No.

In the Supreme Court of the United States

KARL F. THOMPSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a criminal prosecution for excessive force against a law enforcement officer, does the admission of evidence unknown to the officer that the detainee was innocent of the suspected offense violate this Court's holding in *Graham v. Connor*?

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UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Karl F. Thompson, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case, entered on June 17, 2014. (App. A)

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals (App. A) is not reported but is available at 2014 WL 2726680. The Court of Appeals decision denying rehearing and suggesting *en banc* review was entered on July 25, 2014 (App. C) but is not reported. The opinion of the district court (App., B) is not reported but is available at 2012 WL 4120256.

JURISDICTION

The judgment of the Court of Appeals was entered on June 17, 2014. A petition for rehearing suggesting *en banc* review was denied on July 25, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Karl F. Thompson, Jr., a Spokane Police Department Patrol Officer, was convicted on November 2, 2011 for using excessive force during the course of an investigatory stop in violation of 18 U.S.C § 242, and for knowingly making false statements during a subsequent police interview in violation of 18 U.S.C. § 1519. The events giving rise to the convictions occurred on March 18, 2006, wherein a 911

complaint was made in Spokane, Washington reporting the occurrence of a possible theft or robbery of money from an ATM machine.

Two teenage girls had driven to an ATM machine located at a bank drive-through. While attempting to complete a transaction, an unknown and suspicious man approached the girls' car. The man's actions frightened the young women, prompting them to drive away from the ATM without cancelling their pending transaction.

Shortly thereafter, the girls called 911. They remained nearby and continued to maintain visual surveillance on the man while he lingered at the ATM. The caller told the 911 operator that the man was trying to get in their car and that he took money from her bank account. The caller provided a physical description of the man, reporting that he was white, in his forties, with long reddish-blonde hair, wearing a black coat, jeans, and boots. It was also reported that the man appeared to be "high."

In response, the Spokane Police Department ("SPD") was dispatched. At that time, Patrol Officer Karl F. Thompson, Jr. was taking his dinner break at a nearby police station. He heard radio traffic concerning the call and recognized that the suspect was running toward a restaurant which he knew to be in close proximity to his location. Officer Thompson proceeded to his patrol car and brought up the call information on his car computer, known as a CAD report.

Based on the information available in the CAD report, Officer Thompson learned that the suspect was a white male, in his forties, with long reddish blonde

hair, wearing a black jacket, jeans and boots. The report also indicated that the suspect appeared to be "high." It described that the suspect approached the young women while at an ATM, interrupting their transaction. Due to the suspect's actions, the girls drove away; leaving a bank card in the machine with the PIN number entered. The CAD report stated that the suspect was "messing" with the ATM, had "things in his [sic] hands" that "look[ed] like money," and "ran" away from the ATM "with their money."

Radio dispatch provided much of the same information as the CAD report. The dispatcher also broadcast that "the complainants are advising that they have left their card in the machine when the suspect scared them off...and the suspect has used their money." Due to the nature of the call and his closeness to the area, Officer Thompson checked himself in service.

Officer Thompson drove directly to the call area. While en route, information was updated on the CAD report and radio dispatch regarding the suspect's whereabouts. SPD officers were advised that the girls were driving a white Dodge Intrepid. Information was also corrected that the driver of the car did not leave her bank card in the ATM but was able to retrieve it before the suspect approached. In response to the updated information, one of the other officers responding to the call asked the dispatcher, "just to confirm: he took her money?" The dispatcher responded: "Affirm." This broadcast was heard by Officer Thompson.

Officer Thompson spotted the suspect along with the girls' vehicle outside a Zip Trip convenience store located near the area where the 911 call originated. The

male, later identified as Otto Zehm, matched the physical description provided to the officers as the man who approached the girls at the ATM and took their money.

Officer Thompson drove his fully marked police car into the convenience store parking lot and parked perpendicular to the gas pumps. At the same time, Zehm looked directly in Officer Thompson's direction and then proceeded into the convenience store using the north entrance. Officer Thompson, wearing his full police uniform, exited his vehicle and quickly followed Zehm into the store. At the time Officer Thompson went to confront Zehm, a reasonable suspicion existed to conduct an investigatory stop due to the fact that Zehm was suspected of committing the crime of attempted theft or robbery.

Officer Thompson hurriedly followed behind Zehm, entering the store approximately ten seconds after him. Seconds later, Officer Thompson withdrew his baton from his belt, holding it in front of him, as he passed through the north side of the store. When Officer Thompson reached the northwest corner of the store, Zehm had his back towards him and was facing a beverage display in the southwest corner. Zehm turned and faced the swiftly approaching Officer Thompson. According to Officer Thompson, Zehm made immediate and direct eye contact with him as he approached. Zehm was gripping a two-liter Pepsi bottle with both hands, one at each end, at chest level, holding it parallel to the ground. Thereafter, a very complex encounter began.

Officer Thompson later described the initial confrontation with Zehm in a recorded interview after the incident:

> We were both staring at each other. When I came to a stop, I immediately told him, I ordered him, in a, in a forceful voice, drop it. He immediately replied, and during this short discourse, we both did not break eye contact. His eyes were wide. He was looking straight at me.
>
> ...
>
> And I was in full uniform...he said "why?" It was a forceful response. Uh, it, he didn't break eye contact and my first impression was, here I am in full uniform. I'm displaying a baton in a manner that shows I'm prepared to strike. I'm ordering him to drop the bottle which he's holding at chest level in both hands and I he, he tells me why. And I immediately I said "drop it now." I said it twice as loud and he said "no." It was again looking straight at me, clearly without any provocation, that was his response. In my mind at that point, in our proximity, my belief was that he was preparing to assault me. When he turned around and saw me entering, he, he did not immediately flee. He picked up an object and it was held in a manner that I realized was in a position that he could use it as a significant weapon against me.

