

10. Magistrate Imbrogno's July 9, 2009, Discovery Order provided that if the Defendant participated in the receipt of the United States' discovery disclosures that the Defendant, in turn, had to provide reciprocal discovery. *See Discovery Order, Dckt. # 19*. Notwithstanding Magistrate Imbrogno's Order and repeated written requests from the United States over the past month requesting reciprocal discovery, the Defendant has not produced and/or offered for inspection any evidence and/or discovery that Defendant is aware of and/or plans to use at the time of the criminal trial. *See also Order Granting in part (and denying in part) Defendant's Motion for Discovery, U.S. v. Thompson, Dckt. # 47*. Further description of the criminal case proceedings is provided below.

**B. Chronological Summary & Procedural History.**

11. During the early evening of **March 18, 2006**, the Defendant, Spokane Police Department (SPD) Patrol Officer Karl Thompson Jr. (age 57.75 yrs., 5'9" in height and approximately 185 lbs.), was working "power shift" patrol in north Spokane when he made contact with Otto Zehm (age 37, 5'9" and approximately 185 lbs.) at a Zip Trip convenience store. Defendant Thompson contacted Zehm relative to a "suspicious circumstance" complaint arising out of a report of his possibly being involved in the theft of money at a nearby ATM.<sup>1</sup> Zehm had mental disabilities, worked as a janitor, and was a schizophrenic with delayed cognitive responses. In reality, Zehm did not take any money and was wrongfully suspected of taking money from the ATM. *See SPD Investigative Reports, Criminal Def. Disc. #1, in United States Notice of Discovery Disclosures, U.S. v. Karl Thompson Jr.*,

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<sup>1</sup> For expediency, unless otherwise indicated, individuals identified herein may also be referred by their last name (i.e., Karl Thompson may be referred to as "Defendant" or "Thompson"; Otto Zehm or his Estate may be referred to as "Zehm" or "Plaintiff;" etc.). No disrespect is intended by these abbreviated references.

1 Cause # CR-09-0088-FVS, Dckt. # 42, attached hereto as Exhibit # 10.

2 12. Upon contacting Zehm inside the Zip Trip, Defendant Thompson  
3 promptly used his baton and taser to forcibly detain Zehm. Defendant Thompson  
4 stated that he used force after Zehm failed to immediately follow two verbal  
5 commands that were given and only after Zehm allegedly held a plastic 2-liter Diet  
6 Pepsi pop bottle in an aggressive manner (i.e., was about to “assault” or “charge”  
7 Thompson). In response to Defendant’s successive and repeated baton strikes to his  
8 body, Zehm actively resisted. Defendant Thompson claims Zehm was actively  
9 assaultive after his baton strikes. There are other witnesses that describe Zehm as  
10 defensive and trying to evade Thompson’s violent use of force. Officer Thompson  
11 also tasered Zehm and later called for assistance to completely suppress Zehm. *Id.*

12 13. Several other SPD Officers (including named Defendants in this action)  
13 arrived and helped Defendant Thompson forcibly secure Zehm in a prone, “hog tie”  
14 restraint, in which position Zehm remained restrained for approximately 17 minutes,  
15 the last three of which included a plastic non-rebreather mask being applied by  
16 Defendant Raleigh to Zehm’s face to protect officers from possible spitting. *Id.*

17 14. Mr. Zehm ultimately stopped breathing in this restrained position and  
18 collapsed. He was rushed to the hospital, but never regained consciousness and died  
19 two days later from an anoxic brain injury (i.e., oxygen starved brain).

20 15. Later in the evening of **March 18, 2006**, Sgt. Joe Peterson and the  
21 SPD’s Major Crimes Unit assumed the lead role of investigating the circumstances  
22 of Mr. Zehm’s death while in the custody of their own SPD officers. That evening,  
23 SPD’s Acting Chief Jim Nicks triggered the Critical Incident Protocol, which placed  
24 the SPD-MCU Detectives in the position of lead investigators in the case. The  
25 Spokane County Sheriff’s Office was designated to provide “shadow” investigators  
26 and reportedly they were to “shadow” and observe their SPD counterparts’  
27 investigation activities. *Id.*

1 16. SPD Detective Terry Ferguson, a named Defendant in this action, was  
2 designated the lead detective for the SPD's MCU. Det. Mark Burbridge was  
3 designated the crime scene detective and was in charge of handling and processing  
4 the crime scene, as well as contacting and interviewing percipient witnesses. *Id.*

5 17. At approximately 7:30 p.m. on **March 18, 2006**, Asst. Chief Nicks  
6 arrives on scene and is given a briefing by SPD Patrol and MCU personnel. Chief  
7 Nicks then arranges a contact with Asst. City Attorney Rocky Treppiedi, the SPD's  
8 legal adviser and the City's acting Risk Manager. Mr. Treppiedi is contacted before  
9 the Spokane County Prosecutor, who has jurisdiction over all felonies within  
10 Spokane County. *See RCW 36.17.020. See also SPD Records, Computer Aided*  
11 *Dispatch (CAD) Def. Disc #1.*

12 18. Later in the evening of **March 18, 2006**, Acting Chief Nicks gave a  
13 press conference and provided the following description of the Zehm detention  
14 events during a TV interview with a KREM 2 reporter.

15 "I'll begin with officers responded to a suspicious persons call, actually  
16 occurred several blocks from here at a bank and citizens observed this  
17 individual near a cash machine concerned about his behavior. Concerned that  
18 he might be looking a possibly doing a robbery. The citizen called the police  
19 department. Officers responded to the area in order to investigate this  
20 person's actions.

21 We had one officer that came to the store here contacted the suspect inside the  
22 store. The officer was alone at the time, confronted the individual. **The**  
**suspect lunged at the officer during the initial contact and basically a fight**  
**occurred at that time.**

23 . . .  
24 Oh of course, yes [the officers followed procedure], the officers came on  
25 scene used the lowest level mean to control him verbally. **The suspect**  
**attacked the officer.**

26 The Officer was by himself. **The officer used a straight handled baton as a**  
27 **defensive technique** . . . tried to use his taser that was ineffective . . ."

(emphasis added)

1 See *United States Discovery Disclosure, Disc #33, Exhibit #10 (Nicks's KREM 2*  
2 *interview)*.

3  
4 19. On or about **March 21<sup>st</sup> and March 22<sup>rd</sup>**, Cpl. Tom Lee, the SPD's  
5 Public Information Officer issues press releases and/or is quoted by media as  
6 describing Zehm as having "lunged" at or "attacked" the Defendant Thompson.

7 20. On or about **March 22, 2006**, Defendant Thompson gave a recorded  
8 interview to Det. Ferguson. *See attached Exhibit #1*. That same day, Dr. Sally  
9 Aiken, Medical Examiner, conducted an autopsy on Zehm. *Exhibit #10, Disc. #1*  
10 *and 12*.

11 21. The morning of **March 23, 2006**, footage from two Zip Trip store  
12 security camera angles (i.e., camera angles #1 and #2) is reviewed by MCU  
13 Detectives with SPD Brass, reportedly including Acting Chief Nicks, Asst. Chief  
14 Odenthal, Asst. Chief Bruce Roberts, and Asst. City Attorney Rocky Treppiedi. "No  
15 Lunge" or "attack" by Zehm is revealed in either of these video angles. In fact, it  
16 appears that Asst. Chief Odenthal spliced off two (#3 and #4) of the four camera  
17 angles. The cameras at these angles (#3 and #4) are digital, whereas camera angles  
18 #1 and #2 are analog recorders. *See SPD Investigative records (Det. Ferguson,*  
19 *McGregor and Acting Chief Nicks's notebook)*.

