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The Honorable FRED VAN SICKLE

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14 UNITED STATES DISTRICT COURT
15 EASTERN DISTRICT OF WASHINGTON

14	UNITED STATES,)	NO. 09-CR-0088-FVS
15	Plaintiffs,)	
16	vs.)	UNITED STATES’
17)	PROFFER RE: DEFENSE
18	KARL F. THOMPSON JR.,)	COUNSEL’S APPARENT
19)	CONFLICTS OF INTEREST (&
20	Defendants.)	OTHER PENDING MOTIONS)

21 Plaintiff United States of America, through James A. McDevitt, United States
22 Attorney (EDWA), and the undersigned counsel of the United States’ Department of
23 Justice (DOJ), submits the following Proffer in support of its Motion for Resolution
24 of Defense Counsel’s Apparent Conflicts of Interest. These apparent conflicts exist
25 due to defense counsel’s and his firm’s: 1) Pre-indictment retention as a special
26 assistant attorney to the City Attorney’s Office, whose clients’ interests and
27 testimony are and/or may be adverse to defendant; 2) Pre-indictment legal services to

1 “The City of Spokane,” which conceivably includes, but is not necessarily limited to:
2 the Mayor, City Council, SPD Chief Anne Kirkpatrick and Administrators, and/or
3 other individual or groups of SPD officers-employees, whose testimony and/or
4 interests are and/or may be adverse to defendant; 3) Continuing “co-counsel”
5 relationship with the City Attorney’s Office in jointly representing defendant, which
6 co-counsel also claims to represent “all current and former” police officers, and all
7 City employees who may have any interest arising out of defendant’s use of force on
8 Otto Zehm, and whose interests and/or testimony are and/or may be adverse to
9 defendant; and 4) Representation of defendant Thompson whose criminal (and/or
10 civil) interests are and/or may be in conflict with and adverse to co-counsel City
11 Attorney’s numerous representative clients (i.e., City Council, Mayor, Police Chief
12 and/or other SPD or City employees).

13 In light of what the United States believes to be obvious and apparent conflicts,
14 as well as other potential conflicts in defense counsel’s legal relationships with the
15 City and all of its “employees” that could materially affect defendant’s 6th
16 Amendment right to effective and “conflict free” representation at trial, and since
17 defense counsel has refused to address these apparent conflicts pretrial, the United
18 States respectfully requests this Court to perform an in-depth review of defense
19 counsel’s and his firm’s various legal roles and relationships, including but not
20 necessarily limited to: i) scope and nature of prior “City” representation and extent
21 of attorney-client relationships; ii) scope of present presentation of defendant and
22 scope of representation of “any other” City department and/or employees; iii) scope
23 and nature of relationship with “City Attorney co-counsel” and whether prior services
24 and/or joint representation has or may adversely affect defense counsel’s
25 representation of defendant at trial; iv) nature and extent of legal relationship with
26 City Attorney’s Office and his “co-counsel,” and conflicts that exist or may exist due
27

1 to co-counsel's representation of "City and all employees" ; and v) conflicts that exist
2 if defense counsel remains "co-counsel" with city attorneys, who further claim to
3 represent witnesses-clients whose testimony-interests the United States reasonably
4 believes are and/or may be adverse to defendant.

5 This Proffer is supported by the Federal Rules of Criminal Procedure, the
6 rules of evidence, the previously filed *Proffer* of Timothy M. Durkin, Assistant
7 United States Attorney with exhibits and records attached thereto (*See Dckt. #60*),
8 the United States' Memorandum Re: Conflicts of Interest, and the other records
9 and filed materials herein.

10 The following proffer is made in good faith and is based on personal
11 knowledge and/or information that has been acquired by the FBI and DOJ during
12 the course of the DOJ's investigation into the events of defendant Thompson's
13 forcible detention of Otto Zehm on March 18, 2006, which forcible detention
14 ultimately resulted in Spokane Police personnel restraining Mr. Zehm in a
15 prolonged prone, full appendage (hog-tie) restraint, in which position Mr. Zehm
16 quit breathing, never regained consciousness, and experienced a brain death.

17 The undersigned is obligated to note that notwithstanding the alleged factual
18 recitals contained herein that the defendant Thompson, as he presently sits today, is
19 *presumed innocent* of the charged offenses until proven guilty, beyond a
20 reasonable doubt, at trial. Consequently, the summarized recitals within remain
21 allegations until proven at trial. At the time of the criminal trial, it is the United
22 States intention to prove the substantive allegations herein beyond a reasonable
23 doubt, which allegations the United States submits will prove that the Defendant
24 Thompson's use of force – consisting of multiple baton strikes, including both
25 lethal force (e.g., head-neck strikes) and non-lethal force (e.g., torso and leg
26 strikes) and a taser application - violated Mr. Zehm's clearly established
27

1 constitutional right to be free from an unlawful assault and seizure in violation of
2 18 U.S.C. § 242.

3 The United States also intends to prove at trial, beyond a reasonable doubt,
4 that defendant Thompson committed obstruction of justice in violation of 18
5 U.S.C. § 1519 by making one or more “false entries” in a police record,
6 specifically by providing false statements in his March 22, 2006, recorded
7 interview with SPD and SCSO investigators.

8 **I. OVERVIEW**

9 This criminal civil rights case arises out of defendant Spokane Patrol Officer
10 Karl Thompson Jr.’s use of an impact weapon (i.e., a baton) and a taser to forcibly
11 detain and seize Otto Zehm at a north Spokane Zip Trip convenience store during the
12 early evening of **March 18, 2006**, in responding to a “suspicious circumstance” call.
13 *See Rec. #60, Proffer of Timothy M. Durkin, AUSA, ¶ 1.* After being forcibly placed
14 in a “hog-tie” restraint following Officer Thompson’s violent use of force, Mr. Zehm
15 quit breathing and later died from an oxygen deprived brain (i.e., brain death).
16

17 The following is a general overview of certain underlying events involved in
18 the incident, the Spokane Police Department’s criminal investigation that followed,
19 the Estate of Otto Zehm’s civil claim and suit, and the DOJ’s investigation and this
20 current criminal prosecution. This overview is based, in large part, on Officer
21 Thompson’s own recorded statement of March 22, 2006 (*see Dckt. #60, Exhibit #1*),
22 the SPD’s 2006 investigative records, percipient witness information, the Zip Trip
23 convenience store security video footage, SPD dispatch records, Otto Zehm’s
24 autopsy and/or other identified medical records, FBI 302s, Jencks Acts statements,
25 and other reports or records developed in connection with the DOJ’s investigation.
26 *See United States v. Dynovac* 6 F.3D 1407 (9th Cir. 1993) (records existing outside
27 of grand jury are not grand jury material).

1 The following Proffer sets forth apparent conflicts of interest that defense
2 counsel has and/or appears to have in this case. This summary is only an overview
3 of certain events and should not to be considered an exhaustive description of all
4 facts, events, and “circumstances” related to the United States pre-indictment and
5 post-indictment investigation, and/or defense activities, and/or all of the perceived,
6 apparent, and/or potential conflicts defense counsel has in the case.

7
8 **A. U.S. Department of Justice’s Authority & Investigative Interests**

9 1. The DOJ divisions of the FBI, the United States Attorneys' Offices, and
10 the Criminal Section of the Civil Rights Division (located in Washington D.C.) have
11 concurrent responsibility for enforcing criminal civil rights laws designed to preserve
12 personal liberties. The DOJ’s prosecution efforts lie in four primary areas: 1) The
13 1968 Civil Rights Act - prohibiting racially motivated use of force or threats to injure
14 or intimidate persons involved in certain rights and activities; 2) The provisions of **18**
15 **U.S.C. §§ 241 and 242** – Official Misconduct statutes prohibiting persons acting
16 under color of law, (e.g., police officers) from interfering with or conspiring to
17 interfere with an individual's federally protected rights; 3) The Freedom of Access to
18 Clinic Entrances Act of 1994 - which prohibits threats and the use of force against
19 those seeking or providing reproductive health care services; and 4) Other statutes
20 that prohibit the holding of individuals in peonage or involuntary servitude (e.g.,
21 human trafficking, among other offenses). *Id.*

22 2. The DOJ’s Criminal Civil Rights Section in Washington D.C. and the 93
23 different United States Attorneys' Offices work as partners in the enforcement of
24 federal criminal civil rights laws, which enforcement area is deemed a DOJ priority.
25 The FBI is the primary investigative agency for civil rights matters and works in
26 collaboration with the Criminal Civil Rights Section and the U.S. Attorneys’ Offices
27 in completing investigations and in forwarding investigative reports and findings for

1 charging and remedial determinations.

2 3. Annually, there are as many as 10,000 civil rights complaints and
3 inquiries in the form of citizen correspondence, telephone calls, and/or personal visits
4 to DOJ offices. Approximately one-third of these complaints are deemed of
5 sufficient substance to warrant investigation. A much smaller percentage of these
6 cases result in criminal charges. Most of these cases are typically prosecuted jointly
7 with a Main Justice (DOJ) Criminal Section trial attorney and an AUSA from the
8 district's U.S. Attorney's Office. A case involving allegations of excessive force by a
9 law enforcement officer with a temporally related in-custody death is routinely
10 deemed a case of "national interest" for the United States Department of Justice's
11 Criminal Civil Rights Division.

12 4. In this case, the United States Department of Justice (DOJ) opened a
13 case investigation in mid-2006 and, following a lengthy investigation by the DOJ as
14 well as by the Grand Jury sitting in the Eastern District of Washington, a two (2)
15 count Indictment was returned **on June 19, 2009**, charging the defendant Officer
16 Karl Thompson with excessive force against the victim Otto Zehm in violation of 18
17 U.S.C. § 242. The Indictment also charges defendant with obstruction by making a
18 false entry in an investigative "record" in violation of 18 U.S.C. § 1519. *See U.S. v.*
19 *Thompson, Dckt. # 1.*

20
21 **B. Procedural and Discovery History in Criminal Prosecution.**

22 5. On **July 9, 2009**, the defendant was arraigned and U.S. Magistrate
23 Cynthia Imbrogno issued the District's standard ("voluntary open file") Discovery
24 Order. Mr. Carl Oreskovich, who was retained eight (8) months prior (i.e., October
25 2008) by the City Attorney's Office to represent Karl Thompson's "interests" in the
26 legal proceedings arising out of the defendant's alleged excessive use of force,
27 petitioned Magistrate Imbrogno to be appointed as criminal counsel for defendant at

1 public expense. Defendant Thompson remains employed with the SPD and makes
2 more than \$83,000 a year (not including overtime and specialty pay).

3 6. The United States' has provided defendant and his counsel with the
4 "early" disclosure of its criminal case materials, including but not limited to the
5 early disclosure of: i) Jencks Act and other witness statements; ii) local law
6 enforcement's (SPD & SCSO) case investigation files (which contain witness
7 contact information); iii) FBI 302 reports and records; iv) expert witness reports; v)
8 Otto Zehm's medical records in the Government's possession; vi) summaries of
9 expert opinions and their reports; vii) other tangible records and evidence; viii)
10 electronic evidence (i.e., audio recordings, security videotape and enhancements,
11 still photo; ix) computer generated "to scale" models; computer generated
12 simulation – animation of Zip Trip security video; and x) the early production of
13 Brady, Giglio and Henthorn materials. *Ct. Rec. #42, 54-56, 65, 82, 140, 142-43.*

14 7. Defendant and his counsel have had for quite some time the records
15 and reports prepared by SPD Officers that were on-scene after Officer Thompson's
16 alleged excessive use of force on Otto Zehm. They also have summaries of
17 percipient witness interviews by SPD detectives. *See United States' Notices of*
18 *Pretrial Disclosures, id.* Defendant and his counsel also have in their possession
19 crime scene evidence, autopsy records, photographs, and related medical materials.
20 *Id.* In addition, Defendant has been provided with multiple versions of the Zip Trip
21 security video (i.e., all four camera angles), including copies of actual footage, still
22 photographs of each frame of the footage, PowerPoint files containing the stills of
23 the security videos, and FBI enhanced versions of both the video and the stills. *See*
24 *Ct. Rec. 47 (Def. discovery discs nos. 1, 9-21, 24-25, 31-32, 38, 41-44, 46-47, 49-*
25 *51, and 53).*

26 8. In fact, the United States has produced over 21,400 hard pages of
27

1 discovery and approximately another 93 gigabytes (GB) of electronic discovery to
2 date. *See Ct. Rec. 47*. In contrast, defendant has provided only a couple of hundred
3 pages of original discovery (i.e., consisting of Defendant's personnel records).
4 Defendant has also delinquently identified ten (10) retained defense experts and has
5 provided incomplete disclosures about their opinions and the basis for same. *See Ct.*
6 *Rec. 147*.

7 9. Defendant has failed to comply with this Court's November 12, 2009,
8 Order directing defendant to provide all of his Rule 16 reciprocal disclosures by
9 January 25, 2010. The United States has a motion to strike/exclude pending. *Ct.*
10 *Rec. #178*.

11 **C. Nutshell Summary of Defendant's Forcible Detention of Zehm.**

12 10. On **March 18, 2006**, defendant SPD Patrol Officer Thompson
13 responded to a call of a "suspicious circumstance" involving the possible
14 misdemeanor theft of money at a north Spokane ATM. Defendant responded and
15 observed the possible subject Otto Zehm enter a north Spokane Zip Trip
16 convenience store. Defendant decided, before entering the store that he was going to
17 forcibly detain Zehm for the purpose of performing a *Terry Stop*.¹ *See Exhibit 1,*
18 *defendant's statement*. Following defendant's violent use of force on Zehm (i.e., 13
19 baton strikes; 1 taser firing); Zehm was placed by defendant and several other SPD
20 Officers into a commonly referred "hog-tie" restraint (i.e., full appendage restraint)
21 and placed in a prone position. Zehm was forcibly restrained in that position for
22 seventeen (17) minutes, the last three (3) of which Zehm had a plastic non-rebreather
23

24
25 ¹ For expediency, individuals are frequently referred to by their last name (i.e., Karl
26 Thompson referred to as "defendant" or "Thompson"; Otto Zehm referred to as "Otto" or
27 "Zehm," etc.). No disrespect is intended by these abbreviated references.

1 mask applied to his face for the purported purpose of preventing Zehm from
2 “possibly” spitting at the Officers. Three minutes later, Zehm stopped breathing,
3 was unresponsive, and thereafter never regained consciousness. He was officially
4 deemed brain dead and taken off life support systems two days later, on March 20,
5 2006.

6 11. The “suspicious circumstances” call to 911 that was later transferred to
7 SPD dispatch, was a true “suspicious circumstance” report since there was no actual
8 theft of any money at the ATM. Zehm, who was learning disabled, had a mental
9 disability, suffered from schizophrenia, and worked as a janitor for janitorial
10 contractor Skils’ kin, had merely made the two 18 year-old girl complainants nervous
11 while they were attempting to use an ATM in the darkened evening of March 18,
12 2006. Zehm had uncomfortably invaded their space and made unintelligible
13 comments, as the girls hurriedly canceled their ATM transaction and left, but were
14 uncertain whether their transaction actually terminated before Zehm started using the
15 ATM machine. Consequently, the young ladies called 911 with their “suspicious
16 circumstance” call.

17
18 **D. Excess Force for “Terry Stop”.**

19 The United States submits that in order for the Court to understand and
20 appreciate the “conflicts” landscape in this case that a summary recital of the
21 incident and Mr. Thompson’s allegedly false statements is necessary.

22 12. At **approximately 6:26:00 p.m. on March 18, 2006**, the victim Otto
23 Zehm entered the north door of a Zip Trip convenience store on north Division
24 Street in Spokane. Mr. Zehm walked in, smiled at the clerk and other customers,
25 and casually traveled to the southwest corner of the store where there was a display
26 of plastic 2-liter bottles of Diet Pepsi. Mr. Zehm had been in the store on many
27 occasions to buy a large pop and candy.

1 13. Mr. Zehm was 36 years old, 5'11" and weighed approximately 185 lbs.
2 He was developmentally disabled, but worked as a janitor for a local commercial
3 cleaning contractor ("Skils'kin") who actively seeks and employs disabled persons.
4 Skils'kin had a cleaning contract with the Air Force and Mr. Zehm performed
5 cleaning duties at offices located at Fairchild Air Force Base, west of Spokane.

6 14. Otto Zehm suffered from schizophrenia, but was functionally employed
7 and lived alone. He also enjoyed a close relationship with his elderly mother, Mrs.
8 Ann Zehm, with whom he maintained almost daily contact. Unfortunately, in mid-
9 March, Otto had recently been cutting back on his Zyprexa medication for his
10 schizophrenia and his employer noticed that Otto wasn't operating at his normal
11 level of functioning. They noted that he wasn't as mentally sharp and responsive as
12 he ordinarily was. They also noticed that Otto was more cognitively delayed
13 ("slower") than usual and was "confused" and seemed "withdrawn."

