

1 *Michael C. Ormsby*  
 United States Attorney  
 2 Eastern District of Washington  
 3 *Timothy M. Durkin*  
*Aine Ahmed*  
 4 Assistant United States Attorney  
 5 Post Office Box 1494  
 Spokane, WA 99210-1494  
 6 Telephone: (509) 353-2767  
 7 *Victor Boutros*  
 Trial Attorney  
 8 U.S. Department of Justice  
 9 Civil Rights Division – Criminal Section  
 950 Pennsylvania Ave., NW  
 10 Washington, D.C. 20530  
 11 Tel. (202) 514-3204

12 UNITED STATES DISTRICT COURT  
 13 EASTERN DISTRICT OF WASHINGTON

14	UNITED STATES OF AMERICA,	)	
15		)	<b>No. 09-0088-FVS</b>
16	Plaintiff,	)	
17	v.	)	<b>UNITED STATES’ MOTION</b>
18	KARL F. THOMPSON JR.,	)	<b>FOR RECONSIDERATION OF</b>
19		)	<b>COURT’S VENUE SELECTION</b>
20	Defendant.	)	

21 Plaintiff United States, through its counsel *Michael C. Ormsby*, United States  
 22 Attorney for the Eastern District of Washington (EDWA), and the undersigned  
 23 counsel of the United States Department of Justice (DOJ), moves the Court for  
 24 reconsideration of its oral ruling today on Defendant’s September 19, 2011, motion  
 25 for change of venue (ECF 567) and the relief requested by the defendant at the time of  
 26 the parties’ September 29, 2011, hearing.

## I. Procedural History

1  
2 On September 19, 2011, Defendant filed a motion for change of venue, alleging  
3 that there was a recent spike in local Spokane media coverage due to Asst. Chief  
4 James Nicks's declaration that was filed in response to defendant's motion to strike  
5 then Acting Chief Nicks's testimony. (ECF 517) Defendant argued that the recent  
6 spike in media attention, coupled with Spokane's political climate (i.e., city elections)  
7 resulted in "presumed prejudice" to Spokane's portion of the "Jury Division A" venire  
8 panel of prospective jurors. (ECF 567).

9 The Court directed the United States to respond, which response was filed  
10 September 27, 2011. The United States' response noted that under the Supreme  
11 Court's controlling precedent in *U.S. v. Skilling* (2010) and the 9<sup>th</sup> Circuit's  
12 controlling precedent in *Hayes v. Ayers* (9<sup>th</sup> Cir. 2011) [neither case was cited by the  
13 defense], that the defendant could not demonstrate any *presumed media prejudice* to  
14 the eligible jury panel in the Eastern District of Washington (EDWA), which has an  
15 eligible juror base of more than 1,000,000 adult citizens. Therefore, there could be no  
16 presumed prejudice (ECF 581-82).

17 At oral argument, the United States also cited the Louisiana District Court's  
18 decision in *U.S. v. Bowen*, 2011 WL 1979949 (E.D. La. May 20, 2011), involving the  
19 civil rights prosecutions of former New Orleans Police Department officers on a  
20 variety of alleged civil rights violations – bridge shootings, alleged to have been  
21 committed during the *Hurricane Katrina* disaster. These prosecutions generated  
22 significant local and national media reports, and defendants' moved to change venue.  
23 The District Court noted, however, that a lengthy questionnaire (as also utilized in this  
24 case) and proper jury voir dire from the approximately 20 Parishes (i.e., Counties)  
25 would more than sufficient to produce an impartial and unbiased jury.

