

JAMES S. CRAVEN
CITY ATTORNEY

ASSISTANTS:
ROBERT G. BEAUMIER, JR.
BARBARA A. BURNS
PAT J. DALTON
SALVATORE J. FAGGIANO
ELLEN O'HARA
MICHAEL J. PICCOLO
JAMES A. RICHMAN
MILTON G. ROWLAND
TIMOTHY E. SZAMBELAN
ROCKY N. TREPIEDI



OFFICE OF THE CITY ATTORNEY
808 W. SPOKANE FALLS BLVD.
SPOKANE, WASHINGTON 99201-3326
(509) 625-6225
FAX (509) 625-6277

June 21, 2006

Terri Sloyer
John Sklut
Center for Justice
Community Building
35 W. Main Ave., Suite 300
Spokane, WA 99201

Re: Your Client Estate of Otto Zehm;
Your letter dated June 7, 2006.

Dear Counsel:

I have reviewed your letter of June 7, 2006. I apologize for the length of time it has taken me to respond; I simply have too many irons in the fire. (Things may slow down a little after July 3rd when the new Risk Manager begins.)

Your letter seeks an apology to the family. At the outset, let me emphasize once again as various City representatives such as Chief Nicks and Deputy Chief Odenthal, myself, and the investigating officers have personally stated to you and/or Mrs. Zehm - that the City and all those involved express their sympathy to the family for the loss of Otto Zehm's life. Mr. Zehm was apparently well liked by his family, friends, co-workers and neighbors. His death was tragic. I trust you know that the expressions of sympathy have been sincere. Additionally, we have been respectful of Mrs. Zehm's desire to avoid public discussion of the March 18, 2006 incident and his subsequent death, just as we believe you understand we cannot control requests from the media to discuss certain issues and developments. We are willing to meet with you and your client under appropriate circumstances.

Your letter takes issue with Chief Nicks and the City for discussing facts which you believe are not borne out by the investigation, the video from the Zip Trip, and the Medical Examiner's report. We wholeheartedly disagree for the following reasons.

Based on my initial review of the events of March 18, 2006, I believe that each of the responding officers utilized lawful tactics throughout the event and utilized good judgment based on the totality of the circumstances which confronted them. When reviewing the actions of a police officer under the law, the law requires the scrutiny to be taken from the perspective of the involved officer. Neither judges, nor juries, nor litigants, nor anyone else can substitute their own judgment for that of the involved officer under the law. I think the most straight-forward pronouncement and analysis of this point was made by the U. S. Supreme Court in the landmark decision *Graham v. Connor*, 490 U.S. 386 (1989), in which the court established the standard for reviewing the use of force by police officers.

Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right "to be secure in their persons ... against unreasonable ... seizures" of the person. This much is clear from our decision in *Tennessee v. Garner*, *supra*. ... Today we make explicit what was implicit in *Garner*'s analysis, **and hold that all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard**, rather than under a "substantive due process" approach. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims. ...

Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of "the nature and quality of the intrusion on the individual's Fourth Amendment interests" against the countervailing governmental interests at stake. ... **Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.** See *Terry v. Ohio*, 392 U.S., at 22-27, 88 S.Ct., at 1880-1883. Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," *Bell v. Wolfish*, 441 U.S. 520, 559, 99

S.Ct. 1861, 1884, 60 L.Ed.2d 447 (1979), however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. See *Tennessee v. Garner*, 471 U.S., at 8-9, 105 S.Ct., at 1699-1700 (the question is "whether the totality of the circumstances justify[es] a particular sort of seizure").

The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. See *Terry v. Ohio, supra*, 392 U.S., at 20-22, 88 S.Ct., at 1879-1881. The Fourth Amendment is not violated by an arrest ... With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," *Johnson v. Glick*, 481 F.2d, at 1033, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation.

Graham v. Connor, 490 U.S. at 394-398; emphasis added.

I believe the analysis in your letter runs contrary to the Supreme Court's decision. By that I mean you have attempted to make a split second analysis, from your perspective - not the officer's - and have focused "... with the 20/20 vision of hindsight." Your analysis does not "... embody allowance for split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation." While I appreciate your advocacy on behalf of the Zehm family, it appears that the analysis is nevertheless precisely the kind of hyper-critical attempt to second-guess and over analyze a tense, uncertain and rapidly evolving situation.

