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*The Honorable Fred Van Sickle*

12 UNITED STATES DISTRICT COURT  
13 EASTERN DISTRICT OF WASHINGTON

14 **UNITED STATES OF AMERICA,** )

15 **Plaintiff,** )

16 v. )

17 **KARL F. THOMPSON JR.,** )

18 **Defendant.** )  
19

**No. 09-CR-0088-FVS**

**PROFFER RE: DEMOGRAPHICS OF  
EASTERN DISTRICT OF WASHINGTON  
JURY POOL & MEDIA PARTICIPATION  
BY DEFENDANT’S COUNSEL**

20 The Plaintiff United States of America, through its counsel *Michael C. Ormsby*,  
21 United States Attorney for the Eastern District of Washington, and the undersigned  
22 counsel with the United States' Department of Justice, submits the following *Proffer*  
23 *In Opposition to Defendant’s Change of Venue Motion.*  
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**I. OVERVIEW**

Defense counsel has submitted a purported declaration that provides defense counsel's personal commentary, assessment, and conclusory statements of certain media coverage and conclusory statements, allegations and self serving descriptions concerning the important *Fourth Estate's* reporting and news coverage of this prosecution and related issues.

The defense claims that the publicity and coverage is so overwhelming and, in defense counsel's recent viewpoint, so unfairly prejudicial that this court must presume that defendant will be unable to seat 12 reasonable, impartial jurors, and therefore a change of venue to some *unknown* location must occur.

The United States submits the following proffer more accurately describes the nature and extent of the broad and diverse population of the eligible jurors in the Eastern District of Washington. The proffer and attached articles also accurately chronicles some of defendant's, through is counsel and other associates, own deliberate participation in and the promotion of further pretrial media coverage and publicity in this case.

In this vein, the United States submits that the following recitals and attached materials unequivocally demonstrates that that defendant's multiple counsel (both private and within the City Attorney's Office), his supervisors, co-workers, political supporters, and friends, have all actively participated in, have promoted and have solicited media interviews, statements, stories, reports, and even news conferences. The United States further submits that "the defense's" active participation and conduct estops the defendant and his counsel from now crying *wolf* about perceived negative media reports at this 11<sup>th</sup> hour stage in these criminal case proceedings,.

1       **II.    Summary of Demographics of Eastern Federal District of Washington**

2           1.       The Eastern District of Washington (“District”) is comprised of twenty  
3 (20) counties. *See Amended Plan for the Random Selection of Grand and Petit Jurors*  
4 at 2 (available at <http://www.waed.uscourts.gov/localrules/juryplan.pdf>)

5           2.       For purposes of selecting jurors, the District is divided into two sections,  
6 “Jury Division A” (consisting of northeast Adams County and the complete counties  
7 of Asotin, Chelan, Columbia, Douglas, Ferry, Garfield, Grant, Lincoln, Okanogan,  
8 Pend Oreille, Spokane, Stevens and Whitman), and “Jury Division B” (consisting of  
9 southwest Adams County and the complete counties of Benton, Franklin, Kittitas,  
10 Klickitat, Walla Walla and Yakima.

11          3.       As in the past, the Court has previously stated that it will have the Clerk  
12 of the Court draw prospective jurors from both Jury Division A and Jury Division B  
13 for the upcoming trial in this matter.

14          4.       Based upon 2010 data compiled by the U.S. Census Bureau, the twenty  
15 (20) counties in the District contain an adult population of approximately 1,105,950  
16 people. *See Exhibit A.*

17          5.       The twenty counties in the District range in population size from 2,266  
18 (Garfield County) to 471,221 (Spokane County). *Id.*

19          6.       The percentage of persons under 18 years old ranges from 15.3%  
20 (Whitman County) to 36.9% (Adams County), while the percentage of persons over  
21 65 ranges from 7.1% (Franklin County) to 24.3% (Garfield County). *Id.*

22          7.       The percentage of “white persons” ranges from 60.5% (Franklin County)  
23 to 95.0% (Lincoln County). *Id.*

24          8.       The median annual income ranges from \$34,802 (Ferry County) to  
25 \$57,603 (Benton County). *Id.*

26          9.       The total eligible adult jurors in the combined Jury Divisions A and B,  
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1 who are either registered voters or possess a Washington driver's license  
2 /identification card approximates one million EDWA citizens.

