

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

NO. 09-0088-FVS

**United States’ Addendum to First &
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

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 forensic concepts and/or issues involved in this case:

8 **1. Grant Fredericks, Forensic Videographer, Spokane, Washington.**

9 Mr. Fredericks was originally retained by the Spokane Police Department to
10 perform a forensic review of the Zip Trip's store security video captured the night of
11 March 18, 2006. Prior to working as a forensic video analyst, Mr. Fredericks
12 worked as a law enforcement officer in various capacities in British Columbia,
13 Canada. Mr. Fredericks has a bachelor's degree from Gonzaga University in
14 Communications and resides in Spokane County, where he operates his forensic
15 videography consulting business. Mr. Fredericks has also been an instructor for a
16 series of video forensic analysis courses offered by the Law Enforcement and
17 Emergency Video Association (LEVA), a non-profit organization that has reportedly
18 trained hundreds of law enforcement video analysts throughout the world.

19 At the request of the United States Department of Justice (DOJ), Mr.
20 Fredericks performed a supplemental review of the Zip Trip store's security video.
21 This supplemental review focused on approximately the first 1:40 seconds of contact
22 between Officer Thompson and Otto Zehm. It is anticipated that Mr. Fredericks may
23 provide expert opinion evidence at the time of trial that is consistent with the
24 supplemental forensic review and report that he prepared following that review on
25 September 13, 2007. A true and accurate copy of Mr. Frederick's supplemental
26 report is incorporated herein as *Exhibit #70*. Mr. Fredericks's CV is incorporated
27

1 herein as *Exhibit #71*.

2 Mr. Fredericks's supplemental report provides a more complete analysis of
3 the contact between Officer Thompson and Mr. Zehm, and supplemented and
4 modified certain observations and expert opinions reflected in his earlier report that
5 was prepared for the Spokane Police Department relative to Officer Thompson's use
6 of force.

7 It is anticipated that Mr. Frederick's expert opinions will be consistent with
8 his supplemental report and may include, without limitation, the following:

- 9
- 10 • The Zip Trip Security video shows that Officer Thompson entered the
11 convenience store, removed his baton, placed it in a position close to his right
12 shoulder, and quickly traveled the length of the north aisle; all while Zehm's
13 back was to Officer Thompson.
 - 14 • The Zip Trip Security video shows that Zehm began to back away after he
15 first turned to face toward Officer Thompson, who continued to move quickly
16 toward Zehm as Thompson held his baton above his head.
 - 17 • Immediately after the Zip Trip security video shows Thompson appearing to
18 strike Zehm with his baton for the first time, dispatch broadcasted that the
19 complainant was not sure that Zehm had taken any of her money. This
20 dispatch occurred before Thompson strikes Zehm a second time with another
21 overhand, up and down, baton strike.
 - 22 • The Zip Trip Security video shows Thompson activating his taser while
23 standing over Zehm, who was lying on the floor.
 - 24 • The Zip Trip Security video shows Thompson repeatedly moving his baton at
25 a high rate of speed from above his head down toward Zehm consistent with
26 the swinging of a baton.

27 In summary, Mr. Fredericks may testify to forensically confirm Officer
Thompson's rapid deployment of his baton, his rapid rush on Mr. Zehm (who had

1 his back to the Officer), Officer Thompson's continued engagement and almost
2 immediate use of force on Mr. Zehm, who is continuously retreating from the
3 Officer.

4 The United States and Mr. Fredericks reserve the right to supplement, modify
5 or change his findings and/or opinions as more information becomes available and
6 as this case and discovery progresses.

7
8 **2. George Skaluba, Forensic Technician, FBI Laboratory, FAVIAU**
9 **Division, Quantico, VA.**

10 Mr. Skaluba is a director of a team of forensic examiners at a laboratory in
11 Quantico, VA. The division is known as the forensic audio video information
12 analysis unit. Mr. Skaluba's various reports of forensic enhancement and analysis of
13 the Zip Trip store security video, and regular and enhanced still photos generated
14 therefrom, is incorporated herein as *Exhibit #72*. Mr. Skaluba's CV is incorporated
15 herein as *Exhibit #73*.

