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11 UNITED STATES DISTRICT COURT  
12 EASTERN DISTRICT OF WASHINGTON

13 UNITED STATES, )  
14 Plaintiff, )  
15 vs. )  
16 KARL F. THOMPSON, JR., )  
17 Defendant. )

**NO. 09-0088-FVS**  
**UNITED STATES'**  
**MEMORANDUM IN RESPONSE**  
**TO DEFENDANT'S MOTION IN**  
**LIMINE RE: DIVORCE**

19 Plaintiff UNITED STATES, through James A. McDevitt, United States  
20 Attorney for the Eastern District of Washington (EDWA), and Timothy Durkin,  
21 Assistant United States Attorney (EDWA), and Victor Boutros, Trial Attorney with  
22 the United States Department of Justice, Civil Rights Division, respectfully submits  
23 the following memorandum in opposition to Defendant's motion in limine (*Docket*  
24 *No. 167*) seeking to exclude all evidence related to Defendant's purported October  
25 2008 divorce from his wife of approximately 38 years. *See United States Proffer, Ct.*  
26 *Rec. #187, ¶¶ 138, 139, 140, 141.*

27 **UNITED STATES' RESPONSE TO DEFENDANT'S MOTION IN LIMINE RE: DIVORCE**

1  
2 **I. OVERVIEW**

3 Defendant seeks an order in limine excluding any reference to his divorce  
4 granted on September 25, 2008. Defendant argues that his divorce is not relevant to  
5 either of the charged offenses and even if relevant, should be excluded pursuant to  
6 Federal Rule of Evidence 403. Defendant asserts that allowing such evidence would  
7 lead the jury to draw an assumption that the divorce was related to the charges,  
8 possibly affecting the jury's determination of guilt or innocence.

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10 **II. SUMMARY OF DIVORCE PROCEEDINGS**

11 During the spring-summer of 2009, the DOJ and Grand Jury proceeds with its  
12 investigation, including the DOJ's collection of records and materials from the SPD  
13 and City of Spokane. *See United States Proffer, Ct. Rec. #187, ¶ 137.*

14 On or about **September 3, 2009**, while the Estate of Otto Zehm's multi-million  
15 dollar (i.e., *\$2.9 million*) civil claim is pending and the DOJ's criminal investigation  
16 continues, defendant's wife Mrs. Diana Jean Thompson files a petition for divorce in  
17 the District Court for the State of Idaho, Kootenai County. The defendant and Mrs.  
18 Thompson have been married for approximately thirty-eight (38) years and have  
19 three (3) daughters from their marriage. In her divorce complaint, Mrs. Thompson  
20 requests the court to award her all real property interests owned by the couple,  
21 including the family home, as well as a motor vehicle and other personal property.  
22 Plaintiff also requests "one-half" of the defendant's retirement plan through the City  
23 of Spokane. Mrs. Thompson also seeks 100% of defendant's interest in a another  
24 deferred compensation plan and trust. Mrs. Thompson, who reportedly works part  
25 time, also asks the court to order defendant to pay "all" existing community debts.  
26 *See United States Proffer, Ct. Rec. #187, ¶ 138.*

27 On **September 29, 2008**, a little over three (3) weeks after filing the divorce

1 petition, an uncontested decree of divorce is entered with the Court. This decree  
2 transfers “all” interest in the family’s home to defendant’s purported ex-wife. The  
3 order of decree further directs that the home be sold for a reasonable price and on  
4 reasonable terms. Mrs. Thompson is also awarded 50% of defendant’s retirement  
5 with the City and 100% interest in the defendant’s other deferred compensation plan.  
6 Defendant is also purportedly directed in the decree to pay all existing community  
7 debts and to pay \$1500/month in spousal support “until plaintiff’s death.” The decree  
8 further provides, however, that he can continue to reside in the family’s home “rent  
9 free” until the home is sold. *See Ct. Rec. #187, ¶ 139, attached Exhibit #29 – copy of*  
10 *September 29, 2009, Divorce Decree.*