3 10. While local media coverage of law enforcement accountability,  
4 government accountability, and the progression of the prosecution and defense of this  
5 case has been steady in the Spokane metro area (i.e., population base of approximately  
6 470,000), the undersigned counsel has performed searches of the major daily – weekly  
7 print medias in some of the more prominent population based counties in the EDWA  
8 and has learned that there are very few reported stories on Otto Zehm's death, the  
9 resulting civil suit, and/or the prosecution of defendant. The undersigned's search of  
10 newspapers – print media outside of Spokane revealed: The Yakima Herald - no  
11 search results; Tri-City Herald – one (1) result; The Whitman County Gazette – no  
12 articles; The Deer Park Tribune - no results; The Town News (Ellensburg) – no  
13 results; The Wenatchee World – two (2) results; The Lake Chelan Mirror – no results;  
14 The Leavenworth Echo – no results; The Columbian Basin Herald – no results; The  
15 Okanogan Times – no results; The Methow Valley News – no results; White Salmon  
16 Enterprise - no results.

17 11. Notably, a search of some of the major west side print – newspaper media  
18 revealed the following published articles for the past 5.5 years: The Seattle PI - nine  
19 (9) articles; the Seattle Times – no search responses; Tacoma's News Tribune – one  
20 (1) article; the Bellingham Herald – two (2) articles; the Vancouver Columbian – two  
21 (2) articles; the Olympian – one (1) article. Notably, the majority of the “single” or  
22 “two” article” search results would have been “zero” or “one” but for the fact that one  
23 of the news articles reported came from the Associated Press's article on the defense's  
24 recent *Motion for Change of Venue* (i.e., “Officer requests change of venue for trial”).  
25 Seemingly, venue motions garner media attention, otherwise the search results in  
26 many of the above newspapers would have been even lower.

1           **III. Summary of Defendant's Counsel and Other Agents and**  
2 **Representatives Active Solicitation, Participation and Promotion of Media**  
3 **Coverage of the Underlying Incident & Case.**

4           12. On **May 30, 2006**, approximately 2.5 months after defendant's forcible  
5 seizure of Otto Zehm during an investigative stop and Zehm's resulting in-custody  
6 death, the City of Spokane and the Spokane Police Department, through Assistant City  
7 Attorney and Acting Risk Manager Rocco Treppiedi, and others arranged a news  
8 conference in front of the Spokane County Courthouse. At this news televised news  
9 conference, Acting Chief James Nicks released the results of Mr. Zehm's otherwise  
10 confidential autopsy report and further announced that the defendant officer's  
11 immediate force deployment against Zehm was reasonable and appropriate. This  
12 conference was coordinated and attended by one of defendant's personal counsel with  
13 the City Attorney's Office, Asst. City Attorney Treppiedi. *See Exhibit L.*

14           13. On **May 31, 2006**, the City of Spokane, through its spokesperson and the  
15 City Attorney's Office, issued a press release containing more confidential details  
16 about Mr. Zehm's autopsy. Notably, this news release and Zehm's autopsy details  
17 were posted on the City's website, where the autopsy information remained for next  
18 3.5 years. *See ECF 97, Cause No. 09-0080-LRS.* Defendant's counsel in the City  
19 Attorney's Office participated in the lengthy website posting of the news release and  
20 the disclosure of intimate details of Otto Zehm's autopsy.

21           14. On **June 21, 2006**, Asst. City Attorney Treppiedi issued a nine page  
22 letter to the Center for Justice, a public interest law firm representing the Estate of  
23 Otto Zehm and his mother Anne Zehm. In this letter, which was again published and  
24 posted on the City's website, defendant's counsel denied allegations of violating state  
25 law and the parties' stipulated confidentiality order (i.e., by Treppiedi/SPD holding  
26 the May 30, 2006, press conference) and by disclosing confidential information from  
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1 Zehm's autopsy. *Id.* Defendant's counsel Treppiedi also went on to defend and  
2 exonerate defendant's rather instantaneous use of baton strikes to violently seize  
3 Zehm on an investigative stop. Asst. City Atty. Treppiedi also exonerated all other  
4 law enforcement officers who had contact with Zehm immediately before his death,  
5 even though the SPD's own investigation was yet not completed, and the FBI's-DOJ's  
6 investigation was just beginning. See *Exhibit B*.