Throughout the next 75 seconds, a physical confrontation ensued. Officer Thompson issued commands and utilized his baton and taser but was unable to control Zehm.

A second police officer arrived and began assisting Officer Thompson. The two officers were still unable to restrain Zehm. The called into SPD radio dispatch reporting that Zehm was "fighting pretty good." Two seconds later, Officer Thompson called a "Code 6" indicating that the officers needed assistance and that all available units should proceed to the scene immediately with full lights and sirens.

In less than one minute's time, four to five additional officers arrived. With the help of numerous officers working in unison, handcuffs were applied to Zehm.

Once the handcuffs were attached, a physically exhausted Officer Thompson went outside to catch his breath. He had no further contact with Zehm.

After Officer Thompson was relieved, other officers attempted to control Zehm, who continued to resist violently. An additional set of handcuffs were applied because officers were concerned that he would pull the first set off. Officers then put leg restraints on Zehm because he was aggressively fighting and kicking his legs. Many of the officers on scene, along with various fire department personnel, witnessed Zehm's continuous violent resistance which continued for a period at eighteen additional minutes. After Zehm stopped violently resisting the officers, he was heard making the comment "I just wanted a Snickers." Officer Thompson was not present when the comment was made.

Zehm stopped breathing at the scene and went into cardiac asystole. He died two days later while in the hospital. Zehm's death was not caused by any application of force by Officer Thompson. On scene investigation the night of the event established that Zehm was holding his paycheck in his hand at some point during the struggle.

After the incident, the City of Spokane and Spokane County authorities began an inquiry. On March 22, 2006, Officer Thompson waived his *Garrity* rights and voluntarily participated in an interview with investigators. During the interview, Officer Thompson reiterated his belief that he had reasonable suspicion to conduct an investigatory stop on Zehm. At no time at any point during the interview did Officer Thompson claim to know whether Zehm was guilty of any

crime at the ATM at the time of the confrontation. Rather, Officer Thompson maintained that the purpose of confronting Zehm was to detain him so more investigation could follow. After the incident, the investigation revealed that Zehm did not commit the crime of theft or robbery at the ATM.

Trial in this case was originally scheduled to begin June 7, 2010. Both parties had submitted numerous motions for the purpose of excluding evidence unknown to Officer Thompson at the time of his confrontation with Zehm pursuant to *Graham v. Connor,* 490 U.S. 386, 109 S. Ct. 1865 (1989). Officer Thompson moved to exclude after-acquired evidence of Zehm's innocence on the basis that Officer Thompson did not know Zehm was innocent of the suspected crime at the time of his use of force. The government moved to exclude Zehm's mental health history and the defense's theory of excited delirium.

On June 3, 2010, the district court conducted a pretrial hearing on the motions regarding Zehm's innocence, in addition to other pretrial motions including evidence relating to Zehm's mental health history. During that hearing, Officer Thompson withdrew his objection to the government's motions in limine regarding Zehm's mental health history. The court made a preliminary determination that evidence of Zehm's innocence was inadmissible, then later decided to take the issue under advisement. Supplemental briefing was filed addressing the issue.

On the first day of trial, June 7, 2010, the court conducted a final pretrial hearing prior to jury selection. The court ruled that evidence unknown to Officer Thompson, including evidence of Zehm's innocence, was inadmissible. The

government gave notice of its intent to file a notice of interlocutory appeal regarding the court's decision and filed its notice of interlocutory appeal later that same day. The case was stayed while the Ninth Circuit considered the government's appeal.

The Ninth Circuit ultimately affirmed the trial court's ruling, noting that the district court properly weighed the probative value of the evidence against its prejudicial effect. Specifically, it held:

> Here, the district court properly concluded that evidence of Otto Zehm's innocent conduct was relevant under *Boyd*, 576 F.3d at 944 ("[W]here what the officer perceived just prior to the use of force is in dispute, evidence that may support one version of events over another is relevant and admissible."). The district court, however, exercised its discretion under Fed.R.Evid. 403 to exclude this evidence because the potential for prejudice to Officer Thompson substantially outweighed the probative value of the evidence.

United States v. Thompson, 423 Fed. Appx. 758, 758-59 (9th Cir. 2011).

The stay was lifted and trial was reset for October 2011. Trial finally proceeded on October 12, 2011. During trial, the government repeatedly attempted to admit evidence which allowed it to argue Zehm's innocence. Despite the district court's prior evidentiary rulings regarding evidence of Zehm's innocence, and the Ninth Circuit's affirmation of the court's decision, the court eventually conceded to the government's persistent requests. The trial court allowed Zeth Mayfield, a convenience store clerk, to testify that, unknown to Officer Thompson, Zehm frequently purchased items at a different Zip Trip store in a separate area of town; testimony regarding Zehm's statement – "I just wanted a Snickers" – made prior to the time he stopped breathing and after Officer Thompson had disengaged from the confrontation and left the building; and testimony regarding the fact that Zehm had

his paycheck in his hand at some point during confrontation. This evidence was admitted despite the fact that Officer Thompson had no knowledge of any of these facts at the time of the confrontation. Officer Thompson was convicted on November 2, 2011.

On December 23, 2011, Officer Thompson filed a motion for a new trial based upon various errors that occurred during the time of trial. Specifically, he sought a new trial based upon the admission of evidence related to Zehm's innocence because it unfairly tainted the proceedings and prejudiced Officer Thompson's right to a fair trial under the precedent set forth in *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865. On September 18, 2012, the trial court issued it rulings denying Officer Thompson's motion.

