

1 James A. McDevitt  
2 United States Attorney  
3 Eastern District of Washington  
4 Timothy M. Durkin  
5 Assistant United States Attorney  
6 Post Office Box 1494  
7 Spokane, WA 99210-1494  
8 Telephone: (509) 353-2767

*The Honorable Fred Van Sickle*

7 Victor Boutros, Trial Attorney  
8 U.S. Department of Justice  
9 Civil Rights Division – Criminal Section  
10 950 Pennsylvania Ave., NW  
11 Washington, D.C. 20530  
12 Tel. (202) 514-3204

12 UNITED STATES DISTRICT COURT  
13 EASTERN DISTRICT OF WASHINGTON

14	UNITED STATES,	)	<b>NO. 09-0088-FVS</b>
15	Plaintiff,	)	
16	vs.	)	<b>United States’ First Notice of Initial</b>
17		)	<b>Disclosure of Expert Witnesses &amp;</b>
18	KARL F. THOMPSON, JR.,	)	<b>Summary of Anticipated Testimony</b>
19	Defendant.	)	

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 States’ intent to use one or more of the following expert witnesses’ testimony at the  
27 time of trial.

1  
2 **I. RULE 16(a) Expert Disclosures**

3 The United States identifies the following witnesses who, due to their training,  
4 education and/or experience, may be called at the time of trial and may be allowed to  
5 provide expert opinion evidence in the areas of defensive tactics, use of force, and/or  
6 appropriate police procedures for the purpose of aiding and assisting the jury in its  
7 understanding of the various concepts and/or issues involved:  
8

9 **1. Robert M. Bragg, Jr., MSPE Program Manager, Physical Fitness**  
10 **and Defensive Tactics, Washington State Criminal Justice Training**  
11 **Commission, Seattle, Washington**

12 Mr. Bragg is the program manager of the Physical Fitness and Defensive  
13 Tactics Instructor Training by the Washington State Criminal Justice Training  
14 Center in Seattle, WA. As the State's Defensive Tactics and Instructor Certification  
15 Program Manager, Mr. Bragg is recognized as the lead Defensive Tactics Instructor  
16 in the State of Washington and is responsible for assuring that training in the area of  
17 physical force tactics is up to date and on the leading edge of training in the law  
18 enforcement profession. Mr. Bragg has held his position with the Washington State  
19 Criminal Justice Training Commission since its inception in 1981. Since that time,  
20 Mr. Bragg has personally trained thousands of line officers in all areas of the  
21 criminal justice arena and has been responsible for "training the trainers" instruction  
22 at the WSCJTC, which provides certification to qualified law enforcement officers  
23 to instruct at the state and local law enforcement level (i.e., SPD's Defensive Tactics  
24 Instructors).

25 Mr. Bragg has combined his experience in martial arts and formal education  
26 in mechanics, exercise physiology, and sports medicine with the experience of  
27 hundreds of active law enforcement trainers to produce a unique, cohesive, and state  
United States' Notice Re: Expert Witness Testimony

1 of the art state-wide instructor program in control and defensive tactics. Mr. Bragg  
2 has trained and certified several hundred currently active instructors and instructor  
3 trainers in this well-rounded and integrated system. Mr. Bragg has also instruction-  
4 certified several instructors and trainers from other states' law enforcement  
5 academies, including law enforcement academies instructors in Oregon, Montana,  
6 Alaska, Texas, Florida, Idaho, California, and British Columbia. Mr. Bragg has also  
7 been instrumental in establishing an information exchange concerning defensive  
8 tactics techniques and training within the state law enforcement academies in the  
9 northwestern United States.

10 In addition to the foregoing, Mr. Bragg has attained the rank of second degree  
11 black belt in Japanese karate and has been trained in Inosanto Blend, a Southeast  
12 Asian martial arts that includes Kali Muay Thai and Pentjak Silat. Further, Mr.  
13 Bragg holds both a B.A. and a M.S. in physical education with major course work  
14 study devoted to exercise physiology and sports medicine.

