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11
12 UNITED STATES DISTRICT COURT
13 EASTERN DISTRICT OF WASHINGTON

14 **UNITED STATES OF AMERICA,**)
15)
16 **Plaintiff,**)
17 **v.**)
18 **KARL F. THOMPSON JR.,**)
19 **Defendant.**)

No. 09-0088-FVS

**MEMORANDUM IN SUPPORT
OF UNITED STATES' MOTION TO
COMPEL DEFENDANT'S RECIPROCAL
DISCOVERY**

20 COMES NOW Plaintiff United States of America, through its counsel James A.
21 McDevitt, United States Attorney For the Eastern District of Washington, and
22 Assistant U.S. Attorney Timothy Durkin, and submits the following memorandum in
23 support of the United States' motion to compel reciprocal discovery in compliance
24 with Rules 16(b), 12 and the District Court's prior Order directing Defendant to
25 provide reciprocal discovery to the United States.
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1 **I. PROCEDURAL HISTORY**

2 On **June 19, 2009**, the Grand Jury sitting in and for the Eastern District of
3 Washington returned a two count Indictment against the Defendant charging him
4 with a criminal violation of the victim Otto Zehm's constitutional rights, with
5 serious injury resulting, in violation of 18 U.S.C. § 242 and with obstruction of
6 justice under 18 U.S.C. § 1519. *Dckt. #1*.

7 On **July 9, 2009**, the Defendant was arraigned and U.S. Magistrate Cynthia
8 Imbrogno issued the District's standard ("voluntary open file") Discovery Order.
9 This order provided that if the United States did not wish to proceed with "voluntary
10 open file" discovery that it could file of notice of its election. *Dckt. # 19*. Before the
11 hearing on **July 9, 2009**, the United States made available its initial discovery
12 disclosure to the Defendant comprising of approximately **3,400 pages**.

13 On **July 10, 2009**, the United States timely filed notice of its intention to opt
14 out of "open file" discovery status (i.e., disclose of "all investigative material" in this
15 case). *Dckt. # 21*. Notwithstanding Plaintiff's decision to opt out of "open file"
16 discovery, the United States nonetheless voluntarily provided Defendant's counsel
17 with five (5) additional discovery disclosures (e.g., on July 9th, July 31st, August 3rd,
18 August 11th, and August 17th) containing approximately another **7,400 pages and**
19 **another 13.54 gigabytes (GBs)** of "discovery materials" (i.e., records, documents,
20 photographs, video, audio, PowerPoint programs, diagrams, CAD, and other
21 electronic materials). Additional discovery disclosures were provided and/or made
22 available on August 28, 2009, and August 31, 2009, consisting of approximately
23 another **2,000 pages** of discovery (i.e., FBI 302 reports, Grand Jury exhibits-records,
24 and Grand Jury transcripts (i.e., 20 witnesses).

25 As of this date, almost **13,000 pages** of tangible records and materials, and
26 another **13.54 GB** of electronic discovery have been provided to the Defendant. In
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1 contrast, Defendant has made no discovery disclosures.

2 Notably, Magistrate Imbrogno's July 9, 2009, Discovery Order provided that
3 if the Defendant participated in the receipt of the United States' discovery
4 disclosures that the Defendant, in turn, must provide reciprocal discovery. *See*
5 *Discovery Order, Dckt. # 19*. Notwithstanding Magistrate Imbrogno's Order and
6 repeated written requests from the United States over the past month requesting
7 reciprocal discovery, the Defendant has failed to produce and/or offer for inspection
8 any evidence and/or discovery that Defendant is aware of and/or plans to use at the
9 time of trial.

10 **II. DEFENDANT THOMPSON & HIS COUNSEL'S CASE INVESTIGATION**

11 The United States is aware that the Defendant has considerable pre-indictment
12 discovery in his possession and/or under the custody and control of his attorneys. By
13 way of illustration, the Spokane Police Department's civil liability and legal advisor
14 is Asst. City Attorney Rocco Treppiedi. In 2006, Mr. Treppiedi was also the City of
15 Spokane's interim Risk Manager (i.e., the Risk Manager is responsible for overseeing
16 and managing the City's civil rights and tort liability lawsuits, and for directing the
17 management of the City's self-insured liability and retention fund that covers the
18 cost/expense of lawsuits-settlements-judgments).