20 22. On or about **March 29, 2006**, Det. Ferguson consults with Treppiedi  
21 regarding the release of Zehm's payroll check (approximate \$500.00) that was in his  
22 possession the night of the incident to his mother Anne Zehm or Zehm's counsel. *Id.*

23 23. In **late March 2006**, and on several occasions thereafter, Det. Ferguson  
24 conducts her own investigative contacts and interviews without any Spokane County  
25 Detective being present, in apparent violation of the SPD's "Critical Incident  
26 Protocols," *See SPD MCU Investigation reports and file notes. Id.*

27 24. On or about **May 22, 2006**, Dr. Sally Aiken issues her report on

1 autopsy findings. Dr. Aiken concludes that Mr. Zehm's cause of death was *Hypoxic*  
2 *Encephalopathy due to Cardiopulmonary Arrest while restrained (total appendage*  
3 *restraint) in prone position for excited delirium. See May 22, 2006, Autopsy report,*  
4 *Def. Disc. #12, Exhibit 10.* Dr. Aiken also deemed Mr. Zehm's "brain death"  
5 (hypoxic encephalopathy) to be a *homicide* under state law since the death was  
6 causally related to personal intervention and not the result of a naturally occurring  
7 organic demise. *Id.*

8 25. On **May 30, 2006**, Acting Chief Jim Nicks holds a press conference to  
9 announce and discuss certain autopsy findings and conclusions, in alleged violation  
10 of RCW 68.50.105 (Autopsy privacy act) and a mutual "protective order" that was  
11 entered into between the SPD, its civil counsel Mr. Treppiedi, and the Zehm Estate  
12 and its counsel with the Center for Justice. *See Def. Discovery Disc #9, Exhibit #10.*

13 26. The MCU continues its investigation activities from **March 18, 2006**,  
14 through **May 31, 2006**, when presumably Det. Ferguson, Det. Mark Burbridge and  
15 MCU supervisor Sgt. Peterson, conclude that the SPD's investigation was  
16 sufficiently complete to make a "referral" to the Spokane County Prosecuting  
17 Attorney's Office. Det. Ferguson sends her case summary "referral" report to the  
18 Spokane County Prosecuting Attorney's Office with the statement that there is "no  
19 evidence" of any excessive force, "only that amount of force that was reasonably  
20 necessary " *See attached Exhibit #2, Det. Ferguson's May 31, 2006, report*  
21 *concluding no evidence of criminal activity discovered, notwithstanding eye witness*  
22 *and video accounts. **Det. Ferguson recommends the declination of any criminal***  
23 *charges.*

24 27. In Det. Ferguson's **May 31, 2006**, referral report to Mr. Steve Tucker,  
25 Spokane County's elected Prosecuting Attorney, as follows:

- 26 1) "**There is no evidence** to support that excessive force was used, only  
27 force that was reasonable for the circumstances was employed";

- 1           2) “. . . **deadly force [baton strikes to the head] was not applied** as it was
- 2           not warranted” [sic]; and
- 3           3) “In conclusion, **there is no investigative finding of criminal activity** on
- 4           the part of the involved officers.”

5   *See Detective Terry Ferguson’s May 31, 2006, case investigation summary and*  
 6   *referral (i.e., no charges) to the Spokane County Prosecuting Attorney, **Exhibit # 2.***

7           28. In **June 2006**, the United States Department of Justice opens a  
 8   preliminary case investigation into the circumstances of the force used on Zehm and  
 9   his proximally related death while in SPD custody. In July 2006, the U.S.  
 10   Attorney’s Office requests a complete copy of Det. Ferguson’s investigative file  
 11   materials. This request would be repeated on several occasions over the next 2.5  
 12   years and notwithstanding, DOJ would not actually receive a “complete” copy of  
 13   Det. Ferguson’s and the SPD’s MCU investigative file materials until a grand jury  
 14   subpoena is issued in the spring of 2009. *See Proffer of AUSA Durkin and attached*  
 15   **Exhibit #13** *(copy of AUSA Durkin’s March 17, 2009, email to Treppiedi).*

16           29. On **June 7, 2006**, the Center for Justice sends Asst. City Attorney  
 17   Treppiedi a letter asserting that the City, through Acting Chief Nicks’s May 30,  
 18   2006, press conference concerning Dr. Aiken’s autopsy results and findings has  
 19   violated Washington’s Autopsy privacy Act and the parties agreed protective order.  
 20   *See **Exhibit #3**, a true copy of Center for Justice’s letter to Treppiedi.*

21           30. On **June 21, 2006**, Asst. City Attorney Rocky Treppiedi issues a nine  
 22   page letter to the Center for Justice denying any violations of state law, the parties  
 23   protective order, and further goes on to defend and exonerate Defendant Thompson  
 24   from any excessive use of force claims. Mr. Treppiedi goes on to exonerate all of  
 25   the other law enforcement officers who had contact with Mr. Zehm the evening of  
 26   March 18, 2006. Acting Chief Nicks, Asst. Chief Odenthal and Asst. Chief Bruce  
 27

1 Roberts, who oversaw the MCU and the SPD's investigation division, were all  
2 copied in on Mr. Treppiedi's letter exonerating Defendant Thompson. Notably, the  
3 SPD's own investigation was not completed at the time that Mr. Treppiedi  
4 exonerated Defendant Thompson. *See attached **Exhibit #4**, a true and correct copy*  
5 *of Mr. Treppiedi's June 21, 2006, exoneration letter to the Center for Justice.*

6 31. On **June 27, 2006**, per direction of Asst. City Attorney Rocky  
7 Treppiedi, Det. Ferguson displayed Mr. Zehm's personal property items at the  
8 evidence building to the Zehm Estate's legal representatives. *See SPD Investigation*  
9 *Records, Def. Disc #1, Exhibit #10.*

10 32. On **July 10, 2006**, Spokane County Chief Prosecuting Attorney Jack  
11 Driscoll requests that the plastic 2-liter Diet Pepsi bottle recovered from the Zip Trip  
12 be examined for latent fingerprint examination. This had not been previously  
13 pursued by investigators. *See Exhibit 10, Disc #1.*

14 33. On or about **July 13, 2006**, the SPD finally releases two of the Zip Trip  
15 security store video angles in response to public records act requests. Asst. Chief Al  
16 Odenthal gives a presentation to the media regarding the content of the two camera  
17 angles. The SPD realizes for the first time that the "plastic spit mask" was not  
18 provided to Dr. Aiken and had not yet been analyzed. Det. Ferguson re-initiates  
19 interviews (once again solo in apparent violation of Critical Incident Protocols) with  
20 on-scene officers (i.e., Officers *Thompson*, *Uberuaga*, *Raleigh*, *Voeller*, *McIntyre*,  
21 *Dahle*, *Strassenberg*, *Torok*, etc.) concerning the use and application of the non-  
22 rebreather mask. *Id.*

23 34. On **July 13, 2006**, Acting Chief Nicks reportedly admits to the media  
24 for the first time since the SPD's March 18, 2006, news announcement (night of  
25 incident) and the several media disclosures since, that the security video does not  
26 show Zehm "lunging" at or attacking Officer Thompson. *See Spokesman Review*  
27

1 July 14, 2006, article where in Chief Nicks admits giving “inaccurate” information  
2 while trying to defend his officers’ actions during the fatal struggle with Otto Zehm.  
3 Nicks reportedly was also unable to account for why he, Tom Lee, and other SPD  
4 representatives continued to claim for months (x4) that Zehm “lunged” first at  
5 Officer Thompson with the plastic soda bottle before Thompson used force. “**That’s**  
6 **the information that I was provided on scene based on the observations of the**  
7 **witnesses and officers,.**” Nicks is quoted saying. See attached Exhibit #5, a true  
8 and correct copy of Spokesman Review’s July 14, 2006, article regarding Chief  
9 Nicks’s alleged admission of inaccurate account.

