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12 UNITED STATES DISTRICT COURT  
13 EASTERN DISTRICT OF WASHINGTON

14 UNITED STATES OF AMERICA, )

15 )  
16 Plaintiff, )

17 )  
18 vs. )

19 )  
20 KARL F. THOMPSON, JR., )  
21 Defendants. )

No. CR-09-0088-FVS

**MEMORANDUM IN  
SUPPORT OF  
DEFENDANT  
THOMPSON'S MOTION  
IN LIMINE RE:  
WITNESS TESTIMONY  
OF MAKENZIE  
MURCAR AND  
ALLISON SMITH**

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28 COMES NOW the Defendant, KARL F. THOMPSON, JR., by and  
29 through his attorney, CARL J. ORESKOVICH of ETTER, McMAHON,  
30 LAMBERSON, CLARY & ORESKOVICH, P.C., and respectfully submits the  
31 following memorandum in Support of Defendant Thompson's Motion in  
32

1 Limine to limit testimony of Makenzie Murcar and Allison Smith to the 911  
2 call.  
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#### 4 I. SUMMARY OF ARGUMENT

5 After-acquired evidence regarding the impressions of Makenzie Murcar and  
6 Allison Smith after Officer Thompson's confrontation with Otto Zehm are  
7 irrelevant under the "objectively reasonable" standard set forth in *Graham v.*  
8 *Conner*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Therefore, the  
9 FBI 302 reports of Makenzie Murcar and Allison Smith, which have been  
10 altered from their original impressions the night of the incident, must be  
11 excluded from trial. This limitation would exclude any and all evidence  
12 supplied by either girl other than the content of the 911 audio recording which  
13 comprise part of the factual bases and circumstances confronting Officer  
14 Thompson the night of the incident.  
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#### 19 II. BACKGROUND

20 On March 18, 2006, Makenzie Murcar called 911 from the Washington  
21 Trust Bank located at Baldwin and Ruby in Spokane, Washington. (Decl. of  
22 Carl J. Oreskovich.) She reported that a white male in his forties, with long  
23 reddish-blond hair, wearing a black coat, jeans, and boots approached her and  
24 her friend Allison Smith at an ATM machine. Allison Smith, who was driving  
25 the car, had entered her PIN number in to the machine. *Id.* However, because  
26 the girls were scared of the man, they drove off before retrieving any money or  
27 cancelling Smith's transaction. *Id.* According to Makenzie's call, the male  
28 suspect, later identified as Otto Zehm, bent down at the ATM and appeared to  
29 have taken the Allison's money. *Id.* After "messing" with the ATM machine,  
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1 Zehm ran from the scene going south down Division Street. *Id.*

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3 Based upon the information provided by the girls, the Spokane Police  
4 Department was dispatched at approximately 18:15:54 pm to respond to the  
5 call. *Id.* The dispatcher relayed the girl's physical description of Zehm, along  
6 with the fact that they thought he "appeared to be high." *Id.* The dispatcher told  
7 police that the girls said the suspect had "things in his hands" that "looks like  
8 money." *Id.* The dispatcher then told the police that the suspect was running  
9 towards New Harbor Restaurant which is located southwest on Division Street  
10 from where the Washington Trust is located on Ruby based upon information  
11 provided by the girls. *Id.* The dispatcher identified Smith's car, a white Dodge  
12 Intrepid, parked in front of the Zip Trip gas station on Division Street. *Id.*

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16 Officer Karl Thompson was at the North Central COP Shop located at  
17 Shannon and Wall when he heard the first radio traffic concerning this call  
18 come in. (Decl. of Carl J. Oreskovich.) Officer Thompson heard the dispatcher  
19 broadcast that the suspect was running toward the New Harbor Restaurant. *Id.*  
20 Thompson knew the restaurant was located at Division and Indiana. *Id.* Because  
21 of his proximity to the location, Thompson walked outside to his patrol car and  
22 pulled up the call information on his car computer, otherwise known as a CAD  
23 report. *Id.* Based upon the CAD report, Thompson was aware that a white male  
24 approached the complainants at the Washington Trust ATM in an aggressive  
25 manner. *Id.* The driver was frightened by the man, driving away from the ATM  
26 despite having entered her PIN number in order to get away from him. *Id.* The  
27 CAD report also contained information including Zehm's physical description,  
28 the girl's belief that he was high, the fact that he ran from the scene after  
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1 “messaging” with the ATM, and that he appeared to have money in his hand. *Id.*

2  
3 Officer Thompson immediately began driving toward the direction of  
4 Indiana and Division. (Decl. of Carl J. Oreskovich.) While in route, Makenzie  
5 Murcar updated information as to Zehm’s whereabouts. *Id.* Thompson arrived  
6 at the Zip Trip store located at Division and Augusta, spotting Smith’s white  
7 Doge Intrepid as described in the CAD report, along with a white male, 35-40  
8 years old, with long reddish hair, a black leather jacket, and dark trousers. *Id.*  
9 The male matched the physical description broadcast by radio and supplied by  
10 the Makenzie Murcar as the person who approached the girls at the ATM. *Id.*

11  
12 As Thompson pulled up to the store’s gas pump, Zehm spotted him in his  
13 fully marked police car. (Decl. of Carl J. Oreskovich.) Zehm continued into the  
14 Zip Trip store, entering at the north entrance. *Id.* Officer Thompson, wearing his  
15 full police uniform, followed Zehm into the store using the north door and  
16 confronted him in the southwest corner of the store. *Id.*

17  
18 Based upon the information provided by Makenzie Murcar and Allison  
19 Smith during the course of their 911 call, Officer Thompson believed that Otto  
20 Zehm had either committed or attempted to commit the crime of theft or  
21 robbery at the time of his confrontation with him. *Id.*

22  
23 Since the night of the incident, both Makenzie Murcar and Allison Smith  
24 have been interviewed by the FBI. *Id.* Based upon FBI 302 reports provided to  
25 Defendant Thompson as part of the government’s discovery disclosures, it  
26 appears that the girls have altered their testimony regarding the events the night  
27 of March 18, 2006 which prompted them to call 911.  
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### III. LAW

Officer Karl Thompson is charged with violating 18 U.S.C. § 242 for using excessive force during the course of his March 18, 2006 confrontation with Otto Zehm. (*Ct. Rec. # 1.*) “All claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard[.]” *Graham v. Conner*, 490 U.S. at 395, 109 S.Ct. at 1871.

