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12 UNITED STATES DISTRICT COURT
13 EASTERN DISTRICT OF WASHINGTON

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

NO. 09-0088-FVS

**United States’ Second Notice of Initial
Disclosures of Expert Witnesses &
Testimony**

20
21 Plaintiff, United States of America, by and through James A. McDevitt, United
22 States Attorney for the Eastern District of Washington, and Timothy M. Durkin,
23 Assistant United States Attorney for the Eastern District of Washington, and Victor
24 Boutros, Trial Attorney, U.S. Department of Justice (Washington D.C.), submits the
25 following information/notice, pursuant to Fed.R.Crim.P. 16(a)(1)(G), of the United

26
27 United States’ Second Notice of Initial Disclosures of Expert Witnesses &
Anticipated Testimony

1 States' intent to use one or more of the following expert witnesses' testimony at the
2 time of trial.

3 **I. RULE 16(a) Expert Disclosures**

4 The United States identifies the following witnesses who, due to their training,
5 education and/or experience, may be called at the time of trial and may be allowed to
6 provide expert opinion evidence to aid and assist the jury in its understanding of the
7 various medical concepts and/or issues involved in this case:

8 **1. Dr. Sally Aiken, M.D., Forensic Pathologist, Spokane County**
9 **Medical Examiner's Office, Spokane, Washington.**

10 Dr. Aiken is a certified forensic pathologist and has been the Spokane Medical
11 Examiner and/or Deputy Forensic Pathologist for approximately the last eight years.
12 She has performed hundreds of autopsies and is qualified to render opinions in the
13 area of cause of death, contributing causes of death, and injury causation.

14 **Summary of Anticipated Opinions.**

15 It is anticipated that Dr. Aiken will testify in a manner consistent with her
16 autopsy findings and reports of May 22, 2006, and August 24, 2006, as well as
17 opinions provided to the FBI during its investigation, and any sworn testimony or
18 statements, and/or other County Medical Examiner records and reports. The United
19 States anticipates that Dr. Aiken will opine that Mr. Zehm sustained blunt force
20 trauma to his head during the early evening of March 18, 2006, as result of Officer
21 Karl Thompson's use of force. Using reasonable medical certainty, on a more
22 probable than not basis, and based on her forensic examination and other materials
23 provided to her by the Spokane Police Department as well as the United States
24 Department of Justice, it is anticipated that Dr. Aiken may testify, but is not limited
25 to one or more of the following expert opinions concerning forensic pathology and
26

1 injury causation:

- 2 • There is forensic pathological evidence of a baton strike to Mr. Zehm's left
3 upper forehead and a tram track injury that matches the straight baton that is
4 reported to have been used by Officer Thompson on the night of the incident;
- 5 • The tram track marks on Mr. Zehm's left forehead are consistent with other
6 tram track mark injuries that were pathologically and forensically indentified
7 in other areas of Mr. Zehm's body (i.e., baton strikes to torso and extremities).
- 8 • There is forensic pathological evidence of a second baton strike to the top of
9 Mr. Zehm's head. Forensic evidence of the injury located almost directly on
10 the top of Mr. Zehm's head is confirmed by the presence of a hematoma
11 beneath his scalp on the subgalean cap. Given the hematoma involved and
12 location of the injury, it too was more likely caused by a baton strike to that
13 location as opposed to any other form of explainable blunt force trauma;
- 14 • There is forensic pathological evidence of a third blunt force trauma injury
15 located slightly above Mr. Zehm's left ear. The subgalean hemorrhage in this
16 location covers a three inch area beneath Mr. Zehm's scalp. This injury is
17 also consistent with blunt force trauma, to wit: a baton strike;
- 18 • It is Dr. Aiken's opinion that the blunt force trauma and insult to Mr. Zehm's
19 head is considered a serious medical injury. However, it was her opinion and
20 remains her expert opinion that these serious blunt force impacts to Mr.
21 Zehm's head did not cause nor contribute to the etiology of Mr. Zehm's death,
22 which Dr. Aiken still attributes to *hypoxic encephalopathy* resulting from
23 cardiopulmonary arrest while restrained by SPD personnel in a total
24 appendage restraint, in a prone position for a reported episode of excited
25 delirium.
- 26 • It is Dr. Aiken's further opinion that Mr. Zehm's death was not likely to occur
27 without the prone restraint and total appendage restraint position utilized by
law enforcement, and therefore Mr. Zehm's death is classified as a homicide
under Washington law.
- Dr. Aiken will also testify that blunt force traumatic injuries sustained by Mr.