The law reviews the officers' actions from an objective standard. It appears your analysis takes a subjective view, and is based almost entirely on the Zip Trip video, which utterly fails to take into account: (a) the totality of the circumstances known by Officer Thompson at the time he entered the store

(i.e., 9-1-1 call and radio and CAD transmissions regarding an apparent theft/attempted theft at the ATM machine and the easily identifiable suspect appearing to be "high"); (b) Officer Thompson's training and experience; (c) Officer Thompson's direct observations of Mr. Zehm; and (d) the statements of others, such as the store clerk, who heard Officer Thompson yell commands to Mr. Zehm, and heard and observed Mr. Zehm's refusal to comply. Your analysis also leaves Mr. Zehm's actions out of the calculus. While we have all heard about Mr. Zehm's normally pleasant personality, at the time Officer Thompson dealt with him he was non-compliant and physically combative. The descriptions of how aggressive Mr. Zehm continued to be throughout the event are unequivocal and quite instructive. For example:

(1) Officer Braun reported that when he first arrived and saw Mr. Zehm and Officer Thompson on the floor, "... I told Zehm to stop fighting, stop resisting. I delivered 3 or 4 power jabs with my side handle baton to Zehm's left rib cage below his left arm. Uh, after I delivered those, it didn't appear they had any effect on Zehm. He didn't make any sound. He didn't make even any indication that he knew that I had even delivered power jabs to him with my side handle baton." Officer Braun described his next thoughts as "This is going to be a, a big fight. I mean this guy's fighting, I am a larger man and I used my side handle to deliver 3 or 4 power jabs and they had no effect. It's like he didn't even know I was there and I was thinking that this ... is gonna be a big fight." He further stated: "I should go back a little to when I first walked in. Um another one of the things I remembered thinking was that this guy was wanting to fight and not, he was trying to flee or try to get away. He was trying to fight and with that trying to injure somebody. And I, I that became very clear to me when he looked at me like he was getting a target and actually kicked me. I thought he was trying to hurt me."

(2) Paramedic Cappellano told the investigators that although the subject was restrained by police, he was putting up "a hell of a fight." He added, "I've never seen anyone fight that hard." He observed Mr. Zehm continue to spit and fight against the officers who were trying to control Zehm.

(3) Paramedic McMullen described Mr. Zehm to investigators as wildly thrashing around, and said in the medical field the term "combative" is used to describe such behavior. He described Mr. Zehm as screaming "like an animal." He stated that at the scene he did not see a mental patient. "He saw an out of control guy mad at cops for busting him for stealing from those girls."

(4) Paramedic Griffith told investigators that he did not ever recall seeing a guy that was restrained being so violent, especially after being tasered,

stating "They're usually compliant." He said that, due to Mr. Zehm's behavior, it was a good assessment to use an ambulance rather than a police vehicle because of the possibility of drugs being in his system, and/or the highly agitated state complicating the transport. He further stated that he later heard reports that Mr. Zehm had a mental health history, and that a picture in the paper showed him smiling and laughing, but that the subject "was scary that night."

(5) All of the backup officers consistently reported that Mr. Zehm continued his angry, aggressive activity while restrained. Officers were surprised when he actually stretched the restraining device. Mr. Zehm was not even compliant once restrained. Accordingly, the officers had to maintain the hobbling device. Officer Braun was so concerned about Mr. Zehm's strength and combativeness that he followed the ambulance to the hospital in case Mr. Zehm caused additional problems en route to or at the hospital.