10 35. On **July 17, 2006**, Det. Ferguson learns that the plastic spit mask needs  
11 to be forensically examined and considered by the Medical Examiner relative to  
12 possible contributing cause of death. The mask was not originally retrieved and  
13 maintained as evidence. It was originally bagged and dropped in a bio-hazard waste  
14 collection site. Fortunately, it was later retrieved by Det. Ferguson and others from  
15 the County’s bio-hazard waste site near the County’s Risk Mgmt. Office. *Exhibit*  
16 *#10, Disc. #1 and AUSA Durkin’s Proffer.*

17 36. On **July 19, 2006**, Det. Ferguson meets with Chief Criminal Deputy  
18 Prosecutor Jack Driscoll who requests that a forensic video analysis be performed of  
19 the two security video angles showing the first minute of Officer Thompson’s  
20 engagement and force on Zehm. See *SPD Records, Def. Disc. Disc #1.*

21 37. On **July 19, 2006**, Det. Ferguson contacts Chief Deputy Prosecutor  
22 Jack Driscoll again and Rocky Treppiedi concerning “authority” to open the plastic  
23 pop bottle and empty contents so fingerprinting analysis can be performed. *Exhibit*  
24 *11, Disc #1, id, and Proffer of AUSA Durkin.*

25 38. On **July 22, 2006**, Chief Deputy Driscoll meets with Det. Ferguson and  
26 forensic videographer Grant Fredericks, and discusses parameters of technical  
27

1 review (i.e., initial contact and exchange between Defendant Thompson and Zehm).  
2 *Id.*

3 39. On or about **August 2, 2006**, SPD Chief Nicks and other administrators  
4 reportedly learn for the first time that there were actually “four” security video  
5 camera angles at the Zip Trip, not just the two that were reportedly shown the  
6 morning of March 23, 2006, to SPD Administrators and Asst. City Attorney Rocky  
7 Treppiedi. Asst. Chief Nicks is advised that only two camera angles were actually  
8 released in July in response to the media’s public records request. The failure to  
9 disclose all camera angles in SPD’s possession would appear to be a violation of  
10 Washington’s Public Records Act, RCW 42.56.010, et seq. (The PRA is a “strongly  
11 worded mandate for broad disclosure of public records” and its provisions are to be  
12 liberally construed to promote full access to public records, and exemptions are to be  
13 narrowly construed. *Progressive Animal Welfare Soc’y v. Univ. of Wa.*, 125 Wn.2d  
14 243, 250-51, 884 P.2d 592 (1994) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123,  
15 127, 580 P.2d 246 (1978)), discussing former RCW 42.17.251 (1992).  
16 Washington’s courts have uniformly interpreted the PRA's policy to be “that free  
17 and open examination of public records is in the public interest, even though such  
18 examination may cause inconvenience or embarrassment to public officials or  
19 others.” *See Smith v. Okanogan County*, 100 Wn.App. 7, 11, 994 P.2d 857 (2000)  
20 (quoting former RCW 42.17.340(3) (1992)).

21 40. Acting Chief Nicks learns about the two additional (digital) camera  
22 angles from Treppiedi, who reportedly provides his factual opinion that the two  
23 additional (digital) cameras “showed nothing of value.” *See SPD Records on Zehm*  
24 *Investigation and Asst. Chief Nick’s Investigation note, Def. Disc #1 and 57, Exhibit*  
25 *#10; and Spokesman Review articles of August 4, 2006. Disc # 9.*

26 41. On or about **August 3, 2006**, SPD PIO Cpl. Tom Lee advises Chief  
27

1 Nicks that the Spokesman and KREM are pursuing stories on the City’s failure to  
2 disclose the two additional camera angles. Chief Nicks has a meeting with Det.  
3 Ferguson and Lt. Stephens. Lt. Stephens advises that he was unaware of the two  
4 additional camera angles. Det. Ferguson acknowledges that she was aware of all  
5 four angles, but claims (like Asst. City Attorney Treppiedi) that only the analog  
6 cameras #1 and #2 (and not the digital cameras of #3-4) had “anything of value.” *Id.*

7 42. On **August 3, 2006**, Det. Ferguson is directed to go back and review  
8 store security camera angles #3 and #4. Det. Ferguson reportedly reports back that  
9 footage from the camera angles does show the plastic Diet Pepsi bottle being held by  
10 Zehm over his head/face while he is on the floor in front of the clerk’s kiosk and  
11 while Thompson is standing over him with a baton in hand. Chief Nicks’s review of  
12 the two additional camera angles (which crisscross the clerk’s kiosk) show  
13 additional material regarding Officer Thompson’s approach to store and Zehm’s  
14 casual entry. Chief Nicks instructs Lt. Stephens to go back over case with fine tooth  
15 comb. *Id.*

16 43. On **August 7, 2006**, Chief Nicks meets with Asst. Chief Al Odenthal  
17 and seeks an explanation as to why the two additional video angles were missed.  
18 Asst. Chief Odenthal claims that he too was informed that the two other store  
19 security camera angles possessed nothing of value. *Id.*

20 44. On **August 8, 2006**, Asst. Chief Odenthal informs Chief Nicks that Det.  
21 Ferguson removed the original video discs from the property booking and has  
22 provided the “master copy” to Grant Fredericks, the video forensic technician. Det.  
23 Ferguson reportedly did this without advising her supervisor. Det. Ferguson  
24 reportedly thought that the SPD “chain of command” had approved the release of the  
25 original property/evidence to Fredericks because “Rocky told [her] the [County]  
26 Prosecutor” made the request. [sic] Once the original evidence was removed from  
27

1 property, there were no copies of the original “video” evidence remaining booked  
2 into property, only working copies existed. *Id.* The original evidence is later  
3 recovered.

4 45. In approximately **September 2006**, Chief Anne Kirkpatrick is  
5 appointed to Spokane’s vacant Police Chief position. *See AUSA Durkin’s Proffer.*

6 46. On or about **September 21, 2006**, Spokane County Prosecuting  
7 Attorney Steve Tucker announces that Dr. Aiken has concluded her review of the  
8 non-rebreather mask in connection with Otto Zehm’s death. Dr. Aiken reportedly  
9 concludes that her original cause of death (i.e., hypoxic encephalopathy due to  
10 cardio pulmonary arrest while restrained in a prone, full appendage restraint for a  
11 reported episode of excited delirium.) remains unchanged and that the mask does not  
12 appear, based on a test by a runner on a treadmill wearing the mask, to have  
13 contributed to Zehm’s respiratory failure. *See Disc. #9, Spokesman’s article.*

14 47. On or about **September 26, 2006**, forensic videographer Grant  
15 Fredericks finished his report prepared for the SPD. In this report, Mr. Fredericks  
16 concludes that he cannot confirm Officer Thompson’s use of his baton during the  
17 first 1:13 seconds of Defendant Thompson’s attack on Otto Zehm. This conclusion  
18 is seemingly contradicted by Defendant Thompson’s own statement of immediate,  
19 “preemptive” strikes to Zehm’s body. Mr. Fredericks’s conclusion also conflicts  
20 with eye witness accounts of vertical baton strikes to Zehm’s head, neck and upper  
21 torso until Officer Braun arrives, when Defendant Thompson reportedly delivers  
22 baton strikes to Zehm’s lower extremities. *See Def. Disc #14, Exhibit 10.*

23 48. By the **end of September 2006**, the SPD performed the additional  
24 Spokane County Prosecutor directed investigative activities in the late summer-early  
25 fall of 2006, but Detective Ferguson did not revise any of her prior findings and  
26 conclusions in her May 31, 2006, report exonerating Officer Thompson on his use of  
27

1 force as well as the other Officers involved in Mr. Zehm's full appendage restraint  
2 and proximally related in-custody death. *Id, Disc #1.*