Officer Thompson appealed to the Ninth Circuit Court of Appeals, asking the Court to determine "[w]hether the district court erred by admitting evidence at the time of trial of a detainee's innocence in the criminal prosecution of a law enforcement officer under 18 U.S.C. §§ 242 and 1519 when such evidence was unknown to the officer at the time of the confrontation and was unfairly prejudicial." The Court of Appeals affirmed the district court's decision, finding that:

> The district court did not abuse its discretion in admitting testimony about the victim's behavior prior to and during the incident. See *Boyd v. City & Cnty. of S.F.*, 576 F.3d 938, 948 (9th Cir. 2009). Evidence that the victim was not fleeing or hiding from police undermined Thompson's claim that the victim used the soda bottle he was holding as a weapon. The evidence did not raise an undue risk that the jury would impute knowledge of the victim's innocence to Thompson. *See id.* at 947–49.

(App., *infra.*, 16-18d).

REASONS FOR GRANTING WRIT

A. Certiorari should be granted to resolve a conflict between the Courts of Appeals and to correct the Ninth's Circuit's inconsistent, erroneous extension of *Graham v. O'Connor*.

In *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, this Court held that all claims that law enforcement officials have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other "seizure" of a free citizen are properly analyzed under the Fourth Amendment's "objective reasonableness" standard, rather than under a substantive due process standard. This Court determined that whether an officer acted in good faith or maliciously or sadistically for the purpose of causing harm is not relevant and incompatible with the proper Fourth Amendment analysis. *Id.* at 396. This Court held that the "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *Id.* This Court specifically stated that "the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.*

In *Graham* this Court suggested, in a footnote, that there may be limited circumstances under which other factors may be considered:

> Of course, in assessing the credibility of an officer's account of the circumstances that prompted the use of force, a factfinder may consider, along with other factors, evidence that the officer may have

> harbored ill-will toward the citizen. *See Scott v. United States*, 436 U.S. 128, 139, n. 13, 98 S. Ct. 1717, 1724, n. 13, 56 L.Ed.2d 168 (1978). Similarly, the officer's objective "good faith"—that is, whether he could reasonably have believed that the force used did not violate the Fourth Amendment—may be relevant to the availability of the qualified immunity defense to monetary liability under § 1983. *See Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L.Ed.2d 523 (1987). Since no claim of qualified immunity has been raised in this case, however, we express no view on its proper application in excessive force cases that arise under the Fourth Amendment.

Graham, 490 U.S. 386, 399 at n. 12 (citations omitted).

Subsequently, in *Boyd v. City and County of San Francisco,* 576 F.3d 938, 944, the Ninth Circuit broadly interpreted this language from *Graham* and concluded that in an excessive force case, after acquired evidence that may support one version of the events over another is relevant and admissible where what the officer perceived just prior to the use of force is in dispute.

In *Boyd,* following a high speed car chase Cameron Boyd was shot and killed when he acted erratically and allegedly failed to follow police commands. At issue was the admissibility of evidence that was unknown to the officer at the time of the shooting. *Boyd*, 576 F.3d at 944. Earlier in the evening, Boyd had attempted two separate kidnappings from which he was fleeing. *Id.* at 942-943. He had also been involved in a high speed chase in 1993 that ended in a car crash that resulted in the loss of his legs. *Id.* He had filed prior lawsuits against law enforcement agencies and allegedly harbored ill-will toward police. *Id.* at 944. Three days before this shooting, Boyd was arrested for reckless driving and demonstrated the ability to move without assistance despite the fact that he had two prosthetic legs. *Id.* at 942-943. During the reckless driving arrest he

repeatedly screamed at the officers to "kill him". *Id.* Boyd had drugs in his system at the time that he was shot. *Id.* Finally, the defense offered expert testimony that Boyd was attempting to commit "suicide by cop" in his interactions with the police. *Id.* at 945-946. None of this evidence was known to the officer involved in the shooting, but it was admitted.

In affirming the trial court's decision to admit the evidence, the Ninth Circuit relied on the language in footnote 12 of *Graham* and concluded that each of the specific items of evidence supported the officer's version of the events, despite the fact that the evidence was unknown to him at the time of the shooting. In essence, the *Boyd* Court simply performed a relevance determination and did not calculate or consider whether the evidence was known to the officer at the time of the shooting.

However, in later cases, the Ninth Circuit retreated from this broad interpretation of the Graham footnote. In *Hayes v. County of San Diego*, 736 F.3d, 1223 (9th Cir. 2010), the Ninth Circuit properly applied *Graham* and correctly rejected the idea it could consider circumstances or facts not known to the officers at the time they applied deadly force. In *Hayes*, San Diego police officers responded to a domestic disturbance call from a neighbor who had heard screaming from an adjacent home. *Hayes*, 736 F.3d at 1227. Upon entering the home the police officers saw Hayes in an adjacent kitchen area approximately eight feet away with his right hand behind his back. *Id.* When an officer ordered Hayes to show him his hands, Hayes took one or two steps toward the deputy and

raised both hands to approximately shoulder level, revealing a large knife pointed tip down in right hand. *Id.* The officer immediately drew his gun and fired two shots at Hayes. *Id.* Only four seconds elapsed between the officer's verbal command and the shooting. *Id.* At issue in *Hayes* was whether the court could consider facts unknown to the officers at the time of the use of force. Specifically, the evidence indicated that Hayes was intoxicated at the time of the shooting and that he had previously used a knife in harming himself. Relying on *Graham*, the *Hayes* Court rejected the notion that it could consider this evidence and concluded: "we can only consider the circumstances of which [the officers] were aware when they employed deadly force ... Accordingly, when analyzing the objective reasonableness of the officers' conduct under *Graham*, we could not consider the fact that Hayes was intoxicated or had previously used a knife in harming himself." *Hayes*, 736 F.3d at 1232-33.