15 Mr. Bragg possesses a multi-faceted education and professional experience  
16 background that provides him with the special insight needed to be one of the  
17 national innovators of training, research, and development of defensive tactics  
18 equipment. Mr. Bragg has performed pioneering work in the area of bio-mechanics  
19 of batons and the PR24 baton use through high speed cinematography. He has also  
20 completed some of the earliest original research on Oleoresin Capsicum products,  
21 delivery systems, and their tactical use, as well as the effects of OC expulsion on the  
22 human eye. Please see Mr. Bragg's Curriculum Vitae for a description of other  
23 defensive tactics products that he has developed, incorporated herein as **Exhibit #52**.

24 Mr. Bragg is also the past chairman of Ethics Committee and Board of  
25 Directors of the American Society of Law Enforcement Trainers (ASLET.) Mr.  
26 Bragg has also been recognized and bestowed with the honor of Washington State's  
27 Physical Fitness Instructor of the Year in 1990, when the award was in its infancy.

1 Please see Mr. Bragg's Curriculum Vitae for a description of Mr. Bragg's further  
2 professional experience in the field of law enforcement defensive tactics and  
3 defensive tactics equipment.

4  
5 **Summary of Anticipated Opinions:**

6 It is anticipated that Mr. Bragg will testify consistent with the report he  
7 prepared following his objective and independent review of, in light of the totality of  
8 circumstances that reportedly existed on March 18, 2006, Officer Thompson's  
9 violent use of an impact weapon to seize and detain Otto Zehm on a suspicious  
10 circumstance call. A copy of Mr. Bragg's report is incorporated herein as **Exhibit**  
11 **#51**. In summary, Mr. Bragg may testify, but will not necessarily be limited to the  
12 following opinions:

- 13
- 14 • A sincerely, but unreasonably held officer perception of a situation does not  
15 justify use of force;
  - 16 • Officer Thompson's alleged sincere belief that the soda bottle held by Otto  
17 Zehm posed a serious threat and, therefore, presented immediate danger, was  
18 inconsistent with his objective actions;
  - 19 • Officer Thompson's entire use of physical force both at the level of deadly  
20 force and less than deadly force was objectively unreasonable given the  
21 objective totality of circumstances present in the Zehm detention;
  - 22 • In this circumstance, a reasonable officer would not have utilized nor been  
23 taught to utilize deadly force. In fact, had Officer Thompson been a "new  
24 recruit" attending the Washington Criminal Justice Training Academy for the  
25 first time and been presented with a mock Otto Zehm scenario, and had  
26 Officer Thompson engaged in the force pattern reflected in the video, he  
27 would have failed the test scenario;
  - Officer Thompson's use of his baton is inconsistent with his statements about  
his preferences for baton tactics and his specific selection of a non-standard  
baton;

- 1 • Observation of the video does not support many of the statements Officer  
2 Thompson made following the incident to investigators.
- 3 • Officer Thompson's conduct actions, including, but not limited to his subject  
4 creation of his own exigency violate the WSCJTC's and the SPD's defensive  
5 tactics training, policies and generally accepted and reasonable law  
6 enforcement practices.

7 In summary, Mr. Bragg will testify that it is clear, from the objective totality of the  
8 circumstances presented, that Officer Thompson utilized excessive and unreasonable  
9 force from essentially the beginning of his contact of Otto Zehm. If allowed by the  
10 rules of evidence, Mr. Bragg will also opine that no reasonable officer facing the  
11 same objective totality of circumstances would or should have engaged in the level  
12 of force and pattern of force that was violently utilized by Officer Thompson.

13 Mr. Bragg provided his expert services as a defensive tactics and police  
14 procedures expert in connection with his performance of an independent and  
15 objective review of the reasonableness of Officer Thompson's use of force on Mr.  
16 Zehm on a voluntary and *pro bono* basis (i.e., "no fee" was charged by Mr. Bragg  
17 for his expert services).

18  
19 **2. Capt. Randy Roper, Patrol Division Commander, Boise Police**  
20 **Department, Boise, ID.**

21 Capt. Roper has been employed as a law enforcement officer with the Boise  
22 Police Department since 1986 (approximately 23 years). Prior to his current  
23 employment, Capt. Roper was a member of the United States' Marine Corp.  
24 (Sergeant) and worked as a corrections officer for the Ada County Corrections  
25 Department.