11 Over nine months later, on **July 8, 2009**, defendant submitted an application to  
12 the federal court for appointment of counsel at public expense under the Criminal  
13 Justice Act (CJA). At the time, defendant resided with his purported ex-wife Mrs.  
14 (Thompson) Harrison. At the time, the family home, consisting of a log home on  
15 approximately two acres, was listed with a realty agency and was offered for sale at  
16 six hundred seventy-five thousand dollars (\$675,000). *See United States Proffer, Ct.*  
17 *Rec. #187, ¶140.*

18 Another nine (9) months later (1.5 years after entry of the divorce decree), a  
19 review of Kootenai County records reveals that the home has not been sold. Further,  
20 the family home is no longer for sale and defendant is reported to still reside at the  
21 home with his purported ex-wife. *See First Judicial District of State of Idaho,*  
22 *Kootenai County, Case No. CV-08-7037. See Ct. Rec. #187, ¶141.* The purported  
23 reason for the divorce was *irreconcilable differences.* *See Exhibit #29, Ct. Rec.*  
24 *#187.*

25 Defendant has not identify, reference and/or described any other “divorce”  
26 related evidence that he seeks excluded, only the broad category of any reference to  
27 his divorce.

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### III. LAW & DISCUSSION

The United States agrees in principle with the Defendant, but disagrees that “all reference” to his purported divorce should be impermissible. The United States also reserves the right to introduce evidence of Defendant’s divorce consistent with the rules of evidence, including but not limited to impeachment, bias, or expose the Defendant’s untruthfulness.

#### A. Defendant Has Not Demonstrated Unfair Prejudice.

Interestingly, defendant does not explain how the jury’s knowledge of the divorce would influence the jury’s determination of guilt or innocence. Defendant also does not demonstrate how evidence of the divorce causes confusion of the issues or misleads the jury, other than stating the proposition without support. In the absence of any further argument, evidence or authority, Defendant’s mere allegation of unfair prejudice is seems to only be supported speculation and conjecture.

The mere mention of Defendant’s divorce is not so unduly prejudicial that the Court should prohibit “any and all” mention of the divorce. The Court should take notice that the rate of divorce is prevalent in our society today and that it carries virtually no stigma whatsoever. Evidence is unfairly prejudicial only if it makes a conviction more likely because it provokes an emotional response in the jury or otherwise tends to affect adversely the jury’s attitude toward the defendant wholly apart from its judgment as to his guilt or innocence of the crime charged.” *United States v. Johnson*, 820 F.2d 1065, 1069 (9<sup>th</sup> Cir. 1987).

The mere mention of the divorce is not so prejudicial that it must be automatically excluded, such as other more inflammatory evidence of or pictures of weapons. *United States v. Peltier*, 585 F.2d 314, 327 (8<sup>th</sup> Cir. 1978). The Courts have noted that evidence of divorce is not nearly as prejudicial as evidence of other

1 tawdry matters, like lewd magazines and a penis pump, which were still not unfairly  
2 prejudicial. *United States v. Yazzie*, 59 F.3d 807, 810 (9<sup>th</sup> Cir. 1995). Further,  
3 evidence of a child pornography found relevant was also found not to be unfairly  
4 prejudicial. *United States v. Caldwell*, 586 F.2d 338, 342-43 (5<sup>th</sup> Cir. 2009). Further  
5 still, 32 photographs of a murder victim's body at the scene of the murder and during  
6 autopsy held not unfairly prejudicial. *United States v. Fields*, 483 F.3d 313, 354 (5<sup>th</sup>  
7 Cir. 2007). "Snitches are a Dying Breed" t-shirts, seized drugs, and motorcycle club  
8 t-shirt in prosecution of conspiracy to possess and distribute methamphetamine was  
9 found not to be unfairly prejudicial. *United States v. Deitz*, 577 F.3d 672, 691 (6<sup>th</sup>  
10 Cir. 2009). These cases admittedly involve more extreme matters and materials than  
11 a divorce, which assuming relevance for bias, impeachment, and/or credibility,  
12 Defendant has failed to demonstrate how the probative value of divorce and/or  
13 divorce proceeding evidence is substantially outweighed by the danger of unfair  
14 prejudice. As such, the Court should deny Defendant's "blanket demand" motion in  
15 limine.

