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9 UNITED STATES DISTRICT COURT  
10 EASTERN DISTRICT OF WASHINGTON

11 UNITED STATES, )  
Plaintiff, ) **NO. 09-0088-FVS**  
12 )  
13 vs. ) **MEMORANDUM IN SUPPORT OF**  
 ) **UNITED STATES’ MOTION FOR**  
14 ) **HOSTILE WITNESS**  
KARL F. THOMPSON, JR., ) **DESIGNATIONS**  
15 )  
16 Defendant. )

17 Plaintiff UNITED STATES, through Michael C. Ormsby, U.S. Attorney, and the  
18 undersigned counsel of the Department of Justice, respectfully submits this memorandum in  
19 support of its motion in limine seeking to treat certain of the United States’ witnesses as  
20 hostile witnesses pursuant to Fed. R. Evid. 611.

21 **INTRODUCTION**

22 Defendant Karl Thompson has been in law enforcement for almost 40 years. The last  
23 30 years in law enforcement has been in either eastern Washington or northern Idaho.  
24 Defendant joined the Spokane Police Department in 1997. Defendant was well-known in  
25 local law enforcement circles. The events of March 18, 2006 and the investigation that  
26 ensued involved numerous local law enforcement personnel at both the Spokane Police  
27 Department and Spokane County Sheriff’s Department, as well as personnel with the City of

1 Spokane's City Attorney's Office. Many local law enforcement officers and others have  
2 come to the defense of Defendant Thompson as they see this prosecution as an unwarranted  
3 attack on one of their own and on the Spokane Police Department that employs Defendant.  
4 Plaintiff United States seeks to treat some of the witnesses who will be testifying on behalf  
5 of Defendant as hostile witnesses pursuant to F.R.E. 611(c).

#### 6 LEGAL ANALYSIS

7 Federal Rule of Evidence 611 (c) permits leading questions on direct examination  
8 when a party calls a hostile witness, an adverse party, or a witness identified with an adverse  
9 party. The Court has discretion to allow use of leading questions. *United States v. Castro-*  
10 *Romero*, 964 F.2d 1154, 1158 (9<sup>th</sup> Cir. 1992) (citations omitted). Reversal on the basis of  
11 improper leading questions is proper only if the judge's actions amounted to or contributed  
12 to the denial of a fair trial. *Miller v. Fairchild Industries, Inc.*, 885 F.2d 498, 514 (9<sup>th</sup> Cir.  
13 1989). Since the adoption of Rule 611(c), it is no longer necessary for a party to first prove  
14 that a witness is hostile or an adverse party, officer, director or managing agent of such  
15 adverse party. *Haney v. Mizell Memorial Hosp.*, 744 F.2d 1467, 1477 (11<sup>th</sup> Cir. 1984) (error  
16 to prevent leading questions to employee of defendant hospital until hostility was  
17 established); *Ellis v. City of Chicago*, 667 F.2d 606, 612-13 (7<sup>th</sup> Cir. 1981) (Rule 611(c)  
18 enlarged categories of witnesses automatically regarded as adverse and therefore subject to  
19 interrogation by leading questions without further showing of actual hostility). "The  
20 standard, acceptable, and preferred procedure is to permit counsel to lead an adverse or  
21 hostile witness on direct examination." *Scenic Holding, LLC v. New Board of Trustees of*  
22 *Tabernacle Missionary Baptist Church, Inc.*, 506 F.3d 656, 664 (8<sup>th</sup> Cir. 2007). "The  
23 normal sense of a person "identified with an adverse party" has come to mean, in general, an  
24 employee, agent, friend, or relative of an adverse party." *Vanemmerik v. The Ground Round,*  
25 *Inc.*, 1998 WL 474106 (E.D. Pa. 1998) at \*1 (collecting cases). Proof that someone was  
26 previously employed by a party, and had an ongoing relationship with him is sufficient  
27 evidence that a witness is "identified" with an adverse party to permit leading questions on  
direct examination. *Stahl v. Sun Microsystems*, 775 F.Supp. 1397, 1398 (D.Col. 1991).

1 In the instant case, the United States seeks to interrogate the following witnesses on  
2 direct examination using leading questions. The first group of witness listed below have all  
3 filed affidavits or declarations criticizing the U.S. Department of Justice its investigation  
4 techniques and claiming a lack of professional respect during the course of the FBI's, the  
5 Civil Rights Division's, the U.S. Attorney's Office, and the Grand Jury's investigations. *See*  
6 *ECF 187, detailing the SPD's Traffic and Major Crime's Unit's investigation; see also*  
7 *declarations filed in the civil case Zehm Estate, et. al. v. Thompson, City of Spokane, et. al.,*  
8 *Cause No. 09-CV-0080, in opposition to the United States' motion to stay the civil case,*  
9 *which was filed to prevent Defendant Thompson and the City of Spokane's use of the civil*  
10 *discovery processes to try to undermine the integrity of the criminal case prosecution*  
11 *process. Those persons having expressed hostility to the United States and who have*  
12 *identified themselves with the Defendant or the City of Spokane, and/or have expressed*  
13 *displeasure with the United States' Department of Justice's investigation include:*