26 From 1994 through 2004, Capt. Roper was a patrol sergeant supervisor,  
27 SWAT member, and instructor for in-service tactical training for the Boise Police  
United States' Notice Re: Expert Witness Testimony

1 Department's, "Defensive Tactics Instruction." His duties also involved the  
2 supervision of patrol officers on night shift as well as the supervision, training,  
3 operation, and deployment of Boise's Special Operations Unit (SWAT). From  
4 December of 2004 through May of 2008, Capt. Roper was a police Lieutenant and a  
5 Boise SWAT team commander. His duties included supervising patrol sergeants  
6 and patrol officers on night watch; supervising field operations during normal patrol;  
7 supervising SWAT sergeants, operators, and negotiators; Commanding /planning  
8 tactical operations during high risk incidents; serving as Incident Commander during  
9 normal patrol operations; and the investigation and recommended resolution of  
10 citizen complaints about officer conduct.

11 Capt. Roper is currently responsible for managing/leading patrol operations  
12 for the Boise Metropolitan Police Department. Capt. Roper is also responsible for  
13 evaluating policy and practice for use of force by Boise Police Department officers.  
14 Capt. Roper has been the defensive tactics/use of force instructor since 1987. He is  
15 the current coordinator for the Boise Police Department in-service defensive tactics  
16 training program and is responsible for developing defensive tactics training and  
17 policy.

18  
19 **Summary of Anticipated Opinions:**

20 It is anticipated that Capt. Roper will provide expert testimony in the area of  
21 defensive tactics and/or police procedure, which testimony will be consistent with  
22 Capt. Roper's report. See attached **Exhibit #53**. To the extent allowed by the rules  
23 of evidence, Capt. Roper may also testify to, but will not necessarily be limited to  
24 the following summarized opinions at the time of trial:

- 25  
26 • Officer Thompson had lawful authority and a lawful objective when he  
27 entered the Zip Trip convenience store to contact Otto Zehm;

- 1
- 2 • Officer Thompson’s statement that he perceived some pre-assaultive behavior  
3 by Otto Zehm does not match the actual event or time line portrayed in the  
4 store video. This inaccurate description alone, however, does not render an  
5 officer’s use of a baton unreasonable. Rather, it is the totality of the  
6 circumstances in this instance that does not support the level and type of force  
7 utilized by Officer Thompson on Mr. Zehm;
  - 8 • It is unreasonable to assume that Officer Thompson, at the speed that he  
9 approached Otto Zehm, would have had time to effectively evaluate whether  
10 or not Zehm’s actions were pre-assaultive. In fact, it is clear from the video  
11 that Zehm did not in fact assault Officer Thompson during their initial  
12 contact;
  - 13 • An officer cannot “assume” the negative about a suspect’s actions, unless the  
14 officer has special knowledge or other circumstances exist that would  
15 objectively support such a conclusion. Officer Thompson’s stated anxiety that  
16 Zehm “might” throw a plastic pop bottle or use the bottle as a club must be  
17 support by an objectively reasonableness inquiry;
  - 18 • Zehm was not engaged in actively resisting arrest or attempting to evade flight  
19 at the moment the initial force was applied. In fact, Mr. Zehm appears to be  
20 startled by the rapid approach of the officer. This is consistent with the  
21 security video;
  - 22 • The totality of the circumstances did not indicate that any civilians in the store  
23 were threatened or in imminent danger ,and therefore this stated basis for  
24 Officer Thompson’s use of pre-emptive force is not supportable.

25  
26  
27  
Capt. Roper provided his expert services as a defensive tactics and police  
procedures expert in connection with performing an independent and objective  
review of the reasonableness of Officer Thompson’s use of force on Mr. Zehm on a  
voluntary and *pro bono* basis (i.e., “no fee” by Capt. Roper for his expert services).

1           **3. Joseph J. Callanan, Jr., Specialized Training Consultants, Inc.,**  
2 **Coeur d'Alene, ID.**

3           Mr. Callanan is a retired law enforcement officer with actual and expert  
4 experience in federal, state, and local law enforcement activities. Mr. Callanan has a  
5 Bachelor's Degree in Public Administration from Pepperdine University and a  
6 Master's Degree in Public Administration from the University of Southern  
7 California.