The Ninth Circuit again refined its interpretation of *Graham* in *Glenn v. Washington County*, 673 F.3d 864 (9th Cir. 2011). The Ninth Circuit examined the government's interest in use of force in a wrongful death case by examining three primary factors: "(1) whether the suspect poses an immediate threat to the safety of the officers or others, (2) the severity of the crime at issue, and (3) whether he is actively resisting arrest or attempting to evade by flight." 736 F.3d at 872. At issue in *Glenn* was the officers' use of deadly force on an intoxicated and a depressed high school student who was holding a pocket knife to his throat and threatening suicide. *Id.* at 867. In granting summary judgment in favor of the

defendants, the trial court relied upon statements made to a 911 Operator that the student was "threatening to kill everybody" and might "run at the cops with a knife". *Id.* at 873. Although this evidence was unknown to the officers, the trial court relied upon the statements as uncontroverted evidence demonstrating that the officers' safety concerns were not at odds with information provided to law enforcement. *Id.* In reversing the summary judgment, however, the Ninth Circuit cited *Graham* and stated: "We disagree with the district court's suggestion that, even though we must assume the officers did not know of these statements, they provide uncontroverted evidence demonstrating that the officers' safety concerns were not at odds with information provided to law enforcement. We cannot consider evidence of which the officers were unaware – the prohibition against evaluating officers' actions 'with the 20/20 vision of hindsight' cuts both ways." *Id.*, at 873 n. 8.

These three Ninth Circuit decisions cannot be reconciled. *Hayes* and *Glenn* are clear and correctly apply *Graham's* holding: only facts of which the officer is aware may be considered by the Court in determining whether the use of force was objectively reasonable. Yet *Boyd* disregards this limitation and expands the scope of the inquiry to any relevant evidence if it can be said that what the officer perceives just prior to the use of force is in dispute. The *Boyd* Court's wide-open expansion of the admissibility of evidence is not consistent with *Graham*'s holding and runs afoul of this Court's suggestive language in footnote 12, which the *Boyd* Court used to anchor its rationale.

Footnote 12 in *Graham* identified two limited circumstances where the intent of the officer might be relevant to the reasonableness of force used. *Graham*, 109 S. Ct. at 1873 n. 12. First, this Court recognized that when the credibility of the officer's account was at issue, the evidence that the officer harbored ill-will towards the citizen may be relevant. *Id.* Second, that the officer's good faith belief that the use of force did not violate the citizen's constitutional protections maybe relevant to a qualified immunity defense. *Id.* Notably, whether an officer harbored ill-will or believed in good faith that the exercise of force was constitutional are all facts known to the officer and consistent with this Court's *Graham* standard. *Boyd's* application of footnote 12 to include any facts that are relevant, even facts that are unknown to the officer at the time of the use of force, misapplies *Graham* and erodes the *Graham* standard, in violation of the Fourth Amendment to the Constitution.

In this case, the Ninth Circuit relied upon the *Boyd* Court's expansive view of *Graham* in upholding the district court's admission of after-acquired evidence regarding Mr. Zehm's innocence. Specifically, the Ninth Circuit upheld the district court's erroneous admission of after-acquired evidence, including testimony of a convenience store clerk, that Zehm frequently purchased items at a different Zip Trip store in a separate area of town; testimony regarding Zehm's statement made prior to the time he stopped breathing (and after Officer Thompson had disengaged from the confrontation and left the building) that he "just wanted a Snickers"; and testimony that Zehm had his paycheck in his hand at some point

during the confrontation. This evidence was admitted despite the fact that Officer Thompson had no knowledge of any of these facts at the time of the confrontation. Through the admission of this evidence, the jury was allowed to consider evidence beyond the scope of *Graham* thus allowing the jury to judgment Office Thompson's actions with more information than known to him at the time of the incident with the 20/20 vision of hindsight. Such a result unfairly prejudiced Officer Thompson's right to a fair trial.

The prejudicial effect of this evidence supporting Zehm's innocence was substantial. Through Mr. Mayfield's testimony, the government was able to establish that Zehm was in the Zip Trip for no other purpose than to purchase Pepsi, that his behavior was normal and that he was acting normally because he was innocent of any wrong-doing at the ATM. The admission of the Snickers bar statement allowed the government to infer that Zehm was in the Zip Trip for the innocent purpose of purchasing a Snickers bar, inferring that he had done nothing wrong at the ATM and did not know why Officer Thompson was confronting him inside the store. The final piece of evidence, testimony about whether Zehm had a paycheck in his hand during the confrontation, allowed the government to offer its theory that Zehm had a legitimate reason to be at the ATM and was innocent of any crime involving the 911 complainants. None of this evidence was known to Officer Thompson at the time he confronted Zehm. The evidence, admitted under *Boyd*, substantially prejudiced Officer Thompson's right to have his conduct judged as required under *Graham*. This Court should grant certiorari to correct

the Ninth Circuit's inconsistent and erroneous extension of *Graham v. Connor*, especially in light of the influx of excessive force cases nationwide and the likelihood that future litigants will be similarly prejudiced.

B. Certiorari should be granted to resolve a conflict between the Courts of Appeals regarding the correct application of *Graham v. Connor*.

Boyd's expansion of *Graham* was wrongly followed by the Ninth Circuit in *United States of America v. Karl F. Thompson, Jr.*, 2014 WL 2726680. Relying on *Boyd*, the Ninth Circuit affirmed the trial court's ruling admitting evidence of Otto Zehm's innocence in the prosecution of Officer Thompson. The Thompson Court stated:

> The district court did not abuse its discretion in admitting testimony about the victim's behavior prior to and during the incident. *See Boyd v. City & Cnty. of S.F.*, 576 F.3d 938, 948 (9th Cir. 2009). Evidence that the victim was not fleeing or hiding from police undermined Thompson's claim that the victim used the soda bottle he was holding as a weapon. The evidence did not raise an undue risk that the jury would impute knowledge of the victim's innocence to Thompson. *Id.*, at 947-49.