3 49. In approximately **October 2006**, the City Police Department reportedly  
4 suspends its investigation pending a charging decision by Spokane County  
5 Prosecuting Attorney Steve Tucker. Meanwhile, the DOJ opens a full investigation  
6 into the Zehm force – custodial death issue. As a result of the FBI and DOJ pushing  
7 forward with a full investigation, Spokane County Prosecuting Attorney Steve  
8 Tucker defers making any charging decision until after completion of the FBI's  
9 investigation. *See Def, Disc #9, Exhibit #10, AUSA Durkin's Proffer, and attached*  
10 **Exhibit #14**, *Spokesman Review article of October 5, 2006 (Disc #9).*

11 50. From **March 2006 through the present**, however, Asst. City Attorney  
12 Rocky Treppiedi and the City Attorney's Office actively pursued a pre-suit and pre-  
13 indictment investigation on behalf of Defendant Karl Thompson and the other  
14 named Defendants in this civil civil rights action. *See Exhibit #4 and AUSA*  
15 *Durkin's Proffer.*

16 51. On **July 23, 2007**, the Estate of Otto Zehm and Mrs. Anne Zehm,  
17 Otto's mother, individually and as personal representative of the Estate, files an  
18 initial notice of a \$2.9 Million tort and civil rights claim with the City of Spokane  
19 and the City Attorney's (civil) Office. In this claim, submitted pursuant to RCW  
20 4.96.010 (Washington's tort claim statute), Plaintiffs allege damages for civil rights  
21 violations, wrongful death, and other state law tort claims. *See AUSA Durkin's*  
22 *Proffer and Disc. #9, Exhibit #10.*

23 52. During the **spring of 2007**, the DOJ scheduled a meeting with Grant  
24 Fredericks and learns that Mr. Fredericks's \$5,400 bill for forensic services provided  
25 to the SPD was coordinated by Asst. City Attorney Treppiedi and paid for by the  
26 City's Risk Mgmt. Division, not the Spokane Police Department. *Id and FBI 302s.*  
27

1           53. In the **spring of 2007**, the DOJ requested Mr. Fredericks perform some  
2 additional forensic work on the Zip Trip video. Specifically, the DOJ requested that  
3 Mr. Fredericks prepare stills of each frame of each of the four camera angles of the  
4 Zip Trip security video for the critical time frame involved (i.e., the approximate  
5 first 1:30 minutes showing Defendant Thompson’s approach, initial attack, and  
6 continued use of force on Zehm).

7           54. Since the United States was dealing with Mr. Fredericks as an expert  
8 consultant in connection with the DOJ’s continuing investigation, and since the SPD  
9 had suspended its investigation, and had not contracted with Mr. Fredericks to  
10 provide any further law enforcement related services, it was the DOJ’s expectation  
11 that the additional forensic work and the still photographs the DOJ requested to be  
12 prepared by Mr. Fredericks would be provided exclusively to the DOJ and on a  
13 confidential investigation basis. However, when the still photographs, placed into a  
14 Power Point program, were provided by Mr. Fredericks, the DOJ was surprised to  
15 learn that a copy of the stills and the work performed by Mr. Fredericks on behalf of  
16 the DOJ was also provided to Asst. City (civil) Attorney *Treppiedi*. *Id.*

17           55. In **August 2007**, the DOJ also learns that Mr. Fredericks will not  
18 perform any future forensic services in connection with its investigation on a  
19 confidential basis since it is his understanding that he is “under contract” with Rocky  
20 Treppiedi and the City Attorney’s Office. Mr. Fredericks conveys that unless and  
21 until the City Attorney’s Office releases him from his contract-ethical obligation  
22 concerning his forensic work for that office, that he cannot confidentially perform  
23 any additional forensic work for the FBI-DOJ in Spokane. *Id.*

24           56. On or about **August 8, 2007**, the U.S. Attorney’s Office arranged a  
25 conference call with then City Attorney James Craven, who releases Mr. Fredericks  
26 from any further expert or other legal obligation to the City Attorney’s Office  
27

1 relative to that office's handling of civil legal issues for its clients on the Zehm case.  
2 *Id.*

3 57. From the **fall of 2006 through the winter of 2007-2008**, DOJ  
4 continued with its forensic investigation activities. *Id.*

5 58. During the **spring of 2008**, the DOJ and the Grand Jury commenced its  
6 14 month investigation into the Otto Zehm use of force, custodial death, and possible  
7 SPD investigation misrepresentation issues. *Id.*

8 59. In **mid-October 2008**, the United States Attorney's Office is prepared  
9 to issue an official target letter to the Defendant Karl Thompson. Assistant City  
10 Attorney Rocky Treppiedi was inquired as to whether Mr. Thompson had private  
11 criminal counsel. Mr. Treppiedi indicates that Mr. Thompson did not have separate  
12 criminal counsel but that since he represented Mr. Thompson's interests relative to  
13 his use of force, he would be willing to accept the DOJ's intended letter to Mr.  
14 Thompson on his client's behalf. Mr. Treppiedi's offer is declined.

15 60. In **early October 2008**, Spokane Police Chief Anne Kirkpatrick is  
16 contacted by DOJ representatives and informed that the FBI and the U.S. Attorney's  
17 Office anticipates calling a number of SPD personnel in front of the Grand Jury to  
18 provide testimony. Asst. Chief Kirkpatrick volunteers to assist the DOJ by offering  
19 to institute a "gag order" on all SPD personnel who are subpoenaed and/or who  
20 provide testimony before the grand jury. Chief Kirkpatrick's offer to impose a gag  
21 order on SPD personnel appearing before the grand jury, in the interest of  
22 maintaining the confidentiality and integrity of the DOJ's on-going investigation  
23 into "any federal crimes" that may have been committed by SPD personnel in  
24 detaining Otto Zehm, in forcibly holding him in restraints, and/or in connection with  
25 obstructing and/or misleading the SPD's and/or the DOJ's investigation, was  
26 accepted by the DOJ. *Id.*

1           61. On or about **October 20, 2008**, the City Attorney's Office reportedly  
2 submitted a resolution to the Spokane City Council approving the retention of a  
3 private, well known criminal defense attorney Carl Oreskovich to represent and  
4 defend "the City" in connection with the Zehm Estate's pending "civil" civil rights  
5 action. *See Spokesman Review news article of October 21, 2009, Def. Disc #9,*  
6 *Exhibit #10 and attached Exhibit #15, copy of news article.* The City Council,  
7 presumably based on the representations of the City Attorney's Office, approved up  
8 to \$45,000 in defense fees and costs associated with Mr. Oreskovich's "civil"  
9 representation of "the City" in the pending Zehm litigation. *Id.*

10           62. On or about **November 17, 2008**, FBI Special Agent Lisa Jangaard and  
11 AUSA Tim Durkin met with Carl Oreskovich to discuss the United States offer to  
12 allow the Defendant Thompson to appear and testify in front of the grand jury. Mr.  
13 Oreskovich informed the DOJ that he "exclusively" represented Carl Thompson and  
14 he did not, notwithstanding any City resolution to the contrary, represent "the City,"  
15 the Police Department and/or any other SPD administrators or officers. *See AUSA*  
16 *Durkin's Proffer*. Mr. Oreskovich further indicated that he and only he would be  
17 representing Mr. Thompson's "criminal" and "civil" interests in the Otto Zehm  
18 incident. *Id.*

19           63. Mr. Oreskovich also disclosed to Special Agent Jangaard and AUSA  
20 Durkin that the City Attorney's Office had already retained a number of defense  
21 experts in connection with its defense of the likely Zehm civil rights lawsuit,  
22 including defensive tactics and police procedures expert D.B. Van Blaricom (a  
23 former Bellevue PD Chief (retired in approx. 1992) and who the City Attorney's  
24 Office has frequently retained to assist it in the defense of civil rights/torts claims-  
25 suits against the Spokane PD). Mr. Oreskovich further disclosed that it was  
26 represented to him by the City Attorney's Office that the defense experts retained  
27 and paid for by the City would be made available to help criminally defend Mr.