14 15. Although Otto complied with work directions, he had difficulties
15 completing his traditional, routine assigned tasks (i.e., he would clean four toilets,
16 instead of all six in the restroom, forgetting to clean the remaining two). He smiled
17 frequently and laughed spontaneously, as if humoring himself. He had difficulty
18 communicating and maintaining conversations. His employer, who was very
19 sensitive to and accommodating of his learning and mental disabilities, met with him
20 and placed him on administrative leave so that he could get a mental health
21 evaluation. *See Ct. Rec. # 140.*

22 16. Earlier in the evening of March 18, 2006, Otto Zehm walked to an
23 ATM at the Washington Trust Bank on north Ruby Street in Spokane. This outdoor
24 ATM is located approximately 2 blocks north of the subject Zip Trip convenience
25 store. Mr. Zehm had in his possession a paycheck from Skils'kin for slightly over
26 \$500.

1 17. At approximately 6:15 p.m., two 18 year old girls pulled up in a car to
2 the ATM. The young driver stopped her vehicle, entered her ATM card and
3 password. She began to initiate her transaction when she noticed Otto Zehm
4 standing at the front left side of her car. The young girl and her passenger became
5 anxious and Otto's presence made them nervous. Otto reportedly attempted to
6 communicate with the young girls and mentioned "something" about "\$500.00," but
7 they didn't understand what he was saying.

8 18. As Otto moved closer to the ATM, the 18 year old driver terminated her
9 transaction, retrieved her ATM card, and drove a short distance away from the ATM.
10 They decided to wait and observe Otto while he "messed" with the ATM. They
11 became concerned that he was trying to access the driver's account, so the 18 year
12 old female passenger called 911 to report their concern that Otto may be trying to
13 access to the girl's account. Notably, Zehm did not threaten the girls and there was
14 no information or report that remotely indicated or suggested that Zehm possessed
15 any weapons.

16 19. The Spokane County 911 operator taking the call classified it in the
17 Computer Aided Dispatch (CAD) system as a "suspicious circumstance" since it was
18 uncertain whether any criminal offense was committed with the transaction possibly
19 being cancelled and Mr. Zehm possibly trying to access his or the driver's ATM
20 account. The complainant's call about the possible "theft" of money from the ATM
21 was ultimately transferred to SPD Dispatch.²

22
23 ² RCW 9A.56.050 defines "*Theft in the Third Degree*," a misdemeanor, to be the
24 unlawful taking of property of another which does not exceed \$750. RCW 9A.56.190
25 defines "*Robbery*" to be the unlawful taking of personal property "from the person of
26 another" or in his presence, against his will by use or threatened use of immediate force or
27 fear of injury to that person. There was no communication by SPD Dispatch to any officer

1 20. After taking over the handling of the call, SPD Radio dispatched two
2 patrol officers – cars to respond to the ATM area. The first was SPD Officer Steven
3 Braun, Jr. and the second officer dispatched shortly thereafter as back-up was SPD
4 Patrol Officer Tim Moses to back-up Officer Braun.

5 21. Meanwhile, Officer Thompson was on an evening lunch break at a SPD
6 substation, less than a mile away from the store. A number of other patrol officers
7 and supervisors were also present on “break,” watching the 2006 NCAA *Gonzaga v.*
8 *University of Indiana* basketball tournament game. Officer Thompson claims that he
9 heard SPD Radio dispatch the two officers to the “suspicious circumstance” call on
10 his hand-held radio, and decided to check the call information on the CAD on his
11 car’s computer monitor. Officer Thompson is originally from Los Angeles, lives in
12 North Idaho, and had no interest in the GU game. After checking the CAD, Officer
13 Thompson reportedly placed himself on the call through the CAD.

14 22. None of the SPD Officers were privy to the complainant’s 911 call or
15 the conversation the complainants had with the 911 or SPD Dispatch operators. The
16 officers only source of information on the “suspicious circumstance” call came
17 through the operators’ electronically communicated CAD entries and the SPD
18 Dispatcher’s radio traffic. *See attached copy of March 18, 2006, CAD for relevant*
19 *time frame, Exhibit 19; and transcript of SPD radio traffic for relevant time frame,*
20 *Exhibit 20. See also United States Notice (Fourth) of Pretrial Discovery*
21 *Disclosures, Grant Fredericks’s composite of CAD entries and Dispatch radio*
22 *traffic. Ct. Rec. 147.*

23 23. While defendant Thompson was responding, a third Patrol Officer,
24

25
26 that the “Suspicious Circumstance” call involved a “possible robbery.” At best,
27 notwithstanding SPD exaggerations, the call involved a “possible misdemeanor theft.” *Id.*

1 Daniel Strassenberg also checked into the call and notified Dispatch that he was en
2 route. Officer Thompson was aware of Officer Strassenberg's check in since it went
3 out on SPD radio traffic and was communicated to defendant Thompson via the
4 Computer Aided Dispatch (CAD). *See attached Exhibit 19*. Consequently, the
5 dispatched and responding officers to this "suspicious (theft) circumstance"
6 consisted of: 1) Officer Braun - the dispatched officer; 2) Officer Moses – the
7 dispatched back-up officer; 3) Officer Strassenberg - who checked in to the call; and
8 4) defendant Thompson – who also checked himself into the call. None of the
9 officers were "running code" (i.e., lights and siren activated), since the "suspicious
10 circumstance" call was not the type or level of call that warranted running code.

11 24. Defendant was the first officer to approach the location and he observed
12 Zehm casually walking into the convenience store as he began pulling into the Zip
13 Trip's parking lot. While pulling up, he observed Otto walk to the southwest corner
14 of the store where 2-liter pop bottles were displayed. Officer Thompson pulled into
15 the north side parking lot at approximately 6:26 p.m., stopped and parked
16 perpendicular on the north side of the gasoline bay.

17 25. The security video shows that Zehm does not look at nor observe
18 Officer Thompson when he pulled in to park. Defendant made a quick exit from his
19 vehicle, which was parked at the gasoline bay, and is seen hurriedly entering the
20 store. Almost contemporaneous with entering the store, the video shows Officer
21 Thompson extending his non-dominant left hand to remove his wooden baton from
22 the left side of his duty-service belt. Before Officer Thompson gets to the end of the
23 first aisle, he has transferred the baton to his right (dominant) hand (i.e., his gun
24 hand) and has the baton in a loaded position (i.e., upright position - baton resting on
25 right arm-shoulder – a ready strike position) before continuing his rush forward
26 toward Zehm, who remains unaware of Thompson's presence.

1 26. Officer Thompson was first hired as an officer with the L.A. Metro
2 Police Department in approximately 1969 and remained employed there until the
3 late 70's when he apparently moved to northern Idaho. He then became employed
4 with the State of Idaho as an investigator and later with the Kootenai County
5 Sheriff's Office, including rising to the rank of Captain before resigning and joining
6 the Spokane Police Department in their patrol division in March of 1997. As of
7 March 2006, Thompson has been in the SPD's patrol division for approximately
8 nine (9) years.

9 27. Officer Thompson's baton is not the City PD's standard issue metal,
10 side handle baton. It is a straight baton with a grip at the bottom and is reportedly
11 made from Ironwood (one of the hardest woods known in North America). It is
12 longer than the City PD's standard metal baton and is slightly lighter. Thompson
13 apparently has owned this baton for a long time and has used a straight baton since
14 he began with LAPD Metro in 1969. He sought special permission from the SPD to
15 carry it instead of the standard issue metal baton. One of the reasons Officer
16 Thompson cited for wanting to carry the straight wooden baton was that, unlike the
17 standard metal batons, the Ironwood baton would not break during a use force
18 engagement.

19 28. While Officer Thompson is rushing toward Zehm with baton in hand,
20 Zehm can be seen reaching up and retrieving a 2-Liter Diet Pepsi from the display
21 stand against the farthest, southwest corner of the store. After grabbing a 2-liter pop
22 and turning around toward a candy display, Otto noticed defendant rushing at him
23 when defendant was approximately 10 feet away. After alerting to Officer
24 Thompson's presence and his continued rush toward him, with baton in a ready
25 strike position, Zehm began retreating, backing away from the defendant. Within
26 2.5 seconds Officer Thompson delivered his first overhand baton strike at Otto's
27

1 head, neck or upper shoulder region. *See Zip Trip Video, Camera #1; Percipient*
2 *witness statements, and witness summaries of Spokane Medical Examiner Dr. Sally*
3 *Aiken and Dr. Harry Smith, Ct. Rec. #140.*

4 29. There were several patrons in the store near the clerk's kiosk, which is
5 located near the back of the retail area of the store. A number of these witnesses
6 described Officer Thompson's first blow to have hit Zehm either in the head, grazed
7 his head, or landed on his upper shoulder. As Otto continued to retreat from the
8 defendant, Officer Thompson quickly repositioned for a second vertical baton strike,
9 which also was reportedly targeted at Otto's head-neck-shoulder area. Zehm went
10 immediately to the ground after this second overhand, baton strike. *See Camera #1*
11 *and #4.*

12 30. Otto had in his hands the 2-liter plastic Diet Pepsi bottle and after
13 falling backwards on the floor near the clerk's kiosk, Otto is seen using the Pepsi
14 bottle defensively to protect his face and head. Officer Thompson stood over the
15 fallen Zehm and directed him to drop the pop bottle or threatened that he would taser
16 him. Otto continued to hold the pop bottle defensively over his head and within
17 seconds Officer Thompson drew his taser from his service belt and fired at the
18 defensively positioned Otto, who remained lying on his back, approximately two
19 feet away. One barbed taser probe penetrated Otto's chest but the other struck his
20 leather coat, and the five-second taser was not optimally effective.

21 31. Otto reacted to the taser probe by dropping the pop and rolling from
22 back to his stomach, into a crawl position, and then twisting away from defendant.
23 Otto then began crawling west, back down the store aisle trying to get away from the
24 assaultive officer. Meanwhile, defendant continued his violent attack on Otto and
25 used his left hand to grab Otto's leather jacket on the back, top left shoulder and with
26 his right hand delivered several more baton strikes to the targeted back of Otto's
27

1 upper torso – head – neck area. Meanwhile, Otto continued to crawl down the aisle
2 to get away from defendant. *See Cameras #1, 2 and 4; Percipient witness*
3 *statements, Dr. Aiken's and Dr. Smith's Jencks Act statements. See also Ct. Rec.*
4 *140.*

5 32. Approximately 40 seconds after defendant attacked Otto, Officer Braun,
6 the original officer dispatched to the call casually entered the store to help Officer
7 Thompson subdue the now actively resisting Zehm. After entering, the defendant
8 directed Officer Braun to use a couple of baton jabs to the sitting Zehm's left rib
9 cage to try to get Zehm to surrender an arm for cuffing (e.g., Otto had his arms
10 closely clenched to his body). Otto did not surrender his arm for cuffing.

11 33. Officer Thompson then directed Officer Braun to step back and fire his
12 taser at Otto, which Officer Braun did. However, neither taser probe appeared to
13 penetrate past Otto's leather jacket.

14 34. Officer Thompson then directed Officer Braun to use a couple of five-
15 second drive Taser stuns to Otto's upper torso (neck and underarm), which Braun
16 performed. Both taser drives further agitated Zehm and were unsuccessful in getting
17 Zehm to surrender his arms for cuffing.

18 35. Meanwhile, Officer Thompson continued to use his baton to vertically
19 strike the sitting Otto seven (7) more times. However, these vertical baton strikes
20 were to Zehm's lower torso and lower extremities.³ *See Cameras #1 and 2.*
21 Defendant did instruct Zehm to quit resisting, but he rapidly applied several baton
22 strikes while reportedly giving these commands, which action did not allow Zehm
23 sufficient time to go defenseless as he was absorbing defendant's repetitive baton
24

25 ³ Although defendant's delivered his last seven (7) baton strikes in the center aisle,
26 directly in front of Officer Braun (these strikes are captured on camera two), Officer Braun
27 reported that he did not see Officer Thompson deliver any baton strikes to Zehm.

1 strikes.

2 36. Otto continued to pull away and resisted being cuffed and Officer
3 Thompson called SPD Dispatch requesting more officer assistance. Additional
4 officers responded and provided assistance in turning Zehm onto his stomach and
5 cuffing him for full detention.

6
7 **E. Post-Seizure Force and Related *In-Custody* Death**

8 37. Approximately eight (8) officers responded to Thompson's call for
9 assistance. After cuffing Zehm and seeing that he was resisting the restraints and
10 flailing his legs, the officers concluded that Otto should be placed into a four-point,
11 "hog-tie" restraint. The agitated, learning disabled, schizophrenic Otto continued to
12 physically resist the applied restraints. Since Zehm was pulling his hands against the
13 handcuffs, the SPD officers decided to double cuff Otto to ensure good restraints.
14 Even after double cuffing, however, several officers continued to apply downward
15 force on Zehm while he remained in the totally restrained prone position. The
16 officers' purported purpose of the continued suppressive force on Zehm while he
17 was restrained in the hog-tie was to keep him from moving. Cf., *see Drummond v.*
18 *City of Anaheim*, 343 F.2d 1052, 1061-62 (9th Cir. 2003) (continued force, crushing
19 prone victim against ground with weight to neck and torso, despite cries for air and
20 victim being cuffed behind his back and not a threat to officers, was constitutionally
21 excessive) (other citations omitted).

22 38. One of the responding officers, SPD Officer Erin Raleigh, saw that Otto
23 was bleeding from the mouth and thought that he "might" possibly spit at the
24 officers. So, he requested responding Spokane Fire Department (SFD) paramedics,
25 who arrived on scene to remove the taser barb and check Zehm's vitals, to provide
26 him with a spit mask. The paramedics did not have a cloth spit mask, so they
27 provided Raleigh with a non-rebreather mask (i.e., a clear plastic mask containing a

1 nickel size nose nozzle that is designed to be used for the delivery of oxygen (i.e.,
2 via O2 tank)). The officers continued to apply downward pressure after application
3 of the non-rebreather mask (e.g., two officers kneeled on Otto's neck, back and
4 legs). Zehm was maintained in the hog-tie, prone restraint position, with downward
5 force applied to him, for the better part of approximately 17 minutes.

6 39. SPD training regiment and policy require officers to monitor subjects
7 placed in a four point restraint and to ensure that the subject's breathing is not
8 mechanically impaired (i.e., ensure good access to air). Typically, subjects are
9 placed on their side so as to provide reasonable air access. At the end of
10 approximately 17 minutes in the hog-tie restraint, the last three of which included
11 the non-rebreather mask on Zehm's face, Officer Raleigh observed that Otto had
12 stopped breathing. The officers decided to roll Mr. Zehm on to his side and
13 observed that Otto's face had turned purple. They then called for paramedic
14 assistance. Otto's last statement, before he went unconscious, was: "I only wanted a
15 Snickers."

16 40. After the restraints were finally removed by the officers and the
17 paramedics completed their set-up, the paramedics began resuscitation efforts. The
18 elapsed time from Officer Raleigh's notification that Otto was not breathing to when
19 SFD medics began CPR is approximately 3:08 (three minutes, eight seconds). *See*
20 *Cameras #1 and 2*. Otto never regained consciousness and resuscitation efforts on
21 scene were unsuccessful.

22 41. AMR ambulance paramedics arrived shortly after SFD began
23 resuscitation. The AMR paramedics secured incident and medical history from SPD
24 officers and then assisted in resuscitating Zehm and getting him transported to the
25 Deaconess Medical Center Emergency Room. *See Exhibit # 21, copy of AMR's*
26 *Medical Response Report, March 18, 2006*. This paramedic report, drafted the night
27 of the incident, provides as follows:

1 **CAUSE OF INJURY . . . : . . . pt [Zehm] was tasered twice and hit in the**
2 **upper torso, neck and head by a night stick per SPD.** Pt was then hand
3 cuffed prone on the ground and then stopped breathing and went into full
4 arrest.”

5 **PRIMARY ASSESSMENT:** Trauma –Traumatic Arrest.

6 **Hx [history]:** SPD stated pt [Zehm] was attempting to rob someplace close
7 to the gas station, and then fled [sic] scene and ended up inside the gas
8 station where he was confronted by SPD. ***SPD stated [Zehm] became very***
9 ***combative and was tasered twice and hit in the upper torso, neck and head***
10 ***by a night stick per SPD.*** SPD stated [Zehm] was then put into hand cuffs
and placed prone on the ground . . .

11 **Mechanism of Injury:** . . . pt [Zehm] was tasered twice and ***hit in the***
12 ***upper torso, neck and head by a night stick per SPD.*** Pt. was then [cuffed]
13 prone on the ground and quit breathing and went into full arrest.

14 *See Exhibit #21.* This information was conveyed by Spokane Patrol Officers to
15 AMR personnel for medical history and emergency medical treatment purposes. *Id.*

16 42. Zehm was transported to the Deaconess ER at approximately 7:00 p.m.
17 and after approximately an hour of resuscitation efforts, ER personnel were
18 successful in regaining a femoral pulse. However, Mr. Zehm was deemed brain
19 dead and two days later on March 20, 2006, after Mrs. Zehm authorized the donation
20 of several organs, Otto was taken off life support systems and officially declared
21 dead.

