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11
12 UNITED STATES DISTRICT COURT
13 EASTERN DISTRICT OF WASHINGTON

14 UNITED STATES OF AMERICA,)
15) No. CR-09-0088-FVS
16 Plaintiff,)
17) **MEMORANDUM IN**
18 vs.) **SUPPORT OF**
19) **DEFENDANT**
20 KARL F. THOMPSON, JR.,) **THOMPSON'S MOTION**
21 Defendants.) **IN LIMINE TO**
22) **EXCLUDE AFTER-**
23) **ACQUIRED EVIDENCE**
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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
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1 Limine to exclude all evidence regarding Otto Zehm's innocence.
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3 **I. BACKGROUND**

4 On March 18, 2006, two girls called 911 from the Washington Trust Bank
5 located at Baldwin and Ruby in Spokane, Washington. (Decl. of Carl J.
6 Oreskovich.) The complainant reported that a white male in his forties, with
7 long reddish-blond hair, wearing a black coat, jeans, and boots approached
8 them at an ATM machine after one of the girls entered her PIN number. *Id.*
9 Scared, the girls drove off before retrieving any money or cancelling the
10 transaction. *Id.* The male suspect, later identified as Otto Zehm, bent down at
11 the ATM and appeared to have taken the complainant's friend's money. *Id.*
12 After "messing" with the ATM machine, Zehm ran from the scene going south
13 down Division Street. *Id.*
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17 The Spokane Police Department was dispatched at approximately 6:15:54
18 pm. *Id.* The dispatcher relayed the physical description of Zehm, along with the
19 fact that he "appeared to be high." *Id.* The dispatcher told police that the suspect
20 had "things in his hands" that "looks like money." *Id.* The dispatcher then told
21 the police that the suspect was running towards New Harbor Restaurant which
22 is located southwest on Division Street from where the Washington Trust is
23 located on Ruby. *Id.* The dispatcher identified the complainants in a white
24 Dodge Intrepid, parked in front of the Zip Trip gas station on Division Street.
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28 *Id.*

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30 Officer Karl Thompson was at the North Central COP Shop located at
31 Shannon and Wall when he heard the first radio traffic concerning this call
32 come in. *Id.* Officer Thompson heard the dispatcher broadcast that the suspect

1 was running toward the New Harbor Restaurant. *Id.* Thompson knew the
2 restaurant was located at Division and Indiana. *Id.* Because of his proximity to
3 the location, Thompson walked outside to his patrol car and pulled up the call
4 information on his car computer, otherwise known as a CAD report. *Id.* Based
5 upon the CAD report, Thompson was aware that a white male approached the
6 complainants at the Washington Trust ATM in an aggressive manner. *Id.* The
7 driver was frightened by the man, driving away from the ATM despite having
8 entered her PIN number in order to get away from him. *Id.* The CAD report also
9 contained information including Zehm's physical description, the girl's belief
10 that he was high, the fact that he ran from the scene after "messaging" with the
11 ATM, and that he appeared to have money in his hand. *Id.*

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16 Officer Thompson immediately began driving toward the direction of
17 Indiana and Division. *Id.* While in route, the complainant updated information
18 as to Zehm's whereabouts. *Id.* Thompson arrived at the Zip Trip store located at
19 Division and Augusta, spotting the complainant's white Doge Intrepid as
20 described in the CAD report, along with a white male, 35-40 years old, with
21 long reddish hair, a black leather jacket, and dark trousers. *Id.* The male
22 matched the physical description broadcast by radio and supplied by the
23 complainant as the person who approached the girls at the ATM. *Id.*

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27 As Thompson pulled up to the store's gas pump, Zehm spotted him in his
28 fully marked police car. *Id.* Zehm continued into the Zip Trip store, entering at
29 the north entrance. *Id.* Officer Thompson, wearing his full police uniform,
30 followed Zehm into the store using the north door and confronted him in the
31 southwest corner of the store. *Id.*
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1 At the time of Officer Thompson's confrontation with Otto Zehm he
2 believed that Zehm had either committed or attempted to commit the crime of
3 theft or robbery. *Id.*

5 II. LAW

6 After-acquired evidence regarding Otto Zehm's innocence is not relevant
7 under the "objectively reasonable" standard set forth in *Graham v. Conner*, 490
8 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Therefore, evidence that
9 Otto Zehm did not commit theft or robbery at the Washington Trust ATM must
10 be excluded from trial. This limitation would exclude any evidence regarding
11 Zehm's innocence recovered after Officer Thompson's confrontation with him,
12 including but not limited to, evidence as to what Otto Zehm held in his pockets
13 and the fact that Zehm held a Washington Trust bank account.