1 Thompson in the event any indictment was returned by the Grand Jury. *Id.*

2 64. On **March 14, 2009**, the Plaintiffs herein filed the present action  
3 seeking damages for civil rights violations, wrongful death, and state tort law claims.  
4 *See Dckt. #1.*

5 65. **From October 2008 through June 2009**, it became apparent to the  
6 DOJ that Asst. City Attorney Rocky Treppiedi was briefing and preparing most of  
7 the Spokane Police Department and/or the City of Spokane witnesses called to  
8 testify before the Grand Jury. It was also learned that Mr. Treppiedi had debriefed  
9 witnesses that appeared before the grand jury. *See AUSA Durkin's Proffer.*

10 66. In addition, the DOJ learned that Asst. City Attorney Treppiedi was  
11 conducting an "investigation" that appeared to actually "shadow" the investigative  
12 activities of the Grand Jury. For instance, in addition to preparing and/or debriefing  
13 the majority of SPD witnesses, Mr. Treppiedi also conducted post-GJ testimony  
14 interviews of one or more non-SPD witnesses that recently appeared before the  
15 Grand Jury. *Id.*

16 67. The DOJ learned, in March 2009, based on conversations and  
17 exchanges of correspondence with Mr. Treppiedi and Mr. Oreskovich, that  
18 notwithstanding Mr. Oreskovich's earlier statement that "he and he alone"  
19 represented Mr. Thompson's criminal and civil interests, that Mr. Treppiedi was  
20 asserting, notwithstanding the retention of private counsel (Mr. Oreskovich) at  
21 public expense, that he and the City Attorney's Office were continuing to represent  
22 Mr. Thompson's "interests" arising out of Thompson's use of force on Otto Zehm.  
23 Attached here with as **Exhibit #6** is a true and correct copy of Mr. Oreskovich's  
24 **February 18, 2009**, letter advising that notwithstanding our prior conversations that  
25 Asst. City Attorney Treppiedi and the City Attorney's Office were continuing to  
26 represent Karl Thompson's interests in the Zehm incident.

27 68. On or about **May 26, 2009**, the Spokane City Council, presumably

1 based on a resolution and recommendation by the City Attorney's Office, authorizes  
2 \$200,000 in "civil" defense fees and costs for Mr. Oreskovich for his representation  
3 and defense of "the City of Spokane" in the Zehm civil suit. *See Spokesman Review*  
4 *article of May 27, 2009 (www.spokesman.com/stories/2009/may/27/city-approves-*  
5 *200000-for-defense-in-zehm-case/).*

6 69. In the **spring of 2009**, the United States learned that Asst. City Attorney  
7 Rocky Treppiedi contacted and attempted to interview one of the DOJ's expert  
8 witnesses and consultants in its continuing investigation. Upon learning of Mr.  
9 Treppiedi's contact with Robert Bragg, a defensive tactics expert and program  
10 director of the Washington State Criminal Justice Training Commission's defensive  
11 tactics program, AUSA Tim Durkin contacted Mr. Treppiedi and requested that he  
12 cease and desist all further contact with the DOJ's expert. Mr. Treppiedi refused this  
13 request and expressed a belief that while Mr. Bragg had no involvement in the  
14 Defendant Thompson's and/or the SPD's detention of Zehm on the night of March  
15 18, 2006, that he felt that Mr. Bragg was nonetheless a "fact witness" that he could  
16 directly contacted and interviewed. *See AUSA Durkin's Proffer and Exhibit #7.*

17 70. On **June 12, 2009**, Mr. Durkin sent Mr. Treppiedi an e-mail outlining  
18 the DOJ's objection to his attempt to use the civil case and civil discovery processes  
19 as an attempt to engage in ex parte contact with another party's expert wherein  
20 privileged and/or confidential criminal case investigation information could be  
21 obtained. City Attorney Howard Delaney responded indicating that the City would  
22 temporarily stay further attempts to engage in ex parte contact with the United  
23 States' expert witness until a further review of the issue was performed. Attached  
24 herewith as **Exhibit #7** is a true and correct copy of the June 12th e-mail exchange  
25 with Mr. Treppiedi concerning ex parte interviews with the United States' expert.

26 71. During the course of the United States and Grand Jury's investigation,  
27 the United States expressed concerns to Mr. Treppiedi and City Attorney Delaney

1 about what it believed to be “obvious” and “apparent “conflicts relative to Mr.  
2 Treppiedi’s and the City Attorney Office’s “global representation” of “the SPD and  
3 all SPD employees” connected to the Otto Zehm incident, and specifically the City  
4 Attorney’s offices continued representation of the target Karl Thompson.<sup>1</sup> *Id.*

5 72. Mr. Treppiedi and the City Attorney’s Office responded that it did not  
6 feel that it had “any” conflicts of interest in and/or among its representation of the  
7 City of Spokane, the Police Department, Chief Kirkpatrick, Asst. Chief Nicks, Karl  
8 Thompson, Steven Braun, Zach Dahle, Erin Raleigh, Dan Torok, Ron Voeller, Jason  
9 Uberuaga, Theresa Ferguson, Mark Burbridge, and/or any other SPD employee. *Id.*

10 73. On **June 15, 2009**, AUSA Durkin sent an e-mail to Mr. Treppiedi and  
11 City Attorney Howard Delaney, among others, memorializing the United States’  
12 Department of Justice’s concerns with the City Attorney’s Office’s actual and/or  
13 apparent conflicts of interest in claiming “global representation” of all SPD  
14 employees relative to the DOJ’s investigation and excessive force claims. *See*  
15 *attached **Exhibit #8**, a true and correct copy of Mr. Durkin’s June 15, 2009 e-mail*  
16 *outlining “conflicts concerns” with the “global scope” of the City Attorney’s*  
17 *representation of the target and other SPD employees involved in the DOJ’s*  
18 *investigation of the Zehm matter.*

19 74. The DOJ further learned that Mr. Treppiedi, given his and the City  
20 Attorney’s Office’s continued representation (at public expense) of the target of the  
21 United States Department of Justice’s criminal civil rights investigation, was

---

22  
23 <sup>1</sup> The target of the investigation, Karl J. Thompson, Jr., was first notified by  
24 former Asst. Chief Oldenthal in July of 2006 that he was the target and/or subject of the  
25 DOJ’s investigation. Mr. Thompson was provided with an official target letter and  
26 notified of an opportunity to appear in front of the grand jury in November 2009. Mr.  
27 Thompson, through his counsel, Mr. Oreskovich declined this invitation.

1 providing traditionally confidential grand jury information (including debriefed  
2 testimony) to Mr. Thompson and his criminal (and Treppiedi's co-civil) defense  
3 counsel Carl Oreskovich. This circumstance was disconcerting since Mr.  
4 Treppiedi's primary client, Chief Kirkpatrick, had voluntarily issued a "gag order" to  
5 SPD employees that was intended to maintain the confidentiality and integrity of the  
6 DOJ's investigation, and to prevent the dissemination of DOJ investigation activities  
7 to the target of the United States investigation (i.e., the Defendant Thompson). *See*  
8 *AUSA Durkin's Proffer and attached Exhibit #9*.