Under *Graham*, the Supreme Court affirmed the long history of Fourth Amendment jurisprudence which approves an officer’s right to use some degree of physical coercion to make an arrest or investigatory stop. *Id.* at 396, 109 S.Ct. 1865, 1872. An officer’s reasonableness is judged from the perspective of a reasonable officer on the scene and not with 20/20 vision of hindsight. *Id.* “The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.” *Id.* at 396-397.

Ultimately, the issue of excessive force will be decided based upon whether Officer Thompson’s actions were “‘objectively reasonable’ in light of the facts and circumstances *confronting* [him], without regard to [his] underlying intent or motivation.” *Id.* at 397 (emphasis added); *see also Order re Subpoena Duces Tecum (Ct. Rec. # 138)*. Evidence outside the scope of the facts and circumstances confronting Officer Thompson at the time of his encounter with Otto Zehm is irrelevant in proving the existence of any fact that is of

1 consequence to the determination of the action more probable or less probable.  
2 ER 401, 402. Therefore, inclusion of evidence beyond this scope at trial would  
3 result in unfair prejudice. ER 403.  
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5 Further illustrating this point is the 7th Circuit's decision in *Sherrod v.*  
6 *Berry*, 856 F.2d 802 (7th Cir. 1988). In that case, a father of a man killed in a  
7 police shooting brought a civil rights suit on behalf of his son's estate against  
8 the officer who shot and killed his son. The court found that:  
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10 When a jury measures the objective reasonableness of an  
11 officer's action, it must stand in *his* shoes and judge the  
12 reasonableness of his actions based upon the information  
13 he possessed and the judgment he exercised in  
14 responding to that situation.  
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16 Knowledge of facts and circumstances gained after the  
17 fact has no place in the trial court's or jury's proper post-  
18 hoc analysis of the reasonableness of the actor's  
19 judgment. Were the rule otherwise, as the trial court ruled  
20 in this instance, the jury would possess more information  
21 than the officer possessed when he made the crucial  
22 decision.

23 *Id.* at 804-805 (emphasis original). The court ultimately found that the  
24 objective reasonableness standard required that the officer's liability be judged  
25 based exclusively upon the information possessed by the officer "immediately  
26 prior to and at the very moment" he fired the fatal shot. *Id.* at 805. The court  
27 reasoned that admitting evidence or information beyond that scope would be  
28 improper, irrelevant and prejudicial to the determination of whether the officer  
29 acted reasonably under the circumstances. *Id.*  
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3 **IV. ARGUMENT**

4 In determining whether Officer Thompson used an unreasonable amount of  
5 force during his confrontation with Otto Zehm, the jury will be asked to place  
6 themselves in his shoes the night of the incident. In analyzing the objective  
7 reasonableness of his actions, the jury must consider the contemporaneous facts  
8 and circumstances confronting Officer Thompson when he responded to the 911  
9 call. In order to make this determination, the jury must examine the information  
10 provided by Makenzie Murcar and Allison Smith during the course of their 911  
11 call, that was then dispatched to police. Therefore, the testimony of Makenzie  
12 Murcar and Allison Smith should be limited to the contents of the 911 call, i.e.,  
13 the information which created the facts and circumstances confronting Officer  
14 Thompson at the time of his confrontation with Zehm.  
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16  
17 Any testimony from the girls relating to knowledge gained after the fact is  
18 irrelevant to the jury's proper post-hoc analysis whether Officer Thompson's  
19 actions were reasonable. For whatever reason Mackenie Murcar and Allison  
20 Smith have elected to make changes to their testimony, such changes are wholly  
21 irrelevant to the information they provided to police on March 18, 2006. To  
22 allow testimony from Makenzie Murcar and Allison Smith other than the 911  
23 tape would allow the jury to possess more information than Officer Thompson  
24 possessed when he made the crucial decision to use force on Otto Zehm. This  
25 would result in unfair prejudice to Karl Thompson and jeopardize his right to a  
26 fair trial.  
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**V. CONCLUSION**

For the foregoing reasons, Defendant Karl Thompson requests the Court to grant his Motion in Limine regarding the testimony of Mackenzie Murcar and Allison Smith.

RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of April, 2010.

ETTER, McMAHON, LAMBERSON,  
CLARY & ORESKOVICH, P.C.

By/s/ Carl J. Oreskovich  
CARL J. ORESKOVICH, WSBA 12779

Attorneys for Defendant Thompson



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CERTIFICATE OF SERVICE

I hereby certify that on the 9<sup>th</sup> day of April, 2010, I electronically filed the following document:

**MEMORANDUM IN SUPPORT OF DEFENDANT THOMPSON'S  
MOTION IN LIMINE RE: WITNESS TESTIMONY OF  
MAKENZIE MURCAR AND ALLISON SMITH**

with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the following:

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