue and draw upon knowledge of those
associations and
7 ideology that one could have gained from looking at not
just
8 the contents of the letters, by the way, but just
looking at
9 the "to," "from," and the addresses, which is the next
thing
10 that comes -- the one -- next point that comes up.

11 The one thing missing from Counsel's proposal
is what
12 are you going to do about what's in the computer and
how are
13 you going to determine whether or not accesses to this
14 computerized information and copies that may have
already been
15 made and removed from this file are returned along with
16 whatever else is impounded?

17 Under 18 United States Code Section 3501(a),
we having
18 made the allegation of illegality. The Government has
a

19 responsibility to come and affirm or deny. We say
there is
20 good evidence that this computer system could be
accessed by
21 others. They have a statutory obligation to come in
and
22 produce whatever those accesses might have produced and
to halt
23 further accesses. That was the premise of Gelbard vs.
United
24 States.

25 THE COURT: Well, but my understanding of the
evidence

300

1 that we have is that while there can be and has been
apparently
2 access to the fact that there is a YY file and that,
you know,
3 taking it on that maybe it will show on this computer
screen
4 that there is particular correspondence, to actually
get the
5 correspondence, they had to -- they couldn't get it off
of the
6 computer. Correspondence hasn't been scanned into the
7 database; therefore, they have to actually physically
get it.

8 MR. TIGAR: That's exactly right, your Honor.
And

9 what we've now -- what we know about that is that a
number of
10 people had access to those files. And if they wanted
to take
11 something out and copy it and bring the original back,
they
12 could do so.

13 THE COURT: There is no record --

14 MR. TIGAR: There is no record.

15 THE COURT: -- as to what was done.

16 MR. TIGAR: So what we're saying that a record
has to
17 be created, and the only way to create the record is to
make
18 the very inquiry that the Government didn't do. We
have from
19 Agent White down, as it were. We don't have from Agent
White
20 up or out. And thus, our proposal is, as required, we
say, by
21 3501(a) and by the Fourth Amendment, to make this
inquiry; and
22 as a part of the impounding, to ask the DOJ agencies to
account
23 for what use has been made. It's a routine -- you
know, in a
24 civil case, if there was a particular type of document
that a
25 major corporation had to produce, they'd be told, okay,
search

bring them 1 all your offices and subs and bring all those in and
2 into court in compliance with the request. It isn't
3 burdensome, it's done all the time; and it's
particularly not
4 burdensome here, where we have a case number and a YY
5 designator that would permit the material to be brought
in.

6 That's the disclosure part of 3501.

7 THE COURT: The request is if you have any
documents
8 bearing this YY and then some number, return them.

9 MR. TIGAR: Yes, your Honor. And that's very
easily
10 done; and as I say, the specific authority for that is
Gelbard.

11 If you recall, the witness Gelbard had refused to
testify
12 before a grand jury, and he said he had been the
subject of

13 illegal wiretapping. The case was companioned with
Sister

14 Egan's case, and the court relied on a statutory
provision in

15 Title III but also on 3501 saying, Look, if you've
illegally

16 wiretapped this guy and he claims that you did, you
have to

17 tell us, you know, whether you did and what you did

with it.

18 That, we say, is the other part of the equation; and we
could
19 easily formulate an order. The order would be modeled
on a
20 typical civil discovery request that specifically
identifies
21 the particular category of documents.

22 THE COURT: All right. Is that unreasonable?

23 PLAINTIFF'S SURREBUTTAL ARGUMENT ON MOTION TO
SUPPRESS

24 MR. ORENSTEIN: Judge, I think it's not as
burden-free

25 as Mr. Tigar suggests, and I think there is a basis in
this

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1 record to determine that the copies have not gone
beyond the

2 Task Force itself, the command post.

3 THE COURT: You know, I share with Mr. Tigar
the

4 concern that people can sign out that file -- and there
is a

5 sign-out slip, as we know -- and then when the file is

6 returned, the sign-out slip is destroyed and we don't
know what

7 that person -- we don't know who signed out the file
here

had it 8 and -- if anyone, or what they did with it while they
9 out.

10 MR. ORENSTEIN: That -- I think that the
record does
11 support an answer to those questions, which is that --
and all
12 of these people were available for testimony, and some
were
13 examined on this and some were not. But everybody who
was here
14 said they didn't make copies; and there is also the
testimony
15 from Agent Matson about her canvassing --

16 THE COURT: Well, they didn't make copies, but
I don't
17 recall that the evidence is so clear that people
couldn't walk
18 out of the room with a file.