9 75. Mr. Treppiedi was aware of his client's gag order, but claimed that  
10 since he was not an SPD employee that he was not bound by the gag order and/or by  
11 Chief Kirkpatrick's intentions to maintain the confidentiality of the DOJ's/Grand  
12 Jury's investigation. Further, Mr. Treppiedi asserted that since he continued to  
13 represent the criminal target Mr. Thompson that he felt he had an ethical obligation  
14 to provide any and all information that he acquired to Mr. Thompson and/or to Mr.  
15 Thompson's private counsel. Attached as **Exhibit #9**, a true and correct copy of  
16 Mr. Durkin's **June 17, 2009**, e-mail to City Attorney Howard Delaney and Asst.  
17 City Attorney Treppiedi expressing the DOJ's objections and concerns with the City  
18 Attorney's Office providing traditionally confidential grand jury investigation  
19 information to the target of the federal criminal investigation. *Id.*

20 76. On information and belief, and based on a survey of the Criminal  
21 Chiefs and other career AUSA's in the U.S. Attorney's Office who have been  
22 conducting grand jury investigations and criminal prosecutions during the past  
23 approximate 30 years, this is the first time that the target of a federal criminal and  
24 grand jury investigation has been provided seemingly direct access to and direct  
25 information about traditionally confidential grand jury proceedings. *See AUSA*  
26 *Durkin's Proffer*.

27 77. On **June 18, 2009**, Asst. City Attorney Treppiedi and Carl Oreskovich

1 filed a unified Answer and affirmative defenses in this civil action. The 56 page  
2 Answer, signed by Mr. Treppiedi and Mr. Oreskovich on behalf of the Defendant  
3 Thompson (and others) alleges that the Plaintiff Otto Zehm (a mentally disabled  
4 janitor with cognitive delay) threatened Defendant Thompson with a plastic pop  
5 bottle and therefore was solely responsible for causing: Officer Thompson's use of  
6 an impact weapon to strike Mr. Zehm multiple times and taser him; the need to  
7 forcibly subdue him in a prone hog tie restraint; and his proximally related brain  
8 death. *See Zehm v. Thompson, City of Spokane, et al, Dckt. # 12.*

9 78. One day later, on **June 19, 2009**, the Grand Jury for the Eastern District  
10 of Washington returned a Two Count Indictment against Defendant Thompson  
11 charging him with criminal violations of Mr. Zehm's constitutional rights (i.e.,  
12 excessive force) and with obstruction of justice by providing a false statement in  
13 order to justify his excessive force on the victim Zehm. *See U.S. v. Thompson,*  
14 *Cause 09-cr-0088-FVS, Dckt #1.*

15 79. On **August 31, 2009**, a Pre-trial Conference was held in front of the  
16 Honorable Fred Van Sickle, at which time the Court addressed three motions by the  
17 Defendant Thompson. First was a motion to continue the trial date, which the Court  
18 granted and set a trial date of February 8, 2010 (scheduled for four weeks). The  
19 second motion was for a Bill of Particulars on Count Two of the Indictment charging  
20 the Defendant with obstruction of justice (i.e., false statement(s) in an investigation  
21 record (e.g., Defendant Thompson's recorded statement of March 22, 2006). The  
22 Court denied this motion. *See Dckt #47, U.S. v. Thompson, Cause 09-cr-0088-FVS.*

23 80. Defendant's third motion was for criminal case discovery. As outlined  
24 herein, the United States has disclosed a substantial amount of criminal case  
25 investigation materials to Defendant Thompson and his criminal counsel Mr.  
26 Oreskovich. The Court granted in part Defendant's discovery requests which the  
27 United States previously agreed that it would disclose. However, the Court did not

1 grant Defendant's discovery requests that were outside the scope of Rule 16 or the  
2 United States' agreed disclosures. *Id.*

3 81. On **August 19, 2009**, the Defendant Thompson filed a motion in the  
4 civil action seeking to stay of all of Zehm Plaintiffs' discovery demands. However,  
5 Defendant Thompson's motion is unilateral in scope and only seeks to prevent the  
6 Plaintiffs' from using civil discovery processes against Mr. Thompson. Defendant's  
7 motion seek any restriction or limitation on Mr. Thompson's and presumably "all"  
8 of his attorneys' use of the liberal civil discovery processes against the Plaintiffs and  
9 conceivably the United States, its investigative agents, criminal case witnesses, and  
10 experts *See Dckt #19-21, Zehm Estate v. Thompson, et al., Cause 09-cv-0080-LRS.*

11 82. In fact, during the course of Mr. Oreskovich's, Mr. Finer's and AUSA  
12 Tim Durkin's conference last week to address the discoverability of the criminal  
13 case materials the United States has provided to the Defendant, Mr. Oreskovich  
14 informed the United States of his intention to try to have available the full cadre of  
15 liberal civil discovery processes to defend Mr. Thompson on the Plaintiffs' and  
16 conceivably the United States' claims of excessive force.

17 83. Based on assertions and arguments made by Asst. City Attorney  
18 Treppiedi at the time of the party's September 10, 2009, conference call, and based  
19 on the foregoing history of interaction between Asst. City Atty. Treppiedi and the  
20 DOJ, the United States fully expects Mr. Treppiedi and the City Attorney's Office  
21 will also make full use of the liberal civil discovery processes to try to defend  
22 Officer Karl Thompson, who is the City's principal "civil liability client," and the  
23 other named Defendants as well.

24 84. In contrast, during the past three (3) years, the Zehm family attorneys  
25 have provided the City Attorney's Office with access to witnesses, employers, and  
26 health care providers. Understandably, Messrs. Finer and Beggs also want to utilize  
27 the liberal discovery processes to obtain information and evidence that will help their

1 clients' excessive force, wrongful death and other tort claims. However, they have  
2 not as yet interfered in any way with the United States DOJ's or Grand Jury's  
3 investigation and have not attempted to contact DOJ experts or other criminal case  
4 witnesses under the guise of "pre-trial civil discovery."

5  
6 **C. The 911 Call Initiating "Suspicious Person" or "Circumstance"**  
7 **Complaint.**

8 The United States submits that in order for the Court to fully appreciate the factual  
9 as well as legal landscape in this case that a relatively modest recital of the incident and  
10 Mr. Thompson's allegedly false statement may be of assistance.

11 85. At approximately **6:12 p.m. on Saturday, March 18, 2006**, two young  
12 ladies (18 years-old) called 911 to report that they were scared by a person that they  
13 generally described as a street person who was possibly "high" and who was  
14 engaging in bizarre behavior while they were attempting to complete an ATM  
15 transaction at Washington Trust Bank's drive through location on North Ruby Ave.  
16 in Spokane The "suspicious person" described was Otto Zehm, a 36 year old male  
17 with cognitive and psychological disabilities, but who had been actively employed  
18 as a janitor with a local cleaning company that employed functional disabled  
19 individuals. *See SPD & MCU investigation file and records, Disc. #1.*

20 86. The young ladies reported to 911 that they believed they terminated the  
21 ATM transaction but were concerned that since they had hurriedly left the ATM in  
22 their car, and since Mr. Zehm was still "messaging with the ATM," that he may have  
23 taken some money from one of the girl's ATM accessed account. After reportedly  
24 spending several minutes "messaging with" the ATM, Mr. Zehm left the machine  
25 location on foot and the alleged victims followed him in their car while continuing to  
26 talk with the 911 operator, who ultimately transferred their call to SPD's Radio  
27

1 Dispatch Unit. The young ladies reported to the 911 operator that Mr. Zehm  
2 attempted to elude the women, first running from them and then yelling at them.  
3 Notwithstanding, the women continued to follow Mr. Zehm as he took a circuitous  
4 route from the bank to the Zip Trip convenience store located at 1714 N. Division..  
5 *See SPD & MCU investigation file and record, Disc #1.*

6 87. In response to the 911 “suspicious circumstance” call, the SPD Radio  
7 Dispatch Unit dispatched two patrol cars to investigate. The first officer dispatched  
8 was SPD Patrol Officer Steven Braun. The second officer dispatched to assist  
9 Officer Braun was fellow Patrol Officer Tim Moses. Meanwhile, Officer Thompson  
10 was on an evening lunch break at a SPD substation, which is located less than a mile  
11 away from the Zip Trip store. Officer Thompson reportedly heard the dispatched  
12 call to Officers Braun and Moses on his radio while at the station and decided to  
13 respond himself. Officer Thompson was aware that the two other officers were  
14 actively responding, but he was the first officer to arrive at the Zip Trip store. *See*  
15 *SPD & MCU investigation file and records, Disc #1*