22
23 **F. Patrol Officer Thompson & His Application for SPD Chief of Police.**

24 43. The defendant Thompson is originally from Los Angeles and was
25 originally hired as an officer with the L.A. Metro Police Department in
26 approximately in 1969. The defendant remained employed there until approximately
27 1979 when he moved to Hayden, Idaho. The defendant became employed with the

1 State of Idaho as an investigator and later with the Kootenai County Sheriff's Office.
2 The defendant rose to the rank of Captain before resigning after a new Undersheriff
3 gave him a poor performance evaluation. Defendant then ran for the Kootenai
4 County Sheriff's position. After an unsuccessful election, defendant joined the
5 Spokane Police Department in their patrol division in approximately March of 1997.
6 As of March 2006, Thompson was in the SPD's patrol division for approximately
7 nine (9) years and had been in some form of law enforcement for approximately 36
8 years.

9 44. Notably, at the time of his use of violent force to detain Otto Zehm, the
10 City of Spokane was in the midst of an application and search process to replace
11 former Chief of Police Roger Bragdon, who retired at the end of 2005. The
12 defendant was one of the applicants for the vacant Chief position. In fact,
13 "petitions" were being circulated and signed by patrol officers as well as other SPD
14 employees, including those within the SPD Investigation Division, who endorsed
15 and supported the defendant's application for Chief of Police.

16 45. Equally well known at the time was defendant Thompson's
17 announcement that it was his intention to make Lt. James Lundgren, the defendant's
18 supervisor and Lieutenant in charge of the SPD Patrol Division, his Assistant Chief.
19 At the time, the Assistant Chief position was held by then Acting Chief of Police and
20 now Asst. Chief of Police, James Nicks.

21
22 **G. Overview of SPD's Investigative Response – Part I**

23 46. The SPD Patrol Division is divided into two groups (i.e., north and
24 south) that are supervised by Sergeants and Lieutenants. Defendant Thompson was
25 on Sgt. Dan Torok's team. Sgt. Torok also participated in suppressing Mr. Zehm.
26 Sgt. Joe Walker, who supervised the south side patrol unit, shared "on-scene"
27 command authority with Sgt. Torok. Officers who responded but who were not

1 directly involved in physical interaction with Mr. Zehm, were directed to secure and
2 maintain the crime scene. Patrol Cpl. Ty Johnson took photographs of the scene and
3 Officer Thompson, and received from Thompson an on-scene description of
4 defendant's basis for his stop, detention, and forcible seizure. Defendant also spoke
5 with other officers.

6 47. SPD Officers Sandra McIntyre, Zach Dahle, and Sgt. Walker, following
7 their interaction with Officer Thompson and Sgt. Torok, went to the back of the Zip
8 Trip store with a Zip Trip store manager and reviewed the security store's video.
9 After viewing the video, Officer McIntyre contacted Officer Thompson outside of
10 the store. No "lunge" or "attack" by Zehm was shown on the video.

11 48. Shortly after Zehm was taken by ambulance from the Zip trip, Sgt. Joe
12 Peterson, supervisor of the SPD's Major Crimes Unit (MCU) arrived on scene and
13 the MCU assumed the lead role of investigating the circumstances of Mr. Zehm's
14 death while in the custody of fellow SPD officers.

15 49. Shortly after Sgt. Joe Peterson arrived, SPD Patrol Lt. James Lundgren
16 arrived on scene. Sgt. Peterson and Lt. Lundgren received a "scene" briefing from
17 Sgts. Dan Torok and Joe Walker. This briefing included a description that the
18 victim Otto Zehm had "lunged at" or "attacked" Officer Thompson, precipitating
19 Officer Thompson's use of the baton to respond to the described "assaultive" Zehm.

20 50. A short time later, SPD's Acting Chief Jim Nicks arrived and triggered
21 the Critical Incident Protocol, which placed the SPD-MCU Detectives in the position
22 of lead investigators in the case. The Spokane County Sheriff's Office was
23 thereafter notified and requested to participate in the investigation. The County
24 investigators were to "shadow" and observe their SPD counterparts' in all
25 investigation activities. *Id.*

26 51. SPD Detective Terry Ferguson, also a named Defendant in the parallel
27

1 civil action and who is also represented by Defendant's various co-counsel within
2 the City Attorney's Office, was designated the lead detective for the SPD's MCU.
3 Det. Mark Burbridge was designated the crime scene detective and was placed in-
4 charge of handling and processing the crime scene, as well as contacting and
5 interviewing percipient witnesses. *Id.*

6 52. At approximately 7:30 p.m., when Asst. Chief Nicks arrived on scene,
7 he was given a briefing by SPD Patrol (i.e., Sgts. Dan Torok and Joe Walker) and
8 MCU personnel (i.e., Sgt. Peterson and Det. Burbridge). Chief Nicks then contacted
9 asst. city attorney Treppiedi, who was the City's civil liability Risk Manager and the
10 SPD's legal advisor. Treppiedi is contacted before the Spokane County Prosecutor,
11 who has jurisdiction over all felonies within Spokane County is called. *See RCW*
12 *36.17.020. See also SPD Records, Computer Aided Dispatch (CAD) Def. Disc #1.*
13 Treppiedi arrives on scene shortly thereafter and is briefed by Nicks.

14 53. At approximately **8:15 p.m.**, Acting Chief Nicks gave a press
15 conference to some television stations that were on scene. Chief Nicks, based on the
16 briefings that he was provided by SPD Patrol and MCU personnel, provides the
17 following description of the Zehm detention events to the media a KREM 2 news
18 reporter:

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

26 We had one officer [Thompson] that came to the store here contacted the
27 suspect inside the 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.**

1 . . .
2 Oh of course, yes [the officers followed procedure], the officers came on
3 scene used the lowest level mean to control him verbally. **The suspect**
4 **attacked the officer.**

5 The Officer was by himself. **The officer used a straight handled baton as a**
6 **defensive technique** . . . tried to use his taser that was ineffective . . .” [sic]
7 (emphasis added)

8 *See United States Discovery Disclosure, Disc #33, Exhibit #10 (Nicks’s KREM 2*
9 *interview).* A copy of this report is given to Deaconess Medical Center and the
10 Spokane Fire Department. Det. Ferguson acquires the foregoing report when she
11 obtains Zehm’s Deaconess medical records. Consequently, both the SPD and SFD
12 had the AMR report in the early spring of 2006. However, no further follow up
13 investigation is performed on this on scene, recorded information. *See Exhibit #21.*

14 54. At 11:45 p.m. on March 18, 2006, Cpl. Tom Lee, the SPD’s Public
15 Information Officer (PIO) issues a press release and sends an “All” [SPD] Police
16 [personnel] e-mail describing Zehm as “lunging at” Thompson and causing
17 Thompson to “defensively” use his baton to subdue Zehm. *See attached Exhibit*
18 *#22*, copy of Cpl. Lee’s March 18, 2006, e-mail. More specifically, Lee described
19 the events as follows:

20 “. . . ***Patrol responded to a suspicious person call at the Washington Trust***
21 ***Bank at Ruby & Indiana. The caller said a man was hanging around the ATM***
22 ***acting strange. The Caller feared the man might be planning a robbery.***

23 *Shortly after . . . the man ran south. He was contacted by an SPD officer who*
24 ***found him inside the Zip Trip Store . . . the man, who was large and strong,***
25 ***immediately lunged toward the officer and began fighting.***

26 The office put out a radio request for emergency backup. Many other officers
27 arrived to assist. The man did not respond to the officers’ defensive tactics. .
28 . . .”

1 55. Again on **March 21st and March 22nd**, SPD Public Information
2 Officer, Cpl. Lee, based on the on-scene briefings that he and Chief Nicks received,
3 issues press releases and/or is quoted by media as describing Zehm as having
4 “lunged” at or “attacked” the defendant Thompson. *Id. See Dckt. #42, Def.*
5 *Discovery Disclosures.*

6 56. On **March 22, 2006**, Defendant Thompson gives his recorded interview
7 to Det. Ferguson. *See Dckt. #60, Exhibit #1.* That same day, Dr. Sally Aiken,
8 Medical Examiner, conducts her autopsy on Zehm. *See Dckt. #42, Exhibit #10, Def.*
9 *Disc. #1 and 12.*

10 **H. Circumstances of Off. Thompson’s March 22, 2006, Statement.**

11 57. On **March 22, 2007**, SPD – MCU Det. Terry (Boardman) Ferguson met
12 with Defendant Thompson at the Spokane Police Department’s conference room as
13 part of the MCU’s investigation into Officer Thompson’s detention and seizure (i.e.,
14 use of force) of Otto Zehm and Mr. Zehm’s in-custody death. Also present for the
15 meeting, which consisted of an approximately two (2) hour “pre-interview” and a
16 subsequent two (2) hour “recorded interview” was Spokane County Sheriff’s Office
17 (SCSO) Detective Bill Francis. SCSO Det. Francis was present in the role of a
18 “shadow investigator” to the lead investigator Det. Ferguson.⁴ *See Disc #1, Exhibit*
19

20
21 ⁴ In 2006, the Spokane Police Department (SPD) was a signatory to a 2003 interlocal
22 agreement between “Spokane, Kootenai and Surrounding Counties” law enforcement
23 agencies (14 eastern Washington and northern Idaho agencies). This agreement set forth
24 “A Protocol To Investigate Officer-involved Fatal Incidents” among the signing agencies
25 In all presently known pre-2006 critical incidents involving SPD personnel, the SPD
26 decided, both as the “venue” and “employing” agency, to be the lead investigative agency
27 in all “critical incidents” involving its own officers. Based on information and belief, the

1 #10.

2 58. Present with Officer Thompson was Seattle attorney Hillary McClure of
3 the Seattle labor law firm of Aitchison & Vick, Inc. ("Vick law firm"). The Vick
4 law firm historically has represented the Spokane Police Guild and its individual
5 members in labor, employment and disciplinary matters with the City of Spokane
6 and the SPD's administrators. In addition to Ms. McClure, the Guild's Vice
7 President, Jeff Harvey, a fellow SPD Officer, was in attendance for both the preview
8 interview and the second, formal recorded interview. *See Disc #1, Exhibit 10.*

9 59. Under the Critical Incident Protocol and the City's collective bargaining
10 agreement (CBA) with the Guild, Officer Thompson apparently could not to be
11 substantively interviewed about his "critical incident" (i.e., the use of force on Otto
12 Zehm during the early evening of March 18, 2006) for at least *48 hours* following
13 the incident. Consequently, Det. Ferguson made arrangements with Officer
14 Thompson and his Guild representative(s) to perform an interview the morning of
15 Wednesday, March 22, 2004, approximately *88 hours* after the subject incident.

16 60. Officer Thompson did not prepare a written incident report, rather he
17

18 SPD is the only signatory to the 1994 and 2003 critical incident protocols that did not
19 allow outside agencies to serve as lead investigators in cases involving SPD officers.

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

1 and Braun participated in the “voluntary” (i.e., non-*Garrity*) recorded interviews
2 with Major Crimes Detective Terry Ferguson.⁵ *See Disc #1, Exhibit #10.*

3 61. The parties met at the SPD Office at approximately 10:30 a.m. on
4 March 22, 2004, and engaged in a preliminary interview that reportedly lasted
5 slightly over two hours. In this preliminary, unrecorded first interview, Detective
6 Ferguson covered topical areas and questions that the parties’ agreed would be
7 covered again in the subsequent (second) recorded interview. MCU Det. Ferguson’s
8 first, unrecorded interview of Officer Thompson began at approximately 10:33 a.m.
9 and ended shortly after 12:30 p.m. The parties reportedly took a lunch break after
10 the preliminary interview and returned at approximately 1:30 p.m. to begin the
11

12 ⁵ Det. Ferguson previously investigated Thompson in a shooting incident in August of
13 2004 and exonerated him of wrongdoing. On August 7, 2004, Thompson and other SPD
14 officers responded to a family dispute involving an attempted assault with a deadly weapon
15 (handgun) by an intoxicated man named Chris Felch. Felch left the scene in a truck before
16 officers arrived. Thompson saw Felch and used a slow speed maneuver to disable Felch’s
17 truck after a short pursuit. Although another SPD officer had reached through the driver
18 side window and pressed a gun against Felch’s head, Thompson fired five rounds at Felch
19 from the front of his truck. Thompson claims he fired because Felch failed to comply with
20 directions to show his hands and appeared to reach toward the passenger side of the truck
21 to retrieve a weapon. Felch was reportedly shot 3 times in upper torso-arm and was taken
22 into custody for 1st Degree Assault, and was transported to the hospital. Based on her SPD
23 investigative reports, State prosecutors concurred with Ferguson’s recommendation not to
24 pursue charges against Thompson. Neither Det. Ferguson nor the MCU made an official
25 case referral to the County Prosecutor for criminal charges against Felch on the two alleged
26 1st Degree assaults on family members (i.e., Felch fired handgun at family members, but
27 fortunately the handgun jammed).

1 second, official recorded interview. The second, official recorded interview began at
2 approximately 1:34 p.m. and was concluded at approximately 3:27 p.m. The same
3 foregoing individuals attended both the preparatory interview as well as the second,
4 official recorded interview. See *Exhibit #1* and *Exhibit #10, Disc #1*.

5 62. On **March 27, 2006**, Defendant Thompson contacted Det. Ferguson to
6 review the transcribed transcript of his official recorded interview. Officer
7 Thompson reviewed the transcript record for substantive accuracy as well as
8 typographical errors. During this review, Defendant Thompson provided Det.
9 Ferguson additional, clarifying information and made a minor revision to the
10 transcript. Defendant informed Det. Ferguson that all of his baton blows to Zehm
11 were “horizontal” (i.e., not in a vertical (up-down) direction). Thompson then
12 signed the official SPD investigative (statement) record, thereby representing that
13 the statements therein and the record itself was a truthful and accurate account of the
14 events of March 18, 2009. See *Det. Ferguson’s March 27, 2006, incident report,*
15 *Exhibit #1*.

16
17 **I. Defendant Thompson’s Official Statement of Events.**

18 63. During the early evening of **March 18, 2006**, the Defendant, Spokane
19 Police Department (SPD) Patrol Officer Karl Thompson Jr. (age 57.75 yrs., 5’9” in
20 height and approximately 185 lbs.) was working “power shift” patrol in north
21 Spokane when he made contact with Otto Zehm (age 36.4 yrs., 5’9” in height,
22 approximately 185 lbs.) at a Zip Trip convenience store located on the northeast
23 corner of Division and Augusta in Spokane.

24 64. At the time of this incident, defendant had been in and around law
25 enforcement for almost 36 years (i.e., approximately 10 years as Patrol Officer with
26 LAPD (Metro) (1969-79), 5 years with Idaho State investigations, 3 years with
27 Kootenai County Probation, 8 years with Kootenai County Sheriff’s Office, and a

1 couple of years as a self-employed fire investigator for insurance companies; and 8+
2 years with the SPD as a patrol officer). *See Ct. Rec. #42, Defense Discovery Disc.*
3 #1. He also held the position of “Captain” with the Kootenai County Sheriff’s
4 Office before resigning and a later pursuing an unsuccessful run for election as
5 Kootenai County’s Sheriff.

6 65. Defendant Thompson contacted Zehm relative to a” suspicious
7 circumstance” complaint arising out of a report of Zehm possibly being involved in
8 theft of money from a nearby ATM. In reality, Zehm was wrongfully suspected of
9 taking money. In fact, he did not take any money from the ATM and appears to
10 have only been attempting to deposit his last payroll check of approximately five
11 hundred dollars (\$500.00). *See SPD Investigative Reports, Criminal Def. Disc. #1,*
12 *in United States Notice of Discovery Disclosures, U.S. v. Karl Thompson Jr., Cause*
13 *# CR-09-0088-FVS, Dckt. # 42.* Defendant further described the call as possibly a
14 “premature robbery attempt”. *See Ex. #1.*

15 66. Defendant Thompson contacted Zehm inside the Zip Trip for the purpose
16 of a *Terry Stop*. However, Defendant used his straight handle baton to strike Zehm to
17 the ground. He then used his taser to try to forcibly detain Zehm, rather than merely
18 stopping Zehm for “further questioning” (i.e., *Terry Stop*). Defendant Thompson
19 claimed that he used his baton only after Zehm allegedly failed to follow two separate
20 verbal commands to drop the plastic pop bottle, and even then only after Zehm
21 allegedly held the plastic pop bottle in an aggressive manner, which Thompson claims
22 led him to “reasonably believe” that Zehm was “about to assault” or “charge” him.

23 67. In response to Defendant’s successive and repeated baton strikes to his
24 body, Zehm actively tried to get away from Defendant. Defendant Thompson claims,
25 however, that Zehm was actively assaultive towards him after he knocked Zehm to the
26 ground with his baton strikes. In fact, Thompson claims that after he clubbed Zehm to
27

1 the ground, tasered him, and then clubbed him four (4) more times in the south aisle,
2 that Zehm stood up, took a boxing stance and started throwing punch combinations at
3 his face and chest in the south aisle. *See Exhibit 1.*

4 68. Other uninvolved civilian witnesses, however, described Zehm as
5 defensive and trying to evade Thompson's baton and use of force. After Defendant
6 knocked Zehm to the ground with his baton and tasered Zehm, percipient witnesses
7 say Zehm never returned to his feet and in fact remained on the ground to endure
8 Defendant's remaining "11" baton strikes to his body.