26 Notably, no court has ever required that jurors be "unexposed" to publicity or  
27

1 that they be “totally ignorant of the facts and issues involved.” *Irvin v. Dowd*, 366  
2 U.S. 717, 722 (1961). Even in extreme cases, *which is not presented here*, where  
3 pretrial publicity is so pervasive and so prejudicial so as to justify a presumption of  
4 prejudice (again, not here), the *prejudice presumption* can be rebutted by a showing  
5 that the trial court’s *voir dire* successfully identified and avoided bias). *Id.*; *see also*  
6 *Sheppard v. Maxwell*, 384 U.S. 333, 354 (1966) (no presumed prejudice resulting  
7 from “months [of] virulent publicity” alone); *Patton v. Yount*, 467 U.S. 1025, 1029  
8 (1984) (no presumed prejudice from “extensive adverse publicity and the  
9 community’s sense of outrage” resulting from media coverage of the facts of  
10 defendant’s crime, his prior confession, and prior conviction of the offense); and *U.S.*  
11 *v. Parker*, 877 F.2d 327, 330 (5<sup>th</sup> Cir. 1989) (a change of venue should not be granted  
12 on the mere showing of “widespread prejudice”).

13 The United States maintained, as the Courts determined in *Skilling* and *Hayes*,  
14 *supra*, that no *presumed* prejudice has resulted from the fairly balanced and evenly  
15 media accounts, including media reports generated by defense counsel, and that  
16 through proper jury *voir dire*, an impartial and unbiased jury can be seated to hear this  
17 matter in Spokane.

18 Notwithstanding the foregoing and this Court’s own conclusions announced  
19 today in open court that neither *presumed* nor *actual prejudice* has resulted from the  
20 local media accounts, that venue would nonetheless be changed to Yakima and that  
21 the jury would be selected from a panel of Division B eligible jurors. Notably, neither  
22 party requested the Court to change the venue of this trial to Yakima.

## 23 24 **II. Good Cause Exists For Reconsideration of Court’s Venue Decision**

25 The United States submits that the following constitutes “good cause” for  
26 reconsideration and modification of the Court’s venue decision that was issued today,  
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1 one (1) week before trial, and which has moved the trial from the significantly local  
2 contacts of Spokane to Yakima:

3 • The Crime Victims' Rights Act (CRVA), 18 U.S.C. § 3771, which  
4 provides that the victims of federally charged offenses have the right to appear and  
5 provide substantive comment on critical proceedings before this Court, including the  
6 right to be heard on a venue change that the Court elected, but which trial location was  
7 not proposed or requested by any party at the pretrial hearing (i.e., neither party  
8 requested a venue change from Spokane to Yakima);

9 • The devastating impact the Court's venue election has on the Victim's  
10 family members, as well as the Estate of Otto Zehm and their legal advisors and  
11 representatives. The victim family's representatives have advised that the Court's  
12 elected venue change from Spokane to Yakima, and the now 200+ mile trial location  
13 and separation from their Spokane area locations, creates a substantial barrier that  
14 prevents and discourages family members from being able to attend the trial  
15 proceedings, and/or prevents them from participating in critical stages of the  
16 proceedings (i.e., creates an unfair obstacle to the putative victims and their ability to  
17 appear and attend proceedings).

18 • Mrs. Anne Zehm's and the family's legal counsel, previous to today,  
19 intended to exercise their right to attend, view and participate (where appropriate) in  
20 the open public proceedings, and to represent Mrs. Zehm's and the victim's family's  
21 interests. Messrs. Jeffrey Finer, Esq. and Breean Beggs, Esq., also advised that they  
22 too have active legal practices and other local client representation demands, as well  
23 as their own personal and family needs. They have advised that the Court's venue  
24 election (to a location not requested by any party) creates a severe hardship for them  
25 and their client Zehm family members, and effectively prevents them and their victim  
26 family clients from attending, viewing and/or meaningfully participating in trial  
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1 proceedings at the Yakima venue;

2 • The Defense requested at the September 29, 2011, pretrial hearing, that  
3 the trial remain in Spokane, but that the Court use only potential jurors from Jury  
4 Division B, which juror venire panel includes EDWA citizens in the counties  
5 occupying the southwestern portion of EDWA, e.g., southwest Adams County,  
6 Benton, Franklin, Kittitas, Klickitat, Walla Walla and Yakima. The United States'  
7 requested that both Division A & B jurors be used since defendant could not  
8 demonstrate nor show any *presumptive* or *actual* media prejudice concerning the  
9 parties' ability to select twelve neutral jurors from any portion of the EDWA's more  
10 than 1,000,000 jury eligible citizens;

11 • This reconsideration motion is also based on the substantial negative  
12 impact the Court's venue election, a mere one week before trial, will have on the  
13 efficiency of the trial process and this criminal trial's intended *search for the truth*.  
14 The new venue has caused significant adverse logistical difficulties in re-scheduling  
15 and re-arranging witnesses' appearances and testimony, which has already been a  
16 difficult and burdensome process.

