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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, )

Plaintiff, )

vs. )

KARL F. THOMPSON, JR., )  
Defendants. )

No. CR-09-0088-FVS

**RESPONSE TO UNITED  
STATES' MOTION IN  
LIMINE TO ADMIT  
AMR PATIENT REPORT**

COMES NOW the Defendant, KARL F. THOMPSON, JR., by and through his attorney, CARL J. ORESKOVICH of ETTER, McMAHON, LAMBERSON, CLARY & ORESKOVICH, P.C., and responds to United States' Motion in Limine to Admit AMR Patient Report.

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## I. FACTS

On March 18, 2006, Otto Zehm actively and aggressively resisted arrest. Police Officer Karl Thompson utilized force, including baton strikes and application of a taser in an attempt to control Mr. Zehm. Officer Thompson's attempts proved to be futile, as he was unable to control Mr. Zehm by himself. In fact, Mr. Zehm was not handcuffed and leg restrained until at least four other Spokane Police Officers worked in tandem to restrain him. Once restrained, Mr. Zehm continued to aggressively resist arrest, yelling incoherencies, thrashing about, and attempting to pull out of the handcuffs and leg restraints.

The Spokane Fire Department was dispatched "no-code" to assist the officers in removing the taser darts fired at Mr. Zehm. Once the Fire Department arrived at the scene, there was discussion as to whether Mr. Zehm should be transported by ambulance. While Fire Department paramedics and EMTs thought that Mr. Zehm should be transported by police car, police officers were concerned that Mr. Zehm was exhibiting signs of manic exhaustive syndrome (otherwise known as excited delirium) and needed to be transported by ambulance. At that point, American Medical Response ("AMR") was called to transport Mr. Zehm. While AMR was in route to the Zip Trip store, Mr. Zehm stopped breathing, making the call more urgent. Spokane Fire Department paramedics had begun cardiac and resuscitation efforts when AMR arrived. AMR responders assisted in resuscitation, and obtained a gurney. Spokane Fire Department paramedics and AMR responders transported Mr. Zehm to Deaconess Medical Center.

The United States alleges that once in the Zip Trip Store, AMR responders

1 spoke with Spokane Police Department Officer Timothy Moses. (*Ct. Rec. #*  
2 253). The United States further alleges that Moses learned information from  
3 Officer Thompson as to the location of the baton strikes, and relayed that  
4 information to AMR responders, telling them that Mr. Zehm had been struck in  
5 the head, neck, and upper torso. *Id.* However, the United States fails to point out  
6 that Michael Stussi, the AMR responder who drafted the AMR Patient Care  
7 Report, as no recollection as to whether Officer Moses told him that Mr. Zehm  
8 had been struck in the head, neck, and upper torso. *See Grand Jury Transcript*  
9 *of Michael Stussi*, at 19-21. (Attached hereto as *ex parte* Attachment A). In  
10 fact, Mr. Stussi is entirely unclear as to how he learned that Mr. Zehm had  
11 allegedly been struck in the head, neck, and upper torso and subsequently  
12 entered that information into the AMR Patient Care Report. *Id.* Even more  
13 surprising, is the fact that the United States has failed to mention that Officer  
14 Timothy Moses has recently met with the government, correcting his Grand  
15 Jury testimony that Officer Thompson told him that he hit Mr. Zehm in the  
16 head. It is also worth noting that the government has not provided Defendant  
17 Thompson with any *Brady v. Maryland*, 373 U.S. 83 (1963) materials generated  
18 from this interview.

## 25 **II. MEMORANDUM OF POINTS AND AUTHORITIES**

26 The United States' seeks to admit the AMR Patient Report under the hearsay  
27 exceptions for business records, admission of a party opponent (however, no  
28 argument is made in support of this exception), and statements made for the  
29 purposes of medical diagnosis and treatment. However, the United States fails  
30 to recognize that a proper foundation for hearsay statements must be laid before  
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1 they are admissible. Additionally, the hearsay evidence must also pass the test  
2 of trustworthiness. Because the AMR report is inherently untrustworthy, it  
3 should be excluded. To allow otherwise would result in an unfair prejudice to  
4 Defendant Thompson by admitting unreliable evidence.  
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7 **a. AMR Patient Care Report is Inadmissible as a Business**  
8 **Record because it is Untrustworthy.**

9 Under Fed. R. Evid. 803(6), business records, including medical records, are  
10 potentially admissible under the hearsay exception. “A hearsay statement is  
11 admissible as a business record pursuant to Fed.R.Evid. 803(6) if the following  
12 foundational facts are proved: 1) The writing is made or transmitted by a person  
13 with knowledge at or near the time of the incident recorded, and 2) record is  
14 kept in the course of regularly conducted business activity.” *U.S. v. Ordonez*,  
15 737 F.2d 793, 805 (9th Cir. 1983); *see also U.S. v. Childs*, 5 F.3d 1328, 1332  
16 (9th Cir. 1993). However, it must also be shown that the record is trustworthy.  
17 The record is not admissible “if the source of the information or the method or  
18 circumstances of preparation indicate a lack of trustworthiness. *Id.*; *see also*  
19 Fed. R. Evid. 803(6).  
20