2014 WL 2726680 *1.

The *Boyd* holding and its application in *Thompson*, misapplies *Graham* and is in direct conflict with the Fourth Circuit's decision in *Kopf v. Skyrm*, 993 F.2d 374, 379 (4th Cir.1993). *Kopf* involved a 1983 action alleging excessive force against Officer Skyrm during the arrest of her deceased son, Anthony Casella. The facts established that an armed robbery occurred at a pizza take out in Hyattsville,

Maryland. The suspects fled in a white van that was later spotted by the Hyattsville police who gave chase. Two of the suspects, Anthony Casella and Tammy Obloy fled on foot. Casella was later found and in an ensuing struggle was bitten numerous times by a police dog and suffered multiple baton strikes delivered by Officer Skyrm. Following trial a jury returned a verdict in favor of defendant. At issue, was the admissibility of Casella's later plea and conviction for armed robbery of the pizza take-out.

In rejecting the argument that evidence of guilt could be considered, the *Kopf* Court relied on *Graham* and held: "If probable cause to arrest is present, the actual guilt or innocence of the arrestee is irrelevant to the amount of force that may be used. Just as the officer's actions ought not be faulted through 'he 20/20 vision of hindsight' so also should they not be absolved by it." *Kopf*, 993 F.2d at 379. Specifically, the *Kopf* Court ruled that the plaintiff's ultimate conviction for the crime that he was arrested for was not relevant and should have been excluded at trial where the issue was whether the arresting officer used excessive force. *Id.*; *see also Gilyard v. Benson*, 2014 WL 4801465 (4th Cir. Sept. 29, 2014) (rejecting, as without merit, the Section 1983 plaintiff's assertion that the defendant officer's receipt of a letter of guidance from the Sheriff's Department concerning his prior use of a taser device in a separate, unrelated excessive force incident nearly a year before the encounter, had any bearing on the constitutionality of the force the officer employed in the present case); *Elliott v. Leavitt*, 99 F.3d 640, 643 (4th Cir.1996)

("*Graham* requires us to focus on the moment force was used; conduct prior to that moment is not relevant in determining whether an officer used reasonable force.").

Kopf and *Boyd* are irreconcilable. *Kopf* properly rejected the argument that the guilt of the citizen (or conversely the innocence) can be considered in determining the objective reasonableness of an officer's use of force. *Boyd* improperly opened the field to allow any evidence of a party's version of the events, regardless of whetehr that evidence is known to the arresting officer. *Boyd's* holding and subsequent application destroys the objective test required under *Graham* and the Fourth Amendment. By granting certiorari in this case, this Court will be able to clarify and unify the application of *Graham* among circuits.

CONCLUSION

The Court's ruling in *Graham* established that in the Fourth Amendment context, the reasonableness inquiry in an excessive force case is an objective one: the question considered is whether the officer's actions are "objectively reasonable" in light of the facts and circumstances confronting them without regard to their underlying intent or motivation. Consideration of evidence of the arrestee's innocence, which was unavailable to and unknown to the arresting officer, cannot be part of an objective analysis of the officer's actions. The Ninth Circuit decision in *Boyd* conflicts with *Graham*. *Boyd* contradicts other opinions within the Ninth Circuit, and is in direct conflict with the Fourth Circuit's decision in *Kopf*. The Court's review is needed to stop the erosion of *Graham* and to resolve the conflict

among the circuits about the application of *Graham*. The Petition for Writ of Certiorari should be granted.

Dated: October 22, 2014

Respectfully Submitted,

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APPENDIX

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KARL F. THOMPSON, Jr.,

Defendant - Appellant.

No. 12-30366

D.C. No. 2:09-cr-00088-FVS-1

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Fred L. Van Sickle, Senior District Judge, Presiding

Argued and Submitted June 2, 2014
Seattle, Washington

Before: McKEOWN and WATFORD, Circuit Judges, and WHYTE, Senior District Judge.**

1. The government does not challenge the district court's determination that it suppressed exculpatory material by failing to disclose its full knowledge of the opinions of its expert, Grant Fredericks. That failure, however, did not prejudice

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Ronald M. Whyte, Senior District Judge for the U.S. District Court for the Northern District of California, sitting by designation.

APPENDIX A

Karl Thompson under *Brady v. Maryland*, 373 U.S. 83 (1963), as Thompson has not shown that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler v. Greene*, 527 U.S. 263, 280 (1999).

Unlike the evidence at issue in *United States v. Olsen*, 704 F.3d 1172, 1184 (9th Cir. 2013), the evidence here could not have been used to impeach the government's expert at trial, since Fredericks did not testify. Further, the government's pre-trial disclosures put Thompson on notice of potentially favorable opinions in Fredericks' reports; Thompson was thus not deprived of the opportunity to develop a defense strategy that utilized those opinions. Finally, the non-disclosure did not impede Thompson's ability to cross-examine the government's witnesses. Almost all of Fredericks' opinions, to the extent they were favorable to Thompson, were "merely cumulative" of Thompson's own expert's opinions. *United States v. Kohring*, 637 F.3d 895, 902 (9th Cir. 2011).

2. The district court did not abuse its discretion in admitting testimony about the victim's behavior prior to and during the incident. *See Boyd v. City & Cnty. of S.F.*, 576 F.3d 938, 948 (9th Cir. 2009). Evidence that the victim was not fleeing or hiding from police undermined Thompson's claim that the victim used the soda bottle he was holding as a weapon. The evidence did not raise an undue

risk that the jury would impute knowledge of the victim's innocence to Thompson. *See id.* at 947–49.

3. The district court did not err in instructing the jury. The court's instructions correctly stated the intent requirement of 18 U.S.C. § 242. As we have previously held, "'willfulness' encompasses reckless disregard of a constitutional requirement that has been made specific and definite." *United States v. Koon*, 34 F.3d 1416, 1449 (9th Cir. 1994) (internal quotation marks omitted), *aff'd in part, rev'd in part on other grounds*, 518 U.S. 81 (1996).