1 Zehm are forensically temporally related in time and location to law
2 enforcement's March 18, 2006, described use of force on Mr. Zehm , and at
3 least one head-baton injury is consistent with other identified baton related
4 pattern injuries that were forensically confirmed to be present on Mr. Zehm's
5 body.

- 6 • That the blunt force traumatic injuries on Mr. Zehm's head are consistent with
7 blunt force trauma (i.e., baton strikes), notwithstanding that law enforcement
8 personnel and/or lay persons who are not trained in and/or educated in the
9 area of medicine, forensic pathology, and/or injury causation, may have
10 erroneously believed that all blunt force trauma (i.e., baton strikes) to the head
11 will result in lacerations and significant bleeding. This is in error because not
12 all blunt force trauma (i.e., baton strikes) will result in lacerations and/or
13 significant external and/or internal bleeding. Among other considerations
14 relevant to this case is that Mr. Zehm had significantly thick and lengthy hair
15 that would have provided additional protection to his head and scalp, and
16 minimized the risk of laceration and significant bleeding;
- 17 • Dr. Aiken will testify that any preliminary discussions that she would have
18 had relative to cause and origin of injury during the course of her initial
19 autopsy examination would have been preliminary and subject to further
20 review and finalization as reflected in her final autopsy reports. Further, Dr.
21 Aiken will testify that she was not provided with any historical evidence by
22 law enforcement indicating or suggesting that Mr. Zehm sustained any injury
23 to his head by a "counter" or the floor. No such evidence was provided in
24 2006 and none has been provided and/or brought to the Medical Examiner's
25 attention since the incident occurred on March 18, 2006.

26 Dr. Aiken's autopsy reports are already in Defendant's possession and are
27 incorporated herein as **Exhibit #57**. Dr. Aiken's Curriculum Vitae is incorporated
herein as **Exhibit #58**. Dr. Aiken reserves the right to change, modify, and/or
supplement her opinions as this case and new information becomes available and as
this case and discovery progresses.

1 **2. Dr. Harry L. Smith, PhD, M.D., Biodynamic Research Corporation,**
2 **San Antonio, Texas.**

3 Dr. Harry Smith is an expert in the area of mechanics of injury and injury
4 causation. Dr. Smith has a Ph.D. in Nuclear Engineering from Texas A & M
5 University and an M.D. from the University of Texas (Health Science Center at San
6 Antonio). Dr. Smith is board certified in Radiology and Nuclear Medicine, and
7 maintains an active emergency room (trauma) medical practice.

8 Dr. Smith is also a nationally recognized injury causation expert and has been
9 qualified as an expert in courtrooms across the United States. Notably, he provided
10 injury causation testimony in the seminal police misconduct civil rights case of *U.S.*
11 *v. Koon (SDCA)*, which is more commonly known as the “Rodney King ” civil rights
12 in which certain LAPD officers were acquitted in state court of underlying state
13 assault charges but were later prosecuted and convicted of certain federal civil rights
14 violations in Federal District Court. *See Koon v. United States*, 518 U.S. 81, 100,
15 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996).

16 Dr. Smith is also a retired Lt. Col. with the United States Army Reserve. He
17 has been recognized and qualified as an expert in the area of biomechanics of trauma
18 and injury causation.

19 It is anticipated that Dr. Smith will provide opinions based on his independent
20 and objective forensic review of the medical, pathological and other objective
21 evidence developed in the case. Dr. Smith’s opinions may include, but will not
22 necessarily be limited to the following expert opinions, which will be based on a
23 degree of medical and engineering certainty:

- 24 • There are at least three identifiable blunt force impacts to Mr. Zehm’s
25 calvarium (upper skull) that are consistent with baton strikes;

- 1 • The impacts to Mr. Zehm’s calvarium initiated a cascade of brain insults
2 which were synergistic (i.e., repetitive insults that together resulted in greater
3 overall head injury than each impact in isolation). These impacts constitute
4 serious medical injuries.
- 5 • The impacts found on Mr. Zehm’s head were delivered by Officer Karl
6 Thompson’s baton. The basis for this opinion is that the on-scene video
7 reflects multiple vertical baton strikes by Officer Thompson toward Mr.
8 Zehm. Dr. Aiken identified Officer Thompson’s baton as the instrument
9 matching the morphology of the injury to the frontal skull bone above the
10 right eyebrow of Mr. Zehm.
- 11 • The potential argument that the other impacts to Mr. Zehm’s calvarium were
12 created from falling objects or from bumping a “counter” suffers from
13 multiple shortcomings, including but not limited to the mechanical dynamics
14 of Mr. Zehm falling on the top of the head is not within the scope of the
15 reported altercation, with or without a takedown. Further still, there is no
16 physical description or evidence provided by any on-scene law enforcement
17 officer, including Officer Thompson, indicating that Mr. Zehm hit a shelf or
18 fell on top of his head. Further, there is no physical evidence reflected in
19 either the on-scene video or provided by any percipient witness to support
20 such a contention.