9 69. After delivering at least 13 baton strikes and tasering Zehm, and still
10 being unable to cuff Zehm with "one free hand," Officer Thompson called for
11 assistance from other officers to completely suppress the recoiling Zehm. *Id.*

12 70. Several other SPD Officers, including those named as Defendants in the
13 civil suit, (e.g., Officers Steve Braun Jr., Jason Uberuaga, Erin Raleigh, Dan Torok,
14 Zach Dahle, and David Voeller) arrived and helped Defendant Thompson forcibly
15 secure Zehm in a prone, "hog-tie" restraint, in which position Zehm remained for
16 approximately 17 minutes, the last three with a plastic non-rebreather mask on his
17 face.

18 71. In his 1:30 p.m. recorded March 22, 2006, statement to Det. Ferguson,
19 given more than 90 hours after the subject incident, Officer Thompson claimed
20 (among other things) the following in terms of describing Zehm's behavior and his
21 engagement:

- 22 i) Thompson claimed to have "stopped" at a distance of four (4) feet, in a
23 "ready strike" position to visually and verbally engage Zehm;
- 24 ii) After stopping, defendant claims to have issued two direct verbal
25 commands to Zehm upon initial engagement, which reportedly directed Zehm
26 to immediately drop the subject plastic pop bottle that he was holding;
- 27 iii) Zehm reportedly first asked "why" and, after reportedly being told again

1 to “drop it now,” Zehm immediately and defiantly said “no”;

2 iv) Zehm reportedly showed no signs of confusion, misunderstanding or
3 delay in his understanding of the Officer’s quick, decisive, and firm orders;

4 v) After reportedly immediately and defiantly stating “no,” Zehm
5 reportedly gave the defendant a prolonged look of defiance and also reportedly
6 took a position of defiance, and aggressively held the plastic pop bottle in a
7 “loaded” two hand, threatening position, as if ready to “charge” the officer,
8 thereby prompting Officer Thompson’s preemptive baton strike on the now
9 reasonably perceived “about to be assaultive” Zehm;

10 vi) The first baton strike was reportedly a horizontal blow to Zehm’s left
11 upper thigh;

12 vii) The second baton strike was reportedly a horizontal blow to Zehm’s
13 upper right thigh;

14 viii) Zehm reportedly continued to use the plastic pop bottle in a threatening
15 manner and reportedly refused to drop the plastic pop bottle while Zehm and
16 Thompson were on the ground,

17 ix) After falling on to the ground with Zehm, Zehm reportedly threw
18 punches at Thompson’s chest; and a short time later Thompson was able to
19 stand up and stand over Zehm, while Zehm continued to hold the pop bottle;

20 x) While standing, he instructed Zehm to again drop the pop bottle and
21 threatened to taser Zehm if he did not comply, which Thompson did after
22 Zehm refused to drop the plastic pop bottle;

23 xi) After being tasered, Zehm reportedly stood up and took a boxing stance,
24 and threw more punches at the officer, thereby allegedly assaulting defendant
25 before Officer Braun arrived to assist.

26 xii) Defendant never struck Zehm in the head or neck with his baton,
27 particularly since blows to those areas are deemed *lethal force*, which force
could not be justified under the circumstances;

Dckt. #60, Exhibit #1.

72. Specifically, Defendant described his alleged observations of Zehm’s
aggressiveness/combativeness as follows:

1 *“When I stopped ... I believe I was about 4 feet from him ... baton would have*
2 *been in a ... cocked position ... bringing the length of the baton back ... parallel*
3 *to my body standing ... it is ready to go ... this is a ready position ...*

4 *... the purpose ... when verbal commands are given in a heightened risk*
5 *situation ... your intent is to project force. You want them to know the urgency*
6 *of your commands ... so its visual as well as being tactically prepared in case a*
7 *strike has to be quickly delivered.”*

8 *Id.* pg. 17-18, ¶ 111.

9 *“The individual holding the bottle was holding it uh in a very uh tense uh*
10 *manner. In other words, he wasn’t passively holding it ... because of the*
11 *position of it at his chest, shoulder muscles were also tensed ... we made*
12 *immediate eye contact when he turned around. We were both staring at each*
13 *other.*

14 *When I came to a stop, I immediately told him, I ordered him, in a, in a*
15 *forceful voice, drop it. He immediately replied, and during this short*
16 *discourse, we both did not break eye contact. His eyes were wide. He was*
17 *looking straight at me.”*

18 *Id.* pg. 18, ¶ 113.

19 *“I said the manner in which his first response was, he said ‘why?’ It was a*
20 *forceful response... he didn’t break eye contact ... my first impression was ... I*
21 *am in full uniform ... displaying a baton in a manner that shows that I’m*
22 *prepared to strike. I’m ordering him to drop the bottle which he’s holding at*
23 *chest level in both hands and ... he tells me why.”*

24 *Id.*, pg. 18, ¶ 114.

25 *“And I immediately ... said ‘drop it now’ I said it twice as loud and he said*
26 *‘no’.” [he] was again looking straight at me, clearly without any provocation,*
27 *that was his response.*

28 *Id.*, pg. 18, ¶ 114.

29 *“In my mind at that point, in our proximity, my belief was that he was*
30 *preparing to assault me. When he turned around and saw me entering, he ...*
31 *did not immediately flee. He picked up in an object and it was held in a*

1 manner that I realized was in a position that he could use it as a significant
2 weapon against me.”

3 *Id.*, pg. 18, ¶ 114

4 “**[Zehm’s] look certainly was a look that did not display any fear. Uh, did**
5 **not display any confusion.** ... because the eye contact there was no breaking
6 of eye contact. His eyes did not look down at the floor. He did not look
7 around. **He did not appear disorientated in that he was not looking around.**
8 **His voice didn’t waver.** ... [H]is lips were set, in that he wasn’t licking his
lips. ... **his facial appearance was to me, was one that was deliberate, that**
was resolute and, and non-compliant, defiant.

9 **I think defiant would be an accurate term that clearly that he was not going**
10 **to comply with, with my orders.** ... I issued these orders...clearly forceful and
11 the second time immediately was twice as loud as the first ... ‘drop it now.’ I
12 was saying ... in a manner to convince the urgency of what he was required to
do immediately.”

13 *Id.*, pg. 18-19, ¶ 115.

14 After Zehm said no, “**I believe that he was preparing to um strike me and the**
15 **recognition there is that normally there is about $\frac{3}{4}$ of a second reaction time.**
16 ... within that [4 foot] distance, **I knew that he had the advantage and that he**
17 **had a potential weapon that he could reach me** either by swinging or
throwing and if it were to hit me in the face, that um he would achieve a, a
18 huge tactical advantage.”

19 *Id.*, pg. 19, ¶ 116.

20 73. Defendant Thompson also denied using any deadly force at any time
21 during the encounter. Defendant also admitted that any strikes above the shoulders
22 would constitute deadly force (i.e., denied baton strikes to the head-neck area).
23 Officer Thompson agreed that the use of deadly force was not warranted nor
24 justified given the nature of the call and circumstances. *Id.* Notably, defendant has
25 not sought nor requested to make any changes and/or revisions to his official SPD
26 investigative record since he first reviewed and signed the transcribed SPD
27 investigation record on March 27, 2006. *Id.*

1 74. Another detailed summary and analysis of Defendant Thompson's
2 account of what he claims precipitated his use of force on Otto Zehm is set forth in
3 the United States Response to Motion for Bill of Particulars and Memo in
4 Opposition to Defendant's (Criminal) Discovery Demand. *See Dckt. # 40 and 41,*
5 *U.S. v. Thompson, Cause No. 09-cr-0088-FVS, Ct. Rec. #60, Exhibits#11 and 12.*

6 **J. Percipient Witnesses' & Store's Security Video Version.**

7 75. For a more detailed discussion and summary of civilian witnesses'
8 accounts and security video footage in comparison to Thompson's account, the
9 United States directs the Court to incorporated *Exhibits #10, 11 and 12, Dckt. #60.*

10 76. In short, these summaries provide that several patrons in the store
11 described Officer Thompson's first blow and/or a number of later blows to have
12 struck Mr. Zehm in the *head, neck and upper torso*. *See also Exhibit #21 (AMR*
13 *Report)*. Witnesses for the most part described Mr. Zehm as defensive and
14 continuously retreating from Thompson's advancing assault. *Id.*

15 77. Witnesses also described Officer Thompson's attack on Mr. Zehm as
16 "immediate" with virtually no time for Otto Zehm to react to Officer Thompson's
17 presence, let alone his alleged "two" verbal commands. *See SPD & MCU*
18 *investigation file and records, Disc #1; Disc #55 (FBI 302 reports).*

19 78. The store's security video shows Zehm continuously retreating away
20 (backing) from the continuously advancing Thompson during his initial attack (i.e.,
21 the first two vertical baton strikes that caused Zehm to immediately go to the
22 ground). The video also shows that Officer Thompson does not go to the ground on
23 top of Zehm, but rather remains standing, baton in hand, straddling the fallen
24 Zehm. *Id.* This is inconsistent with Defendant's recorded-transcribed statement.

25 79. Zehm is also shown in camera #4, on his back on the ground, holding
26 the two (2) liter plastic Diet Pepsi bottle above his head-face while on his back in an
27

1 apparent defensive position while Officer Thompson continues, baton in hand, to
2 stand over Zehm. The video does not show Zehm using the pop bottle aggressively
3 or punching at Officer Thompson. *Id.* This too contradicts Defendant's story.

4 80. Zehm also attempts to crawl away from Thompson after he is tasered,
5 but Thompson continues his attack, standing above and following Zehm, delivering
6 vertical baton strikes to Zehm as Zehm crawls west down the south aisle toward the
7 store's west door. *Id.* This contradicts the Defendant's recorded statement.

8 81. In short, Officer Thompson's recorded interview account is
9 contradicted by percipient witnesses and the convenience store's security video.
10 Forensic medical evidence also supports the conclusion that Mr. Zehm sustained
11 blunt force trauma, consistent with baton strikes, to his head. *See Autopsy and*
12 *AUSA Durkin's Proffer, Dckt. #60.*

13
14 **K. Overview of SPD Investigation – Part II**

15 82. The morning of **March 23, 2006**, MCU supervisors, detectives, and
16 SPD Brass review footage of defendant's use of force on Zehm captured on two of
17 the Zip Trip store's four security camera angles (i.e., camera angles #1 and #2).
18 The meeting participants include, but are not necessarily limited to: Sgt. Joe
19 Peterson; Det. Terry Ferguson; Det. Mark Burbridge; Asst. Chief Al Odenthal;
20 Asst. Chief Bruce Roberts; Acting Chief Nicks, and asst. city attorney Treppiedi.
21 "No Lunge" or "attack" by Zehm is seen on either of the security video camera
22 angles (i.e., cameras #1 and #2). Interestingly, the SPD reports that there are no
23 records, reports, or notes generated from this multi-level review of the Zip Trip's
24 security video, confirmation that "no lunge" is seen, and defendant's statement.

25 83. Asst. Chief Odenthal (now retired) reportedly had Det. Ferguson splice
26 off two of the camera angles (i.e., #3 and #4) from the store's security video for the
27 purpose of viewing at the SPD Investigators – Brass meeting the morning of March

1 23, 2006. The cameras spliced (i.e., cameras #3 and #4) are digital, whereas camera
2 angles #1 and #2 are analog recorded. Cameras #3 and #4 are not reviewed by
3 investigators and/or administrators at the March 23, 2006, meeting. *See SPD*
4 *Investigative records (Det. Ferguson, McGregor and Acting Chief Nicks's notebook,*
5 *Dckt. #60, Exhibit #16).*

6 84. On or about **March 29, 2006**, Det. Ferguson consults with Treppiedi
7 regarding authorization to release Zehm's payroll check that he had on him
8 (approximately \$500.00) to his mother Anne Zehm. *Id.* Det. Ferguson thereafter
9 releases the check from booked evidence.

10 85. In **late March 2006** and on multiple occasions thereafter, Det. Ferguson
11 conducts her own investigative contacts and her own witness interviews without any
12 Spokane County Detectives being present, in apparent violation of the SPD's
13 "Critical Incident Protocols." *See SPD MCU Investigation reports and file notes.*
14 *Id.; Dckt. #60, Exhibit #16.*

15 86. Det. Burbridge conducts percipient witness interviews. The first couple
16 of which are performed with Det. Ferguson, in violation of the *Critical Incident*
17 *Protocols* which provides for the accompaniment of another agency's "shadow
18 investigator" during investigative interviews. Most of the remaining interviews are
19 performed with SCSO Det. Doug Marske as his shadow investigator. Det.
20 Burbridge and Marske are familiar with each other and at the time of the DOJ's
21 investigation are friends.

22 87. On or about **May 22, 2006**, Dr. Sally Aiken issues her report on
23 autopsy findings. Dr. Aiken concludes that Mr. Zehm's cause of death was *Hypoxic*
24 *Encephalopathy due to Cardiopulmonary Arrest while restrained (total appendage*
25 *restraint) in prone position for excited delirium.* *See May 22, 2006, Autopsy report,*
26 *Def. Disc. #12, Exhibit #10.* Dr. Aiken also deemed Mr. Zehm's "brain death"
27

1 (hypoxic encephalopathy) to be a *homicide* under state law since the death causally
2 resulted from personal intervention and was not the result of a naturally occurring
3 organic demise. *Id.*

4 88. On **May 30, 2006**, Acting Chief Jim Nicks holds a press conference to
5 announce and discuss Dr. Aiken's autopsy findings and conclusions, in apparent
6 violation of RCW 68.50.105 (Autopsy Privacy Act) and a mutual "Protective Order"
7 that was entered into between the SPD, Asst. City Atty. Treppiedi, and the Zehm
8 Estate and its counsel that very day. *See Def. Discovery Disc #9, Exhibit #10.; See*
9 *Civil Dckt. #42. See also Plaintiff's Third Amended Complaint, Ct. Rec. #106, 112,*
10 *09-cr-0080-LRS.* The City Attorney's Office reportedly counseled and advised the
11 SPD before Chief Nicks held the press conference involving the release of Zehm's
12 confidential autopsy information.

13 89. On **May 30, 2006**, at approximately the same time as the City's press
14 conference, Det. John Miller called Spokane County Medical Examiner, Dr. Sally
15 Aiken, to verify certain autopsy findings and information so that these findings and
16 information could be accurately released in the City's press conference. Dr. Aiken
17 informed Det. Miller that the release and disclosure of any autopsy information to
18 the public, without the consent of the family, violated RCW 68.50.105 (Autopsy
19 Privacy Act). Dr. Aiken also advised Det. Miller that she could not authorize nor
20 provide any further information that might be used or released in connection with the
21 SPD's media release. Det. Miller explained that it was too late for him to prevent
22 the SPD's release of the autopsy information.

23 90. In addition, on **May 31, 2006**, the City issues a written press release
24 containing more confidential details about Zehm's autopsy. The City Attorney's
25 Office apparently authorizes the posting of this additional press release on the City's
26 website. *See Dckt. #97 and 112, Zehm Estate v. Thompson, et al.* In fact, the City's
27

1 press release containing the alleged unlawful disclosure of Zehm's confidential
2 autopsy details remained on the City's website for approximately 3.5 years (i.e.,
3 May 30, 2006, through October 2009). *See Id., Dckt. #97 and 112.*

4 91. From **March 18, 2006**, through **May 31, 2006**, the MCU continued its
5 investigation activities. On or before May 31, 2006, Det. Ferguson, Det. Burbridge
6 and MCU supervisor Sgt. Peterson determined that the SPD's investigation was
7 complete. Det. Ferguson then made a case "referral" to the Spokane County
8 Prosecuting Attorney's Office. In this case "referral" report to Spokane County
9 Prosecuting Attorney Steve Tucker's Office, Det. Ferguson states that there is "no
10 evidence" of any excessive force by any SPD Officer. Det. Ferguson further reports
11 that "only that amount of force that was reasonably necessary was used." *See Det.*
12 *Ferguson's May 31, 2006, referral report concluding no evidence of criminal*
13 *activity discovered, notwithstanding eye witness of Thompson's and video accounts.*
14 Det. Ferguson further recommended the declination of any criminal charges. *Id.*

15 92. On **May 31, 2006**, Det. Ferguson, Det. Burbridge, and Sgt. Peterson
16 meet at the MCU to review and final the SPD's investigation report and Det.
17 Ferguson's/MCU's referral to the Spokane County Prosecuting Attorney's office.
18 Det. Ferguson's **May 31, 2006**, referral report to Spokane County's elected
19 Prosecuting Attorney provides in relevant part as follows:

- 20 1) "**There is no evidence to support that excessive force was used**, only
21 force that was reasonable for the circumstances was employed";
- 22 2) ". . . **deadly force [baton strikes to the head] was not applied** as it was
23 not warranted" [sic]; and
- 24 3) "In conclusion, **there is no investigative finding of criminal activity** on
25 the part of the involved officers."

