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8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF WASHINGTON

10 UNITED STATES, )  
11 Plaintiff, ) NO. 09-CR-0088-FVS  
)  
12 vs. ) UNITED STATES’ MOTION FOR  
) NUNC PRO TUNC EXTENSION OF  
13 ) TIME TO RESPOND TO COURT’S EX  
14 ) PARTE ORDERS & STAY OF DOJ  
) EXPERT’S CONFIDENTIALITY  
15 )  
\_\_\_\_\_ )

16 Plaintiff United States, through the undersigned counsel of the United States  
17 Department of Justice (DOJ), moves the Court for a *nunc pro tunc* extension of time to  
18 respond to the Court’s two prior ex parte Orders (*ECF Nos. 810 and 814*), which counsel  
19 for the United States and the U.S. Attorney for the Eastern District of Washington,  
20 Michael C. Ormsby, did not receive until after the entry of the Court’s order this morning  
21 granting the Defendant an additional 30 additional days in which to determine whether or  
22 not to supplement or amend Defendant’s pending motion for new trial, and vacating the  
23 previously scheduled January 27, 2012, sentencing as a result of the extension.

24 The United States respectfully informs the Court that its two prior ex parte orders  
25 dated December 13, 2011, and December 20, 2011, were not received or accessed by any  
26

1 of the Government's attorneys involved in the case until this morning. Further still, the  
2 Court's December *ex parte* Orders were not served upon or provided to U.S. Attorney  
3 Michael Ormsby, even though the Court's Orders directed that they be properly served  
4 upon him.

5 The undersigned counsel's legal assistant was out of the office on December 13,  
6 2011, the date of the Court's first order, nonetheless the undersigned did attempt to  
7 access the Court's generically described *ex parte* order (i.e., *ECF 810*, "Ex Parte ORDER  
8 *as to Karl F Thompson, Jr.* Signed by Senior Judge Fred Van Sickle."). However, access  
9 was rejected through an inaccessible, document not available in electronic format, or  
10 error report. Access was similarly denied/rejected to the December 20, 2011, Order  
11 (*ECF 814*, "Ex Parte ORDER *as to Karl F Thompson, Jr.* Signed by Senior Judge Fred  
12 Van Sickle"). Similar access attempts by the Civil Rights Division's counsel (Mr.  
13 Boutros) also failed. In fact, all of the DOJ counsel involved in the case have confirmed  
14 that they were not provided with and did not see the Court's two prior December *ex parte*  
15 orders (*ECF 810, 814*) until this morning.

16 In view of Defense counsel's prior *ex parte* and CJA applications, and the Court's  
17 entry of numerous *ex parte* orders concerning the same, as well as the Court's orders  
18 denying the United States access to *ex parte* motions – orders "as to Karl F. Thompson"  
19 (*see ECF 805* denying United States motion for access – unsealing of defense *ex parte*  
20 filings; *cf.*, Defense only *Ex parte Orders "as to Karl Thompson," ECF No. 240, 556,*  
21 *564, 792, and 802*), and counsel's failed attempts to access the subject orders, counsel for  
22 the DOJ reasonably believed that the Court's two subject December *ex parte* orders  
23 related to "Karl F. Thompson" and not to the United States. Further still and as  
24 previously indicated, the U.S. Attorney, Mr. Ormsby, likewise did not receive and was  
25 not provided with the Court's December *ex parte* Orders until today, notwithstanding the  
26 Court's Order directing that service be performed upon him.

27 MOTION FOR *NUNC PRO TUNC* EXTENSION TO RESPOND TO COURT'S *EX PARTE*  
ORDERS & FOR STAY OF DOJ EXPERT'S CONFIDENTIALITY OBLIGATION

1 Based on the diligence that has been exercised by the DOJ's counsel in this case  
2 and in prior cases before this Court, counsel for the United States can affirmatively  
3 represent that they would never knowingly ignore this Court's Orders. Nor would DOJ  
4 counsel knowingly fail to provide an appropriate and/or timely response to the Court's  
5 orders, particularly one involving a requirement to *show cause*.

6 As the Court is aware, the United States, through U.S. Attorney Michael Ormsby,  
7 did provide a letter response to Mr. Fredericks's expert confidentiality release issue on  
8 December 23, 2011. In the letter response, the United States, then completely unaware of  
9 the Court's prior *ex parte* orders, disclosed that it was voluntarily providing Mr.  
10 Fredericks's signed statement purporting to contain *Brady v. Maryland* material to the  
11 Defense for their review and consideration. As indicated in the response, it is the United  
12 States position that Mr. Fredericks and his counsel do not understand nor appreciate the  
13 full nature and extent of the United States' discovery disclosures to the Defense that  
14 concerns Mr. Fredericks, his reports, statements and/or testimony.

15 Notably, it was the United States voluntarily disclosure of Mr. Fredericks's  
16 information to the Defense on December 23<sup>rd</sup> that prompted the Defense to seek a 30-day  
17 extension (*see ECF 823*) to allow the Defense sufficient time to review Mr. Fredericks's  
18 statement and materials in comparison to the United States' disclosures, and to determine  
19 whether or not the Defendant should include that information in an amended motion for  
20 new trial. The United States also explained in the letter response that, other than the  
21 criminal discovery and disclosure processes, it was not otherwise releasing Mr.  
22 Fredericks from his expert confidentiality obligations. The United States is further  
23 concerned that a release would extend to third parties and/or the media.

24 Based on the foregoing, the United States submits that *good cause* exists to grant a  
25 *nunc pro tunc* extension for the United States to provide its response to the Court's *ex*  
26 *parte* orders. The United States further respectfully requests that the Court consider Mr.

27 MOTION FOR *NUNC PRO TUNC* EXTENSION TO RESPOND TO COURT'S *EX PARTE*  
ORDERS & FOR STAY OF DOJ EXPERT'S CONFIDENTIALITY OBLIGATION

1 Ormsby's December 23, 2011, letter as its response to the Court's December 13, 2011,  
2 Order, and in light of the information provided therein, and except as otherwise provided  
3 by the Federal Rules of Criminal Procedure governing discovery and/or disclosures,  
4 including disclosures required by *Brady v. Maryland*, that the Court stay the release of  
5 Mr. Fredericks's DOJ confidentiality obligations until further order of the Court.

6 RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of January 2011,

7 MICHAEL C. ORMSBY  
8 United States Attorney - EDWA

9 s/ *Tim M. Durkin*  
10 Timothy M. Durkin, AUSA  
11 Aine Ahmed, AUSA  
12 Victor Boutros, DOJ Trial Attorney  
13 Attorneys for Plaintiff United States

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17  
18 **Certificate of ECF and/or Mailing**

19 I hereby certify that on the date of the electronic filing of the foregoing pleading with  
20 the Clerk of the Court using the CM/ECF System, that the CM/ECF System sent notification  
21 to the following CM/ECF participants:

22 Carl Oreskovich, Esq., et al (defense counsel)

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

24 s/ *Tim M. Durkin*  
25 Timothy M. Durkin  
26 Assistant United States Attorney