19 Asst. City Attorney Rocky Treppiedi and the City Attorney's Office have been
20 defending "excessive use of force" claims against the Defendant Karl Thompson
21 since almost the incident itself, which occurred more than three years ago. In fact,
22 under SPD "critical incident" protocols, Asst. City Atty. Rocky Treppiedi, the SPD's
23 legal liability (i.e., civil rights and torts) advisor, is notified by the SPD and/or its
24 investigators before the Spokane County Prosecuting Attorney's Office is notified or
25 contacted, which "Prosecutor's Office" has exclusive jurisdiction over all felony
26 criminal cases in this County. In fact, that was the sequence of events in the Zehm
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1 case and Asst. City Atty. Treppiedi is reported to have personally responded to the
2 scene the night of incident.

3 Notably, on **June 21, 2006**, Mr. Treppiedi issued a letter that was published to
4 the media and posted on the City of Spokane's website that, in the opinion of the
5 City's legal advisor to the SPD and on behalf of the Spokane Police Department,
6 "exonerated" the Defendant from "excessive force" concerns raised by the Zehm
7 family and their counsel with the Center for Justice. *See attached **Exhibit D***, a true
8 and correct copy of Asst. City Atty. Rocco Treppiedi's **June 21, 2006**, letter
9 "defending" excessive force claims against the Defendant.¹

10 At that time, however, the City of Spokane Police Department's own
11 "investigation" was not completed. In fact, the Spokane County Prosecuting
12 Attorney's Office, Steve Tucker, Prosecutor, and Jack Driscoll, Chief Criminal
13 Deputy, directed the SPD investigators to go back and perform further investigative
14 activities, including a directive that they analyze the Zip Trip security store video to
15 try to more accurately ascertain the initial sequence of events and baton strikes

17 ¹ The Defendant Karl Thompson is being represented and defended in the
18 victim Otto Zehm's Estate's federal civil rights (excessive force – §1983) action by
19 three (3) different Asst. City Attys.: 1) Rocco Treppiedi, 2) Ellen O'Hara, and 3)
20 Salvatore Faggiano; in addition to 4) Mr. Oreskovich, who represents Mr. Thompson
21 in both the civil and criminal action. *See Cause No. 09-CV-0080-LRS*, the
22 *Honorable Lonny Suko presiding*.

23 The City Attorney's Office has been actively defending Mr. Thompson on the
24 Zehm's "civil rights" claim for over three years. *See Rocky Treppiedi's June 21,*
25 *2006, letter exonerating Mr. Thompson* from any civil rights culpability, even
26 though at the time the Spokane Police Department had not yet "officially" concluded
27 its criminal investigation at: www.spokesmanreview.com/sections/zehm. Mr.
Treppiedi's **June 21, 2006**, letter exonerating Mr. Thompson was also posted on the
City of Spokane's website and made available to the media.

1 claimed to have been deployed by the Defendant.

2 In response, in **July 2006**, after the Spokane Police Department finally released
3 “all four camera angles” of the security video, the Spokane Police Department
4 retained forensic videographer Grant Fredericks. SPD Det. Terry Ferguson, along
5 with Asst. City Attorney Rocco Treppiedi (who had already issued his **June 21,**
6 **2006, letter** exonerating Officer Thompson), coordinated getting SPD investigation
7 evidence and materials to Mr. Fredericks. On or about September 26, 2006, Mr.
8 Fredericks issued the report he prepared for the SPD, which concluded, in part, that:

9 *“[Officer Thompson] appears to be struggling with Zehm on the ground for*
10 *approximately one minute and thirteen seconds, before his uses his baton.”*

11 [sic]

12 *See Grant Fredericks, Forensic Analyst’s September 26, 2006, Report, pg. 17.*

13 Noteworthy is that payment for Mr. Fredericks’s forensic services was arranged and
14 made through, not the Spokane Police Department, but rather through the City’s civil
15 liability Risk Management Division, where Mr. Treppiedi was the interim
16 Manager/Director.