26 *See Detective Terry Ferguson's May 31, 2006, case investigation summary and*
27

1 *referral (i.e., no charges) to the Spokane County Prosecuting Attorney, pg. 7.*

2 93. Det. Ferguson's report and description that there is/was "***no evidence***"
3 that excessive force was used is false and inaccurate. In fact, Det. Ferguson, Det.
4 Burbridge, and the MCU had evidence and statements supporting the claim that
5 defendant Thompson had used excessive and unreasonable force in: i) attacking
6 Zehm right away (and "no lunge"); and ii) having struck Otto Zehm in the head,
7 which is evidence of the unlawful use of deadly force.

8 94. On **June 7, 2006**, the Center for Justice sent asst. city attorney
9 Treppiedi a letter asserting that the City, through Acting Chief Nicks's May 30,
10 2006, press conference releasing Dr. Aiken's autopsy results on Mr. Zehm, violated
11 Washington's Autopsy Privacy Act and the parties agreed protective order. *See*
12 *RCW 68.50.010 (Coroner's jurisdiction), 68.50.105 (Autopsy Reports Confidential,*
13 *Reid v. Pierce County, 136 Wn. 2d 195, 961 P.2d 333 (1998) (decedent's relatives*
14 *may pursue invasion of privacy claims for unauthorized release of autopsy*
15 *information); see also Dckt. #60, **Exhibit #3**, copy of Center for Justice's letter to*
16 *Treppiedi.*

17 95. On **June 21, 2006**, asst. city attorney Treppiedi issued a nine page
18 response letter to the Center for Justice denying any violations of state law or the
19 parties' confidentiality order. Treppiedi also goes on to defend and exonerate
20 defendant Thompson from any excessive use of force claims. Treppiedi further
21 exonerates all other law enforcement officers who had contact with Zehm the
22 evening of March 18, 2006. Acting Chief Nicks, Asst. Chief Odenthal and Asst.
23 Chief Bruce Roberts, who supervised the MCU and the SPD's investigation, and the
24 patrol division, were copied on Treppiedi's letter exonerating Defendant Thompson
25 and others.

26 96. Notably, the SPD's own investigation was not complete when Treppiedi
27

1 exonerated Defendant Thompson. This letter is also posted on the City's website.
2 *See Dckt. #60, Exhibit #4, Asst. City Attorney's June 21, 2006, exoneration letter to*
3 *Center for Justice.*

4 97. On **June 27, 2006**, per direction of asst. city atty. Treppiedi, Det.
5 Ferguson displayed Mr. Zehm's personal property items at the evidence building to
6 the Zehm Estate's legal representatives. *See Dckt. #42, SPD Investigation Records,*
7 *Def. Disc #1, Exhibit #10.*

8 98. On **July 10, 2006**, Spokane County's Chief Criminal Deputy
9 Prosecuting Attorney Jack Driscoll, acting on Det. Ferguson's May 31, 2006, case
10 referral, requests Det. Ferguson to have the plastic 2-liter Diet Pepsi bottle recovered
11 from the Zip Trip examined for latent fingerprint examination. This had not been
12 previously performed. *See Exhibit 10, Disc #1.*

13 99. On or about **July 13, 2006**, the SPD, in response to the media's public
14 records act requests some months prior to "all" security video finally releases two
15 (2) of the Zip Trip's four (4) security video angles. Asst. Chief Al Odenthal gives a
16 presentation to the media regarding the content of the two camera angles and also
17 exonerates the involved officers.

18 100. On or about **July 13, 2006**, the SPD realizes for the first time that the
19 "plastic spit mask" had not been provided to Dr. Aiken and had not yet been
20 analyzed. Det. Ferguson re-initiates interviews (again solo, in violation of Critical
21 Incident Protocols) with on-scene officers (i.e., Officers *Thompson, Uberuaga,*
22 *Raleigh, Voeller, McIntyre, Dahle, Strassenberg, Torok,* etc.) concerning the use and
23 application of the non-rebreather mask. *Id.*

24 101. On **July 13, 2006**, Acting Chief Nicks reportedly admits to the media
25 for the first time since the SPD's March 18, 2006 (night of incident), news
26 announcement and the several media disclosures since, that the Zip Trip security
27

1 video “does not” show Zehm “lunging” at or “attacking” Officer Thompson. *See*
2 *Spokesman Review July 14, 2006, article wherein Chief Nicks admits giving*
3 *“inaccurate” information while trying to defend his officers’ actions during the fatal*
4 *struggle with Otto Zehm.*

5 102. Nicks reportedly is unable to account for why he, Tom Lee, and other
6 SPD representatives continued to claim for months (i.e., approximately four months)
7 that Zehm “lunged” first at Officer Thompson before Thompson used force.

8 *“That’s the information that I was provided on scene based on the observations of*
9 *the witnesses and officers,”* Nicks is quoted saying. *See Dckt. #60, Exhibit #5,*
10 *copy of Spokesman Review’s July 14, 2006, article regarding Chief Nicks’s alleged*
11 *admission of inaccurate account.*

12 103. On **July 17, 2006**, Det. Ferguson is advised by SPD Brass that the
13 plastic spit mask needs to be forensically examined and considered by the Medical
14 Examiner for possible contribution to cause of death. The SPD-MCU did not
15 originally retrieve or maintain the mask as evidence. It was originally bagged as
16 waste and dropped in a bio-hazard waste collection site. It was retrieved at a later
17 date by Det. Ferguson from the County’s bio-hazard waste drop site. *See Dckt. #42,*
18 *Exhibit #10, Disc. #1.*

19 104. On **July 19, 2006**, Det. Ferguson meets with Chief Criminal Deputy
20 Prosecutor Jack Driscoll. Criminal Chief Driscoll further requests that the SPD have
21 a forensic video analysis performed on the security video angles showing the first
22 minute of Officer Thompson’s engagement of and use of force on Zehm. *See Dckt.*
23 *#42, SPD Records, Def. Disc. Disc #1.*

24 105. On **July 19, 2006**, Det. Ferguson contacts Chief Deputy Prosecutor
25 Jack Driscoll again and Treppiedi concerning “authority” to open the plastic pop
26 bottle and empty the contents so fingerprinting analysis can be performed. *Exhibit*
27

1 #10, Disc #1.

2 106. On **July 19, 2006**, asst. city attorney Treppiedi shows up at the Spokane
3 Medical Examiner's office claiming to have an appointment, which the ME's Office
4 had no record of scheduling. Dr. Aiken was uncomfortable meeting with Treppiedi,
5 since he is not a prosecutor, is not law enforcement, and was not entitled to obtain
6 any information from the ME relative to Mr. Zehm's autopsy. *See RCW 68.50.105.*
7 Mr. Treppiedi claimed, however, that he was generally interested in soliciting Dr.
8 Aiken's opinions relative to SPD policies, not Zehm's autopsy. Consequently, Dr.
9 Aiken agreed to meet briefly with Treppiedi.

10 107. Notwithstanding Treppiedi's representation that he was not interested in
11 Zehm autopsy information, Treppiedi inquired as to whether or not Det. Ferguson
12 had previously informed Dr. Aiken of the presence of the non-rebreather mask.
13 Treppiedi wanted to know what Dr. Aiken was going to do in response to the
14 seemingly late disclosed "non-rebreather mask" being involved in Zehm's detention.

15 108. Dr. Aiken declined any further conversation about the confidential
16 Zehm autopsy. Dr. Aiken did, however, inform Treppiedi about her displeasure with
17 the City's release of portions of the autopsy report that were publicly distributed to
18 the news media on May 30, 2006. She further informed Treppiedi about her
19 conversation with Det. Miller, who called to secure authorization for the release of
20 confidential autopsy information the day of the press release, which Dr. Aiken
21 declined. She also shared Det. Miller's response to her that it was "too late" to stop
22 the City's release of the confidential autopsy information due to the
23 contemporaneous "timing" of the City-SPD's press conference.

24 109. On **July 22, 2006**, Chief Deputy Driscoll meets with Det. Ferguson and
25 forensic videographer Grant Fredericks to discuss parameters of technical review
26 (i.e., initial contact and exchange between Defendant Thompson and Zehm). *Id.*
27

1 110. On or about **August 2, 2006**, SPD Acting Chief Nicks and other
2 administrators reportedly learn for the first time that there are actually “four”
3 security video camera angles at the Zip Trip, not just the two (i.e., cameras #1 & #2)
4 that were shown the morning of March 23, 2006, to SPD administrators and asst.
5 city attorney Rocky Treppiedi and shown to the media on July 13, 2006. Acting
6 Chief Nicks is also advised that only two camera angles were released in July, not all
7 four (4) camera angles (#1-4), in response to the media’s public records request.

8 111. The failure to disclose all camera angles in response to the media’s
9 public records request appears to be a violation of Washington’s Public Records Act,
10 RCW 42.56.010, et seq. (The PRA is a “strongly worded mandate for broad
11 disclosure of public records’ “and its provisions are to be liberally construed to
12 promote full access to public records, exemptions are narrowly construed.”
13 *Progressive Animal Welfare Soc’y v. Univ. of Wa.*, 125 Wn.2d 243, 250-51, 884 P.2d
14 592 (1994) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246
15 (1978)), discussing former RCW 42.17.251 (1992). Washington’s courts have
16 uniformly interpreted the PRA's policy to be “*that free and open examination of*
17 *public records is in the public interest, even though such examination may cause*
18 *inconvenience or embarrassment to public officials or others.*” See *Smith v.*
19 *Okanogan County*, 100 Wn.App. 7, 11, 994 P.2d 857 (2000) (quoting former RCW
20 42.17.340(3) (1992), now codified at RCW 42.56. (2006)).

21 112. Asst. city attorney Treppiedi oversaw the handling of the City’s records
22 requests and informed the County Prosecutor’s Office that he would process the
23 public records requests received on the case so that the County Prosecutor’s Office
24 would not have to respond.

25 113. On **August 2, 2006**, Acting Chief Nicks learns from Treppiedi that the
26 two additional (digital) camera angles, undisclosed (digital) to the media, “showed
27

1 nothing of value” to SPD investigators. *See Dckt. #42, SPD Records on Zehm*
2 *Investigation and Asst. Chief Nick’s Investigation records, Def. Disc #1 and 57,*
3 *Exhibit #10; and Spokesman Review articles of August 4, 2006. Disc # 9; See also*
4 *Ct. Rec. #60, Exhibit #16 (Nicks’s notes).*

5 114. On or about **August 3, 2006**, the SPD’s Public Information Officer Cpl.
6 Lee advises Chief Nicks that the Spokesman Review newspaper and KREM TV are
7 pursuing stories on the City’s failure to disclose the two additional camera angles.
8 Chief Nicks has a meeting with Det. Ferguson and Lt. Stevens. Lt. Stevens, who is
9 the Lieutenant in charge of the MCU, advises Nicks that he too was unaware of the
10 two additional camera angles. Det. Ferguson reportedly acknowledges that she was
11 aware of all four angles, but claims that only the analog cameras #1 and #2 (and not
12 the digital cameras of #3-4) have “anything of value.” *Id.*

13 115. Det. Ferguson is directed to go back and review store security camera
14 angles #3 and #4. After further review, Det. Ferguson reports that footage from
15 camera angle #4 shows Zehm holding the plastic Diet Pepsi over his head/face while
16 on his back, on the floor in front of the clerk’s kiosk, with Thompson standing over
17 him with his baton, and later using his taser. Chief Nicks’s review of the two
18 additional camera angles (which crisscross the clerk’s kiosk) show additional
19 material regarding Zehm’s casual entry into the store and Officer Thompson’s rapid
20 advance on Zehm. In light of these developments, Chief Nicks instructs Lt. Stevens
21 to go back over the case with a fine tooth comb. *Id.* This is approximately two (2)
22 months after Det. Ferguson’s May 31, 2006, report that there was no evidence of any
23 crime and 1.5 months after the City’s Risk Manager and City Attorney’s Office
24 exonerated Thompson’s use of force. *Id.*

25 116. On **August 7, 2006**, Chief Nicks meets with Asst. Chief Al Odenthal
26 and seeks an explanation on why the two additional video angles were missed. Asst.
27

1 Chief Odenthal claims that he too was informed by Detective Ferguson that the two
2 other store security camera angles possessed nothing of evidentiary value. *Id.*

3 117. On **August 8, 2006**, Asst. Chief Odenthal informs Chief Nicks that Det.
4 Ferguson removed the original video discs from the property booking and provided
5 the “master copy” to Grant Fredericks, the forensic video technician. *See Ct. Rec.*
6 *#60, Exhibit #16, Chief Nicks’s notes.* Nicks learns that Det. Ferguson has done this
7 without advising her supervisor.

8 118. Det. Ferguson reports that she thought the SPD “chain of command”
9 had approved the release of the original property/evidence to Fredericks since
10 “Rocky [Treppiedi] told [her] the [County] Prosecutor” made the evidence transfer
11 request. [sic] *Id.* According to Chief Nicks’s notes, once the original evidence was
12 removed from property, there was no original “security video” evidence remaining
13 booked on property, only working copies in investigating officer’s files remained.
14 *Id.* The original disc evidence was later recovered from Mr. Fredericks and re-
15 booked on to property. *Id.*

16 119. On approximately **September 11, 2006**, new Spokane Police Chief
17 Anne Kirkpatrick is appointed to Spokane’s vacant Chief Position.

18 120. On or about **September 21, 2006**, Spokane County Prosecuting
19 Attorney Steve Tucker announces that Dr. Aiken has concluded her review of the
20 non-rebreather mask relative to Otto Zehm’s death. Dr. Aiken reportedly concludes
21 that her original cause of death determination (i.e., hypoxic encephalopathy due to
22 cardio pulmonary arrest while restrained in a prone, full appendage restraint for a
23 reported episode of excited delirium.) remains unchanged and that tests conducted
24 (albeit, not under similar conditions) on the mask did not implicate the mask in
25 Zehm’s respiratory failure. As indicated, Dr. Aiken’s non-rebreather mask test did
26 not replicate the conditions under which Zehm expired. Rather the test involved a
27

1 college age athlete running on a treadmill while wearing the mask. *See Dckt. #42,*
2 *Disc. #9, Spokesman's article.*

3 121. On or about **September 26, 2006**, forensic videographer Grant
4 Fredericks finished his report prepared for the SPD. In this report, Mr. Fredericks
5 concludes that he cannot confirm Officer Thompson's use of his baton during the
6 first 1:13 seconds of Defendant Thompson's attack on Otto Zehm. This conclusion
7 is seemingly contradicted by Defendant Thompson's own statement of immediate,
8 "preemptive" strikes to Zehm's body. Mr. Fredericks's conclusion also conflicts
9 with eye witness accounts of vertical baton strikes to Zehm's head, neck and upper
10 torso until Officer Braun arrives, when Defendant Thompson reportedly delivers
11 baton strikes to Zehm's lower extremities. *See Def. Disc #14, Exhibit #10.*

12 122. Mr. Fredericks approximate five thousand dollar (\$5000) bill for his
13 forensic report is not paid by the SPD, but rather through Treppiedi and the City's
14 civil liability Risk Management Division.

15 123. By the **end of September 2006**, the SPD completed the additional
16 investigative activities directed by the Spokane County Prosecutor's Office.
17 Detective Ferguson did not, however, revise any of her prior findings and
18 conclusions contained in her May 31, 2006, report exonerating Officer Thompson's
19 use of force on Zehm. *Id., Disc #1.*

20 124. In approximately **October 2006**, the City Police Department suspends
21 its investigation pending a charging (declination) decision by Spokane County
22 Prosecuting Attorney Steve Tucker. Meanwhile, the DOJ opens a full investigation
23 into the Zehm force – custodial death matter. As a result of the FBI and DOJ
24 pushing forward with a full investigation, Spokane County Prosecuting Attorney
25 Steve Tucker defers making any final charging decision until after completion of the
26 FBI's investigation. *See Ct. Rec. #40, Def, Disc #9; Ct. Rec. #60, Exhibit #10 and*
27

1 *Exhibit #12, Spokesman Review article of October 5, 2006 (Disc #9).*

2 125. From **March 2006 through the present**, however, Treppiedi and the
3 City Attorney's Office actively pursue a pre-suit and pre-indictment tort defense
4 preparation for Defendant Karl Thompson and the other named SPD and City
5 Defendants in the civil action. *See Dckt. #60, Exhibit #4.*

6 126. On **July 23, 2007**, the Estate of Otto Zehm and Mrs. Anne Zehm, Otto's
7 mother, individually and as personal representative of the Estate, file with the City of
8 Spokane and the City Attorney's (civil) Office an initial notice of a \$2.9 Million tort
9 and civil rights claim. In this claim, submitted under RCW 4.96.010 (Washington's
10 tort claim statute), Plaintiffs allege damages for civil rights violations, wrongful
11 death, and other state law tort claims. *See Dckt. #60, Disc. #9, Exhibit #10.*

12
13 **K. Overview of U.S. Dept. of Justice's Investigation.**

14 127. In **June 2006**, the United States Department of Justice (DOJ – FBI)
15 opened a preliminary case investigation into the circumstances of the force used on
16 Zehm and his proximally related death while in SPD custody. In July 2006, the U.S.
17 Attorney's Office requests a complete copy of Det. Ferguson's investigative file
18 materials. This request would be repeated on several occasions over the next 2.5
19 years. However, the DOJ would not receive a "complete" copy of Det. Ferguson's
20 and the SPD's MCU investigative file materials until in the spring of 2009. *See*
21 *Dckt. #60, Exhibit #13 (copy of AUSA Durkin's March 17, 2009, email to*
22 *Treppiedi).*

23 128. In the **fall of 2006** and later, the DOJ conducts percipient witness
24 interviews and use SPD Det. Burbidge's witness interview summaries as a reference
25 point. The DOJ learns that the Detectives interview with a witness previously
26 interviewed by the media and critical of defendant's use of force (i.e., reporting baton
27 strikes to the head) that they decided, before the interview, that they would try to

1 discredit her. The Detectives felt that the witness had an anti-law enforcement bias
2 (i.e., during an television interview stated she saw Thompson immediately strike
3 Zehm in the head with baton). This same approach, however, is not used with any
4 other witness, including those that are felt to be law enforcement friendly. In
5 addition, most of the interviewed percipient witnesses make significant changes to
6 Burbridge reports summarizing their interviews during the DOJ's investigation. The
7 revisions are more incriminating of defendant Officer Thompson's use of force than
8 is contained in Burbridge's summaries (i.e., witnesses variously describe:
9 immediate use of force; lack of any significant warning; lack of response time for
10 Zehm; Zehm described as trying only to get away, not attack/assault officer; and
11 they describe location of baton strikes that are inconsistent with defendant's
12 versions. DOJ later requests Det. Burbridge's notes from interviews, but is
13 informed that Burbridge has destroyed them. Det. Marske did retain notes for
14 several, but not all percipient witness interviews. These notes, while generally
15 supportive, do not address all described discrepancies and/or omissions.