- 14 a. Spokane Police Department Officer Ty Johnson;
- 15 b. Spokane Police Department Officer Erin Raleigh; Officer Raleigh is also a  
16 named defendant in the civil case;
- 17 c. Spokane Police Department Officer Steve Braun; Officer Braun is also a  
18 named defendant in the civil case;
- 19 d. Spokane Police Department Officer Zachary Dahle; Officer Dahle is also a  
20 named defendant in the civil case;
- 21 e. Spokane Police Department Officer Jason Uberuaga; Officer Uberuaga is also  
22 a named defendant in the civil case;
- 23 f. Spokane Police Department Officer Ron Voeller; Officer Voeller is also a  
24 named defendant in the civil case;
- 25 g. Spokane Police Department Officer Dan Strassenberg;
- 26 h. Spokane Police Department Officer Dan Torok; Officer Torok is also a named  
27 defendant in the civil case;
- i. Spokane Police Department Officer Joe Walker;
- j. Spokane Police Department Officer Larry Bowman;
- k. Spokane Police Department Officer James Lundgren;
- l. Spokane Police Department Officer Mark Burbridge, MCU Detective;
- m. Spokane Police Department Detective Terry Ferguson; Det. Ferguson is also a  
named defendant in the civil case;

Additionally, the United States should be authorized, at its election, to treat the following

1 witnesses as hostile witnesses because they have identified themselves with Defendant Karl  
2 Thompson, the Spokane Police Department, the Spokane Fire Department, and/or the City of  
3 Spokane City Attorney's Office:

- 4 n. Spokane County Sheriff's Office, Doug Marske;
- 5 o. Spokane Fire Department EMT John Cappellano;
- 6 p. Spokane Police Department Officer Jeff Harvey;
- 7 q. Spokane Police Department Officer Thomas Lee
- 8 r. Spokane Police Department Officer Sandra McIntyre;
- 9 s. Spokane Police Department Officer Tim Moses;
- 10 t. Spokane Police Department Officer Gil Moberly;
- 11 u. Spokane Police Department Officer Al Odenthal; and
- 12 v. Spokane Police Department Officer Ernie Wutherich.

13 In addition to the above expressing hostility to the U.S. Department of Justice's investigation  
14 and its prosecution of the Defendant, one or more of the foregoing is or has been the subject  
15 of the United States' DOJ's ongoing obstruction arising out of its original investigation that  
16 resulted in the Grand Jury's filing of charges against this Defendant. There may also be one  
17 or more persons to be added to this list of proposed hostile witnesses.

18 As this Court is aware, "The classification [as hostile] usually involves a showing by  
19 the examining party that the witness is biased against the direct examiner, his/her client or  
20 both and often is demonstrated by examples of that witnesses [sic] demeanor." *Washington*  
21 *v. Illinois Dept. of Revenue*, 2006 WL 287 3437 (C.D. Ill. 2006) at \*1. All of the identified  
22 witnesses have presented themselves as adverse to the prosecution in this case, are friends or  
23 close associates of Defendant Karl Thompson, or have identified themselves with entities  
24 that were heavily involved in either the confrontation itself or the local investigation of the  
25 events of March 18, 2006. As such, each of the listed witnesses should be designated as  
26 hostile. *United States v. Hicks*, 748 F.2d 854, 859 (4<sup>th</sup> Cir. 1984) (no abuse of discretion to  
27 permit leading questions to defendant's girlfriend whom the government called to testify);  
*Ellis*, 667 F.2d at 613 (trial court should have allowed leading questions to police officers  
who were employees of defendant City of Chicago and were present during portion of  
incident giving rise to lawsuit and who had worked closely with another defendant police

1 officer); *United States v. Brown*, 603 F.2d 1022, 1026 (1<sup>st</sup> Cir. 1979) (no abuse of discretion  
2 where court decided *sua sponte* that witness who was close friend of defendant and  
3 participant in crime could be interrogated with leading questions after difficult and confusing  
4 initial questioning by prosecutor).

5 **CONCLUSION**

6 For the foregoing reasons, the Court should designate each of the above-identified  
7 witnesses as hostile and allow the United States to conduct its direct examination of each of  
8 them through the use of leading question.

9 RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of May 2010.

10 *MICHAEL C. ORMSBY*  
United States Attorney - EDWA

11 *s/ Victor Boutros*  
12 *s/ Timothy M. Durkin*  
VICTOR BOUTROS  
13 Trial Attorney, Civil Rights Division  
14 TIM M. DURKIN  
15 Assistant U.S. Attorney - EDWA  
16 Attorneys for Plaintiff United States

17  
18  
19 **Certificate of ECF and/or Mailing**

20 I hereby certify that on the date of the electronic filing of the foregoing pleading with the  
21 Clerk of the Court using the CM/ECF System, that the CM/ECF System sent notification to the  
22 following CM/ECF participants:

23 Carl Oreskovich, Esq.

24 And to the following non CM/ECF participants: N/A

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