7 15. On **July 23, 2006**, Asst. City Attorney Treppiedi voluntarily participated  
8 in a television interview with KREM 2 TV news anchor Randy Shaw for defendant's  
9 and Treppiedi's media benefit. In this TV interview, Treppiedi claimed that *no one*  
10 was justified in second-guessing Officer Thompson's description of Zehm as a threat  
11 to his safety, nor could anyone second guess defendant's immediate use of violent  
12 force to seize Zehm during the purported *Terry* stop. Treppiedi further explained that  
13 while Zehm's death was a tragic, it was a cost society must bear in affording law  
14 enforcement the authority to respond to and seize citizens on reports of possible  
15 criminal offenses. See *Exhibit K*.

16 16. On **October 20, 2008**, it is announced that well known criminal defense  
17 attorney Carl J. Oreskovich (Oreskovich) has been retained by the City Attorney's  
18 Office as "special counsel" and that City Council has approved up to \$45,000 to pay  
19 for Oreskovich's legal services to the City Attorney's Office in the *Otto Zehm* death  
20 incident. Oreskovich also personal represents defendant. The City Attorney's Office  
21 promoted Oreskovich's retention as special counsel and by March 2009, Oreskovich  
22 had billed the City upwards of \$30,000 or more for work performed on the case.

23 17. On **March 7, 2008**, the Estate of Otto Zehm and Zehm's mother Anne  
24 Zehm file a federal civil rights suit (just before statute of limitations expires) after the  
25 putative plaintiffs are unable to resolve their various state and federal claims with the  
26 City Attorney's Office. The lawsuit names the defendant, Acting Chief James Nicks,  
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1 fellow officers Steven Braun Jr., Zack Dahle, Erin Raleigh, Dan Torok, Ron Voeller,  
2 Jason Uberuaga, Major Crimes Unit Detective Theresa Ferguson, and the City of  
3 Spokane as defendants. In response to the lawsuit, City attorney Howard Delaney and  
4 licensed attorney Mary Verner (i.e., also the elected Mayor) issue public statements to  
5 the media supporting the defendant and claiming that defendant's force was  
6 reasonable and justified.

7 18. Verner also makes media claims that attorneys for the defendant and the  
8 City have "almost continually engaged in a good-faith dialogue with the attorneys  
9 representing Mr. Zehm's mother and his estate." Attorney/Mayor Verner further  
10 claims that: "As a city, however, we intend to continue to work toward a mutually  
11 acceptable settlement in this matter." Counsel for the Estate and Mrs. Zehm, however,  
12 contest attorneys Verner and Delaney's characterizations of their negotiation position  
13 and other exoneration representations on behalf of defendant. *See Spokesman Review*  
14 *article reporting on filing of civil suit, March 13, 2008.*

15 19. On **May 27, 2009**, the City Council publicly announces in a resolution  
16 prepared by the City Attorney's Office that it has authorized additional legal fees in  
17 the mount of \$200,000 for Oreskovich in his role as a special counsel for the City  
18 Attorney's Office in connection with the City Attorney's defense of Zehm Estate's  
19 lawsuit over his March 18, 2006, forcible detention by defendant and subsequent in-  
20 custody death.

21 20. At this point, all counsel (i.e., Oreskovich, Treppiedi, Delaney, Verner)  
22 making media statements on behalf of defendant are aware that the United States  
23 Department of Justice's and federal Grand Jury's investigations has been on-going for  
24 approximately one (1) year and is approaching a resolution.

25 21. On **June 18, 2009**, defendant's counsel Oreskovich and Treppiedi jointly  
26 file defendant's Answer and Affirmative Defenses in the Zehm civil suit. The  
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1 Answer, which is jointly prepared by defendant's counsel Oreskovich and Treppiedi,  
2 blames Zehm for his own in-custody death. The Answer is jointly filed on behalf of  
3 the defendant and his fellow civil defendants Assistant Chief James Nicks, fellow  
4 officers Steven Braun Jr., Zack Dahle, Erin Raleigh, Dan Torok, Ron Voeller, and  
5 Jason Uberuaga, MCU Det. Theresa Ferguson, and the City of Spokane. The filing of  
6 defendant's answer is provided to the media.