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17 **B. The Facts and Circumstances of the Divorce are Relevant and  
18 Probative of Untruthfulness.**

19 The fact of the divorce and circumstances under which it was granted are  
20 however, relevant to veracity. The circumstances surrounding Defendant's divorce  
21 strongly suggest impermissible fraudulent transfers. The divorce and circumstances  
22 surrounding the divorce may therefore become relevant. "[E]vidence of a witness'  
23 participation in fraudulent transactions is probative of truthfulness." *United States v.*  
24 *Jackson*, 882 F.2d 1444, 1446 (9<sup>th</sup> Cir. 1989) (citations omitted). Defendant is  
25 charged in Count Two with "making a false statement in an interview" in violation of  
26 18 U.S.C. § 1519. As such, Defendant's and/or his purported ex-wife's veracity are  
27 directly at issue.

1 Federal Rule of Evidence 404(a)(1) specifically provides that character  
2 evidence otherwise not admissible is admissible by the prosecution in a criminal case  
3 to rebut evidence of a pertinent trait of character offered by an accused. And while  
4 evidence of character is typically limited to reputation or opinion testimony, where  
5 the character or trait of character of a person is an essential element of a charge, proof  
6 may be made of specific instances of that person's conduct. Fed. R. Evid. 405.

7 Should Defendant put on evidence of his honesty or good reputation at trial, he  
8 has put his character at issue. F.R.E. 404(a)(1); *United States v. Gillespie*, 852 F.2d  
9 475, 479 (9<sup>th</sup> Cir. 1988), *citing*, *Michelson v. United States*, 335 U.S. 469, 479, 69  
10 S.Ct. 213 (1948) (defendant in bribery case put general character at issue when he  
11 called five witnesses who testified about his good reputation and honesty); *United*  
12 *States v. Mendoza-Prado*, 314 F.3d 1099, 1105 (9<sup>th</sup> Cir. 2002). In *Mendoza-Prado*,  
13 the defendant and one of his witnesses had testified to his character. The court, citing  
14 Rule 404(a)(1), held that such testimony opened the door to the government's  
15 evidence to demonstrate bad character. Therefore, the United States should then be  
16 allowed to introduce evidence related to the divorce and other similar evidence that is  
17 relevant to and/or touches upon truthfulness.

18 In addition, should Defendant choose to testify at his trial, Rule 608 provides  
19 that the credibility of a witness may be attacked by evidence in the form of opinion or  
20 reputation. Rule 608(b) permits impeachment by specific acts that have not resulted  
21 in a criminal conviction. *United States v. Osazuwa*, 564 F.3d 1169, 1175 (9<sup>th</sup> Cir.  
22 2009). The Court has discretion to allow inquiry into specific instances of conduct  
23 by the witness on cross-examination of the witness concerning the witness' character  
24 for truthfulness or untruthfulness. Fed. R. Evid. 608(b); *United States v. Geston*, 299  
25 F.3d 1130, 1137 (9<sup>th</sup> Cir. 2002) ("[s]pecific bad act evidence is admissible under Rule  
26 608(b) for the purpose of attacking or supporting the witness credibility if it is  
27 probative of the witness' character for truthfulness or untruthfulness or challenges a

1 witness' credibility").

2 For instance, in *United States v. Abel*, the United States Supreme Court  
3 affirmed the trial court's decision under Rule 608(b) to allow cross-examination  
4 using extrinsic evidence to show veracity and bias of a witness. 469 U.S. 45, 46  
5 (1984). In addition, Rule 611(b) explicitly allows cross-examination on matters  
6 affecting the credibility of a witness. The United States should be allowed to  
7 impeach by examining the Defendant (should he choose to testify) or other witnesses,  
8 including Defendant's wife, regarding Defendant's divorce.<sup>1</sup>

9 The Ninth Circuit has recognized the importance of allowing such testimony  
10 pursuant to Rule 608(b):

11 Rule 608 expresses the Advisory Committee's feeling that since the issue of  
12 credibility is often central, depriving the jury of relevant information about  
13 witnesses is unwarranted and unduly interferes with the law's basis emphasis  
14 on truth-finding. It recognizes, however, that a mechanical test of admission  
15 may be incapable of achieving justice in a particular case. Rule 608(b) should  
16 accordingly be interpreted in a manner consonant with the basis aim of the  
17 rules of evidence: to strike a balance between the needs of the judicial system  
18 and the needs of the individual witness as determined by the unique  
19 circumstances of the case in which he is appearing.

