

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF WASHINGTON

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4  
5 UNITED STATES OF AMERICA,  
6 Plaintiff,

7 v.

8  
9 KARL THOMPSON, JR.,  
10 Defendant.

No. CR-09-88-FVS

ORDER VACATING SENTENCING  
HEARING AND GRANTING  
PERMISSION TO SUPPLEMENT  
MOTION FOR NEW TRIAL

11  
12 **THIS MATTER** comes before the Court without oral argument based  
13 upon the defendant's request for expedited review of his motion  
14 seeking permission to supplement, as appropriate, his motion for a new  
15 trial.

16 **BACKGROUND**

17 The circumstances giving rise to this order are unusual.  
18 Typically, an order has its genesis in a motion. Strictly speaking,  
19 that is not so in this instance. The Court received a letter "out of  
20 the blue" as it were. The letter set in motion a chain of events that  
21 led to this order. The following is a partial explanation of that  
22 chain of events.

23  
24 Some years ago, the government retained a forensic video analyst  
25 to help with the investigation and prosecution of the defendant.  
26 Pursuant to *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10

1 L.Ed.2d 215 (1963), the government must disclose to the defendant's  
2 attorneys any evidence generated by the forensic video analyst that  
3 indicates the defendant is not guilty of the crimes charged. The  
4 government's attorneys disclosed a substantial amount of information  
5 about the analyst's work. At some point, the analyst decided that, in  
6 his opinion, the government's disclosures are incomplete and  
7 inaccurate. However, he had signed a confidentiality agreement which,  
8 apparently, prevents him from discussing his work with persons who are  
9 not associated with the government. As a result, he contacted an  
10 attorney who is not involved in the case and asked the attorney to  
11 seek his release from the confidentiality agreement. The attorney did  
12 so in a letter that is dated December 1, 2011, and that is addressed  
13 to both the Court and to one of the government's attorneys. The  
14 attorney asked the government to voluntarily release the analyst from  
15 the agreement. In the alternative, the attorney asked the Court to  
16 order the government to release the analyst. Counsel for the  
17 government asked the analyst's attorney to request the analyst to  
18 state more specifically why he thinks the government's disclosures are  
19 inaccurate, misleading, or incomplete. The analyst travels  
20 extensively. Consequently, he did not respond immediately. On  
21 December 13th (which is during the period when the government's  
22 attorney was waiting for a response from the analyst via the analyst's  
23 attorney), the Court entered an *ex parte* order directing the  
24 government to show cause, by December 19th, why it should not be  
25  
26

1 ordered to release the analyst from his confidentiality agreement. On  
2 or about December 16th, the analyst signed an eight-page statement  
3 explaining why, in his opinion, the government's disclosures are  
4 inadequate. At about 5:45 p.m. on the 16th, the analyst's attorney  
5 faxed copies of this statement to the Court and to the government.  
6 The 16th was a Friday; the 19th a Monday. The 19th also was the  
7 deadline for the government to file a response to the show-cause  
8 order. The government did not do so. The Court treated the absence  
9 of a response as consent to the entry of an order. *Cf.* Local Rule  
10 7.1(e) (a party's failure to respond to a motion is deemed consent to  
11 the relief requested). Thus, on December 20th, the Court entered an  
12 *ex parte* order directing the government to release the analyst from  
13 the confidentiality agreement and to provide a copy of his statement  
14 to the defendant's attorneys. The government was to accomplish the  
15 latter by noon on December 21st. This was two days before the  
16 deadline for the defendant to file a motion for a new trial under  
17 Federal Rule of Criminal Procedure 33. The government did not ask the  
18 Court to vacate the order (which remains in effect), nor did the  
19 government comply with the December 21st disclosure deadline. On  
20 December 23rd, counsel for the government sent a four-page letter to  
21 the Court; at the same time sending a copy of the letter to the  
22 defendant's attorneys. In the letter, the government's attorney  
23 rejected the analyst's allegation that the government failed to  
24 accurately disclose his analysis to counsel for the defendant.  
25  
26

1 Furthermore, the government's attorney refused to release the analyst  
2 from his confidentiality agreement with the government. However, the  
3 government's attorney did agree to furnish a copy of the analyst's  
4 statement to the defendant's attorneys. They state that they received  
5 it on December 27th. The next day, they filed a motion seeking 30  
6 days in which to both investigate the issues raised by the analyst's  
7 statement and, if warranted, supplement the defendant's pending motion  
8 for a new trial. The government filed a response on December 29th.  
9 The government does not object to the defendant's motion for  
10 additional time, but the government does urge the Court to limit the  
11 extension to a period to 14 days.  
12

13 **RULING**

14 It is unusual for an expert witness to seek release from a  
15 confidentiality agreement. There is no established procedure for  
16 resolving such a request. It clearly appears the analyst's attorney  
17 and the attorneys for the government have attempted to resolve a novel  
18 dispute in a professional manner. Be that as it may, the fact remains  
19 that the analyst's allegations raise serious constitutional issues  
20 under *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d  
21 215 (1963). The defendant is entitled to a reasonable opportunity to  
22 investigate them.  
23

24 **IT IS HEREBY ORDERED:**

- 25 1. "Defendant's Motion to Shorten Time" (**ECF No. 825**) is **granted**.  
26 2. "Defendant's Motion for Extension of Time" (**ECF No. 823**) is

1 **granted.**

2 3. **The pending sentencing hearing (January 27, 2012) is stricken.**

3 A new sentencing hearing will be scheduled as needed.

4 4. The defendant may have until **4:00 p.m. on January 24, 2012**, to  
5 supplement his pending motion for a new trial.

6 5. The government may have until **4:00 p.m. on February 7, 2012**,  
7 to file a response.

8 6. The defendant may have until **4:00 p.m. February 17, 2012**, to  
9 file a reply.

10 7. After the Court has had an opportunity to review the parties'  
11 submissions, the Court will advise counsel whether oral argument will  
12 be helpful.

13 **IT IS SO ORDERED.** The District Court Executive is hereby  
14 directed to enter this order and furnish copies to counsel.

15 **DATED** this 5th day of January, 2012.

16  
17  
18 s/ Fred Van Sickle  
19 Fred Van Sickle  
Senior United States District Judge