16 88. Officer Thompson, who was not running code (i.e., no lights and siren  
17 activated) observed Mr. Zehm casually walk into the convenience store as he was  
18 pulling his patrol car into the parking lot. After observing Mr. Zehm walk into the  
19 store, Officer Thompson observed Mr. Zehm continue to walk to the southwest  
20 corner of the store where a 2-liter pop display was located. Also at the end of the  
21 merchandise aisle in this vicinity is a large candy display. *See SPD & MCU*  
22 *investigation file and records. Disc #1.*

23 89. Officer Thompson quickly stopped his patrol car in a perpendicular  
24 position to the gas pumps across from the store’s north entrance. He grabbed his  
25 straight baton, quickly exited his vehicle, leaving his car running and his car door  
26 open, and hurriedly entered the store. After entering, Officer Thompson switched  
27

1 his baton from his left hand to his dominant right hand and raised the baton into a  
2 “loaded” or ready strike position as he quickly advanced on Zehm, who still had his  
3 back to the officer, and who appears not to have realized that Officer Thompson was  
4 rapidly approaching him. *See SPD & MCU investigation file and records, Disc #1.*

5 90. Approximately 2.5 seconds after Mr. Zehm first turned to look to his  
6 left and noticed the on-rushing Officer Thompson, and while Mr. Zehm was  
7 continuing to retreat away from the rapidly advancing officer, Officer Thompson  
8 delivered the first of at least 13 baton strikes to Mr. Zehm’s body. *See Zip Trip*  
9 *security video and stills, and SPD & MCU investigation file and record, Disc. #16-*  
10 *19.*

11  
12 **D. Defendant Thompson’s Account of Force Events of March 18, 2006.**

13 91. A detailed summary and analysis of Defendant Thompson’s account of  
14 what he claims precipitated his use of force on Otto Zehm is set forth in the United  
15 States Response to Motion for Bill of Particulars and Memo in Opposition to  
16 Defendant’s (Criminal) Discovery Demand. *See Dckt. # 40 and 41, U.S. v.*  
17 *Thompson, Cause No. 09-cr-0088-FVS, courtesy copies of which are attached hereto*  
18 *as Exhibits#11 and 12.*

19  
20 **E. Circumstances of Thompson’s March 22, 2006, Statement.**

21 92. On **March 22, 2007**, SPD – MCU Det. Terry (Boardman) Ferguson met  
22 with Defendant Thompson at the Spokane Police Department’s conference room as  
23 part of the MCU’s investigation into Officer Thompson’s detention and seizure (i.e.,  
24 use of force) of Otto Zehm, Mr. Zehm’s in-custody death, and Mr. Zehm’s alleged  
25 assault of Officers Thompson and Braun. Also present for the meeting, which  
26 consisted of a “pre-interview” and a subsequent “recorded interview” was Spokane  
27

1 County Sheriff's Office (SCSO) Detective Bill Francis. SCSO Det. Francis was  
2 present in the role of a "shadow investigator" to the lead investigator Det. Ferguson.<sup>1</sup>

3 93. Present with Officer Thompson was Seattle attorney Hillary McClure of  
4 the Seattle labor law firm of Aitchison & Vick, Inc. ("Vick law firm"). The Vick  
5 law firm historically has represented the Spokane Police Guild and its individual  
6 members in labor, employment and disciplinary matters with the City of Spokane  
7 and the SPD's administrators. In addition to Ms. McClure, the Guild's Vice  
8 President, Jeff Harvey, a fellow SPD Officer, was in attendance for both the preview  
9 interview and the second, formal recorded interview.

10 94. Under the Critical Incident Protocol and the City's collective bargaining  
11

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12 <sup>1</sup> In 2006, the Spokane Police Department (SPD) was a signatory to a 2003 interlocal  
13 interlocal agreement between "Spokane, Kootenai and Surrounding Counties" law  
14 enforcement agencies (14 eastern Washington and northern Idaho agencies). This  
15 agreement set forth "A Protocol To Investigate Officer-involved Fatal Incidents" among  
16 the signing agencies. In all presently known pre-2006 critical incidents involving SPD  
17 personnel, the SPD decided, both as the "venue" and "employing" agency, to be the lead  
18 investigative agency in all "critical incidents" involving its own officers. Based on  
19 information and belief, the SPD is the only signatory to the 1994 and 2003 critical  
20 incident protocols that did not allow outside agencies to serve as lead investigators in  
21 cases involving SPD officers.

22 The protocol provides, however, that criminal investigations into officer involved fatal  
23 incidents will be ". . . be performed in a manner that provides both the appearance and  
24 the reality of a thorough, fair, complete and professional investigation, free of conflicts  
25 of interest." See Section III.A.4 of Inland Empire Law Enforcement Liaison Group's  
26 2003 "Officer-Involved Fatal Incidents" protocol. Officers from other agencies assisting  
27 the SPD are commonly referred to as "shadow investigators." New SPD Chief Anne  
Kirkpatrick (appointed in September 2006) implemented changes to where the SPD is  
now the "shadow" investigative agency.

1 agreement (CBA) with the Guild, Officer Thompson apparently could not to be  
2 substantively interviewed about his “critical incident” (i.e., the use of force on Otto  
3 Zehm during the early evening of March 18, 2006) for 72 hours following the  
4 incident. Consequently, Det. Ferguson made arrangements with Officer Thompson  
5 and his Guild representative(s) to perform an interview the morning of Wednesday,  
6 March 22, 2004, approximately 88 hours after the subject incident.

7 95. As indicated, Officer Thompson did not prepare a written report, rather  
8 he and Braun participated in “voluntary” (i.e., non-*Garrity*) recorded interviews with  
9 Major Crimes Detective Terry Ferguson.<sup>11\*</sup>

---

11  
12 <sup>1</sup>  
13 \*Ferguson previously investigated Thompson in a shooting incident in August of  
14 2004 and exonerated him of wrongdoing. On August 7, 2004, Thompson and other SPD  
15 officers responded to a family dispute involving an attempted assault with a deadly weapon  
16 (handgun) by an intoxicated man named Chris Felch. Felch left the scene in a truck before  
17 officers arrived. Thompson saw Felch and used a slow speed maneuver to disable Felch’s  
18 truck after a short pursuit.

19 Although another SPD officer had reached through the driver side window and  
20 pressed a gun against Felch’s head, Thompson fired five rounds at Felch from the front of  
21 his truck. Thompson claims he fired because Felch failed to comply with directions to  
22 show his hands and appeared to reach toward the passenger side of the truck to retrieve a  
23 weapon. Felch was reportedly shot 3 times in upper torso-arm and was taken into custody  
24 for 1st Degree Assault, and was transported to the hospital. Based on her SPD  
25 investigative reports, State prosecutors concurred with Ferguson’s recommendation not to  
26 pursue charges against Thompson. Neither Det. Ferguson nor the MCU made an official  
27 case referral for criminal charges to the Prosecutor against Felch on two alleged 1st Degree  
assaults on family members (i.e., fired handgun, which jammed, at family members).