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20 <sup>1</sup> The "anti-marital facts" privilege, which prohibits one spouse from testifying  
21 against another during the length of the marriage, is inapplicable since Defendant and his  
22 wife are purportedly divorced. *United States v. Marashi*, 913 F.2d 724, 729 (9<sup>th</sup> Cir.  
23 1990). The second privilege, the "marital communications" privilege, bars testimony  
24 concerning statements privately made between spouses, *but only covers communications*  
25 *made during a valid marriage and that are confidential.* *Id.* at 729-30. Therefore,  
26 conversations, communications and statements between defendant and his ex-wife are not  
27 privileged. *Id.*

1 *United States v. Batts*, 558 F.2d 513, 517 (9<sup>th</sup> Cir. 1977) (*opinion withdrawn and*  
2 *aff'd on other grounds by 573 F.2d 599*), *citing* 3 Weinstein's Evidence, § 608 at  
3 608-24. The jury should not be deprived of relevant evidence of Defendant's  
4 untruthfulness.

5 There is evidence to raise the presumption that the Defendant's unopposed  
6 divorce was a fraudulent transfer of assets made to protect Defendant from a  
7 judgment in the civil case filed by the Estate of Otto Zehm, and made for the purpose  
8 of fabricating non-existent faux divorce financial obligations that would make  
9 defendant eligible for appointment of counsel at public expense under the CJA.

10 In that divorce - *see Exhibit #29, United States Proffer, ¶¶ 137-141, Ct. Rec.*  
11 *187* - Defendant agreed in essence to allow his wife to be awarded all real property  
12 interests owned by the couple, including the family home, as well as one-half of the  
13 Defendant's retirement plan through the City of Spokane (where he remains  
14 employed), 100 percent of Defendant's interest in another deferred compensation  
15 plan and trust, and agreed to pay all house and community debts, and further agreed  
16 to pay his part-time employed spouse \$1,500.00 a month *for life*. The Petition for  
17 Divorce was filed in Kootenai County, Idaho on September 3, 2009. A motion for  
18 entry of default in the divorce case was filed on September 25, 2009, even though  
19 defendant and his ex-wife reside together. A Decree of Divorce was signed by a  
20 Kootenai County Magistrate on September 25, 2009, and filed on September 29,  
21 2009.

22 Whether a transfer is fraudulent is to be decided under the law of the state of  
23 Idaho where Defendant's divorce was granted. Idaho Code § 55-913 defines, in  
24 relevant part, that a transfer is fraudulent if the debtor made the transfer without  
25 receiving a reasonably equivalent value in exchange for the transfer and the debtor . .  
26 . believe or reasonably should have believed that he would incur debts beyond his  
27 ability to pay when they became due. I.C. § 55-913(1) (b). In determining intent to



1 hinder, delay, or defraud a creditor, the Idaho Code lists several factors, including the  
2 following: (a) the transfer was to an insider; (b) the debtor retained possession or  
3 control of the property transferred after the transfer; (c) before the transfer was made  
4 the debtor had been sued or threatened with suit; (d) the transfer was of substantially  
5 all of debtor's assets; and (e) the debtor was insolvent or became insolvent shortly  
6 after the transfer was made. *See* I.C. § 55-913(2), Idaho's version of the *Uniform*  
7 *Fraudulent Transfers Act (UFTA)*.

8 In the instant case, the divorce petition sought an extraordinarily skewed  
9 division of assets, especially in light of the length of the marriage and the fact that  
10 Idaho is a "community property" versus a separate property state. Defendant  
11 acknowledged service of the petition. Defendant also entered into a stipulation on  
12 September 3, 2009 (the date the divorce petition was filed) that transferred 100  
13 percent of Defendant's interest in his deferred compensation plan to his wife.  
14 Defendant then made no effort to contest the petition and allowed a default to be  
15 entered shortly after the petition was filed.