14 Officer Karl Thompson is charged with violating 18 U.S.C. § 242 for using
15 excessive force during the course of his March 18, 2006 confrontation with Otto
16 Zehm. (*Ct. Rec. # 1.*) "All claims that law enforcement officers have used
17 excessive force – deadly or not – in the course of an arrest, investigatory stop,
18 or other 'seizure' of a free citizen should be analyzed under the Fourth
19 Amendment and its 'reasonableness' standard[.]" *Graham v. Conner*, 490 U.S.
20 at 395, 109 S.Ct. at 1871. Under *Graham*, the Supreme Court affirmed the long
21 history of Fourth Amendment jurisprudence which approves an officer's right
22 to use some degree of physical coercion to make an arrest or investigatory stop.
23 *Id.* at 396, 109 S.Ct. 1865, 1872. An officer's reasonableness is judged from the
24 perspective of a reasonable officer on the scene and not with 20/20 vision of
25 hindsight. *Id.* "The calculus of reasonableness must embody allowance for the
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1 fact that police officers are often forced to make split-second judgments – in
2 circumstances that are tense, uncertain, and rapidly evolving – about the amount
3 of force that is necessary in a particular situation.” *Id.* at 396-397. Ultimately,
4 the issue of excessive force will be decided based upon whether Officer
5 Thompson’s actions were “‘objectively reasonable’ in light of the facts and
6 circumstances *confronting* [him], without regard to [his] underlying intent or
7 motivation.” *Id.* at 397 (emphasis added); see also *Order re Subpoena Duces*
8 *Tecum* (Ct. Rec. # 138).

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12 In the case *Kopf v. Skrym*, 993 F.2d 374 (4th Cir. 1993) (cited by the United
13 States for its validity in Ct. Rec. #107), the court properly excluded evidence
14 that the arrestee had been convicted of armed robbery, while allowing evidence
15 that the officers were confronted with apprehending participants in a nighttime
16 armed robbery and had probable cause to arrest. *Id.* at 379. The court held that
17 “the actual guilt or innocence of the arrestee is irrelevant to the amount of force
18 that may be used,” and an officer’s actions should not be faulted or absolved by
19 20/20 vision hindsight. *Id.* In other words, an officer may be justified to use
20 force despite the fact the suspect is innocent of the crime. Conversely, the use of
21 force may not be justified despite the fact the suspect has committed a crime.
22 Instead, whether or not the force is reasonable is based upon the facts and
23 circumstances confronting the officer that prompted him to use force in the first
24 instance. A later determination of guilt or innocence simply is not relevant to
25 that inquiry.

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31 Further illustrating this point is the 7th Circuit’s decision in *Sherrod v.*
32 *Berry*, 856 F.2d 802 (7th Cir. 1988). In that case, a father of a man killed in a

1 police shooting brought a civil rights suit on behalf of his son's estate against
2 the officer who shot and killed his son. The court found that:
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4 When a jury measures the objective reasonableness of an
5 officer's action, it must stand in *his* shoes and judge the
6 reasonableness of his actions based upon the information
7 he possessed and the judgment he exercised in
8 responding to that situation.

9 Knowledge of facts and circumstances gained after the
10 fact has no place in the trial court's or jury's proper post-
11 hoc analysis of the reasonableness of the actor's
12 judgment. Were the rule otherwise, as the trial court ruled
13 in this instance, the jury would possess more information
14 than the officer possessed when he made the crucial
15 decision.

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

28 Officer Thompson should not be faulted for his actions based upon facts
29 gained after his confrontation with Otto Zehm. At the time of Officer
30 Thompson's confrontation with Zehm, Officer Thompson was confronted with
31 facts as related to him by the 911 dispatcher and information contained in the
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1 CAD report, in addition to the circumstances confronting him at the scene.
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3 Based upon this information, Officer Thompson believed that Otto Zehm had
4 committed or attempted to commit the crime of theft or robbery at the
5 Washington Trust ATM. An after-the-fact determination that Otto Zehm had
6 not actually committed either of those crimes is irrelevant in determining
7 whether Officer Thompson's actions were objectively reasonable based upon
8 the above mentioned facts and circumstances *confronting* him.
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11 Any evidence as to Otto Zehm's innocence would allow the trier of fact to
12 judge the reasonableness of Officer Thompson's actions using 20/20 hindsight
13 and allow the jury to consider more information than was known to him at the
14 time of the confrontation. Such a result is contrary to the standards set forth in
15 *Graham*. Therefore, any evidence relating to Otto Zehm's innocence should be
16 excluded from trial because to allow otherwise would be improper, irrelevant
17 and prejudicial to the determination of whether Defendant Karl Thompson acted
18 reasonably under the circumstances.
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21 IV. CONCLUSION

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23 For the foregoing reasons, Defendant Karl Thompson requests the Court to
24 grant his Motion in Limine, excluding all evidence relating to Otto Zehm's
25 innocence in committing the crime of theft or robbery.
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RESPECTFULLY SUBMITTED this 9th 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 9th day of April, 2010, I electronically filed the following documents:

MEMORANDUM IN SUPPORT OF DEFENDANT THOMPSON'S MOTION IN LIMINE TO EXCLUDE AFTER-ACQUIRED EVIDENCE

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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