4. The district court did not err in denying Thompson's motion for a new trial on the ground of alleged juror misconduct. The juror's "off-the-cuff statement" about historical corruption in Spokane does not "resemble the type of 'extraneous information' this court proscribes." *Price v. Kramer*, 200 F.3d 1237, 1255 (9th Cir. 2000). Even if the juror's isolated comment constituted impermissible extraneous information, Thompson has not shown "a reasonable possibility that the extrinsic material could have affected the verdict." *United States v. Mills*, 280 F.3d 915, 921 (9th Cir. 2002).

AFFIRMED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

KARL F. THOMPSON, JR.,

Defendant.

No. CR-09-88-FVS

ORDER DENYING THE DEFENDANT'S "MOTION FOR NEW TRIAL"

THIS MATTER comes before the Court based upon the defendant's "Motion for New Trial." He is represented by Carl J. Oreskovich and Courtney A. Garcea. The United States is represented by Joseph H. Harrington, Aine Ahmed, and Timothy M. Durkin.

BACKGROUND

The parties are familiar with the facts of this case. This order sets forth only those facts that are necessary for the resolution of the defendant's "Motion for New Trial."

STANDARD

The defendant moves for a new trial pursuant to Federal Rule of Criminal Procedure 33(a). Rule 33(a) states in pertinent part, "Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." A district court's authority to grant a motion for a new trial under Rule 33(a) is much broader than its authority to grant a motion for a judgment of

acquittal under Rule 29(c). *United States v. Alston*, 974 F.2d 1206, 1211 (9th Cir.1992). In *Alston*, the Ninth Circuit explained:

> The district court need not view the evidence in the light most favorable to the verdict; it may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses. . . . If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.

Id. at 1211-12 (internal punctuation and citations omitted).

WHETHER ALLOWING THE VERDICTS TO STAND WOULD WORK A SERIOUS MISCARRIAGE OF JUSTICE

A. Count One

Count One alleged the defendant violated 18 U.S.C. § 242 by willfully depriving Otto Zehm of his Fourth Amendment right to be free from objectively unreasonable force. The United States had to prove four elements beyond a reasonable doubt: First, the defendant acted under color of law. Second, he deprived Mr. Zehm of his Fourth Amendment right to be free from objectively unreasonable force. Third, he acted willfully. Fourth, his conduct resulted in bodily injury to Mr. Zehm. In moving for a new trial, the defendant focuses upon the third element. He alleges the evidence preponderates heavily against the jury's determination he acted willfully. According to him, a serious miscarriage of justice will occur if the verdict on Count One is allowed to stand. He cites the following circumstances:

There was evidence indicating his actions served a legitimate law enforcement purpose. Grant Fredericks' analysis of the video recordings of the opening seconds of the confrontation is inconsistent with, and undermines, Dr. Richard Gill's analysis. The video recordings don't capture all of the confrontation; many important things occurred "off camera." Evidence indicating the defendant admitted striking Mr. Zehm in the head is unreliable, and there is no evidence the defendant gratuitously employed force against Mr. Zehm.

Ruling:

Presumably, the jury determined the defendant employed objectively unreasonable force during his struggle with Mr. Zehm. The jury's determination is supported by substantial evidence. Allowing it to stand does not pose a serious risk of injustice. Can the same be said of the jury's determination the defendant acted willfully? As he points out, the evidence of willfulness was not overwhelming. The jury could have found otherwise based upon the evidence that was presented to it. Nevertheless, the Court cannot say a serious miscarriage of justice will occur if the jury's finding of willfulness is allowed to stand.

B. Count Two

Count Two alleged the defendant violated 18 U.S.C. § 1519 by knowingly making a false entry in a record and document with the intent to impede, obstruct, or influence an investigation of a matter within the jurisdiction of the Federal Bureau of Investigation ("FBI"). The United States had to prove two elements beyond a

reasonable doubt: First, the defendant knowingly made a false entry in a record or document. Second, the defendant did so with the intent to impede, obstruct, or influence the investigation of matter within the jurisdiction of the FBI. In moving for a new trial, the defendant focuses upon the first element. He alleges the evidence preponderates sufficiently heavily against the jury's determination he knowingly made a false entry in a record or document that a serious miscarriage of justice may have occurred. He cites the following circumstances: The video recordings are incomplete. They do not present Mr. Zehm's facial expressions. Some of the testimony of the percipient witnesses is consistent with his (the defendant's) account of the confrontation. Admittedly, some of his statements were inaccurate, but he was trying to remember and describe a complex series of actions that unfolded very rapidly under extremely stressful circumstance.

Ruling:

The defendant does not dispute his account of the confrontation is materially inconsistent with the video evidence and the observations of the percipient witnesses. Nevertheless, he maintains any inaccuracies in his account are attributable to faulty memory rather than to an intent to deceive. The jury did not accept his explanation.

WHETHER THE COURT IMPROPERLY ADMITTED EVIDENCE OF MR. ZEHM'S INNOCENCE

In rulings issued prior to, and during, the defendant's trial, the Court attempted to balance two competing interests. One interest

was the defendant's interest in having the jury determine whether his actions were objectively reasonable in light of the facts confronting him on March 18, 2006. The other interest was the United States' interest in testing the accuracy of his account of what occurred in the convenience store. At trial, the United States argued it should be allowed to present some evidence indicating Mr. Zehm had innocent reasons for being in the convenience store. Such evidence was necessary, said the United States, in order to rebut the suggestion Mr. Zehm had gone inside the store in order to hide from the police. The Court allowed the United States to present three pieces of evidence to which the defendant objected at trial and to which he continues to take exception: a convenience store employee testified he had seen Mr. Zehm purchase Pepsi numerous times at a different store; a police officer said she heard Mr. Zehm say, shortly before he stopped breathing, "All I wanted was a Snickers." Finally, a different police officer said Mr. Zehm had his paycheck in hand when the officer arrived.