17 The above finding reached by Mr. Fredericks’s in his September 2006 report
18 directly conflicted with Officer Thompson’s own statement that he did deploy
19 several, immediate and successive baton strikes to Mr. Zehm during the first 1:13
20 minutes after reportedly “perceiving” the victim Mr. Zehm to be verbally and
21 physically noncompliant, aggressive with the plastic pop bottle, and “about to
22 charge” and “assault” the Defendant. *See Exhibit A, Defendant’s March 22, 2006,*
23 *recorded statement-police report, attached to United States Memorandum in*
24 *Opposition to Bill of Particulars. Dckt. #40.* It also conflicted with eye witness
25 accounts. After receiving Mr. Fredericks’s report and being cognizant of the U.S.
26 DOJ’s continuing investigation, the Spokane County Prosecuting Attorney’s Office

1 decided to defer any criminal charging decision until the FBI and DOJ completed its
2 investigation.

3 Meanwhile, Mr. Treppiedi and other counsel within the Spokane City
4 Attorney's Office have continued to provide legal representation to the Defendant
5 during the past three plus (3+) years, and have been actively conducting a pre-
6 indictment, pre-suit investigation on the Defendant's and the Spokane Police
7 Department's behalf. During the past three (3) years, the Zehm family attorneys have
8 provided the City Attorney's Office with access to witnesses, employers, and health
9 care providers.

10 In addition to its own civil investigation, the United States is aware that the
11 City Attorney's Office has run since the fall of 2008 its own "shadow grand jury"
12 investigation for the Defendant's benefit. This "shadow" investigation has closely
13 paralleled the Grand Jury's own traditionally confidential proceedings. In fact, the
14 City Attorney's Office (specifically Asst. City Atty. Rocco Treppiedi, who again,
15 personally represents the Defendant) prepped and debriefed the majority of the
16 witnesses from the Spokane Police Department and/or City of Spokane that were
17 called to testify in front of the Grand Jury.

18 Notwithstanding conflict concerns raised with the City Attorney's Office, the
19 Asst. City Attorney involved has opined that since he personally represents and
20 continues to personally represent the Defendant Karl Thompson, that he is obligated
21 to disclose to the target of the federal criminal investigation (i.e., the Defendant Karl
22 Thompson) and his counsel Carl Oreskovich information from the Grand Jury
23 proceedings that has traditionally remained confidential.

24 The Asst. City Attorney involved has also acknowledged channeling
25 traditionally confidential grand jury information to the federally targeted Defendant,
26 notwithstanding a "gag order" that his own client, Spokane Police Chief Anne
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1 Kirkpatrick issued last fall to SPD personnel appearing before the grand jury.

2 The United States is further aware that since the fall of 2008 that Mr.
3 Oreskovich has participated in meetings with the Asst. City Attorney and other SPD
4 personnel in which grand jury proceedings and other discovery materials were
5 discussed.

6 Further still, in *November 2008*, the United States was informed that experts
7 had been retained for the Defendant, through the City of Spokane's Attorney's Office
8 (and Risk Management Division), and that these experts would be relied upon by the
9 Defendant and his counsel to help defend any criminal excessive force charge that
10 might be returned by the Grand Jury.

11 Further evidence that a significant public/private investigation was performed
12 on Defendant's behalf "before" the Indictment was returned is that on **June 18, 2009**
13 (one day before the Grand Jury's Indictment), the Defendant's "public counsel" (i.e.,
14 Asst. City Attys. Rocco Treppiedi and Ellen O'Hara) and his "private counsel" (i.e.,
15 Mr. Oreskovich) filed an "Answer & Affirmative Defenses" on his behalf in the
16 *Zehm Estate, et al v. Thompson, et al*, civil civil rights action. *See Cause No. 09-CV-*
17 *0080-LRS, Dckt # the Honorable Lonny Suko presiding*. The Defendant makes many
18 averments in his Answer, including claims the Mr. Zehm was "about to be assaultive"
19 and that his actions were "reasonable." This Answer goes on to blame Mr. Zehm for
20 his forcible detention, the baton strikes administered by the Defendant, and his
21 resulting "in-custody death." This Answer also denies that any head strikes were
22 deployed. *See Estate of Zehm v. Thompson, et al, id, Dckt. # 12*.