The analysis in your letter fails to acknowledge the rapidity in which confrontations between citizens and officers – including this one – occur. You acknowledge that "2 seconds" before he was struck by Officer Thompson that Mr. Zehm had turned and noticed the officer. Much can occur during those 2 seconds, as well as the few seconds preceding it. Based on the statements of witnesses, including Officer Thompson, much did occur. Officer Thompson is an experienced, well trained officer. Based on everything he knew as he approached Mr. Zehm, he was prepared for the possibility that Mr. Zehm would be armed with a weapon and/or be assaultive. An officer is not required to be struck before he can use force. The split second within which the decision to use force – how much and how applied – is not captured by the Zip Trip video. In any event, 2 seconds is well beyond the reaction time of about $\frac{3}{4}$ second it takes to take physical action. The Zip Trip video does not contain audio, so any analysis based solely on the sketchy, bouncy video during which there are times when Mr. Zehm and Officer Thompson are not in view, is not definitive; analysis must include the totality of the circumstances, and cannot resort to freeze-frame analysis, as the *Graham* decision prohibits.

Mr. Zehm had a 2 liter bottle of soda in his hands when confronted by Officer Thompson, which the officer considered, based on training and experience and the totality of the circumstances, to be a potential weapon. (If you don't believe this, it can be readily demonstrated how a several pound item – such as the bottle – can be used to instantly put an officer on the defensive to avoid the missile and provide the suspect with the opportunity to reach for a concealed weapon or take other aggressive action.) The video does not have

sound, therefore the repeated commands from Officer Thompson to Mr. Zehm to "drop it" and Mr. Zehm's repeated responses, "No," are not depicted.

There are many other facts that go into the analysis of the use of force by Officer Thompson, including how and when he used his baton and Taser. In short, Chief Nicks will not, as you request, publicly retract what you characterize as "misrepresentations" because they are not misrepresentations. What you have characterized as misrepresentations appear to be your own subjective view of the video and facts. As you are aware, the City was prepared to release the video but we withheld release upon the Prosecutor's directive. When the tape is released, Chief Nicks will be happy to publicly describe what is depicted.

Your request to have the Chief acknowledge that Mr. Zehm was on his stomach "X" amount of time and on his side "y" amount of time cannot be done. Mr. Zehm's position cannot always be seen on the video, and he was struggling against the restraints virtually the entire time, regardless of whether he is on his side or stomach.

Similarly, your conclusion that, "[a]ccording to the autopsy report, this restraint [on his stomach] is what caused Mr. Zehm's death," is quite subjective and leaves out many parts of the Medical Examiner's findings. Mr. Zehm didn't die because he was restrained; he died because of a variety of facts - one of which is that he was restrained, one of which is that he was prone part of the time, and a major factor, that he was in a lengthy state of excited delirium. The Medical Examiner's report states in part:

CAUSE OF DEATH: In light of these circumstances, the death is attributed to hypoxic encephalopathy due to cardiopulmonary arrest while restrained (total appendage restraint) in a prone position for excited delirium.

If he had died while on his side, it might have read "on his side" (or some similar terms) instead of "in a prone position." The medical literature contains examples of both, plus cases where people are strapped and fully restrained on boards, on their backs, and in other positions. In fact, the full paragraph above the "Cause of Death" on page 5 is entitled "Prone Restraint." Nowhere within that paragraph is there any mention of any comparison between being restrained while prone versus on one's side. There is a reference to the research into the deaths of people who experience sudden death and cardiopulmonary arrest who were in states of excited delirium who were

restrained. The Medical Examiner described the research as "conflicting and somewhat controversial."

Two additional major factors must be considered as well. First, the officers were trained, and acted pursuant to their training, to monitor Mr. Zehm once he was fully restrained, regardless of whether he was on his back, stomach, or side. They not only monitored him – they had paramedics on scene and had them take immediate steps to provide medical aid to him once he stopped breathing. They did all they could, given his extraordinary efforts to fight against the officers and then against the restraints.

The second is Mr. Zehm's state of excited delirium. As previously described, he was very combative, and it took several officers to obtain and maintain control of him. He apparently had a very high tolerance for pain, since the baton strikes and jabs, and the Taser, seemingly had no effect on him. He struggled and fought against the restraining device virtually the entire time. He moved around even while restrained. The paramedics could not even take basic vitals due to his wildness, spitting, anger, etc. In short, there was no choice but to keep him in restraints. As previously stated, he was monitored and given immediate medical aid when he went into distress.