16 129. During the **spring of 2007**, the DOJ scheduled a meeting with Grant
17 Fredericks and learns that Mr. Fredericks's \$5,400 bill for forensic services to the
18 SPD was coordinated by Acting Risk Manager Treppiedi and paid out of the City's
19 Civil Risk Mgmt. Division, not the Spokane Police Department. *Id., and FBI 302s.*

20 130. In **May 2007**, the DOJ requests Mr. Fredericks to perform additional
21 forensic work on the Zip Trip security video. Specifically, the DOJ requests Mr.
22 Fredericks to prepare stills of each frame of each of the four camera angles of the
23 security video for critical time periods involved (i.e., approximately the first 1:30
24 minutes showing Defendant Thompson's approach, initial attack, and continued use
25 of force on Zehm).

26 131. Since the United States was dealing with Mr. Fredericks as an expert
27

1 consultant in connection with the DOJ's continuing investigation, and since the SPD
2 had suspended its investigation and did not contract Mr. Fredericks to provide any
3 further law enforcement related services, it was the DOJ's expectation that the
4 requested additional forensic work and the photo stills that Mr. Fredericks prepared
5 would be provided exclusively to the DOJ and on a confidential investigation basis.
6 However, when Mr. Fredericks produced the still photographs, the DOJ is surprised
7 to learn that a copy of the stills and the work performed by Mr. Fredericks at DOJ's
8 behest has also been provided to asst. city (civil) attorney Treppiedi. *Id.*

9 132. In **Spring 2007**, the DOJ also performs interviews of Spokane Fire
10 Department personnel. During the course of the interviews, an attending assistant
11 city attorney provides, on several occasions, his interpretive "substantive
12 clarifications," which rephrase the witness's statements. These "clarifications"
13 likewise suggest testimony and/or statements that are adopted by the interviewed
14 percipient witnesses. The DOJ decides following completion of these interviews
15 that, if it is going to be successful in searching for accurate witness recall, untainted
16 by representative statements and/or suggested "clarifications," that the DOJ will
17 have to use the lengthier, more time consuming, grand jury process to perform and
18 complete it's examination of City fire department personnel, SPD officers,
19 investigators, and administrators.

20 133. In **August 2007**, Mr. Fredericks informs the DOJ that he cannot
21 perform any future forensic services in the DOJ's investigation on a confidential
22 basis since he is "under contract" with Treppiedi and the City Attorney's Office.
23 Mr. Fredericks conveys that unless and until the City Attorney's Office releases him
24 from his contract-ethical obligation concerning forensic work for that office, he
25 cannot confidentially perform any further forensic work in the case for the FBI-DOJ.
26 *Id.*

1 134. On or about **August 8, 2007**, the U.S. Attorney's Office arranged a
2 conference call with then City Attorney James Craven who releases Mr. Fredericks
3 from any further expert and/or other legal obligation to the City Attorney's Office
4 relative to the SPD and/or the City Attorney Office's handling of liability claims
5 against its clients. *Id.*

6 135. From the **fall of 2006 through the winter of 2007-2008**, the DOJ
7 continues with its forensic investigation examination and review activities. *Id.*

8 136. During the **spring of 2008**, the DOJ and the Grand Jury is prepared to
9 commence its 14 month investigation into the Otto Zehm use of force, custodial
10 death, and possible SPD investigation misrepresentation issues. *Id.*

11 **L. Overview of Defense Counsel's Retention & Scope of Representation**

12 137. During the **spring-summer of 2009**, the DOJ and Grand Jury proceeds
13 with its investigation, including the DOJ's collection of records and materials from
14 the SPD and City of Spokane.

15 138. On or about **September 3, 2009**, while the Estate of Otto Zehm multi-
16 million dollar (i.e., **\$2.9 million**) civil claim is pending and the DOJ's criminal
17 investigation continues, defendant's wife Mrs. Diana Jean Thompson files a petition
18 for divorce in the District Court for the State of Idaho, Kootenai County. The
19 defendant and Mrs. Thompson have been married for approximately thirty-eight (38)
20 years and had three (3) daughters from the marriage. In her divorce complaint, Mrs.
21 Thompson requests the court to award her all real property interests owned by the
22 couple, including the family home, as well as a motor vehicle and other personal
23 property. Plaintiff also requests "one-half" of the defendant's retirement plan
24 through the City of Spokane. Mrs. Thompson also seeks 100% of defendant's
25 interest in a another deferred compensation plan and trust. Mrs. Thompson, who
26 reportedly works part time, also asks the court to order defendant to pay "all"
27

1 existing community debts.

2 139. On **September 29, 2008**, a little over three (3) weeks after filing the
3 divorce petition, an uncontested decree of divorce is entered with the Court. This
4 decree transfers “all” interest in the family’s home to defendant’s purported ex-wife.
5 The order of decree further directs that the home be sold for a reasonable price and
6 on reasonable terms. Mrs. Thompson is also awarded 50% of defendant’s retirement
7 with the City and 100% interest in the defendant’s other deferred compensation plan.
8 Defendant is also purportedly directed in the decree to pay all existing community
9 debts and to pay \$1500/month in spousal support “until plaintiff’s death.” The
10 decree further provides, however, that he can continue to reside in the family’s home
11 “rent free” until the home is sold. *See attached Exhibit #29 – copy of September 29,*
12 *2009, Divorce Decree filed in Kootenai Co. Dist. Ct.*

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

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

24 142. **In early October 2008**, Spokane Police Chief Anne Kirkpatrick is
25 contacted by DOJ representatives and is informed that the FBI and the U.S.
26 Attorney’s Office anticipates calling a number of SPD personnel in front of the
27

1 Grand Jury to provide testimony. Asst. Chief Kirkpatrick volunteers to assist the
2 DOJ by offering to institute a “gag order” on all SPD personnel who are subpoenaed
3 and/or who provide testimony before the grand jury. Chief Kirkpatrick’s offer to
4 impose a gag order on SPD personnel appearing before the grand jury, in the interest
5 of maintaining the confidentiality and integrity of the DOJ’s on-going investigation
6 into “any federal crimes” that may have been committed by SPD personnel in
7 detaining Otto Zehm, and forcibly holding him in restraints and/or in connection
8 with obstructing and/or misleading the SPD’s and/or the DOJ’s investigation, was
9 accepted by the DOJ. *Id.*

10 143. **In early fall 2008**, the United States Attorney’s Office is prepared to
11 issue an official target letter to the Defendant Karl Thompson. Asst. city atty.
12 Treppiedi is contacted on October 6, 2008, and queried on whether Officer
13 Thompson has private criminal counsel. Treppiedi indicates that Thompson does
14 not have separate criminal counsel, but offers that since he represents Thompson’s
15 tort defense interests relative to his use of force on Zehm that the City Attorney can
16 accept the DOJ’s target letter on Mr. Thompson’s behalf. The United States
17 respectfully declines Treppiedi’s offer.

18 144. Approximately two weeks later, on or about **October 20, 2008**, the City
19 Attorney’s Office and its Risk Management Division prepared and submitted a
20 resolution to the Spokane City Council requesting approval for the retention of well
21 known criminal defense attorney Carl Oreskovich for the purpose of representing
22 and defending “the City” and it’s “employees” in connection with the Zehm Estate’s
23 pending “civil” civil rights action. *See Spokesman Review news article of October*
24 *21, 2009, Def. Disc #9, Exhibit #10 and Exhibit #13, copy of news article. See also*
25 *attached Exhibits 23-24, and 25-27.*

26 145. The City Council, based on representations of the City Attorney’s
27

1 Office, approved up to \$45,000 in defense fees and costs associated with Mr.
2 Oreskovich's alleged "civil" representation of "the City" and its "employees" in the
3 pending Zehm litigation. *Id.*

4 146. On or about **November 17, 2008**, FBI Special Agent Lisa Jangaard and
5 AUSA Tim Durkin met with Carl Oreskovich to discuss the United States' offer to
6 allow the Defendant Thompson to appear and testify in front of the grand jury. In
7 this meeting, Mr. Oreskovich informed the DOJ that he "exclusively" represents
8 Karl Thompson and he does not, notwithstanding any City resolution or newspaper
9 article to the contrary, represent "the City," or for that matter, any other Spokane
10 Police Department officers, any other SPD administrators, and/or any other city
11 "employees." *See Ct. Rec. #60, ¶ ¶ 58-63.* Mr. Oreskovich further indicates that
12 he and only he will be representing Mr. Thompson's "criminal" and "civil" interests
13 stemming from the Otto Zehm arrest incident. *Id.*

14 147. Mr. Oreskovich also discloses to Special Agent Jangaard and AUSA
15 Durkin that the City Attorney's Office has already retained a number of defense
16 experts in connection with its civil liability defense of the likely (but not then filed)
17 Zehm civil civil rights lawsuit, including specifically defensive tactics and police
18 procedures expert D.P. Van Blaricom (a former Bellevue PD Chief (retired in
19 approx. 1984)). The City Attorney's Office has frequently retained Van Blaricom to
20 assist it in its defense of civil rights/torts claims-suits against the Spokane PD. Mr.
21 Oreskovich further discloses that defense experts retained and paid for by the City
22 would be made available by the City Attorney's Office to help defend Thompson in
23 the event any criminal indictment was returned by the Grand Jury in the future. *Id.*

24 148. In **December 2008**, Oreskovich calls the Spokane County Medical
25 Examiner's Office to schedule an appointment with Medical Examiner, Dr. Sally
26 Aiken. Although Oreskovich has reportedly been provided access to the autopsy
27

1 through his “co-counsel” in the City Attorney’s Office, who is also the legal advisor
2 to the SPD, Oreskovich likewise is not an investigating law enforcement officer and
3 is not a prosecutor. Thus, the appointment is canceled when Oreskovich is advised
4 that Dr. Aiken cannot meet with him because he is not authorized under RCW
5 68.50.105 to discuss/review the autopsy.

6 149. On **March 13, 2009**, the Estate of Zehm and his mother Ann Zehm file
7 their civil civil rights action seeking damages for civil rights violations, wrongful
8 death, and state tort law claims. *See Estate of Otto Zehm, et al., v. Thompson, City of*
9 *Spokane, et al., 09-cv-0080-LRS, Dckt. #1.*

10 150. **From October 2008 through June 2009**, it became apparent to the
11 DOJ that Asst. City Atty. Treppiedi was briefing and preparing most of the Spokane
12 Police Department and/or the City of Spokane witnesses called to testify before the
13 Grand Jury. It was also learned that Treppiedi was debriefing SPD witnesses who
14 appeared before the grand jury. *See Ct. Rec. #60, ¶ 65.*

15 151. The DOJ also learned that Treppiedi was conducting an “investigation”
16 that appeared to “shadow” in some of the investigative activities of the DOJ and/or
17 Grand Jury. For instance, in addition to preparing and/or debriefing the many SPD
18 witnesses, Mr. Treppiedi also conducted post-GJ testimony interviews of one or
19 more non-SPD witnesses that had recently appeared before the Grand Jury. *Id.*

20 152. On **February 2, 2009**, Oreskovich has a telephone conversation with
21 AUSA Durkin wherein he informs the United States that he and he alone represents
22 Mr. Thompson’s “criminal and civil interest.”

23 153. On **February 3, 2009**, AUSA Durkin sends a letter to Oreskovich
24 confirming the parties’ previous conversations concerning Mr. Oreskovich’s
25 exclusive representation of Mr. Thompson and expressing concern over Treppiedi’s
26 reported disclosure of grand jury material, gleaned from other witnesses, to
27

1 Thompson and to Oreskovich. *See attached Exhibit #28.*

2 154. On **February 18, 2009**, the DOJ learns, based on conversations and
3 exchanges of correspondence with Treppiedi and Oreskovich, that notwithstanding
4 Oreskovich's earlier representation to AUSA Durkin and FBI Special Agent Jangaard
5 that "he and he alone" represented the defendant Thompson's criminal and civil
6 interests, Treppiedi was now asserting (notwithstanding Oreskovich's independent
7 retention at public expense) that Treppiedi and the City Attorney's Office also
8 continued to represent Thompson's global "interests" arising out of his use of non-
9 lethal and lethal force on Otto Zehm. *See Dckt. #60, Exhibit #6, Oreskovich's*
10 *February 18, 2009*, letter advising that Asst. City Attorney Treppiedi continues to
11 represent Thompson's, the SPD's, SPD administrators, other SPD officers, and the
12 City's interests in the Zehm incident, and any possible civil liability.

13 155. From **October 2008 through June 18, 2009**, defense counsel Mr.
14 Oreskovich was also actively participating in investigating and reviewing excessive
15 force claims against Thompson and apparently the City, and other officers. Mr.
16 Oreskovich's activities include conducting pre-grand jury and post-grand jury
17 interviews of investigators and other SPD personnel. *See attached Exhibit #30,*
18 *copy of Det. Ferguson's October 28, 2008, e-mail confirming meeting with*
19 *Treppiedi and three additional attorneys (i.e., Oreskovich, Faggiano and O'Hara).*

20 156. On or about **May 26, 2009**, the Spokane City Council, based on another
21 resolution prepared by the City Attorney's Office and its recommendation, authorizes
22 an additional **\$200,000** in "civil" defense fees and costs to pay Mr. Oreskovich for his
23 continued representation and defense of "*The City of Spokane*" and "*its employees*"
24 relative to the Otto Zehm matter. *See Spokesman Review article of May 27, 2009*
25 *([www.spokesman.com/stories/2009/may/27/city-approves-200000-for-defense-in-](http://www.spokesman.com/stories/2009/may/27/city-approves-200000-for-defense-in-zehm-case)*
26 *[zehm-case](http://www.spokesman.com/stories/2009/may/27/city-approves-200000-for-defense-in-zehm-case)). See also attached Exhibit #27 (City Council Resolution).*

1 157. In the **spring of 2009**, the United States learns that asst. city attorney
2 Treppiedi contacted and attempted to interview one of the DOJ's retained expert
3 witnesses and consultants in its continuing investigation of defendant Thompson,
4 Treppiedi's claimed client. Upon learning of Treppiedi's contact with Robert Bragg,
5 a defensive tactics expert and program director of the Washington State Criminal
6 Justice Training Commission's defensive tactics program, AUSA Durkin contacted
7 Treppiedi and requested that he and the City Attorney's Office cease and desist all
8 further contact with the DOJ's expert on their client's (including Thompson's) behalf.

9 158. Mr. Treppiedi refused the DOJ's request and expressed the belief that
10 while Mr. Bragg had no direct involvement in defendant Thompson's and/or any
11 other SPD officers' detention of Zehm the night of March 18, 2006, that Mr. Bragg
12 could nonetheless be a "fact witness" (concerning State and SPD training) and
13 therefore he had the right to engage in ex parte contact with and interview Mr.
14 Bragg, even if he was a DOJ expert and Treppiedi represented a directly adverse
15 party. *See Exhibit #7, Ct. Rec. 60.*

16 159. On **June 12, 2009**, AUSA Durkin sent Treppiedi an e-mail outlining
17 the DOJ's objection to Treppiedi's/City Attorney's attempt to use the civil case and
18 civil discovery processes to engage in *ex parte contact* with another party's expert
19 wherein privileged and/or confidential criminal case investigation information could
20 be improperly solicited and/or obtained. *Id.*

21 160. City Attorney Howard Delaney responded to AUSA Durkin's
22 correspondence indicating that the City would temporarily "stay" further attempts to
23 engage in ex parte contact with the United States' expert witness until a "further
24 review" of the issue was performed. *See Ct. Rec. 60, Exhibit #7, copy of the June*
25 *12th e-mail exchange concerning City Attorney's ex parte interviews with the United*
26 *States' expert.* Treppiedi's co-counsel Mr. Oreskovich was copied in on this
27

1 transmittal. No further response was received or provided City Attorney Delaney or
2 his Office.