7 22. Notably, at **8:00 a.m. the morning of June 18, 2009**, representatives of  
8 the DOJ met with defendant and his attorneys Oreskovich and Lamberson to discuss a  
9 possible plea resolution in lieu of an Indictment being proposed to the Grand Jury.  
10 Defendant and his counsel are later given a sneak peak of some of the evidence  
11 showing defendant's use of lethal baton strikes on Zehm (i.e., evidence of baton  
12 strikes aimed at/hitting Zehm's head). Defendant's counsel declined any further plea  
13 proposals or discussions. Defense counsel, including Treppiedi, thereafter filed the  
14 joint Answer for all of the civil defendants, even though there are apparent conflicts in  
15 and between the several named defendants (i.e., Nicks, Uberuaga, Torok, Ferguson,  
16 the City of Spokane (i.e., City Council and Mayor), etc.).

17 23. On **June 19, 2009**, the Grand Jury returned a two-count indictment  
18 against the defendant. The Indictment is unsealed on **June 22, 2009**, after news  
19 accounts of defendant's Answer filed in the civil case by his attorneys Treppiedi and  
20 Oreskovich, through City Attorney Delaney.

21 24. On **June 25, 2009**, Oreskovich as Special Counsel to the City Attorney's  
22 Office, contacted the Spokesman-Review demanding that the paper clarify its report  
23 on the scope of Oreskovich's multiple contracts with the City Attorney's Office. *See*  
24 *Exhibit C at 15*.

25 25. On **June 23, 2009**, following the Court's appointment of Oreskovich as  
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1 CJA counsel for defendant at public expense,<sup>1</sup> Oreskovich voluntarily participated in a  
2 television news interview about defendant's Indictment and promotes a defense  
3 version of the case, contesting and dismissing the merits of the Grand Jury's  
4 Indictment. *See Exhibit J.*

5 26. On multiple occasions since defendant's Indictment was returned on June  
6 19, 2009, by the Grand Jury, defense counsel Carl Oreskovich actively participated in  
7 and was quoted in television broadcasts and print media reports and articles while  
8 commenting on the case. Oreskovich's comments and quotes all promote a *defense*  
9 *theory or theme* of the case. Oreskovich's solicited media comments included, *inter*  
10 *alia*, criticism of the Government's evidence, allegations that the Government put  
11 pressure on witnesses to testify against defendant, questions about the accuracy of the  
12 Government's evidence, including statements about the very "inadmissible evidence"  
13 that Defendant now complains is being reported by the media. The defense also  
14 makes bald, unsupportable assertions that the Government has deliberately attempted  
15 to prejudice the jury pool, notwithstanding that the government has not participated in  
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17 <sup>1</sup> The Criminal Justice Act (CJA) provides for the appointment of private criminal  
18 defense counsel at public expense for the indigent. 18 U.S.C. § 3006A. The CJA generally  
19 provides for the appointment of one attorney where a person is financially indigent and  
20 qualifies for representation at public expenses. The CJA also provides for appointment of up  
21 to two or more counsel in "death penalty" cases. Here, no less than four (4) private defense  
22 counsel from the Etter, McMahon, Lamberson, et al firm have openly provided CJA  
23 representation for the defendant in this case, as have a number of paralegals. In addition,  
24 approximately 12 different defense experts have been retained at public expense. The  
25 number of attorneys and paralegals providing representation at public expense here exceeds  
26 the total number of CJA counsel that the Honorable James Zagel, U.S. District Court Judge,  
27 Northern District of Illinois, authorized/allowed former Illinois Governor Rod Blagojevich  
to have in his defense and recently concluded trial in *U.S. v. Blagojevich*, which involves a  
20 count public corruption – wire fraud indictment. *See N.D. ILL.* District Court Cause No.  
08-CR-0888-JBZ; *cf.*, *U.S. v. Kennedy*, 64 F.3d 1465 (10<sup>th</sup> Cir. 1995).

1 any media and has not provided any media comment since June 22, 2009, when the  
2 unsealing of the indictment was announced. *See Exhibit C at 1, 2, 4, 6; Exhibit J.*

3 27. On several occasions since his direct withdrawal of representation of  
4 defendant (following the United States motion to have defense counsel's apparent  
5 conflicts of interests clarified and resolved), former defense counsel Asst. City  
6 Attorney Treppiedi has likewise continued to comment to the media about the merits  
7 of the Government's case against Defendant and has attempted to influence media  
8 reports and discredit reports on the Government's evidence. *See, e.g., Exhibit D at 23.*

9 28. On several occasions, City Attorney Howard Delaney, defendant's then  
10 counsel and now former attorney, to whom Attorney Delaney and the rest of the City  
11 Attorney's Office still owes a continuing duty, has likewise provided solicitous  
12 comments to the media about the case and has expressed his own belief that the  
13 criminal charges filed against Defendant are not warranted. *See, e.g., Exhibit E at 10.*

