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The Honorable FRED VAN SICKLE

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11
12 UNITED STATES DISTRICT COURT
13 EASTERN DISTRICT OF WASHINGTON

14 UNITED STATES,)
15 Plaintiff,) **NO. 09-0088-FVS**
16 vs.) **UNITED STATES'**
17) **MEMORANDUM IN SUPPORT OF**
18 KARL F. THOMPSON, JR.,) **MOTION IN LIMINE TO ADMIT**
19 Defendant.) **AMR PATIENT CARE REPORT**

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21 The Plaintiff UNITED STATES, through James A. McDevitt, United States
22 Attorney for the Eastern District of Washington (EDWA), and Victor Boutros,
23 Trial Attorney with the United States Department of Justice (DOJ), Civil Rights
24 Division, and the undersigned Assistant United States Attorney (EDWA),
25 respectfully submits the following Memorandum In Support of Plaintiff's *Motion*
26 *In Limine* seeking an order to admit the Spokane AMR Ambulance (Paramedic)
27 Report from the evening of March 18, 2006.

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2 **I. SALIENT FACTS**

3 On March 18, 2006, after Defendant Thompson fired taser probes into Otto
4 Zehm and repeatedly struck him with a police baton, two American Medical
5 Response (“AMR”) responders arrived on scene to assist in the removal of taser
6 probes from and to provide medical treatment to Zehm. They discovered that this
7 call would not be a simple taser probe removal. The call had become far more
8 urgent: Zehm had stopped breathing and they needed to gather information about
9 how Zehm was injured for medical diagnosis and treatment purposes. *See* Grand
10 Jury Transcript of Aaron Jaramillo (“Jaramillo GJ”), a true and correct copy is
11 submitted *ex parte* as **Exhibit A**, at 48:17, which reference and submittal is
12 authorized under Rule 6(e) and this Court’s prior orders authorizing the
13 Government’s use of grand jury materials “in connection with” and attendant to
14 pretrial court hearings and proceedings, and at trial

15 To acquire the information they needed to help diagnose and treat Zehm, the
16 two AMR responders spoke with Spokane Police Department Officer Timothy
17 Moses, who was standing nearby. *See* Grand Jury Transcript of Timothy Moses
18 (“Moses GJ”), a true and correct copy of which is submitted *ex parte* as **Exhibit B**, at
19 66:7 -12; *see also* Jaramillo GJ 45:2-21. Moses told them that Zehm had been hit in
20 the head, neck, and upper torso with a police baton. *See* Moses GJ 67:24 – 68:1;
21 Jaramillo GJ 46:1-15. Moses received information about the nature and location of
22 the baton blows directly from defendant Thompson when Thompson was “venting”
23 to Moses about what had happened in Thompson’s force engagement with Zehm.
24 Moses GJ 69:17-19; 70:8-10. Moses relayed the blow location information provided
25 by Thompson to the AMR responders with specificity because he understood that
26 information would be crucial for proper medical treatment. Moses GJ 66:7-21.

27 A short time later that same evening, one of the AMR responders wrote his

1 “Patient Care Report” of the incident (“AMR Patient Care Report”), a true and
2 correct copy of which is attached hereto as *Exhibit C*. It is the regular practice of
3 AMR to create patient care reports, which are kept in the course of AMR’s regularly
4 conducted activities. Because the AMR paramedic who authored the report
5 understood the significance of the location of the baton blows for medical diagnosis
6 of injury, the mechanics of the injury, and the treatment of injury, he noted it
7 carefully in several fields on his report, including the “Cause of Injury or Illness,”
8 “Primary Assessment,” and “Mechanism of Injury” fields. In each of those fields,
9 the report notes that *Zehm was “hit in the upper torso, neck and head by a night*
10 *stick per SPD.” Id.*

11 On March 22, 2006, Defendant Thompson provided a detailed account of
12 what occurred at the Zip Trip on March 18, 2006. Following an unrecorded
13 approximately two hour interview, Thompson went on the record with a statement
14 about the incident, which was audio recorded. Defendant Thompson reviewed and
15 signed a verbatim transcription of that audio recording on March 27, 2006. *See*
16 *Verbatim Transcript of Defendant Thompson’s Recorded Statement, Ct. Rec. 60,*
17 *Exhibit #1*. In it, defendant affirms that he knew from his training that he was not
18 permitted to hit Zehm in the head unless deadly force was justified. Defendant
19 further affirms that deadly force was never justified during his altercation with
20 Zehm. Defendant further states that he hit Zehm wherever he could, “except the
21 head.” *Id.* at 21-22, 33.