17 • The new venue election requires each party to now re-arrange round trip  
18 travel of over 400 miles and accommodations for each of the parties' respective  
19 witnesses. As this Court is aware, the scheduling of trial proceedings is not an exact  
20 science and there will likely be "holdover witnesses" and/or witnesses that will be  
21 "delayed" from testifying at their pretrial forecasted date and time, which creates all  
22 kinds of scheduling difficulties for the parties and for that matter the witnesses, all of  
23 which adversely impacts the efficiencies of trial and the criminal trial's truth seeking  
24 function;

25 • Presently, the United States anticipates calling approximately 60  
26 witnesses in its case in chief. The Defense has subpoenaed no less than 57 witnesses  
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1 that they expect to appear in court for examination and testimony. The Defense has  
2 also identified “100 witnesses” in its Amended Witness List. The United States has  
3 identified approximately 150 witnesses. Together, the parties anticipate calling an  
4 estimated 120 witnesses in their respective cases. Approximately 90% of these  
5 identified witnesses are local residents of Spokane and its nearby areas. All of these  
6 witnesses will be significantly and adversely impacted by the Court’s election of a  
7 venue that is more than 200 miles from these witnesses’ residences, families, and  
8 places of employment. . The U.S. Marshal’s Service and the District’s apparently  
9 limited Criminal Justice Act (CJA) fund will have to pay for this additional,  
10 substantial cost created by the Court’s change of venue election.

11 • The approximate remaining 10% of the identified witnesses are from out  
12 of state and will have to first fly to the Pasco-Tri Cities’ Airport and then drive the  
13 approximate 3-4 hour roundtrip to Yakima, since there is no direct flight service to  
14 Yakima. Many of these witnesses are experts and the United States and the Criminal  
15 Justice Act (CJA) fund program (both funded by U.S. taxpayers) will have to “foot the  
16 bill” for this additional travel expense and cost created by the Court’s venue election.

17 • The further exceptional financial impact (in this difficult financial time)  
18 caused by the Court’s venue election in requiring both the United States and the  
19 Defense to have to uproot their respective offices on a week’s notice and arrange for  
20 office accommodations in a city more than 200 miles/3-4 hours away for a period  
21 covering the next 5-6 weeks. This uprooting also requires both the United States and  
22 the defense to arrange for residential accommodations for the involved office  
23 personnel during the same time frame. This substantial, elective cost likewise  
24 adversely impacts limited taxpayer resources during ever tightening fiscal times (i.e.,  
25 the U.S. Marshal Service is responsible for covering the cost of subpoenaed witness  
26 appearance and travel; the Department of Justice will incur substantial costs and  
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1 expenses in having to move its office-trial operations to Yakima, and the reportedly  
2 limited resources of the local CJA Fund (which is supposed to provide funding for all  
3 other EDWA defendants who properly qualify (as indigents) for legal representation  
4 at public expense), which fund is paying for all of the significant and substantial  
5 defense costs that are being incurred in this case). Further, there will be significant  
6 travel costs incurred by the multiple personnel representing and assisting with the  
7 prosecution and defense of this matter, now set for trial in Yakima.

8 • A change of venue to a location more than 200 miles away has caused  
9 significant disruption of the United States case preparation. The United States must  
10 prove every element of the charged offenses beyond a reasonable doubt. Many courts  
11 have recognized the “heavy burden” the government must bear in successfully  
12 prosecuting and convicting a charged defendant. *United States v. Day*, 591 F.2d 861  
13 (D.C. Cir. 1978) (trial court should employ sound rule that balance should generally  
14 be struck in favor of admission; "In so weighing the evidence, the court should be  
15 mindful of the heavy burden the government bears to prove its case beyond a  
16 reasonable doubt and should not unduly restrict the government in the proof of its  
17 case." *Day*, 591 F.2d at 877, n. 29; *see also* Recurring Trial Problems, Fifth Edition,  
18 Federal Judicial Center 2001, Part V - Evidence, Section V.A.4.a. Critical  
19 government trial prep time on its case (i.e., plaintiff bears the burden of proving case)  
20 must now be devoted to the logistics of moving and re-setting up the government's  
21 business – case operations.