Ruling:

The defendant was entitled to have the jury determine whether his actions were objectively reasonable in light of the circumstances that confronted him on March 18, 2006. Evidence that Mr. Zehm had innocent reasons for being in the convenience store did not distract the jury from its task. The evidence gave the United States an opportunity to argue its theory of the case (*i.e.*, that Mr. Zehm neither defied the defendant nor threatened him) without depriving the defendant of an

opportunity to argue his theory of the case (*i.e.*, he reasonably thought Mr. Zehm posed an immediate risk of harm).

WHETHER DELIBERATING JURORS CONSIDERED EXTRANEOUS PREJUDICIAL INFORMATION

Shortly after the jury rendered its verdicts, the defendant's attorneys sought permission to interview the jurors in order to determine whether their deliberations had been influenced by extraneous prejudicial information. Counsel cited four categories of evidence that, in their opinion, indicated the deliberative process had been compromised. One category of evidence consisted of statements the presiding juror, Diane Riley, made to the news media after she learned the defendant's attorneys were challenging the jury's verdicts. The Court denied counsel's request to interview the jurors. In doing so, the Court analyzed some of Ms. Riley's statements to the news media. The Court concluded her statements did not indicate the jurors had been exposed to extraneous prejudicial information. Two or three months passed. An alternate juror encountered a Court Security Officer ("CSO") in Yakima, Washington. The alternate told the CSO other jurors had discussed the merits of the case while the parties were still presenting evidence. The alternate thought at least some jurors had made up their minds before deliberations began. Given the alternate juror's comments to the CSO, the Court interviewed the alternate and three jurors who participated in deliberations. The interviews did not produce evidence indicating that jurors made up their minds prior to deliberations or that, during

deliberations, they considered extraneous prejudicial information.

Ruling:

The verdicts were not tainted by premature discussions among the jurors or by the jurors' consideration of extraneous prejudicial information.

WHETHER THE COURT'S INSTRUCTIONS CONCERNING "WILLFULNESS" AND SELF-DEFENSE DEPRIVED THE DEFENDANT OF A FAIR TRIAL

The defendant argues he was deprived of a fair trial by erroneous jury instructions. He cites both Instruction No. 12 (definition of "willfully") and Instruction No. 11 (self defense).

A. Definition of "Willfully"

Over the defendant's objection, the Court gave the following definition to the jury:

> "Willfully" means that the defendant acted voluntarily and intentionally, with the intent not only to act with a bad or evil purpose, but specifically to act with the intent to deprive Otto Zehm of a right that is made definite by the Constitution.
>
> To find that the defendant acted willfully, you must find that the defendant not only had a generally bad or evil purpose, but also that the defendant had the specific intent to deprive Mr. Zehm of his Fourth Amendment right to be free from objectively unreasonable force. This does not mean that the government must show that the defendant acted with knowledge of the particular provisions of the Fourth Amendment to the Constitution, or that the defendant was even thinking about the Fourth Amendment when he acted.
>
> One may be said to act willfully if he acts in open defiance or in reckless disregard of a known and definite constitutional right -- in this case, the right to be free

> from objectively unreasonable force. This specific intent to deprive another of a constitutional right need not be expressed; it may at times be reasonably inferred from the surrounding circumstances of the act. Thus, you may look at the defendant's words, experience, knowledge, acts and their results in order to decide the issue of willfulness.
>
> If you find that the defendant had the purpose -- that is, the end at which his act was aimed -- to deprive Mr. Zehm of his Fourth Amendment right to be free from objectively unreasonable force, then the defendant acted willfully. By contrast, if you find the defendant acted through mistake, carelessness, or accident, then he did not act willfully.

(ECF No. 719.) The defendant argues the Court's "willfulness" instruction misstated the law as it has been established by the Supreme Court. According to the defendant, the United States had to prove he "had a general bad or evil purpose to act with the specific intent to either 1) knowingly depriving a person of their rights under the Constitution; or 2) acting in open defiance or reckless disregard of a person's rights." Defendant's Reply (ECF No. 1047) at 15. The defendant cites *Screws v. United States*, 325 U.S. 91, 104, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945), in support of his definition of the term "willfully." The defendant argues the Court's definition allowed the jury to believe it could conclude he acted willfully if it found he "acted 1) with a bad or evil purpose to deprive [Otto] Zehm of his constitutional rights or, 2) in open defiance or reckless disregard of this right, irrespective of his bad or evil intent." Defendant's Reply at 14.

Ruling:

Defining the term "willfully" is difficult because there are two ways in which a person's behavior may be considered willful. As the Eleventh Circuit observed recently, "A person acts 'willfully' for purposes of section 242 when he acts with 'a specific intent to deprive a person of a federal right made definite by decision or other rule of law,' or 'in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite.'" *United States v. House*, 684 F.3d 1173, 1199-1200 (11th Cir.2012) (quoting *Screws v. United States*, 325 U.S. 91, 103, 105, 65 S.Ct. 1031, 1036-37, 89 L.Ed. 1495 (1945)). Ninth Circuit law is in accord. *See, e.g., United States v. Reese*, 2 F.3d 870, 881 (9th Cir.1993) (quoting the passage quoted by the Eleventh Circuit). The definition of the term "willfully" that the Court gave in this case -- *i.e.*, Instruction No. 12 -- set forth both ways in which a person's behavior may be considered willful. While Instruction No. 12 may not be a model of clarity, it is an accurate statement of the law.

B. Self Defense

The other instruction the defendant objects to is Instruction No. 11. It stated:

> A person is entitled to defend himself against the immediate use of objectively unreasonable force by a police officer. However, the person may use no more force than appears reasonably necessary under the circumstances.

(ECF No. 719.) As the defendant points out, a person is entitled to defend himself if he is confronted with the immediate use of

objectively unreasonable force by a police officer. Here, the threshold issue was whether the defendant employed objectively unreasonable force. The jury would not have been permitted to consider self defense unless it first found the defendant employed objectively unreasonable force. However, in that case, it was unnecessary to consider self defense. Thus, in the defendant's opinion, the self defense instruction was superfluous and distracting.