22 **II. LEGAL ANALYSIS**

23 Thompson’s statement to Moses that Thompson struck Zehm in the head,
24 neck and upper torso with his baton is obviously relevant. It goes to whether
25 Thompson used deadly force against Zehm and whether use of deadly force was
26 objectively reasonable under the circumstances. It also goes to the willfulness
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1 element of 18 U.S.C. § 242 and it is relevant to whether Thompson made a knowing
2 false statement in the audio recording of his statement (and the verbatim transcript
3 he later reviewed and adopted) in violation of 18 U.S.C. § 1519. The statement in
4 the AMR Patient Care Report reflecting what Moses learned from Thompson is
5 relevant for the same reasons and is therefore presumptively admissible. FED. R.
6 EVID. 402.

7 There is no hearsay problem with the AMR Patient Care Report because there
8 are multiple hearsay exceptions justifying its admission. The AMR Patient Care
9 Report is admissible because it is a business record. FED. R. EVID. Rule 803(6). The
10 statement from Thompson to Moses is not hearsay when offered by the Government
11 because it is the admission of a party opponent. FED. R. EVID. 801(d)(2). The
12 statement from Moses to the AMR responders subsequently recorded in the AMR
13 Patient Care Report is admissible because it was made for purposes of medical
14 diagnosis or treatment. FED. R. EVID. 803(4). Because the AMR Report is
15 presumptively admissible, and there is no hearsay problem with its admission, the
16 Court should grant the Government's motion seeking an order admitting the AMR
17 Report into evidence.

18 **A. The AMR Patient Care Report is Admissible as a Business Record.**

19 The AMR Patient Care is admissible as a business record. FED. R. EVID. Rule
20 803(6). A document satisfies the business record exception to the hearsay rule if it is
21 a "report, record, or data compilation, in any form, of acts, events, conditions,
22 opinions, or diagnoses, made at or near the time by, or from information transmitted
23 by, a person with knowledge, if kept in the course of a regularly conducted business
24 activity, and if it was the regular practice of that business activity to make the
25 memorandum, report, record or data compilation." *Id.* AMR is a "business" for
26 purposes of the business records exception. *Id.* ("The term 'business' as used in this
27 paragraph includes business, institution, association, profession, occupation, and

1 calling of every kind, whether or not conducted for profit.”).

2 For the AMR Patient Care Report to qualify as a business record in this
3 Circuit, it need only satisfy two foundational facts: (1) the record was “made or
4 transmitted by a person with knowledge at or near the time of the incident recorded”;
5 and (2) the record was “kept in the course of regularly conducted business activity.”
6 *United States v. Ray*, 930 F.2d 1368, 1370 (9th Cir. 1991).

7 The AMR Patient Care Report easily satisfies the first element. There is no
8 question that the record was made and transmitted by a person with knowledge:
9 Moses passed on the information he received from Thompson, who delivered the
10 head blows, and the AMR responders faithfully recorded it. In addition, the AMR
11 Patient Care Report fall comfortably within the confines of the requirement of being
12 made at or near the time of the incident recorded since it was created shortly after the
13 incident, which was the last call of the night. Courts have warned that:

14 The requirement that the regular course of business included a timely
15 recording is not to be applied with any technical niggardliness. Dealing with
16 business records, account must be taken of practical considerations. [The
17 timing] is not to be judged, then, by arbitrary or artificial time limits,
measured by hours or days or even weeks.

18 *Missouri Pac. R. Co. v. Austin*, 292 F.2d 415, 422-23 (5th Cir. 1961). If a report
19 can be created weeks after the incident and satisfy the timely recording requirement,
20 then clearly the AMR Patient Care Report in this case, which was created shortly
21 after the incident, easily satisfies that element.