22 • The Court's finding today that while there has been increased Spokane  
23 local media coverage and electronic media comments and tangential matters on the  
24 case as it approaches trial, *there has been no showing of “actual prejudice” to the*  
25 *Defendant's ability to seat a fair and impartial jury in Spokane;*

26 • The Court's finding today that there has not been any demonstration of  
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1 “actual prejudice” from media –other reports that has adversely affected the  
2 Defendant’s ability to pick and seat 12 impartial jurors from the combined Panel A  
3 (i.e., the Counties of Spokane, Adams, Asotin, Chelan, Columbia, Douglas, Ferry,  
4 Garfield, Gant, Lincoln, Okanogan, Pend Oreille, Stevens and Whitman) and Panel B.

5 •

### 6 **III. Conclusion & Request For Relief**

7 In sum, there are no utilities gained from the Court’s venue decision today. The  
8 victim’s family was not given notice of the Court’s venue election and was deprived  
9 the opportunity to comment and/or participate. *See e.g.*, 18 U.S.C. § 3771(a)(2) and  
10 (3); and U.S. v. Hertz, 2010 U.S. Dist. Lexis 14849 (D. Colo. Feb. 4, 2010) (Victim’s  
11 right to access may override defendant’s request for change of venue). Defendant  
12 does not gain anything more than he already requested from this Court; that is the  
13 opportunity to pick impartial jurors from the alleged, but unproven (media) taintless  
14 Jury Division B panel. Meanwhile, the Court’s venue selection has created barriers  
15 where none previously existed, compounded witness scheduling/appearances/court  
16 planning inefficiencies that were already performed or mitigated, created additional,  
17 significant and unnecessary cost and expense in a most difficult financial time, and  
18 finally, has caused a significant disruption in the preparation of the Government’s  
19 (and presumably the defendant’s case). Wherefore, the United States submits that  
20 good cause has been shown to warrant reconsideration of the Court’s new venue  
21 selection.

22 The United States proposes that the following, less disruptive and more  
23 economically feasible jury selection and trial process. The Court and the parties  
24 proceed with jury selection on October 11, 2011, in Yakima as scheduled. Jury  
25 selection in Yakima from the Division B panel will mitigate the as yet still unproven  
26 and unfounded media – publicity prejudice concerns raised in defendant’s motion.  
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1 Upon completion of the selection of a fair and impartial jury from Division B jurors,  
2 the Court, jury and parties return to Spokane and commence with the evidentiary trial  
3 phase of the case (i.e., on October 12, 2011, as previously scheduled).

4 Therefore, the United States and Representatives from the Estate of Otto Zehm  
5 and the Zehm family respectfully requests the Court to set a telephonic hearing so that  
6 this important and pressing venue issue can be reviewed and resolved at the earliest  
7 opportunity.

8 Likewise, the Defense has indicated that it would like to request a two (2) day  
9 continuance of the trial date so as to have the time and opportunity to logistically  
10 move its personnel and case materials to Yakima. The granting of the United States  
11 and the Victims' requested relief will avoid any further continuance or delay, and will  
12 result in the sitting of a fair, impartial jury, with minimum further disruptions.

13 RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of October 2011.

14 *MICHAEL C. ORMSBY*  
15 United States Attorney

16 s/ Timothy M. Durkin  
17 Timothy M. Durkin  
18 Assistant United States Attorney  
19 Attorneys for Plaintiff United States

20 **Certificate of ECF and/or Mailing**

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

26 Carl Oreskovich, Esq.

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

s/ Tim M. Durkin  
Assistant United States Attorney