Ruling:

There was substantial evidence Mr. Zehm physically resisted the officers. This instruction informed jurors his resistance was lawful as long he reasonably believed he was confronted with an immediate use of objectively unreasonable force by the officers. Had the Court not given this instruction, jurors might have wondered whether he broke the law simply by resisting the defendant and the other officers.

WHETHER THE UNITED STATES ENGAGED IN PROSECUTORIAL MISCONDUCT

The defendant alleges the United States engaged in two types of prosecutorial misconduct.

A. Pretrial

The defendant alleges the United States intentionally withheld information that is favorable to him.

Ruling:

This allegation is addressed in a separate order.

B. Trial

The defendant alleges the United States deprived him of a fair trial by the following: (1) repeatedly asserting or implying, during

its opening statement and closing argument, that Mr. Zehm was innocent of wrongdoing at the ATM, and (2) during its closing argument, falsely stating Detective Ferguson recommended that country prosecutors refrain from filing a criminal charge against him (the defendant).

Ruling:

The statements and arguments to which the defendant objects may or may not have been improper, but they did not deprive him of a fair trial.

IT IS HEREBY ORDERED:

The defendant's "Motion for New Trial" (**ECF No. 818**) is **denied.**

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

DATED this 18th day of September, 2012.

s/ Fred Van Sickle
Fred Van Sickle
Senior United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. KARL F. THOMPSON, Jr., Defendant - Appellant.	No. 12-30366 D.C. No. 2:09-cr-00088-FVS-1 Eastern District of Washington, Spokane ORDER

Before: McKEOWN and WATFORD, Circuit Judges, and WHYTE, Senior District Judge.*

The panel unanimously votes to deny the petition for panel rehearing. Judges McKeown and Watford vote to deny the petition for rehearing en banc, and Judge Whyte so recommends. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc, filed June 1, 2014, is DENIED.

* The Honorable Ronald M. Whyte, Senior District Judge for the U.S. District Court for the Northern District of California, sitting by designation.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellant, v. KARL F. THOMPSON, Jr., Defendant - Appellee.	No. 10-30167 D.C. No. 2:09-cr-00088-FVS-1 MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Fred L. Van Sickle, Senior District Judge, Presiding

Argued and Submitted February 7, 2011
Seattle, Washington

Before: B. FLETCHER, PAEZ, and IKUTA, Circuit Judges.

We consider the government's interlocutory appeal of the district court's pretrial exclusion of evidence. We have jurisdiction under 18 U.S.C. § 3731, and we affirm.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

We review a district court's pretrial exclusion of evidence for abuse of discretion. *United States v. Bonds*, 608 F.3d 495, 498 (9th Cir. 2010). "[P]retrial in limine evidentiary rulings are to be accorded the same deference on appeal as rulings made during trial." *United States v. Layton*, 767 F.2d 549, 555 (9th Cir. 1985). We do not reverse an evidentiary ruling under an abuse of discretion standard unless we are "'convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances.'" *Boyd v. City and Cnty. of San Francisco*, 576 F.3d 938, 943 (9th Cir. 2009) (quoting *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000)).

Here, the district court properly concluded that evidence of Otto Zehm's innocent conduct was relevant under *Boyd*, 576 F.3d at 944 ("[W]here what the officer perceived just prior to the use of force is in dispute, evidence that may support one version of events over another is relevant and admissible."). The district court, however, exercised its discretion under Fed. R. Evid. 403 to exclude this evidence because the potential for prejudice to Officer Thompson substantially outweighed the probative value of the evidence. In so ruling, the court noted the sympathetic nature of this evidence and expressed concern that a limiting instruction would not be effective in keeping the jury focused on the elements of the alleged offense. Although the district court's reasoning for its Rule 403 ruling

gives us pause, we cannot say that it is "illogical, implausible, or without support in inferences that may be drawn from the record." *See United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc) (adopting an abuse of discretion test for denial of motions for a new trial). Indeed, "[t]he record reflects that the court conscientiously weighed the probative value against the prejudicial effect for each piece of evidence, which is a showing sufficient for affirmance." *Boyd*, 576 F.3d at 949.

In affirming the district court's ruling, we are mindful of the government's representation at oral argument that the excluded evidence is not essential to its ability to prove its case beyond a reasonable doubt. Further, we take note of the district court's statement that, if warranted by the evidence at trial, it would reconsider its ruling. The court's willingness to revisit the issue is significant because the court issued its ruling pretrial, without the benefit of the witnesses' actual testimony.

AFFIRMED

No. _____

IN THE
Supreme Court of the United States

KARL F. THOMPSON, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

Motion to Leave to Proceed In Forma Pauperis

Petitioner, Karl F. Thompson, Jr., seeks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of fees or costs and to proceed in forma pauperis.

Petitioner was represented on appeal by Carl J. Oreskovich and is presently represented by Carl J. Oreskovich. Counsel was appointed pursuant to the Criminal Justice Act of 1964, 18 U.S.C. §3006A(d)(6).

Dated: October 22, 2014

Respectfully Submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, v. KARL F. THOMPSON, JR., Defendant.	No. CR-09-088-FVS ORDER APPOINTING CJA COUNSEL

Based upon Defendant's financial affidavit, with attachments, and consistent with the Criminal Justice Act, 18 U.S.C. § 3006A, and the Act's Guidelines, Criminal Justice Act (CJA) Panel Member Carl Oreskovich is appointed to represent Defendant. Defendant has an attorney-client relationship with Mr. Oreskovich, and Mr. Oreskovich is familiar with the allegations in the captioned matter. Consistent with the CJA local Plan and Guidelines, Vol. 7, Ch. II, Part A, 2.01(C), "[i]f at any time after appointment, counsel obtains information" that his client becomes "financially able to make payment, in whole or in part, for legal or other services" related to representation, he shall advise the presiding judge.

IT IS SO ORDERED.

DATED July 8, 2009.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE