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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

UNITED STATES OF AMERICA,)	NO. CR-09-88-FVS
)	
Plaintiff,)	MEMORANDUM IN SUPPORT
)	OF MOTION TO SET AN
)	EARLIER TRIAL DATE
v.)	
)	(18 U.S.C. § 3771)
)	
KARL F. THOMPSON, JR.,)	EXPEDITED HEARING
)	REQUESTED
Defendant.)	

Plaintiffs, by and through their counsel of record, Jeffrey K. Finer of the Law Office of Jeffrey K Finer, and Breean Beggs, of the law office of Paukert and Troppman, submits the following in support of their motion seeking an earlier trial setting.

The trial date is now set for March, 2011, based in part upon the recent November-December briefing schedule set by the Court of Appeals. For the reasons set forth below, the civil rights Plaintiffs seek to reserve an earlier trial date in the event that the Ninth Circuit expedites review. A motion for that

1 purpose is — or will shortly be — filed in the Ninth Circuit appeal.

2 **Facts Related to this Motion.** The Court is well-advised of the background
3 facts of this prosecution. For the purposes of this motion, the essential facts
4 include the following:

5 a. Defendant Karl Thompson faces two felony counts (assault and giving
6 false statements) arising from a violent struggle during a *Terry*-stop of Otto
7 Zehm;

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9 b. Weeks before his indictment, but before discovery began, the Estate for
10 Otto Zehm and his mother filed civil rights claims against Defendant Thompson,
11 other officers who responded to the scene, the acting Chief of Police, and the
12 City of Spokane (see *Estate of Otto Zehm et al. v. City of Spokane, et al.*, 09-
13 0080-LRS);

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15 c. Following indictment, Defendant's counsel gave notice that Defendant
16 intended to invoke his Fifth Amendment rights in discovery, at least until the
17 disposition of the criminal prosecution;

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19 d. Based on this notice, the United States intervened in the civil rights case,
20 where it sought and obtained a stay in that proceeding pending the resolution of
21 the criminal prosecution; and

22
23 e. The criminal case is now on interlocutory appeal with briefing set for
24 mid-fall.

1 **Standing by Victim’s Estate to Seek Relief.** In general, a non-party to a
2 criminal case has no standing to seek relief from the Court's scheduling orders.
3 As shown below, however, a victim (or, by definition, the victim’s
4 representative and surviving family) has standing to put certain enumerated
5 concerns before the criminal trial court. See 18 U.S.C. § 3771.

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7 Signed into law on October 30, 2004, the Crime Victims' Rights Act
8 (“CVRA”) invests victims with a limited “right to be heard” in certain
9 proceedings. See Pub. L. 108-405. These limited victims’ rights arise from
10 President Regan's 1982 crime victim task force. The perceived problem then, as
11 now, focused on the lack of attention placed on the rights of crime victims by
12 law enforcement officers, by prosecutors, and by the courts themselves. Item 4
13 of the "Recommendations for the Judiciary" specifically noted that case-setting
14 and continuances needed to take into account the interests of victims as well as
15 defendants.¹

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18 The recommendation for consideration of victim's input on case-scheduling
19 was codified at 18 U.S.C. §3771(a)(7), which states:

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22 _____

23 ¹ See Final Report of the President's Task Force on Victims of Crime,
24 http://www.ojp.usdoj.gov/ovc/publications/presdntstskforcprpt/gov_action.pdf at
72 (“Recommendations for the Judiciary” on giving due consideration to victims
interests).

1 (a) **Rights of Crime Victims.** A crime victim has the following rights:

2 * * * *

3 (7) The right to proceedings free from unreasonable delay.

4 This right has been found to attach even in instances where the trial court
5 entered a new scheduling order without a public court proceeding. See *United*
6 *States v. Turner*, 367 F.Supp.2d 319, 336 (ED NY 2005).

8 The prosecution in *Turner* involved “a routine criminal case.” The court
9 granted an agreed 35-day waiver of Speedy Trial without holding a public
10 hearing on the matter. As part of its consideration, the court specifically gave
11 Angela Francisco <AngelaF@ywcaspokane.org> thought to whether the waiver
12 resulted in a delay of trial sufficient to trigger any victim’s rights under 18
13 U.S.C. § 3771(a)(7). The court concluded that absent a public hearing, notice
14 and opportunity to be heard were not implicated. *Turner, id.* n. 14 at 334. Thus,
15 the trial court ruled, without input from the victim, that the waiver and 35-day
16 delay did not impose undue hardship. Nevertheless, the *Turner* court
17 reconsidered after reflecting on the victim's right to be heard on the question of
18 waiver and the proposed delay. The *Turner* court withdrew its order granting the
19 continuance and provided for specific means for the victim to comment on the
20 proposed delay. The court acknowledged that Section 3771 provided the victim
21 with the right to be heard on the issue of “unreasonable delay” even if
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1 scheduling hearings *per se* were not enumerated among the specified hearings
2 requiring notice. *Turner*, at 35 n.14. Finally, the court reflected on the grave
3 warnings given by Congress when it passed Section 3771. The court
4 acknowledged that Congress was concerned that courts may be tepid in their
5 enforcement of the rights set forth in Section 3771. “Congress has taken pains to
6 emphasize that a failure by courts and prosecutors to give effect to this statute
7 may lead to an even more fundamental reordering of our criminal justice
8 system.”) *Id.*, at 336-337. Congress’s concern went so far as to mandate four
9 years of reports on utilization of the CVRA, which prompted the *Turner* court to
10 argue for a searching consideration of the law’s purposes and application. *Id.*, at
11 337.
12