8           From 1967 to 1989, Mr. Callanan was employed with the Los Angeles County  
9 Sheriff's Department in various capacities, including work in defensive tactics at the  
10 LA County law enforcement training academy. Mr. Callanan retired in 1989 as a  
11 Lieutenant with full law enforcement credentials. Mr. Callanan is a nationally  
12 recognized expert in the areas of law enforcement force utilization (defensive  
13 tactics) and police procedures. Mr. Callanan has remained active in the law  
14 enforcement field as a consultant and trainer, and maintains professional affiliations  
15 and teaching credentials. He is a frequent teacher, instructor, trainer, and writer in  
16 many law enforcement areas, including use of force.

17           It is anticipated that Mr. Callanan's opinions will be consistent with those  
18 delineated in the report that he prepared following his independent and objective  
19 review of SPD Karl Thompson's use of force on Otto Zehm during the early evening  
20 on March 18, 2006. A summary of Mr. Callanan's opinions include, but are not  
21 necessarily limited to the following:

- 22
- 23       • Officer Thompson had sufficient information to perform a temporary  
24       detention of the subject Otto Zehm the evening of March 18, 2006;
  - 25       • To a professional police standard of care, Officer Thompson significantly  
26       deviated from generally accepted police procedures in terms of his rapid,  
27       independent and reckless approach on the subject Zehm;



- 1 • To a professional standard of care, Officer Thompson did not have sufficient  
2 information upon which the precipitous drawing of the baton could be  
3 justified. Further, any use of a 30-inch straight baton within the narrow  
4 confines of the Zip Trip store was as highly impractical as it was unwarranted;
- 5 • To a professional standard of care, Officer Thompson ignored his own safety,  
6 the safety of the store employees and patrons, the safety of the subject to be  
7 detained, and the safety of additional law enforcement officers that were  
8 necessarily deployed after Officer Thompson initiated his dynamic contact;
- 9 • To a professional standard of care, the reportedly highly trained and very  
10 experienced Officer Thompson ignored the real possibility that the subject  
11 Zehm was intoxicated, mentally deficient or simply an unusual “street  
12 person.” The importance of this missing assessment is based on the variety of  
13 accepted police procedures designed to minimize and manage the risks  
14 inherent to such encounters. Whether or not Office Thompson acted  
15 intentionally, his failure to follow proper and generally effective police  
16 procedures created a foreseeable emergency, the consequence of which is  
17 clearly unacceptable;
- 18 • To a professional police standard of care, Officer Thompson’s escalation and  
19 application of force was grossly unreasonable, unnecessary, and likely  
20 unlawful;
- 21 • To a professional police standard of care, Officer Thompson’s seemingly  
22 premature selection and violent application of his straight baton was grossly  
23 unreasonable, unnecessary and likely unlawful. The video recording clearly  
24 depicts the subject Zehm as being initially startled by Officer Thompson’s  
25 rapid advance and then withdrawing from the officer. There is no observable  
26 indication that the subject attempted to either aggress or to flee. In fact, it  
27 appears that the subject did not have sufficient time to do either once he  
actually became aware of the officer’s rapid approach;
- Officer Thompson’s seemingly unwarranted, unreasonable, and violent  
application of the baton in a series of vertical strikes constituted a serious,  
life-threatening use of force to the level of danger that such techniques are  
generally considered excessive and potentially lethal.
- Officer Thompson’s representation that the baton was deployed horizontally

1 at the subject's lower extremities is inconsistent with the video recording and  
2 the physical constraints of the store environment;