22 The AMR Patient Care Report also satisfies the second element. This Circuit
23 has held that if the party furnishing the information that was recorded was “acting
24 routinely, under a duty of accuracy, with employer reliance on the result,” then the
25 report is admissible under this Rule 803(6). *United States v. Pitman*, 475 F.2d 1335
26 (9th Cir. 1973). Here, the AMR Patient Care Report was created as part of the
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1 routine responsibilities of AMR responders, who perform under a particularly sober
2 duty of accuracy since the content of AMR's Patient Care Reports are relied upon by
3 doctors and other emergency health care providers and can quite literally be a matter
4 of life or death. The report was also kept in the course of a regularly conducted
5 business activity. Completing Patient Care reports after an incident is the regular
6 practice of AMR responders. Because the AMR Patient Care Report satisfies the
7 foundational predicates for the business records exception, it is admissible under
8 Rule 803(6).

9 **B. AMR Patient Care Report and Moses's Statements to AMR**
10 **Responders Are Admissible Under Rule 803(4).**

11 The AMR Patient Care Report and Moses's statement to AMR responders that
12 Zehm was hit in the head and neck by a police baton are admissible as statements
13 made for purposes of medical diagnosis. An exception to the hearsay rule exists for
14 "[s]tatements made for purposes of medical diagnosis or treatment and describing
15 medical history, or past or present symptoms, pain, or sensations, or the inception or
16 general character of the cause or external source thereof insofar as reasonably
17 pertinent to diagnosis or treatment." Fed. R. Evid. 803(4). The rationale for this
18 exception is the substantial guarantee of trustworthiness of statements made for the
19 purpose of receiving medical treatment. *White v. Illinois*, 502 U.S. 346, 355-56
20 (1992). Notably, Rule 803(4) does not require that each statement be "necessary"
21 for medical treatment; it requires only that the statement be "reasonably pertinent to
22 diagnosis or treatment." *United States v. Santos*, 589 F.3d 759, 763 (5th Cir. 2009).
23 Furthermore, as in Moses's case, "a statement made in the course of procuring
24 medical services, where the declarant knows that a false statement may cause
25 misdiagnosis or mistreatment carries special guarantees of credibility." *White*, 502
26 U.S. at 356. "It should [also] be emphasized that whether a statement is admissible
27 under [this exception] does not depend solely on the intent of the person asking the

1 questions, but also on whether the respondent understands herself to be providing
2 information for purposes of medical treatment.” *People of Territory of Guam v.*
3 *Ignacio*, 10 F.3d 608, 613 (9th Cir. 1993). In this case, both Moses and the AMR
4 responders understood that the mechanism of injury was given for purposes of
5 medical treatment.

6 The reach of the medical diagnosis hearsay exception is broad. Although the
7 statement must be made for purposes of obtaining medical diagnosis or treatment,
8 “the statement need not have been made to a physician. Statements to hospital
9 attendants, *ambulance drivers*, or even members of the family might be included.”
10 Fed. R. Evid. 803(4) advisory committee’s note (emphasis added); *United State v.*
11 *Corey*, 2000 WL 1728126, at *1 (9th Cir. 2000) (admitting victim’s statements to a
12 nurse); *Smith v. Pfizer, Inc.*, 2010 WL 668290, at *7 (M.D. Tenn. 2010) (finding that
13 Rule 803(4) applied to a pharmacist who was not even the victim’s own pharmacist);
14 *United States v. Bercier*, 506 F.3d 625, 630 (8th Cir. 2007) (admitting a patient’s
15 statement to the emergency room nurse because it described how an injury occurred
16 and was pertinent to a physician’s medical diagnosis); *Williams v. Gov’t of Virgin*
17 *Islands*, 271 F. Supp. 2d 696, 704-05 (D.Vi. 2003) (admitting statements made to a
18 counselor and social worker because they were made for the purpose of and
19 pertinent to medical treatment); *United States v. Running Horse*, 175 F.3d 635, 638
20 (8th Cir. 1999) (applying a child victim’s statement to a psychologist under the
21 medical diagnosis exception); *United States v. Tome*, 61 F.3d 1446, 1451 (10th Cir.
22 1995) (stating that Rule 803(4) could apply to a state caseworker if the subject
23 matter was “reasonably pertinent” to medical diagnosis or treatment). Accordingly,
24 Moses’s statements to the AMR Responders clearly qualify.

25 In addition, the Ninth Circuit has held that the information need not come
26 from the patient to qualify under the rule. “The plain language of [Rule 803(4)] does
27 not limit its application to patient-declarants.” *United States v. Yazzie*, 59 F.3d 807,

1 813 (9th Cir. 1995). In other words, “[s]tatements need not refer to the *declarant’s*
2 physical condition.” 4 Jack Weinstein & M. Berger, Weinstein’s Evidence
3 ¶803(4)[01](1988) (emphasis in original). Rule 803(4) has even been applied to
4 statements of unrelated bystanders who have knowledge about a victim’s injuries.
5 *Bucci v. Essex Ins. Co.*, 393 F.3d 285, 299 (1st Cir. 2005) (finding that although the
6 declarant was an unidentified witness, he provided a description to the ambulance
7 crew – which later wrote a report – for the purpose of the victim’s medical
8 treatment). In short, parties other than the victim may report statements regarding
9 what happened to the victim, provided that they are making the statement for the
10 purpose of acquiring treatment for the victim. Thus, the fact that the information
11 came from Moses rather than Zehm does nothing to undermine the application of
12 this hearsay exception.

13 In this case, Moses’s statement to the AMR paramedics falls under the
14 medical diagnosis or treatment hearsay exception and carries significant indicia of
15 trustworthiness. First, Moses was aware of the acute nature and life-threatening
16 condition Zehm was in and his need for urgent and effective medical attention.
17 Second, Moses’s provided the statement to AMR despite the fact that it was against
18 the interest of the party with whom he identified – namely, Thompson. If Moses had
19 any incentive to lie, it would be to protect the litigation interests of his fellow police
20 officer. But he did not. He chose to provide accurate information to help AMR and
21 other medical personnel effectively treat Zehm’s acute, life-threatening condition. In
22 light of these indicia of reliability, it is appropriate for the Court to ascribe to Moses
23 the motive he himself gave for the statement: to provide accurate information to
24 AMR so that they could effectively treat Zehm’s injuries. Because Moses’s
25 statement satisfies the foundational predicate for a statement made for purposes of
26 medical diagnosis or treatment, it is admissible under Rule 803(4).

27 Even if the AMR Patient Care Report were not a business record, its recording

1 of Moses's statement would be independently admissible under Rule 803(4). The
2 AMR Patient Care Report, as its name implies, is itself made for purposes of medical
3 diagnosis or treatment. As evidenced by its repeated emphasis throughout the
4 report, Moses's statement that Zehm had been hit in the head, neck, and upper torso
5 with a police baton were viewed as a particularly important piece of information for
6 purposes of diagnosis and treatment.

7 To treat a patient most effectively, paramedics must take into consideration
8 the cause of trauma to the victim. If they fail to understand the mechanism of the
9 patient's injury, they will have a harder time effectively diagnosing and treating him.
10 Similarly, if the mechanism of injury is not in the AMR Patient Care Report, then
11 the other emergency and trauma care specialists will be less able to provide effective
12 medical intervention. Because Moses's statement and the rest of the AMR Patient
13 Care Report were documented for purposes of medical diagnosis or treatment, they
14 are admissible under Rule 803(4).

15 **III. CONCLUSION**

16 For the foregoing reasons, the Court should admit the AMR Patient Care Report
17 into evidence.

18 RESPECTFULLY SUBMITTED this 5th day of May 2010.

19
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22 s/ Victor Boutros
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Certificate of ECF and/or Mailing

I hereby certify that on this 5th day of May 2010, I electronically filed the foregoing pleading with the Clerk of the Court using the CM/ECF System which will send notification to the following CM/ECF participants:

Carl J. Oreskovich

and to the following non CM/ECF participants: n/a

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