19 MR. ORENSTEIN: That's correct.
20 The next point I was going to make was the
testimony
21 by Agent Matson of her canvass of all those agents who
could
22 have been in a position to do that, who all said they
had no
23 interaction with the prison mail. So I think --

24 THE COURT: Well, what's wrong with just
sending out a
25 copy of an order that says, if you have any YY-
designated

1 material, send it to us?

2 MR. ORENSTEIN: Okay.

3 THE COURT: That, again, is a very practical
solution

4 to it and avoids a good deal of effort here in an area
of the
5 law that I think is very uncertain.

6 MR. ORENSTEIN: Well, we will certainly -- we
will

7 immediately seal up and provide to the Clerk of the
Court the

8 copies that we have. We'll send out that letter and if
there

9 is anything further to seal up and provide to the
Court.

10 THE COURT: I think counsel should get
together on the

11 format of that.

12 MR. TIGAR: Yes, your Honor. I think we can
agree on

13 the form of a letter; and if there is any disagreement,
we know

14 where your Honor is.

15 RULING ON MOTION TO SUPPRESS

16 THE COURT: I'm not asking the Government to
advise

17 all of these people that this court has ruled that they

finding 18 violated the Constitution. That's not the point. The
the basis 19 here that is critical, I think, is that as of now, on
to 20 of the record that is presented here, there is nothing
you know, 21 suppress. We don't have evidence here that I could,
admissible in 22 issue an order that says this evidence is not
Therefore, the 23 this trial because of this presumed violation.
that 24 effort is to be sure that we don't have prospectively
25 problem; and we're going to do that by containing this

304

and the 1 information, this correspondence, through the sealing
return what 2 direction to all those who might have had access to
3 they have.

and 4 MR. TIGAR: Yes, your Honor. Time out of mind
motions 5 long before there was a Rule 41, courts of equity on
the sort 6 like this would order the return of property. It was
7 of specific release that --

8 THE COURT: That's what we'll do, and you get

together

9 on the wording of it.

10 MR. TIGAR: Yes, your Honor.

11 THE COURT: All right. Then this matter, you
know --

12 the motion to suppress as -- for an order of
suppression -- I

13 don't want to say it's denied particularly. There
hasn't been

14 a finding of a constitutional violation, but it is
being

15 remedied in the manner that I've just directed.

16 MR. TIGAR: We understand your Honor's order;
and we

17 will, of course, continue to do what we feel is
necessary to

18 protect our record.

19 THE COURT: All right. So counsel get
together on

20 that.

21 Now, I want -- we have some matters that we're
going

22 to hear next week. And we had previously discussed
hearing

23 motions, as many as we could get on, on Thursday. I
talked

24 about Thursday afternoon; but since we had that
discussion,

25 I've rearranged my calendar matters that were set on
next

giving 1 Thursday morning so that we could start in the morning,
set 2 us more time, if need be. So what I propose is that we
the rest 3 10:00 Thursday morning for motions, and then I'll keep
we may 4 of the day open so that we can use all of the day that
404(b) 5 need. And that would, I think, include the motion to
6 exclude -- well, I sort of have a shorthand here -- the
7 issues and also the hearsay statements and the matters
quarry, too, 8 concerning the event in Arkansas and I guess the
the death 9 which is a separate matter, and the motion to strike
matters. 10 penalty notice. I believe those to be the open

11 MR. TIGAR: Those are the only ones on my
notes, your

12 Honor, for open court consideration.

of 13 THE COURT: All right. Then I have a couple
not open 14 matters that I want to see you in chambers on that are
And, of 15 court matters but are motions relating to discovery.
public 16 course, our discovery matters, we have kept in a non-

subject 17 basis consistent with the Court's criteria in the

18 order.

19 So five or ten minutes, we'll see you in
chambers.

20 MR. MACKEY: Yes, your Honor.

21 THE COURT: All right. Recess.

22 (Recess at 10:53 a.m.)

23 * * * * *

24

25

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9

DEFENDANT'S EXHIBITS

Withdrawn

10	Exhibit	Offered	Received	Refused	Reserved
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11	D - L	274	275		
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12 * * * * *

13 REPORTER'S CERTIFICATE

14 transcript from

I certify that the foregoing is a correct

Dated

15 the record of proceedings in the above-entitled matter.

16 at Denver, Colorado, this 22d day of August, 1997.

17

18

Zuckerman

Paul A.

19

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