- 3 • Officer Thompson had many viable alternative and tactical options available  
4 to him at the time of his encounter. Of the various commonly practiced police  
5 procedures, Officer Thompson's rapid approach and unreasonable use of the  
6 straight baton was among the least desirable. As recorded, the incident had a  
7 predictable injury consequence to one or more of the participants or  
8 onlookers.
- 9 • After careful review and thoughtful analysis, Officer Thompson's conduct  
10 represents official misconduct in the form of deliberate police brutality.
- 11 • After careful review and thoughtful analysis, Officer Thompson's conduct  
12 represents official misconduct in the form of deliberate indifference to the  
13 standing policy of the Spokane Police Department;
- 14 • Officer Thompson' rapid and continued deployment of 30 inch straight baton  
15 cannot be justified for it was neither reasonable nor necessary to the  
16 circumstances. The security store video clearly illustrates that Officer  
17 Thompson precipitated the violence without taking the time to conduct a  
18 "threat assessment" required by the SPD policy statement and common to  
19 professional law enforcement standards. No "flight or fight" indicators on the  
20 part of the subject can be observed in the video recordings.
- 21 • There is an absence of any indication that the subject demonstrated "assaultive  
22 behavior" toward Officer Thompson or that his possession of a two-liter  
23 plastic soda pop represented a viable weapon;
- 24 • There is an absence of any indication that the subject demonstrated any  
25 indication of foot bail, even though such a maneuver was readily available to  
26 Zehm;
- 27 • Careful review of the video recordings establishes that Officer Thompson  
deployed a 30 inch straight baton multiple times in very close quarters and  
within a narrowly confined aisle and did so in a "high to low" vertical manner.  
At times, the Officer's right hand holding the baton can be seen raised well  
above the Officer's shoulder and even his head, and then brought down  
powerfully in a vertical manner to the subject who appears down and on the

1 floor. Such baton techniques are not approved by police procedures based on  
2 the significant probability of producing a serious and potentially lethal injury.

- 3 • In summary, a properly trained and well-seasoned police officer, reportedly  
4 like that of Officer Thompson, in a like setting to that which Officer  
5 Thompson was objectively operating under on the evening of March 18, 2006,  
6 **would not** act in the same manner or believe such a precipitous use of force  
7 was objectively reasonable, necessary or even lawful.

8 Mr. Callahan reserves a right to change and/or modify his opinions should further  
9 material and information be discovered as this case and discovery progresses. Mr.  
10 Callanan performed his independent, objective, and expert review of Defendant  
11 Thompson's use of force on Otto Zehm as his standard, usual, and customary rate  
12 for providing these types of services for investigating law enforcement agencies and  
13 others.

#### 14 **4. Combined Fact-Expert Witnesses.**

15 The United States may also call at the time of trial combined fact/expert  
16 witnesses, one or more in which may have been directly involved in either the  
17 underlying incident and/or the following local investigation. These designated  
18 witnesses may testify in the areas of defensive tactics and/or police procedures, and  
19 include but are not limited to the following: Assistant Chief James Nicks, Detective  
20 Larry Bowman (Former Certified Defensive Tactics Instructor), Detective Randy  
21 Lesser (SPD Taser Instructor), Patrolman Robert Boothe (the SPD's Lead Defensive  
22 Tactics Instructor), and Patrolman Jason Uberuaga (another SPD Defensive Tactics  
23 Instructor).

24 It is anticipated, to the extent allowed by the rules of evidence, that these  
25 persons may be called to testify to combined factual testimony and expert opinions  
26 that are reflected in their investigative reports, records, as well any sworn testimony  
27

1 or statements. These facts-opinions may touch upon one or both issues of: i) the  
2 reasonableness of the use of force by Officer Thompson and/or ii) the inaccuracy of  
3 Officer Thompson's stated basis for his use of force on Otto Zehm in comparison to  
4 other objective evidence in the case.

5 **Conclusion**

6 The United States reserves the right to change, modify, and/or supplement this  
7 first initial disclosure of expert witnesses as more information becomes available  
8 and as this case and discovery progresses.

9 RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of September 2009.

10 JAMES A. MCDEVITT  
11 United States Attorney (EDWA)

12 s/ Tim M. Durkin  
13 TIMOTHY M. DURKIN  
14 Assistant U.S. Attorney  
15 Attorneys for Plaintiff United States

16  
17  
18 **Certificate of ECF and/or Mailing**

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

22 Carl Oreskovich, Esq.

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

24 s/ Timothy M. Durkin  
25 Timothy M. Durkin  
26 Assistant United States Attorney  
27 Eastern District of Washington  
Post Office Box 1494  
Spokane, WA 99210-1494  
Telephone: (509) 353-2767  
[Tim.Durkin@USDOJ.gov](mailto:Tim.Durkin@USDOJ.gov)