23 This Answer could only have been filed after the Defendant and his counsel
24 had performed an investigation and performed "due diligence," which means that a
25 significant and substantial investigation had to be performed by the Defendants'
26 counsel (all four of them) before the Answer was drafted, approved by the Defendant,
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1 and filed. See "due diligence" requirement under Rule 11 of the Federal Rules of
2 Civil Procedure. See also attached Exhibit E, a copy of subject Answer.

3 Consequent, it appears that that experts have and were retained for the
4 Defendant's benefit and defense, and that significant pre-indictment and pre-suit
5 investigation has been performed by Defendant's public and private counsel over the
6 past three plus (3+) years, and notwithstanding that the United States has already
7 voluntarily disclosed substantial discovery (i.e., 13,000 pages, including grand jury
8 transcripts and materials and another 13.58 GB of electronic discovery), the
9 Defendant has failed and/or refused to disclose a single document of reciprocal
10 discovery.

11 **III. LAW & DISCUSSION**

12 Rule 16(b) requires that Defendant disclose the following:

13 **(b) Defendant's Disclosure.**

14 (1) Information Subject to Disclosure.

15 (A) ***Documents and Objects.*** If a defendant requests disclosure under Rule
16 16(a)(1)(E) and the government complies, then the defendant must permit the
17 government, upon request, to inspect and to copy or photograph books, papers,
18 documents, data, photographs, tangible objects, buildings or places, or copies
19 or portions of any of these items if:

- 20 (i) the item is within the defendant's possession, custody, or control; and
21 (ii) the defendant intends to use the item in the defendant's case-in-chief at
22 trial.

23 (B) ***Reports of Examinations and Tests.*** If a defendant requests disclosure
24 under Rule 16(a)(1)(F) and the government complies, the defendant must
25 permit the government, upon request, to inspect and to copy or photograph the
26 results or reports of any physical or mental examination and of any scientific
27 test or experiment if:

- (i) the item is within the defendant's possession, custody, or control; and
(ii) the defendant intends to use the item in the defendant's case-in-chief at
trial, or intends to call the witness who prepared the report and the report
relates to the witness's testimony.

1 (C) **Expert witnesses.**--The defendant must, at the government's request, give
2 to the government a written summary of any testimony that the defendant
3 intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence
as evidence at trial, if--

4 (i) the defendant requests disclosure under subdivision (a)(1)(G) and the
government complies; or

5 (ii) the defendant has given notice under Rule 12.2(b) of an intent to present
6 expert testimony on the defendant's mental condition.

7 This summary must describe the witness's opinions, the bases and reasons for
those opinions, and the witness's qualifications.

8 . . .
(emphasis added)

9 The Advisory Committee notes on Defendant's reciprocal discovery obligations
10 under Rule 16 noted:

11 **Subdivision (b)** enlarges the right of government discovery in several ways:
12 (1) it gives the government the right to discovery of lists of defense witnesses
as well as physical evidence and the results of examinations and tests; (2) it
13 requires disclosure if the defendant has the evidence under his control and
intends to use it at trial in his case in chief, without the additional burden,
14 required by the old rule, of having to show, in behalf of the government, that
the evidence is material and the request reasonable; and (3) it gives the
15 government the right to discovery without conditioning that right upon the
16 existence of a prior request for discovery by the defendant.

17 See Advisory Committee's notes to 1974 Amendment to Rule (emphasis added).

18 Rule 16 (c) further imposes a "continuing obligation" to disclose discovery and
19 evidence that comes into the Defendant's and/or his counsel's possession.

20
21 **(c) Continuing Duty to Disclose.** A party who discovers additional evidence
22 or material before or during trial must promptly disclose its existence to the
other party or the court if:

23 (1) the evidence or material is subject to discovery or inspection under this
24 rule; and

25 (2) the other party previously requested, or the court ordered, its production.