21 The United States contends that the AMR report was transmitted by a person  
22 with knowledge at or near the time of the incident because Officer Timothy  
23 Moses “passed on the information he received from Thompson...and the AMR  
24 reporters faithfully recorded.” (*Ct. Rec. # 253*). First, Officer Thompson denies  
25 imparting this information to Officer Moses. Second, the United States fails to  
26 disclose that Officer Timothy Moses has since corrected his Grand Jury  
27 Testimony encompassing this statement. As such, the writing was not made or  
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1 transmitted by a person with knowledge. It is Defense Counsel's understanding  
2 that Officer Moses contends that Officer Thompson did not make a statement  
3 regarding the alleged location(s) of baton strikes to him. Third, the United  
4 States fails to mention that Michael Stussi, creator of the AMR report, has no  
5 recollection regarding the content of his conversation with Officer Moses that  
6 night. Therefore, the writing was not written by a person with knowledge of  
7 what occurred because Michael Stussi cannot identify where his "knowledge"  
8 originated from. Mr. Stussi may have received this information for the Spokane  
9 Police Department (SPD), the Spokane Fire Department (SFD), at the Zip Trip  
10 or possibly at the hospital. Simply stated, he cannot tell us when, where, or  
11 from whom the information came. *See Stussi FBI 302 Report* (Attached hereto  
12 as *ex parte* Attachment B).

17 While the AMR report does not pass the foundational requirements required  
18 under Fed. R. Evid. 803(6), even more evident is the lack of trustworthiness  
19 inherent in the document. As noted above, the information allegedly transmitted  
20 by Officer Moses that Mr. Zehm was hit with baton strikes to the head, neck,  
21 and upper torso has been corrected. Therefore, the alleged basis for the  
22 information contained in the AMR patient report no longer exists, rendering the  
23 source of the information nonexistent and untrustworthy. Furthermore, Michael  
24 Stussi has no recollection of obtaining information regarding alleged baton  
25 strikes to the head, neck, and upper torso from Officer Moses. In fact, Mr.  
26 Stussi has no recollection of when or whom that information originated from.  
27 Therefore, the method and circumstances of preparation indicate an inherent  
28 lack of trustworthiness. Notably, the United States fails to share this fact with  
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1 the Court.

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3 **b. AMR Patient Care Report Not Admissible under Fed. R. Evid.**  
4 **803(4).**

5 Under Fed. R. Evid. 803(4), “statements made for purposes of medical  
6 diagnosis or treatment and describing medical history, or past or present  
7 symptoms, pain, or sensations, or the inception or general character of the cause  
8 of external source thereof insofar as reasonably pertinent to the diagnosis or  
9 treatment” are admissible as a hearsay exception. Fed. R. Evid. 803(4).

12 While statements made by a patient or victim for the purpose of seeking  
13 medical treatment or procuring medical services are inherently trustworthy,  
14 such is not the case here. *See White v. Illinois*, 502 U.S. 346, 355-56 (1992).  
16 Rather, the AMR Patient Care Report is not inherently trustworthy because  
17 there is no indication as to where the statement “pt was...hit in the upper torso,  
18 neck and head by a night stick per SPD” originated from. *See Bucci v. Essex*  
20 *Ins. Co.*, 393 F.3d 285, 298 (1st Cir. 2005) (when the declarant is unknown, the  
21 reliability of the statement becomes less certain). Again, it is Defense Counsel’s  
22 understanding that Officer Moses has corrected his Grand Jury testimony  
23 whereby the United States alleges that Officer Moses told AMR responders that  
24 Officer Thompson told him he utilized baton strikes to the head, neck, and  
25 upper torso. Furthermore, Michael Stussi has no recollection of Officer Moses  
26 making this statement. Therefore, because the originating source of the above  
27 mentioned statement contained in the AMR report cannot be identified, it is not  
28 inherently trustworthy under Fed. R. Evid. 803(4) and should be excluded.  
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**c. AMR Report is Prejudicial and Should be Excluded**

Pursuant to the provisions of Fed. R. Evid. 403, the evidence sought to be admitted by the United States is overly prejudicial and should be excluded. Rule 403 states that evidence otherwise relevant may still be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice.” Fed. R. Evid. 403. If the Court should find that the AMR report is somehow admissible under a hearsay exception, it should nonetheless exclude the report because it is unfairly prejudicial to Defendant Thompson. The AMR report has no valid basis or foundation because 1) the statement to which it was alleged to have been generated from has been corrected; and 2) the creator has no recollection of the source of the statement in question. The Court should not allow Defendant Thompson to be prejudiced from an unreliable and untrustworthy piece of evidence. As such, Defendant Thompson requests that the Court deny the United States motion.

**III. CONCLUSION**

For the foregoing reasons, Defendant Thompson requests the Court to deny the United States Motion in Limine to Admit AMR Patient Care Report.

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RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of May, 2010.

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CLARY & ORESKOVICH, P.C.

By/s/ Carl J. Oreskovich  
CARL J. ORESKOVICH, WSBA 12779

Attorneys for Defendant Thompson



CERTIFICATE OF SERVICE

I hereby certify that on the 12<sup>th</sup> day of May, 2010, I electronically filed the following document:

**RESPONSE TO UNITED STATES' MOTION IN LIMINE TO ADMIT AMR PATIENT REPORT**

with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the following:

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