1 96. The parties met at the SPD Office at approximately 10:30 a.m. on  
2 March 22, 2004, and engaged in a preliminary interview that reportedly lasted  
3 slightly over two hours. In this preliminary, unrecorded first interview, Detective  
4 Ferguson covered questions and areas of inquiry that were to be covered again in the  
5 subsequent (second) recorded interview. MCU Det. Ferguson's first, unrecorded  
6 interview of Officer Thompson began at approximately 10:33 a.m. and reportedly  
7 ended shortly after 12:30 p.m. The parties reportedly took a lunch break after the  
8 preliminary interview and returned at approximately 1:30 p.m. to begin the second,  
9 official and formally recorded interview. The second, official recorded interview  
10 began at approximately 1:34 p.m. and was concluded at approximately 3:27 p.m.  
11 The same foregoing individuals attended both the preparatory interview as well as  
12 the second, official recorded interview. *See Exhibit #1.*

13 97. On **March 27, 2006**, Defendant Thompson contacted Det. Ferguson to  
14 review the now transcribed transcript of his officially recorded interview. Officer  
15 Thompson reviewed the transcript record for substantive accuracy as well as  
16 typographical errors. During this review, Defendant Thompson provided Det.  
17 Ferguson additional, clarifying information and made a minor revision to the  
18 transcript. Defendant Thompson then signed the official SPD investigative  
19 (statement) record, thereby representing that the statements therein and the record  
20 itself was a truthful and accurate account of the events of March 18, 2009. *See*  
21 ***Exhibit #1.***

22  
23 **F. Summary of Defendant Thompson's Recorded 03/22/06 Statement.**

24 98. The following is derived from *Exhibits #11, 12 and 10*, and is summarized  
25 below for the Court's benefit. In sum, Officer Thompson claimed (among other things)  
26 during his recorded investigative interview that:  
27

- 1 i) He twice issued verbal instructions instructing Zehm to drop the pop
- 2 bottle during the Defendant's initial contact with the Defendant;
- 3 ii) Zehm defiantly told him "no;"
- 4 iii) Zehm gave him a look of defiance and positioned the plastic pop bottle
- 5 in a threatening position, as if ready to charge the officer, thereby prompting
- 6 Officer Thompson's preemptive baton strike;
- 7 iv) The first baton strike was a horizontal blow to Zehm's left upper thigh;
- 8 v) The second baton strike was a horizontal blow to Zehm's upper right
- 9 thigh;
- 10 vi) Zehm continued to use the plastic pop bottle in a threatening manner
- 11 and refused to drop it while Zehm was on the ground, prompting the officer to
- 12 use the taser;
- 13 vii) Zehm threw punches at the officer while Zehm was on the ground; and
- 14 viii) After being tasered, Zehm stood up and took a boxing stance, and threw
- 15 more punches at the officer, thereby assaulting him before Officer Braun
- 16 arrived.

16 *Exhibit #1, id.*

17 99. Officer Thompson further denied using deadly force (i.e., denied baton  
18 strikes to the head-neck area) during the encounter and admitted that strikes above  
19 the shoulders are considered deadly force. Officer Thompson agreed that the use of  
20 deadly force was not warranted nor justified given the nature of the call and  
21 circumstances. *Id.*

22 100. The Defendant has not sought nor requested to make any changes  
23 and/or revisions to this official SPD investigative record since he signed it on March  
24 27, 2006. *Id.*

25 **G. Percipient Witnesses' & Store's Security Video Version.**

26 101. For more detailed discussion and summary of civilian witnesses'  
27

1 accounts and security video footage in comparison to Thompson's account, the  
2 United States directs the Court to incorporate *Exhibits #10, 11 and 12*.

3 102. In short, these summaries provide that several patrons in the store  
4 described Officer Thompson's first blow and/or a number of later blows to have  
5 struck Mr. Zehm in the head, neck and upper torso. Witnesses for the most part  
6 described Mr. Zehm as continuously retreating from the advancing officer.  
7 Witnesses also described Officer Thompson's attack on Mr. Zehm as "immediate."  
8 *See SPD & MCU investigation file and records, Disc #1; Disc #55 (FBI 302*  
9 *reports).*

10 103. The store's security video shows Zehm continuously backing away  
11 (retreating) from as he faces the continuously advancing Officer Thompson during  
12 his initial attack (i.e., the first two vertical baton strikes that caused Zehm to  
13 immediately go to the ground). The video also shows that Officer Thompson does  
14 not go to the ground on top of Zehm, but rather remains standing, baton in hand,  
15 straddling the fallen Zehm. *Id.* Zehm is shown in camera #4 holding the two (2)  
16 liter plastic Diet Pepsi bottle above his head-face in an apparent defensive position  
17 while Officer Thompson continues, baton in hand, to stand over Mr. Zehm in front  
18 of the clerk's kiosk. The video does not show Mr. Zehm punching at Officer  
19 Thompson. *Id.* Zehm attempts to crawl away from Thompson after he is tased, but  
20 Thompson continues his attack, standing above Zehm, and delivering vertical baton  
21 strikes to Zehm as he is attempting to crawl away. In short, Officer Thompson's  
22 recorded interview account is contradicted by the percipient witnesses and by the  
23 convenience store's security video. Forensic medical evidence also supports the  
24 conclusion that Mr. Zehm sustained blunt force trauma, consistent with a baton  
25 strike, to his head. *See Autopsy and AUSA Durkin's attached Proffer.*  
26  
27

1  
2 **H. Defendant Thompson's Charged False "Entry" Under 18 U.S.C. 1519.**

3 104. When the Defendant Thompson signed his transcript on March 27,  
4 2006, SPD-MCU investigators already had in their possession several witness  
5 accounts and other materials that significantly contradicted Officer Thompson's  
6 initial and subsequent versions of his engagement of Mr. Zehm. *See Disc #1 and*  
7 *#55.* During the course of the MCU's investigation it acquired additional  
8 information and materials that further contradicted Thompson's transcribed  
9 statement.

10 105. These contradictions included, but were not limited to Officer  
11 Thompson's description of:

- 12 i) His initial engagement of Mr. Zehm (i.e., Thompson's failure to stop, as  
13 he claimed, at a distance of four (4) feet to facially address Mr. Zehm and  
14 issue verbal commands);
- 15 ii) The nature and extent of the "verbal commands" claimed to have been  
16 issued (i.e., Officer Thompson claims to have issued two direct, successive,  
17 loud verbal commands to Mr. Zehm, while in the alleged stopped, addressed  
18 and confrontational position);
- 19 iii) Mr. Zehm's alleged immediate, knowing, defiant and verbal response to  
20 Defendant's claimed verbal commands (i.e., Officer Thompson claimed that  
21 Zehm's responses to his loud, successive verbal commands were "immediate,"  
22 knowing, defiant, and aggressive (among other descriptions));
- 23 iv) The amount of time Defendant allegedly afforded Mr. Zehm to  
24 perceive, understand, react and comply with the claimed verbal commands  
25 (i.e., Officer Thompson's first baton strike is within approximately 2.5  
26 seconds of first contacting Mr. Zehm);
- 27 v) Mr. Zehm's asserted knowing and intentionally defiant, aggressive, and  
non-retreating "about to be assaultive" physical stance with the plastic two  
liter bottle of Diet Pepsi, which actions Officer Thompson claims to have been  
taken by Zehm in response to his claimed verbal commands (i.e., Zehm, upon

1 alerting to the continuously advancing Officer Thompson, never took a fixed  
2 position of defiance and/or aggress, and records/video only show Zehm  
retreating from the Defendant Officer); and

3 vi) The impact location of the baton strikes (i.e., criminal discovery shows  
4 several of Defendant Officer Thompson's strikes were to Zehm's head, neck  
5 and upper torso, in addition to lower torso and extremities Defendant claimed  
6 he struck).

7 *See Disc. #1 and #55, and AUSA Durkin's Proffer.*

8 106. Defendant and all of his counsel are also in possession of evidence  
9 showing that Mr. Zehm suffered blunt force trauma to his head during Officer  
10 Thompson's "detention and seizure" of Mr. Zehm for "questioning" related to the  
11 "suspicious circumstance" call and the possible theft at a nearby ATM. *See autopsy,*  
12 *Disc #12.*