16 The purported transfer of unequal property interests in a divorce, without  
17 arms length transaction, has been found to violate the Uniform Fraudulent  
18 Transfers Act and the Bankruptcy Code's similar anti-fraudulent transfer  
19 provision. *See Britt v. Damson*, 334 F.2d 896 (C.A. Wash. 1964) (uneven property  
20 transfer pursuant to Washington community property divorce decree was a  
21 "transfer" within anti-fraudulent conveyance provision); *In Re Pilavis*, 223 B.R. 1,  
22 (Mass. 1999) (unequal transfer of property between spouses in divorce was subject  
23 to avoidance as fraudulent transfer); *In re Clausen*, 44 B.R. 41, 43 (Bankr. D.  
24 Minn. 1984) (a default divorce decree allowed by husband awarding the parties'  
25 homestead totally to his wife it constituted a fraudulent transfer subject to  
26 avoidance.); *see also Valvanis v. Milgroom*, 529 F.Supp.2d 1206 (9th Cir. 2007)

1 (transfer of husband's interest in property to wife during marriage for no  
2 consideration was fraudulent and subject to avoidance).

3 In *In Re Clausen, id.*, where the purported ex-husband (like the defendant  
4 here) similarly allowed a "default" divorce to result in the transfer of all of his real  
5 property interests to the purported ex-wife, the Court noted that that the ex-  
6 husband's "... inaction evidences his [fraudulent] intent very clearly." [sic]. *Id.*

7 Notably here, defendant filed a financial declaration and/or affidavit with this  
8 Court indicating he was *indigent*. If Thompson puts his character at issue, then the  
9 jury is entitled to hear the facts of Thompson's divorce and fraudulent transfer  
10 because they directly implicate his character for truthfulness. Pursuant to Fed. R.  
11 Evid. 404(a)(1), if Defendant introduces evidence of his veracity or truthfulness (a  
12 trait pertinent to Count 2), the United States is allowed to introduce evidence to rebut  
13 Defendant's evidence. This would include evidence of Defendant's divorce and the  
14 presumptively fraudulent transfer of assets.

15 Rule of Evidence 403 does not exclude evidence of the divorce and fraudulent  
16 transfer because the probative value of this evidence of dishonesty is not substantially  
17 outweighed by the danger of unfair prejudice. The United States must prove that  
18 Defendant made a false statement, and evidence of a fraudulent transfer goes directly  
19 to Defendant's veracity. "Evidence is prejudicial only when it has an additional  
20 adverse effect on a defendant beyond tending to prove the fact or issue that justifies  
21 its admission." *United States v. Barker*, 1 F.3d 957, 959 n.3 (9<sup>th</sup> Cir. 1993). In the  
22 instant case, evidence regarding the divorce would tend to prove the fact or issue that  
23 justifies its admission but would have no effect on Defendant.

24 Examination by the United States into the circumstances of Defendant's  
25 divorce is relevant to credibility and bias. Therefore, the Court will need to balance  
26 at trial each question's relevance to defendant's alleged honesty and veracity against  
27

1 its "unfair" prejudicial impact. *United States v. Daniele*, 886 F.2d 1046, 1054 (8<sup>th</sup>  
2 Cir. 1989). These questions will need to be resolved at trial and Court's balancing of  
3 relevance against unfair prejudice should provide sufficient safeguards against the  
4 introduction of any evidence whose probative value is outweighed by the danger of  
5 unfair prejudice.

6 **IV. CONCLUSION**

7 For the foregoing reasons, the Court should allow the United States to inquire, on  
8 cross-examination into the fact and circumstances of Defendant's divorce for the  
9 purpose of impeachment and attacking Defendant's and other suitable witness'  
10 credibility.

11 RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of April 2007.

12  
13 JAMES A. MCDEVITT  
14 U.S. Attorney - EDWA

15 s/ Timothy M. Durkin  
16 TIM M. DURKIN  
17 Assistant U.S. Attorney  
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21 ***Certificate of ECF and/or Mailing***

22 I hereby certify that on this 30<sup>th</sup> day of April 2008, I electronically filed the  
23 foregoing pleading with the Clerk of the Court using the CM/ECF System which will  
send notification to the following CM/ECF participants:

24 Carl J. Oreskovich  
and to the following non CM/ECF participants: n/a

25 s/ Timothy M. Durkin  
26 Timothy M. Durkin  
27 Assistant United States Attorney