14 29. Notably, defendant is the subject of a Facebook social media page  
15 entitled "We Support Karl Thompson." This page is administered by a "co-worker of  
16 Karl's" and solicits financial contributions and donations for legal fees on behalf of  
17 defendant. Since its inception, this page has generated more than one hundred internet  
18 messages supporting defendant and remains an active site. *See Exhibit G.*

19 30. It is also noteworthy, in light of defense counsel's and defendant's former  
20 counsel's conclusory statements and complaints about "unfair" media coverage, that  
21 the Spokane Police Department ("SPD"), a public law enforcement agency, also  
22 maintains its own Facebook page that likewise publicly promotes media and social  
23 support for the felony, criminally charged Defendant, by endorsing (i.e., "liking") a  
24 link to the "We Support Karl Thompson" page. *See Exhibit F.*

25 31. Marlene Feist, Spokesman for Mayor Mary Verner, defendant's  
26 employer, has also made several statements to the media concerning the criminal and  
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1 civil cases pending against Defendant. *See* Exhibit H.

2 32. The City of Spokane, through its Mayor and the City Attorney's Office  
3 has issued several press releases and "Frequently Asked Questions" (FAQs)  
4 documents concerning the criminal and civil cases pending against Defendant. *See*  
5 Exhibit H. Notably, several of the "fact" representations in defendant's former legal  
6 counsel's public proffering in the FAQs are patently false.<sup>1</sup>

### 7 **III. CONCLUSION**

8 The Eastern District of Washington is comprised of a diverse group of potential  
9 jurors. As discussed in the Government's memorandum filed contemporaneously  
10 herewith, the media coverage of this case is not so widespread, not so inaccurate,  
11 misleading or false, or for that matter prejudicial as to warrant a change of venue.  
12 *U.S. v. Skilling*. In addition, to the extent that defendant asserts that he has been  
13 prejudiced, the defense's active participation and solicitation of media reports and  
14 accounts, both directly and indirectly through others, estops defendant from  
15 legitimately seeking a change of venue since he and his attorneys have played a  
16 significant role in fueling the ongoing media coverage of this case.  
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19 <sup>1</sup> At a recent September 9, 2011, press conference, Mayor Verner released a document  
20 purportedly containing accurate statements about the criminal and civil cases in the form of  
21 answers to Frequently Asked Questions (FAQs). However, several of the publicly  
22 disseminated "FAQ" statements are patently false and inaccurate, including representations  
23 by city attorneys that they "met with" DOJ officials after receiving a June 15, 2009, e-mail  
24 outlining DOJ concerns, *inter alia*, with conflicts of interest within the city attorney's office  
25 and interferences with the DOJ's on-going investigation. Although the DOJ did request a  
26 very common, inter-public agency meeting with the Mayor, City Council President, and SPD  
27 Chief Anne Kirkpatrick, the city attorney's office never communicated a response to that  
meeting request, and further, DOJ Officials never met with city attorneys to discuss or  
review DOJ concerns (i.e., Thompson was indicted on June 19, 2009). Further, no Court has  
yet considered, reviewed, and/or addressed any city attorney's actions-conduct in this matter.

1 RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of September 2011.

2 *MICHAEL C. ORMSBY*  
3 United States Attorney (EDWA)

4 *s/ Tim M. Durkin*  
5 TIMOTHY M. DURKIN  
6 Assistant United States Attorney  
7 Attorneys for Defendant  
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16 **Certificate of ECF and/or Mailing**

17 I hereby certify that on the date of the filing of this document with the Clerk of the  
18 Court using the CM/ECF System that the Clerk's ECF system will send notification of  
19 such filing to all counsel and/or I hereby certify that I have arranged for mailing by  
20 United States Postal Service and/or arranged other delivery of the document the  
21 following day to non-CM/ECF participant(s):

22 *Carl Oreskovich, Esq. (and three (3) other associated counsel)*

23 And to the following non-ECF participants: N/A

24 *s/ Timothy M. Durkin*  
25 **Timothy M. Durkin**  
26  
27

Exhibits A-L



U.S. v. Thompson  
09-CR-00088-FVS

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16x 4.7GB 120min

Exhibits A-L  
USA Response to  
Motion to Change  
Venue