3 161. During the course of the United States' and Grand Jury's investigation,
4 the United States expressed repeated concerns to Treppiedi and City Attorney
5 Delaney about what it believed to be "obvious" and "apparent "conflicts relative to
6 Treppiedi's and the City Attorney Office's "global representation" of "the SPD and
7 all SPD employees" connected to the Otto Zehm incident, including but not limited
8 to the City Attorney's continued representation of the target Karl Thompson.⁶ The
9 DOJ was concerned on multiple fronts. First, it is well established that excessive
10 force used by a police officer at the time of the arrest is not within the performance
11 of the officer's duty." *Smith v. City of Hemet*, 394 F.3d 689, 695-96 (9th Cir.2005),
12 cert. denied, 545 U.S. 1128, 125 S.Ct. 2938, 162 L.Ed.2d 866 (2005) ("Excessive
13 force used by a police officer at the time of the arrest is not within the performance
14 of the officer's duty. [citations].") *United States v. Span*, 970 F.2d 573, 581 (9th
15 Cir.1992) (an officer who uses excessive force is not in good faith performance of
16 his duties); *State v. Hoffman*, 116 Wash.2d 51, 100, 804 P.2d 577 (1991) (Officer
17 involved in crime of violence acts outside scope of authority); and *People v. White*,
18 101 Cal.App.3d 161, 164 (1980) (The performance of an officer's duty does not
19 include the infliction of excessive force.). Second, a conflict exists where an
20 attorney owes duties to an entity whose interests are and/or may become adverse to
21 the individual client. *State v. Nielsen*, 29 Wash.App. 451, 453, 629 P.2d 1333
22 (1981) (Interests are sufficiently adverse if it is shown that attorney owes a duty to
23

24 ⁶ The target of the investigation, Karl J. Thompson, Jr., was notified in July of
25 2006 that he was a target and/or subject of the DOJ's investigation. Thompson was
26 (officially) provided with an official target letter and notified of an opportunity to appear
27 in front of the grand jury in November 2009.

1 defendant to take some action that could be detrimental to his other client(s)). The
2 DOJ was also concerned that the legal department for a fellow law enforcement
3 agency was releasing sensitive law enforcement information to the target of the
4 criminal investigation in contradiction of the law enforcement agency's expressed
5 interests.

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

11 163. On **June 15, 2009**, AUSA Durkin sent an e-mail to Treppiedi and City
12 Attorney Delaney that, among other things, memorialized the United States'
13 Department of Justice's concerns with the City Attorney's Office's actual and/or
14 apparent conflicts of interest in claiming "global representation" of all SPD
15 employees relative to the DOJ's investigation and excessive force claims. *See Ct.*
16 *Rec. 60, Exhibit #8, copy of AUSA Durkin's June 15, 2009 e-mail outlining*
17 *"conflicts concerns" with the "global scope" of City Attorney's representation of*
18 *target and other SPD employees involved in the DOJ's investigation of the Zehm*
19 *matter.* Treppiedi's co-counsel, Mr. Oreskovich was provided a copy of this
20 transmittal.

21 164. The DOJ further learned that Treppiedi, given his and the City
22 Attorney's Office's continued representation (at public expense) of the target
23 Defendant Thompson, was channeling confidential grand jury information
24 (including debriefed testimony) to Thompson and to Treppiedi's co-defense counsel
25 Carl Oreskovich. This circumstance was disconcerting to DOJ in light of
26 Treppiedi's primary client, Chief Kirkpatrick's issuance of a "gag order" to SPD
27

1 employees that was intended to maintain the confidentiality and integrity of the
2 DOJ's investigation, and which order was intended to prevent the dissemination of
3 DOJ investigation activities to the target of the United States investigation (i.e., the
4 Defendant Thompson). *See Ct. Rec. 60, Exhibit #9.*

5 165. Treppiedi was aware of his client Chief Anne Kirkpatrick's gag order,
6 but asserted that since he is not an SPD employee that he is not bound by the gag
7 order and/or by Chief Kirkpatrick's desire to maintain the confidentiality of the
8 DOJ's/Grand Jury's investigation. Treppiedi further asserted that since he continued
9 to represent the target Thompson that, notwithstanding any conflict, he had an
10 ethical obligation to provide any and all information that he acquired to Mr.
11 Thompson and to his co-counsel Mr. Oreskovich. *See Ct. Rec. 60, Exhibit #9*, a true
12 and correct copy of AUSA Durkin's **June 17, 2009**, e-mail to City Attorney Delaney
13 and Treppiedi conveying DOJ's objections to dissemination of traditionally
14 confidential grand jury investigation information to criminal target. *Id.*

15 166. On **June 18, 2009**, Asst. City Attorney Treppiedi and Carl Oreskovich
16 filed a unified **Answer and Affirmative Defenses** in the civil action. The 56 page
17 Answer, signed Treppiedi and Oreskovich on behalf of the Defendant Thompson
18 (and all other Defendants) alleges that the Plaintiff Otto Zehm (the mentally disabled
19 janitor with cognitive delay) threatened Defendant Thompson with a plastic pop
20 bottle and therefore was solely responsible for causing: a) Officer Thompson's use
21 of an impact weapon to strike Mr. Zehm multiple times and taser him; b) the need to
22 forcibly subdue him in a prone hog-tie restraint; and c) his proximally related brain
23 death. *See Zehm v. Thompson, City of Spokane, et al, Dckt. # 12.* This answer also
24 avers that Defendant Thompson "never" struck the victim Zehm in the head with
25 his baton. *Id.*

26 167. Obviously, defense counsel Oreskovich must have exercised significant
27

1 “due diligence” in during his pre-Answer & Affirmative Defenses review and
2 investigation of the civil Plaintiffs’ civil rights “excessive force” claims so as to
3 allow him and his co-counsel with the City to prepare and file a 54 page Answer &
4 Affirmative Defenses not only on behalf of defendant Thompson, but also
5 defendants Asst. Chief Nicks, Det. Ferguson, Sgt. Torok, Officer Braun, Officer
6 Raleigh, Officer Uberuaga, Officer Voeller, Officer Dahle, and City of Spokane (i.e.,
7 SPD).

8 168. The next day, **June 19, 2009**, the Grand Jury for the Eastern District of
9 Washington returned a Two Count Indictment against Defendant Thompson
10 charging him with criminal violations of Mr. Zehm’s constitutional rights (i.e.,
11 excessive force) and with obstruction of justice by providing one or more false
12 entries in a law enforcement report to justify his excessive force on the victim Zehm
13 (i.e., false statements in his recorded interview statement). *See U.S. v. Thompson,*
14 *Cause 09-cr-0088-FVS, Dckt #1.*

15 169. 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 Defendant
17 Thompson’s motion for a Bill of Particulars on Count Two of the Indictment
18 charging obstruction of justice (i.e., false statement(s) in an investigation record
19 (e.g., Defendant Thompson’s recorded statement of March 22, 2006)). The Court
20 denied Defendant’s motion. *See Dckt #47, U.S. v. Thompson, Cause 09-cr-0088-*
21 *FVS.*

22
23 **M. Defendant Thompson’s Charged False “Entry” Under 18 U.S.C. 1519.**

24 167. When the Defendant Thompson signed his transcript on March 27,
25 2006, SPD-MCU investigators already had in their possession several witness
26 accounts and other materials that significantly contradicted Officer Thompson’s
27 initial and subsequent versions of his engagement of Mr. Zehm. *See Disc #1 and*

1 #55. During the course of the MCU's investigation it acquired additional
2 information and materials that further contradicted Thompson's transcribed
3 statement.

4 168. These contradictions include, but were not limited to Officer
5 Thompson's description of:

6 i) His initial engagement of Mr. Zehm (i.e., Thompson's failure to stop, as
7 he claimed, at a distance of four (4) feet to facially address Zehm and issue
8 verbal commands);

9 ii) The nature and extent of the "verbal commands" claimed to have been
10 issued (i.e., Officer Thompson claims to have issued two direct, successive,
11 loud verbal commands to Zehm, while in the alleged stopped, addressed and
12 confrontational position);

13 iii) Mr. Zehm's alleged immediate, knowing, defiant and verbal response to
14 Defendant's claimed verbal commands (i.e., Officer Thompson claimed that
15 Zehm's responses to his loud, successive verbal commands were "immediate,"
16 knowing, defiant, and aggressive (among other descriptions));

17 iv) The amount of time Defendant allegedly afforded Zehm to perceive,
18 understand, react and comply with the claimed verbal commands (i.e., Officer
19 Thompson's first baton strike is within approximately 2.5 seconds of first
20 contacting Mr. Zehm);

21 v) Mr. Zehm's asserted knowing and intentionally defiant, aggressive, and
22 non-retreating "about to be assaultive" physical stance with the two liter
23 plastic Diet Pepsi bottle, which actions Defendant claims Zehm made in
24 response to his claimed verbal commands (i.e., Zehm, upon alerting to the
25 continuously advancing Officer Thompson, never took a fixed position of
26 defiance and/or aggress, and records/video only show Zehm retreating from
27 the Defendant Officer); and

vi) The impact location of the baton strikes (i.e., criminal discovery shows
several of Defendant Officer Thompson's strikes were to Zehm's head, neck
and upper torso, in addition to lower torso and extremities Defendant claimed
he struck). This conclusion is supported by witnesses, video, medical,
forensic pathology, and human factors engineering evidence.

1 *See Disc. #1 and #55.*

2
3 **N. Conflicts In “Global Representation.”**

4 169. During the course of DOJ’s and the Grand Jury’s investigation, the DOJ
5 raised concerns with the City Attorney’s Office and defense counsel Oreskovich
6 over apparent, and seemingly irreconcilable conflicts in and among the various
7 parties that they claim to “individually” and “globally” represent. In addition to the
8 conflict recitals above, these additional and seemingly irreconcilable conflicts
9 include, but are not necessarily limited to:

10 i. **Asst. Chief Jim Nicks** – The United States anticipates that then Acting
11 Chief Nicks will testify at trial, based on the security store video stills and
12 other information, that Defendant Thompson used force in excess of that
13 authorized by SPD policy and law. The United States also expects Asst. Chief
14 Nicks to testify that Thompson’s statement to investigators was materially
15 inaccurate in comparison to the security store video and forensic medical
16 findings. *See Dckt. #60, Exhibit #15, of Asst. Chief Nicks Jenks Statement*
(copies which are submitted in camera).

17 More specifically, Asst. Chief Nicks is expected to testify consistent with his
18 prior recorded Jencks Act statement in the following manner:

- 19
- 20 • The Defendant Officer Thompson has years of training in defensive
21 tactics, dealing with emotionally disturbed individuals and hostage
22 negotiations. Officer Thompson is a highly trained law enforcement
23 officer and should have outstanding communications skills;
 - 24 • Asst. Chief Nicks would have expected the Spokane Police Department
25 investigation to have provided its in-house use of force instructors with a
26 thorough disclosure of the evidence concerning the “totality of the
27 circumstances” and to have secured opinions on: a) Was the use of force
lawful; b) Was the use of force objectively reasonable; and c) Was the
use of force in compliance with Spokane Police Department policy. The

1 SPD Major Crimes Unit investigation team did not perform these tasks;

- 2 • The SPD Major Crimes Unit also failed to perform a side-by-side
3 analysis and comparison of Officer Thompson's recorded statement
4 against the objectively recorded Zip Trip store security video;
- 5 • Based on Officer Thompson's statement in comparison to the Zip Trip
6 store security video, Officer Thompson's baton strikes were not mostly
7 "horizontal" as claimed. Rather the baton strikes were more vertical and
8 applied in a downward manner. These vertical strikes are inconsistent
9 with the defensive tactics training provided to him on the use of a baton;
- 10 • Based on the Zip Trip security store video, Officer Thompson did not
11 stop to engage in a verbal exchange with Otto Zehm (i.e., give orders)
12 before the rapid delivery of Officer Thompson's first two baton strikes;
- 13 • Based on the video, Otto Zehm is retreating the entire time from the
14 rapidly advancing Officer Thompson and does not take a position of
15 aggress and/or engagement toward Officer Thompson, and does not
16 appear "about to charge" and/or about to be assaultive" toward Officer
17 Thompson;
- 18 • Based on the video, during Officer Thompson's initial engagement of
19 Otto Zehm, Mr. Zehm appears to be "passive resistant" and is not
20 assaultive toward the officer. Therefore Officer Thompson was not
21 authorized under SPD Use of Force policies to utilize an impact weapon
22 on and/or strike Zehm;
- 23 • Based on the security video, Otto Zehm did not take a boxing stance
24 and/or throw punches at Officer Thompson in the south aisle. The
25 objective video evidence is inconsistent with Officer Thompson's
26 statement to SPD investigators;
- 27 • When an officer is engaged in a "Terry stop," the training emphasis is on
communication and notification that the subject is being temporarily
detained for further questioning relative to a "suspicious circumstance."
Officer Thompson's aggressive advance and rapid use of an impact
weapon on Otto Zehm, who was not assaultive nor reasonably appeared
"about to charge" or "be assaultive," violated Spokane Police Department

1 Use of Force policies;

- 2 • Based on the security video, Officer Thompson’s use of an impact
3 weapon was not objectively reasonable, was assaultive, and was of a
4 level of force higher than that authorized by the Spokane Police
5 Department’s policies and procedures governing law enforcement’s use
6 of force on public citizens;
- 7 • It would be objectively unreasonable for Officer Thompson to use lethal
8 force against Otto Zehm. Lethal force isn’t even on the page here and
9 would constitute an unlawful assault;
- 10 • Based on the recorded events of the video and the inconsistencies in
11 Officer Thompson’s statement to Spokane Police Department
12 investigators, Officer Thompson’s use of a taser was not authorized and
13 violated the Spokane Police Department’s use of force policies;
- 14 • Asst. Chief Nicks is familiar with Spokane County’s Medical Examiner,
15 Dr. Sally Aiken, and would defer to her opinions on the existence of
16 objective medical evidence supporting the conclusion that Mr. Zehm
17 sustained blunt force trauma to the head, which blunt force trauma was
18 consistent with one or more baton strikes by Officer Thompson;

19 Mr. Oreskovich is co-counsel with City Attorneys who claim to globally represent
20 Asst. Chief Nicks and defendant Thompson. Defense counsel’s “co-counsel” creates
21 a conflict of interest between this witness and his client.

22 ii. **Officer Rob Boothe** – Officer Boothe is the SPD’s lead defensive
23 tactics instructor as well as one of approximately four master firearms
24 instructors in the state of Washington. MCU Det. Terry Ferguson enlisted
25 Officer Boothe’s assistance in the SPD’s criminal investigation. However,
26 Officer Boothe stated that Det. Ferguson did not provide him with all of the
27 video that captured Officer Thompson’s use of force and/or forensic medical
findings by the County Medical Examiner’s Office.

The United States anticipates that Officer Boothe will testify based on

1 his recorded Jencks Act statement that it is his expert opinion, based on his
2 review of all of the video footage and related information, that Officer
3 Thompson used force in excess of that authorized by SPD policy and by law.