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14 Finally, the court took into account that Congress expressed the intent that
15 the new rights be given meaningful application. Sponsoring lawmakers went so
16 far as to assert that if the new laws were ignored “you can be sure as the Sun will
17 rise tomorrow, we will be back with a constitutional amendment.” *Turner*, at
18 337, quoting Senate debate.
19

20 The trial court ordered the government to provide it “with sufficient
21 information about the victims in this case to fulfill its independent obligation to
22 ensure that those victims are afforded their rights.” The end result of this order
23 was to permit any victim “to object to the scheduling order or to suggest an
24

1 alternate procedure.” See also *United States v. Patkar*, 2008 WL 233062, at 5
2 (D. Hawaii, 2008) (unpublished), citing *Turner* with approval and noting that
3 Section 3771 should be “liberally applied to the extent consistent with other
4 law.”

5 In this case, the Honorable Court and all the parties are aware of the deceased
6 victim’s status and know the identities of his Estate’s representative, of his
7 surviving mother, and of their counsel. Both the Estate and Otto Zehm’s
8 surviving mother are “crime victims” under the statute. 18 U.S.C. § 3771(e).
9 Moreover, the civil rights Plaintiffs’ vital interests in the proceedings are not
10 speculative — given the existence of Plaintiffs’ suit and their previous request to
11 be heard in the criminal proceedings (*ie.*, bail). Nor is it necessary to delay relief
12 in order to obtain basic information such as required in the *Turner* ruling. The
13 victims merely seek to have their views presented, and both Estate and Mrs.
14 Zehm have standing to have those views heard.

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18 **Requested Relief.** In this instance, the United States has sought interlocutory
19 appeal of pre-trial evidence rulings. The victims recognize that there was an
20 evident need to stay proceedings in the trial court and reset the matter for a date
21 after disposition at the Ninth Circuit. The government initially sought a brief
22 stay and a new trial date for August, 2010.

23
24 Unfortunately, the Circuit’s initial schedule set briefing for mid-Fall. At the

1 time this setting was made, no motion to expedite appeal was before the Circuit.
2 The undersigned counsel has been advised that, in response to the Circuit's fall-
3 briefing schedule and the March trial date, the United States will request
4 expedited review in order to advance both proceedings. The victims support that
5 request. The victims anticipate that the United States will seek a briefing and
6 argument schedule to permit a ruling sufficiently in advance of a
7 November/December trial setting. The victims understand that a coordinated
8 appeal-and-trial schedule would require that the court and parties have adequate
9 time to review the Circuit's decision in advance of trial.
10

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12 The Estate of Otto Zehm and Mrs. Zehm respectfully request that the Court
13 re-set trial for late Fall, 2010. The United States can thus request a shortened
14 briefing schedule and the Circuit can consider its willingness to hear the appeal
15 knowing that a prompt trial date is available.
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17 As a practical matter, it may be appropriate to hold the March, 2011, in
18 reserve so that — if the Ninth Circuit denies expedited review — the Spring,
19 2011 date is still available.
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21 Allowing for expedited review and a prompt resetting serves significant
22 interests. The Defendant and the public have an interest in the speedy resolution
23 of this criminal case. The victims share this interest. Further, the litigants' civil
24 suit is benefitted from reasonably prompt resolution of the criminal prosecution.

1 So long as the criminal case is delayed, discovery in the civil case is likewise
2 impeded, preventing the Plaintiffs and Defendants from making a fully informed
3 assessment of the litigation risks and hobbling their ability to evaluate
4 settlement.

5 DATED THIS 2nd day of July, 2010.
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7 s/ Jeffrey K. Finer, WSBA #14610
8 Attorney for the Estate of Otto Zehm
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CERTIFICATE OF SERVICE

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I, Jeffry Finer, certify that a true and correct copy of the foregoing document was sent via CM/ECF to the following:

Tim Durkin, Assistant United States Attorney

Victor Boutros, Trial Attorney

Carl J. Oreskovich, Attorney for Defendant

Dated this 2nd day of July, 2010.

s/ Jeffry Finer
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