26 Fed.Crim.Rule.Pro. 16(b) and (c). Defendant also has discovery obligations under
27 Rule 12. Notwithstanding, to date Defendant has not produced any discovery.

1 Therefore, the United States requests that the Court enter an order directing
2 production of all evidence that Defendant is aware of and intends to rely upon at the
3 time of trial. The United States requests that Defendant's initial disclosures (i.e., all
4 evidence, materials Defendant and his civil and/or criminal attorneys have collected
5 over the past three (3+) plus years, including expert disclosures, by no later than
6 October 15, 2009 (assuming a trial setting for late winter 2010), and if not disclosed,
7 that all undisclosed evidence currently in Defendant's and/or his attorneys'
8 possession/control be excluded from use at the time of trial.

9 The United States further requests that the Court set a second, additional pre-
10 trial disclosure date, for the purpose of disclosing all remaining evidence, records and
11 materials that the Defendant and his criminal and/or civil attorneys have accumulated
12 and which he intends to rely upon at trial, including expert disclosures, by no later
13 than sixty days before trial.

14 The United States' position and request is supported by the following
15 recognized authority: *United States v. Ryan*, 448 F.Supp. 810, 811 (S.D.N.Y.)
16 (1978) ("While the refusal to testify is constitutionally protected, the trial strategy
17 determination is not so protected. Since the defendant had availed himself of the
18 strategy to obtain discovery of the government, he must comply with the requirement
19 for reciprocal discovery."), *aff'd*, 594 F.2d 853 (2d Cir. 1978), *cert. denied*, 441 U.S.
20 944 (1979); *Taylor v. Illinois*, 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988)
21 (exclusion of a defense witness as sanction for discovery violations by defense
22 counsel does not violate the Sixth Amendment); *United States v. Scholl*, 166 F.3d
23 964 (9th Cir. 1999) (exclusion of defendant's proffered evidence was appropriate
24 sanction for discovery rule violation); *U.S. v. Croft*, 124 F.3d 1109 (9th Cir. 1997)
25 (affirming exclusion of expert testimony due to defendant's failure to provide notice
26 until trial was underway, particularly since defendant knew at early stage that such
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1 evidence would be proffered); and *U.S. v. Duran*, 41 F.3d 540, 545-46 (9th Cir.
2 1994) (court properly excluded defendant's exhibits that were withheld from
3 discovery and not disclosed until after the close of Government's case, which was
4 defense counsel's intended trial strategy).

5 **IV. CONCLUSION**

6 Although Defendant has moved to continue the trial date until the spring of
7 2010, Defendant's counsel with the City Attorney's Office have been investigating
8 this case on his behalf for more than three (3) years. Even Mr. Oreskovich, who was
9 retained last October to individually represent Mr. Thompson's "excessive use of
10 force" interests (both criminally and civilly) has been involved in the defense of Mr.
11 Thompson's alleged "excessive use of force" for more than ten (10) months.

12 To date, the United States has provided the Defendant with almost **13,000**
13 **pages** of hard discovery and approximately another **13.5 GBs** of electronic discovery.
14 Defendant's reciprocal discovery disclosures are mandatory under Rule 16(b). *See*
15 Fed.R.Crim.P. 16(b).

16 The Government respectfully requests the court to issue an order compelling
17 and directing the Defendant to produce reciprocal discovery in his custody and/or the
18 control of his private attorney Mr. Oreskovich, and/or his public counsel at the City
19 of Spokane Attorney's Office.

20 RESPECTFULLY SUBMITTED this 31st day of August 2009.

21 JAMES A. MCDEVITT
22 United States Attorney (EDWA)

23 *s/ Timothy M. Durkin*
24 TIMOTHY M. DURKIN
25 Assistant United States Attorney
26 Attorneys for Plaintiff United States
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Certificate of ECF and/or Mailing

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

Carl Oreskovich, Esq.

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

s/ Timothy M. Durkin
Timothy M. Durkin