4 The United States also expects Officer Boothe to testify that Officer
5 Thompson's statement describing Mr. Zehm's behavior as about to be
6 "assaultive," the stated basis for Defendant's use of an impact weapon, is not
7 objectively reasonable and inaccurate in comparison to the store security
8 video and other evidence. *See Dckt. #60, Exhibit #18, Jencks Act Statement.*

9 More specifically, the United States anticipates Officer Boothe
10 testifying in a manner consistent with his prior recorded Jencks Act statement
11 in the following manner:

- 12 • SPD Detective Terry Ferguson of the Major Crimes Unit solicited
13 Officer Boothe's analysis of the defensive techniques that Officer
14 Thompson applied on Otto Zehm. However, Detective Ferguson only
15 provided Officer Boothe with limited information (i.e., two (2) video
16 angles) about the incident and her own overview and recital of the
underlying "suspicious circumstances" call she stated Officer
Thompson was investigating;
- 17 • Based on a more detailed review of Officer Thompson's recorded
18 statement, in comparison to what is reflected on the Zip Trip store
19 security video, there was no objective basis authorizing the use of an
20 impact weapon targeted at Mr. Zehm's head, neck, or above the
shoulders (i.e., no lethal force authorized);
- 21 • Spokane Police Department use of force policy is defined on a
22 "reasonable officer" standard. This is the same standard used by the
23 Courts to determine the lawfulness of an officer's use of force;
- 24 • In order for a Spokane Police Department officer to use an impact
25 weapon on a subject (i.e., a baton), the subject has to be "assaultive" or
26 there must be an "objectively reasonable" basis to perceive that the
subject is "about to be assaultive." An officer's "subjective" belief that
27 is not reasonably supported by "objective evidence" will not support an

1 officer's unreasonable use of force;

- 2 • The use of a taser on a subject is objectively unreasonable unless the
3 subject is "actively assaultive" or there is an objectively reasonable
4 apprehension that an "assault is imminent." The firing of a taser at Otto
5 Zehm, who was actively resistant but not actively assaultive, was
6 objectively unreasonable and is contrary to the Department's defensive
7 tactics training, and violated Spokane Police Department policies;
- 8 • Based on the video, Otto Zehm is retreating the entire time that Officer
9 Thompson is advancing upon him and attacking him with his baton;
10 Therefore, Otto Zehm is "actively resistant" but was not "assaultive." It
11 was not objectively reasonable for Officer Thompson to believe that
12 Mr. Zehm was "about to charge" or "about to be assaultive" toward
13 Officer Thompson. Therefore, there was no reasonable threat to Officer
14 Thompson and Officer Thompson's use of an impact weapon was
15 objectively unreasonable and violated Spokane Police Department use
16 of force policies;
- 17 • After Otto Zehm was knocked to the ground, it does not appear from
18 the video that Otto Zehm used the Pepsi bottle as a weapon against the
19 Officer. Rather, Otto Zehm appears to be using the Pepsi bottle
20 defensively. Given this, it was objectively unreasonable and a violation
21 of Spokane Police Department policy for Officer Thompson to utilize a
22 taser on a passively and/or actively resistant, but not assaultive (or
23 about to be assaultive) Otto Zehm;
- 24 • Based on the video, Otto Zehm did not, as Officer Thompson claimed
25 stand up in the south aisle, take a boxing position, and throw punches at
26 the Officer. Officer Thompson's recorded statement describing Mr.
27 Zehm in this manner is inconsistent with the Zip Trip store's security
video;
- Based on Officer Thompson's description of Zehm, in comparison to
the events objectively captured by the security video, Officer
Thompson's use of force is not objectively reasonable;
- Any baton strikes by Officer Thompson targeted at Mr. Zehm's head,
neck, and/or above Mr. Zehm's shoulders is deemed "lethal force,"

1 which level of force would not have been warranted or objectively
2 reasonable in this case;

3 Again, defense counsel is co-counsel with three asst. city attorneys and a City
4 Attorney's Office who claims to "globally represent everyone" employed with the
5 SPD and the City of Spokane. This creates an obvious conflict relative to Officer
6 Boothe's sworn testimony.

7 iii. **Officer Jason Uberuaga** – Officer Uberuaga, a certified defensive
8 tactics instructor, provided the United States with two Jencks Statements. In
9 the first Jencks Statement, Officer Uberuaga stated that based on the security
10 store video stills, Officer Thompson used force in excess of that authorized by
11 SPD policy and law.

12 Approximately one week later, after reflection and meeting with asst.
13 city attorney Treppiedi, Uberuaga contacted the DOJ and asked to provide a
14 clarifying Jencks Statement. In this additional statement, Officer Uberuaga
15 stated that, based on the number of baton strikes (i.e., being thirteen versus
16 what he believed were more during his first Jencks Act statement), that
17 Officer Thompson may not have used excessive force based on deference to
18 Thompson's subjective beliefs, not objective reasonableness.

19 However, Officer Uberuaga did not refute his earlier testimony that
20 Officer Thompson's recorded statement describing Otto Zehm as aggressive
21 and threatening with the pop bottle was inaccurate in comparison to the
22 security store video. *See Dckt. #60, Exhibit #17, copies of Uberuaga's Jencks
23 Statements.*

24 More specifically, Officer Uberuaga is expected to testify consistent
25 with his prior recorded Jencks Act statement in the following manner:

- 26 • Much of the articulated basis for Officer Thompson's use of force, as
27 claimed in his recorded statement, is inconsistent to the action captured
on the Zip Trip security store video;

- 1 • Officer Thompson also did not “stop” at any time to give his claimed
2 verbal commands to Otto Zehm;
- 3 • From the time that Otto Zehm turned and responded to Officer
4 Thompson’s rapid advance, with baton ready to strike, Otto Zehm did not
5 take a position of aggression against Officer Thompson;
- 6 • Specifically, in response to Officer Thompson’s rapid advance, Otto
7 Zehm did not take a “charged position”;
- 8 • From the time that Otto Zehm turns and observes Officer Thompson’s
9 rapid advance, with baton in a ready strike position, Otto Zehm
10 continuously retreats away from Officer Thompson;
- 11 • Officer Thompson’s statement that Otto Zehm only turned away from the
12 Officer after he delivered his first baton strike, allegedly to Zehm’s left
13 upper thigh, and that he then grabbed the back of Zehm’s coat collar to
14 deliver a second baton strike, allegedly to Zehm’s right upper thigh, is
15 not consistent with the Zip Trip store’s security video;
- 16 • Officer Thompson’s recorded statement claiming that Otto Zehm, after
17 being knocked to the ground by Officer Thompson’s two (2) baton
18 strikes and then being tased, got back up on his feet and engaged in a
19 boxing stance in the south aisle, from which standing boxing stance
20 Zehm allegedly threw punches at Officer Thompson, is not supported by
21 the events captured by the objectively recorded Zip Trip security video;
- 22 • Officer Thompson’s statement that he perceived the retreating Zehm to
23 take a “charged position,” which position Officer Thompson claims he
24 felt Zehm was going “charge him,” is not supported by the Zip Trip store
25 security video, which only shows Zehm retreating from Officer
26 Thompson’s rapid advance;
- 27 • Officer Thompson’s stated perception that Otto Zehm took a fixed,
loaded, defiant position, with “the plastic pop bottle,” which Officer
Thompson stated was the basis for allegedly perceiving that Zehm was
“about to charge” him, is contradicted by the Zip Trip store security
video and not objectively reasonable;

- 1 • Based on the store security video, it would be objectively unreasonable to
2 use an impact weapon upon a retreating, non-compliant or actively
3 resistant Zehm, and the use of an impact weapon violates Spokane Police
4 Department's use of force model, policies and training;
- 5 • The delivery of any baton strike targeted above Otto Zehm's shoulders
6 (i.e., head and neck) constitutes lethal force, and the use of any lethal
7 force on Otto Zehm was not objectively reasonable nor supportable under
8 the circumstances;
- 9 • Although the security video conflicts with Officer Thompson's
10 description of Otto Zehm's behavior, I will defer to Officer Thompson's
11 "subjective beliefs" as to why he used force;
- 12 • Despite Officer Thompson's subjective beliefs-statements to the contrary,
13 the Zip Trip security video does not support Officer Thompson's physical
14 description that: i) He stopped at a distance of four feet to give verbal
15 commands to Zehm; ii) that Zehm stood his ground and was defiant in
16 response to the alleged verbal commands; iii) that Zehm was physically
17 "aggressive" toward him; and/or iv) that Zehm was "about to charge"
18 him.

19 Again, Mr. Oreskovich is co-counsel with the City Attorney's Office who purport to
20 globally represent Mr. Uberuaga and defendant Thompson.

21 iv. **Det. Terry Ferguson** – The United States anticipates that Det.
22 Ferguson will testify that her May 31, 2006, investigation report summary and
23 case referral that she sent to the Spokane County Prosecuting Attorney's
24 Office stating that the SPD investigation did not reveal "any evidence" of
25 excessive force was "inaccurate." The United States also anticipates Det.
26 Ferguson will testify that there were many glaring missteps and omissions
27 during the course of the SPD's "independent investigation." This neglect
includes, but is not limited to the failure to interview AMR ambulance
paramedics who were informed on scene by SPD personnel that Otto Zehm
had "attacked" SPD Officer (Thompson) and in response Officer Thompson
struck Zehm in the "head, neck, and upper torso."

1 Defendant denies delivering any baton strikes to Mr. Zehm's head
2 which is contradicted by not only percipient witness statements, but also
3 forensic medical findings by Dr. Sally Aiken, the County's Medical Examiner.
4 *See Ct. Rec. #60, Exhibit #19, Terry Ferguson's Jencks statement; see also*
5 *Def. Discovery Disc #1 and 12.*

6 Mr. Oreskovich is co-counsel with the City Attorney's Office who represent Det.
7 Ferguson and defendant Thompson.

8
9 v. **Officer Tim Moses** - Officer Tim Moses was dispatched as back up to
10 Officer Braun. After arriving on-scene he met with defendant and received a
11 description from Defendant that is adverse and could affect Defendant's penal
12 interests. .

13 Again, defense counsel is co-counsel with City Attorney's Office claims to globally
14 represent Officer Moses and all other officers, officials and/or employees,
15 notwithstanding obvious, apparent and/or potential conflicts of interest.

16
17 170. In addition to the foregoing, the United States has identified the
18 following combined SPD fact-expert witness that it may call during its case in chief
19 at trial (*see United States Supplement to Expert Disclosures, Ct. Rec. 141*):

20 vi. **Scott Lesser, Detective, Spokane Police Department, Spokane,**
21 **Washington.** Detective Lesser is a twenty-three (23) year veteran with the
22 Spokane Police Department. He is also the Spokane Police Department's
23 certified taser instructor. Detective Lesser is currently the lead instructor for
24 the taser program in the Spokane Police Department. Detective Lesser
25 attended an advanced taser instruction certification course in July 2002 and
26 received an additional instructor's certification for the M26 taser on July 10,
27 2002. In January 2004, Detective Lesser received additional taser
instruction for the M26 and X26 tasers. He was recertified as an instructor
on January 14, 2004. A copy of Detective Lesser's detailed report, Det.

1 Ferguson's report of interacting with Det. Lesser, Det. Lesser's prior sworn
2 Jencks statement and testimony, and a summary of his work experience and
3 training has been previously provided to Defendant's counsel. it is
4 anticipated that Detective Lesser, in addition to factual testimony, may
5 provide one or more of the following expert witness testimonials at trial:

- 6 • A download of Officer Thompson's taser showed that it was discharged
7 (i.e., the trigger was pulled) at approximately 13:25:15 hours on March
8 18, 2006. This was likely a test discharge when the Officer came on
9 duty. The second discharge occurred at approximately 19:21:49 hours,
10 when Officer Thompson reportedly fired his taser at Otto Zehm.
11 Detective Lesser noted the date stamp on Defendant Thompson's taser
12 was correct; however the time stamp was not. With regard to Officer
13 Steve Braun, Jr.'s taser, Detective Lesser examined the taser and
14 confirmed that there were four (4) applications on March 18, 2006. The
15 first application was at approximately 18:13:04, which is reportedly when
16 Officer Braun, at Officer Thompson's request fired his taser at Zehm; the
17 second five (5) second application was at 18:14:10, when Thompson
18 reportedly directed Braun to drive stun Zehm; the third, five (5) second
19 discharge was at 18:14:21, and a fourth, five (5) second discharge was at
20 18:14:29. *The time of the discharges are not consistent with the actual
21 time that Officer Thompson engaged Zehm and then had Officer Braun
22 taser Zehm. The fourth taser discharge is inconsistent with Officers
23 Thompson's and Braun's statements;*
24
- 25 • Upon firing the probes of a taser, the probe spread is one (1) foot of
26 separation for every seven (7) feet of distance between the taser and the
27 target. The further apart the probes spread, the more effective the
application. The optimal application is from a distance of twelve (12) to
twenty (20) feet. The reason for this is when probes are in close
proximity, only a small portion of the body is affected by the taser's
electrical current. The taser has two defensive aspects: 1) it disrupts the
subject's motor nervous system or muscles; and 2) inflicts pain to try to
gain compliance;
- Upon impact, the taser's electrical current travels over the area between
the two probes. The fired probe is still effective if only one of them
penetrates skin and the other penetrates clothing. Taser International

1 studies have shown that electricity will travel through clothing, but will
2 not inflict optimal force;

- 3 • The application of a drive stun is not as effective as firing probes. The
4 distance between the probes in a drive stun is approximately 1.5 inches,
5 which means that only a small area of the body is affected by the drive
6 stun, which typically causes a burn;
- 7 • With a successful probe (firing) application there will be a small sized
8 hole where the probe(s) enter the skin. A drive stun will usually leave a
9 redness similar to that of a minor burn;
- 10 • *The firing of probes is only authorized on an “assaultive person”;*
- 11 • *The application of a drive stun can be used with an “active resister”;*
- 12 • Spokane Police Department’s policy provides that for an officer to fire /
13 deploy taser probes, the suspect *must be displaying “assaultive
14 behavior”* toward the officer or other subjects;
- 15 • Defendant Officer Thompson was trained on the Spokane Police
16 Department’s policy and has received appropriate taser deployment
17 training;
- 18 • In 2005, Detective Lesser trained Officer Thompson on the Spokane
19 Police Department’s taser policy and the appropriate taser application,
20 and the level of force a subject must present before an officer can utilize
21 either a taser probe firing or a drive stun;

22 *See Ct. Rec. 141.*

23 **O. United States On-going & Continuing Obstruction Investigation.**

24 171. In addition to the foregoing clear conflicts existing in and among the
25 City Attorney Office’s and Mr. Oreskovich’s “global representation,” the United
26 States has learned during the course of its on-going investigation that Officer
27 Thompson did describe to one or more SPD officers-investigators on scene,

1 immediately following his use of force, that Mr. Zehm “lunged” at him, “attacked”
2 him, and/or “came at him” with the subject plastic pop bottle.

3 172. Officer Thompson did not, however, describe Otto Zehm in this manner
4 four days later on March 22, 2006, when he gave his official recorded interview to
5 Det. Ferguson. *See Ct. Rec. #60, Exhibit #1.*

6 173. Defendant Thompson and his counsel now deny having ever described
7 Zehm as having lunged at, attacked, and/or “coming at him” with the plastic pop
8 bottle. However, the Defendant’s denials are conflicted by more than one SPD
9 personnel’s statements, Asst. Chief Nick’s on scene media statements immediately
10 following the incident, and other SPD officers’ sworn *Jencks Act* statements. Mr.
11 Oreskovich is co-counsel with City Attorneys who claim to represent these officers.

12 174. In addition to the apparent conflicts between Defendant Thompson’s
13 “initial story” and his later “official story” provided four (4) days later during his
14 recorded interview, and the other conflicts in the statements/testimony by MCU
15 investigators, SPD supervisors and administrators, and other persons present the
16 night of the incident relative to the origination of the false “lunge” description, the
17 DOJ is continuing its investigation into possible further federal obstruction charges
18 that may have been committed by one or more other SPD personnel during a
19 possible “cover up” communicated to the public, the media, the prosecutor, and
20 certain SPD administrators. It is troubling that Mr. Oreskovich’s “co-counsel”
21 claims to represent not only these potential subjects of the DOJ’s investigation, but
22 also defendant Thompson.

23 175. In fact, the DOJ is continuing to investigate a number of subjects,
24 including one or more named defendants in the civil action relative to possible
25 criminal obstruction violations under 18 U.S.C. §§ 1501, et seq.; 1623, et seq.

26 176. As indicated, the DOJ’s investigation has yielded evidence that suggests
27

1 that Officer Thompson's account of the altercation with Zehm changed from an
2 initial recounting of the application of force to a lunging/attacking Zehm in the form
3 of police baton blows delivered to Zehm's head and/or neck and/or upper torso,¹ to a
4 later version defendant provided in the subsequent recorded statement provided to
5 SPD investigators on March 22, 2006. In this later version, Thompson stated that he
6 hit Zehm wherever he could except for his head, adding that he avoided delivering
7 head blows due to his recognition that his engagement of Mr. Zehm did not rise to a
8 level that allowing him (Officer Thompson) to use deadly force (i.e., baton strikes
9 directed above Zehm's shoulders) on Zehm. Defendant also claimed that Zehm did
10 not lunge/attack him, just appeared "about to" charge, attack or lunge at him.

11 177. Defendant is represented by counsel who seemingly has significant
12 conflicts in and among his co-counsel's clients, which representative clients have or
13 may have interests adverse to defendant at the time of trial.

14
15 RESPECTFULLY SUBMITTED this 12th day of April, 2010.

16 JAMES A. MCDEVITT
17 United States Attorney (EDWA)

18 s/ Timothy M. Durkin
19 TIMOTHY M. DURKIN
20 Assistant United States Attorney
21 Attorneys for Plaintiff United States

22
23 ¹ The intentional application of a baton strike (i.e., "impact weapon") above a subject's
24 shoulders (i.e., to head or neck) is proscribed by both SPD policy and in any circumstance
25 where the use of deadly force is not reasonably warranted. See *Smith v. City of Hemet*, 394
26 F.3d 689, 700-04 (9th Cir.2005) (*en banc*) (discussing highest threat standard required for
27 Officer's use of deadly force); see also 18 U.S.C. § 242 (elements).

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Certificate of ECF and/or Mailing

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

Carl Oreskovich, Esq.
Counsel for Karl Thompson

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

s/ Timothy M. Durkin
Timothy M. Durkin
Tim.Durkin@USDOJ.gov