Further, the hyper-critical focus on the officers' actions leaves out another significant part of the story. Mr. Zehm had suffered for many years from a mental illness that has required treatment and medication. All information gathered to date – from family, coworkers and supervisors, and people who knew and liked him in the community – establishes the fact that Mr. Zehm had stopped taking his medications and had been acting strangely during the weeks before March 18th. His new pattern of behavior became a concern to those people, and his supervisors even tried to determine if he should be involuntarily hospitalized to get treatment. His bizarre behavior at the ATM and during his confrontation with police could probably have been avoided if he had continued his treatment for his mental illness. As previously mentioned, the friendly Otto Zehm people had become accustomed to was not the man who interrupted the women at the ATM, was non-compliant with Officer Thompson, and was combative throughout the events in the Zip Trip. The SPD has a well-developed protocol for working with mentally disturbed people, but here they were responding to a report of criminal activity, not merely a confused or ill individual. While the initial call to 9-1-1 was immediately characterized as a "suspicious person," that characterization was fleshed out with more detail by the complainants so that, by the time Officer Thompson encountered Mr. Zehm at the Zip Trip, it was either a theft or an

attempted theft/robbery of the women at the ATM. The last radio transmission before Officer Thompson entered the store was as follows:

Officer: Just to confirm, he took her money?

Radio Dispatcher: Affirm.

Officer Thompson: ... He's just walking into the Zip Trip.

Thus, the last radio communication Officer Thompson heard before going into the Zip Trip was that the suspect had taken the victim's money. (That was later clarified to say the women weren't sure if he actually got their money out of the ATM).

In sum, society puts police officers into places the rest of society runs from or ignores when people need help. The officers responded and, based on the totality of the circumstances they faced, did their best to obtain and maintain control of Mr. Zehm by using only that amount of force deemed reasonable and necessary at the time, under the circumstances. They were concerned with their own safety, the safety of everyone in the store, and Mr. Zehm's as well. Despite all the media attention about the use of batons and Tasers, when all is said and done the officers did not cause significant injury to Mr. Zehm during the frantic struggle to obtain and maintain control of him, despite his enormous strength and manic fight. His death, after being restrained during his lengthy episode of excited delirium, could not be prevented even with paramedics right there to immediately attend to him.

As I have previously discussed with you, the City does not believe it violated the Agreed Protective Order at the press conference on May 30, 2006.

Additionally, the brief portions of the Medical Examiner's report that were quoted at the conference did not violate Washington law. The quotes were consistent with what had already been released by the Medical Examiner earlier that day and that had already appeared in media reports on the internet and radio reports. The City did not release any confidential information about Mr. Zehm that would violate his or his family's right of privacy. The two paragraphs quoted in the press release describing the Medical Examiner's characterization of "homicide" were of particular relevance to the public, especially in light of unintentionally misleading media reports about the Medical Examiner's findings. The wording discusses the Medical Examiner's definition of "homicide," not Mr. Zehm. Under Washington law, a person's privacy is violated when disclosure of information about the person would be

highly offensive to a reasonable person, and is not of legitimate concern to the public. RCW 42.17.255. Here, no information that would be highly offensive to a reasonable person was disclosed, and the disclosed information was of legitimate interest to the public. You requested that the City remove the press release from its website; it was removed the morning after you requested (the individual who manages the website was gone for the day when first requested).

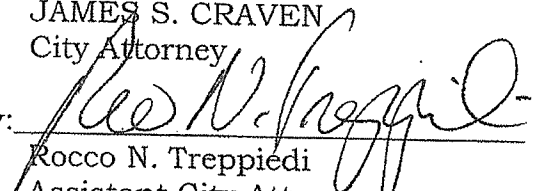
As we have previously discussed, since you obtained the "Zip Trip video" from a source other than the City, it is not covered by the terms of the Protective Order; the concern the City had about disclosure of the video was the Prosecutor's position based on the Rules of Professional Conduct.

Once again, my apologies for responding so late. If we can arrange to meet with your client under appropriate circumstances, Chief Nicks and other City representatives would be willing to meet with her.

Very truly yours,

JAMES S. CRAVEN
City Attorney

By:


Rocco N. Treppiedi
Assistant City Attorney

- c: Acting Chief James Nicks, Spokane Police Department
Deputy Chief Al Odenthal, Spokane Police Department
Deputy Chief Bruce Roberts, Spokane Police Department