21 Incorporated herein a **Exhibit #59**, a copy of Dr. Harry Smith’s Curriculum Vitae.
22 Dr. Smith’s formal written report reflecting his opinions will be provided as **Exhibit**
23 **#60**. Dr. Smith’s opinions and conclusions are based on information and materials
24 acquired during the course of the United States DOJ’s investigation.

25 Dr. Smith reserves the right to modify, change, and/or supplement his
26 opinions should further information become available as this case and discovery
27 progresses.

1 **3. Dr. Scott Edminster, M.D.**

2 Dr. Edminster is the Director of the City of Spokane Fire Department's
3 Medical Department and is certified in emergency medicine. Dr. Edminster may
4 testify as both a fact and expert witness as provided under the rules of evidence.

5 It is anticipated that Dr. Edminster will testify consistent with the reports he
6 generated following his providing acute emergency room care to Mr. Zehm on the
7 night of March 18, 2006, and in a manner consistent with statements-opinions that he
8 provided during FBI interviews. It is anticipated that Dr. Edminster may testify, but
9 is not limited to the following medical opinions that will be based on a degree of
10 medical certainty:

- 11 • Multiple law enforcement personnel assisted in the ambulatory transport of
12 Mr. Zehm to the ER;
- 13 • Mr. Zehm was in an extreme state of cardiac-pulmonary arrest upon arrival,
14 and ER medical personnel administered a lengthy effort of resuscitation that
15 ultimately resulted in the return of a pulse;
- 16 • During the course of providing medical care and in getting a history provided
17 by SPD, SFD, and AMR personnel at the hospital, Dr. Edminster learned of
18 and observed multiple contusions consistent with baton strikes to Mr. Zehm's
19 body;
- 20 • A series of CT scans were ordered by Dr. Edminster, including one of Mr
21 Zehm's head, following the history of baton strikes being deployed and the
22 ER physician's observation of an injury to Mr. Zehm's upper right forehead,
23 which caused the ER physician concern that Mr. Zehm sustained blunt force
24 trauma to his head;

25 Incorporated herein as **Exhibit #61** are copies of Dr. Edminster's medical report(s)
26 that were dictated following the acute medical care and treatment that he provided to

1 Mr. Zehm on March 18, 2006. A copy of Dr. Edminster's CV will be incorporated
2 and provided as **Exhibit #62**. The United States and/or Dr. Edminster, combined
3 fact-expert witness, reserve the right to modify,

4
5 **4. Dr. Timothy Bax, M.D., Trauma Surgeon, Sacred Heart Doctor's**
6 **Bldg., Spokane, WA.**

7 Dr. Robert Bax is a Trauma and Thoracic Surgeon who provided critical care
8 and treatment to Otto Zehm on the evening of March 18, 2006, and following. Dr.
9 Bax may testify both as a fact and an expert witness, and may provide testimony and
10 opinions that are consistent with his medical report (s) of the acute medical care that
11 he provided to Mr. Zehm on March 18, 2006, and/or consistent with statements
12 and/or opinions provided to the FBI during its investigation.

13 Dr. Bax may also testify, but is not necessarily limited to the following
14 summarized expert opinions:

- 15 • During the late evening hours of March 18, 2006, Mr. Zehm underwent a
16 lengthy resuscitation effort in the emergency room that was provided by Dr.
17 Edminster and attending ER personnel;
- 18 • A CT scan of Mr. Zehm's head reflected mild cerebral edema with no
19 evidence of internal (i.e., within the brain) bleeding or internal trauma. The
20 lack of evidence of a significant brain injury did not, however, equate to Mr.
21 Zehm not having been struck in the head with a baton;
- 22 • Dr. Bax may testify that certain CT findings as well as forensic pathological
23 findings on Mr. Zehm are consistent with blunt force (baton) trauma to Mr.
24 Zehm's head;
- 25 • Dr. Bax may also opine that blunt force trauma to Mr. Zehm's head would
26 have likely resulted in a concussion and/or a minor brain injury, even though
27 such an injury would not have been detectable by a CT scan as there would

1 not necessarily be bleeding under the skull into the brain from a concussive-
2 insulting injury.

3 Dr. Bax's medical reports are incorporated herein as Exhibit #63 and his CV will be
4 provided as Exhibit #64.

5 The United States and/or Dr. Bax reserve the right to modify, change and/or
6 supplement his findings and opinions as more information may become available as
7 this case and discovery progresses.

8
9 **5. Dr. Richard Lambert, Pulmonary Specialist, Spokane,**
10 **Washington.**

11 Dr. Lambert is a board certified physician specializing in Internal Medicine
12 and Pulmonology and has been practicing medicine in Spokane for the past twenty-
13 three years. Dr. Lambert provided critical care to Otto Zehm the night of March 18,
14 2006, and following at Deaconess Medical Center.

15 His initial involvement in the case was a result of being contacted and
16 requested for consultation by Dr. Scott Edminster. Dr. Lambert recalled that there
17 was a lengthy resuscitation effort by Dr. Edminster and his ER trauma team that was
18 ultimately successful in sustaining a heartbeat. Based on conversations with Dr.
19 Edminster and the noteworthy presence of local law enforcement, it was Dr.
20 Lambert's impression that there were legal considerations to the Spokane Police
21 Department extending from the involved altercation.

22 Dr. Lambert may testify both as a fact and an expert witness, and may provide
23 testimony and opinions that are consistent with his medical report (s) of the acute
24 medical care that he provided to Mr. Zehm on March 18, 2006, and/or consistent
25 with statements and/or opinions that he provided to the FBI during its investigation.
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1 Dr. Lambert's medical reports are incorporated herein as Exhibit #65 and his CV
2 will be provided as Exhibit #66.

3 The United States and/or Dr. Lambert reserve the right to modify, change
4 and/or supplement his findings and opinions as more information may become
5 available as this case and discovery progresses.

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7 **6. Dr. Michael Dobersen, M.D., Ph.D., Forensic Pathologist, Littleton,**
8 **Colorado, or equivalent forensic pathologist.**

9 Dr. Dobersen is a certified Forensic Pathologist and from 1993 through the
10 present has been the Arapaho County Medical Examiner in Littleton, Colorado. He
11 is licensed to practice medicine in the States of Colorado and Washington.

12 It is anticipated that Dr. Dobersen's opinions will reflect his findings and
13 conclusions following his performance of an independent and objective forensic
14 review of the forensic pathological evidence from Mr. Zehm's autopsy and other
15 objective evidence recovered in this case. It is anticipated that Dr. Dobersen will
16 deal with "cause of death" issues as well as "serious injuries" resulting causation
17 determinations. Dr. Doberson may alternatively be retained to provide rebuttal
18 expert witness testimony

19 A copy of Dr. Dobersen's report and his CV will be provided upon
20 completion.

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22 **7. Combination Fact & Expert Witnesses.**

23 The United States may call one or more of Mr. Zehm's treating health care
24 providers including but not necessarily limited to Dr. Mark Terry, Radiologist; Dr.
25 Roger Cook, Cardiologist; one or more Spokane Fire Department paramedics; one or
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27 United States' Second Notice of Initial Disclosures of Expert Witnesses &
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1 more AMR ambulance paramedics; one or more ER or trauma nurses and/or other
2 health care providers and/or technicians at the Deaconess Medical Center; one or
3 more of Mr. Zehm's mental health providers (i.e., including but not limited to
4 Melissa Leffler, ARNP); one or more health care providers working for Blackhawk
5 organ recovery service, who (with the consent of the Zehm Estate) harvested certain
6 organs from Mr. Zehm that were donated to organ transplant recipients.

7 It is anticipated that these combination fact-expert witnesses will testify in a
8 manner consistent with the medical reports that they prepared and/or consistent with
9 statements and/or provided to the FBI during the course of interviews by one or
10 more of the subject health care professionals and providers. CV's of any combined
11 fact-expert witnesses that are ultimately identified to be called at the time of trial will
12 be provided to Defendant upon request.

13 **II. Conclusion**

14 The United States reserves the right to change, modify, and/or supplement this
15 first initial disclosure of expert witnesses as more information becomes available
16 and as this case and discovery progresses. The United States further reserves the
17 right, as with all of its expert disclosures, to identify such other and further expert
18 witnesses that it may call at trial in response to and/or in rebuttal to any conflicting
19 opinions and/or testimony provided by one or more defense witnesses.

20 RESPECTFULLY SUBMITTED this 21st day of September 2009.

21 JAMES A. MCDEVITT
22 United States Attorney (EDWA)

23 s/ Tim M. Durkin
24 TIMOTHY M. DURKIN
25 Assistant U.S. Attorney
26 Attorneys for Plaintiff United States

27 United States' Second Notice of Initial Disclosures of Expert Witnesses &
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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 will send notification to the following CM/ECF participants:

Carl Oreskovich, Esq.

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

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