16 Mr. Skaluba is a recognized expert in the area of forensic video, audio and
17 photographic examination and analysis. He has testified and has been recognized as
18 an expert in multiple courts across the United States, including serving as a forensic
19 video expert witness in the "Rodney King" case (i.e., *U.S. v. Koon, et al.*) that was
20 prosecuted in the Southern District of California that resulted in the successful
21 prosecution and conviction of certain LAPD Patrol Officers for using excessive
22 force (i.e., repetitive baton strikes) in violation of Rodney King's constitutional
23 rights. *See generally U.S. v. Koon*, 518 U.S. 81, 100, 116 S.Ct. 2035, 135 L.Ed.2d
24 392 (1996).

25 It is anticipated that Mr. Skaluba will testify in a manner consistent with the
26 forensic work and analysis reflected in his reports and may offer opinions that
27

1 closely parallel this forensic work and may be similar to the analysis and opinions
2 reflected in expert Grant Frederick's supplemental report. *See opinion summary*
3 *above, incorporated herein by reference.*

4 The United States and Mr. Skaluba reserve the right to supplement, modify or
5 change his findings and/or opinions as more information becomes available and as
6 this case and discovery progresses.

7
8 **3. Richard Gill, PhD, Human Factors & Mechanical Engineering,**
9 **Spokane, WA.**

10 Dr. Richard Gill, Ph.D., earned a Bachelor of Science and Master of Science
11 in systems engineering, has completed graduate study in engineering at
12 Massachusetts Institute of Technology ("MIT"), and has a Ph.D. in mechanical
13 engineering, specializing in human factors. Dr. Gill has served as a professor of
14 engineering for more than twenty (20) years and has served as an expert witness in
15 more than one thousand (1,000) cases. Dr. Gill has completed a preliminary report
16 in this case, a true and accurate copy of which is incorporated herein as *Exhibit #73*.
17 A copy of his CV is incorporated as *Exhibit # 74*.

18 It is anticipated that Dr. Gill's testimony will be consistent with his report and
19 may include, without limitation, the following given to degree of engineering
20 certainty:

- 21 • Thompson was in a position to observe that Zehm casually opened the door
22 and entered the convenience store and walked down the aisle at a slow speed,
23 a cue that Zehm was not attempting to flee during that arguable initial phase of
24 visual contact;
- 25 • Thompson entered the convenience store and approached Zehm at an average
26 pace that more than tripled Zehm's entrance into and around the store;

- 1 • The ease with which Thompson was able to close the gap should have been a
2 reconfirming cue to Thompson that Zehm was not attempting to elude, evade
3 or flee;
- 4 • The fact that Zehm bypassed efficient exit routes, walked directly by a viable
5 exit, and placed himself in a corner where there was no exit should have been
6 another cue to a trained officer that Zehm was not attempting to elude, evade
7 or flee;
- 8 • Thompson made the decision to reach for his baton before Zehm arrived in the
9 general vicinity of the pop display, which means he intended to draw the
10 impact weapon well before Zehm was at the pop display and well before
11 Zehm removed the plastic two-liter of pop;
- 12 • Following his first opportunity to see Thompson to the time Thompson first
13 knocked him to the floor with his baton, Zehm showed no signs of aggressive
14 or threatening behavior, and is observed continuously backing away from
15 Thompson;
- 16 • By contrast, from the moment he entered the store to the time he delivered his
17 first baton strike, Thompson never stopped his forward motion toward Zehm;
- 18 • It is unlikely that Thompson's account of the forceful verbal commands he
19 claims to have issued and the verbal and allegedly non-compliant responses he
20 claims Zehm gave ever took place;
- 21 • Thompson's first baton swing was a very rapid, powerful, vertically oriented
22 strike that most likely impacted Zehm's head, shoulder, or upper torso, not
23 Zehm's left thigh as Officer Thompson claims;
- 24 • It is highly unlikely that Officer Thompson's first baton blow struck Zehm's
25 leg, or even his lower waist. Likewise, Thompson's described sequence for
26 his claimed second baton blow to Zehm's right thigh is inaccurate.

27 In summary, Dr. Richard Gill may testify to forensically confirming Officer
Thompson's rapid deployment of his baton, his rapid rush on Mr. Zehm (who had
his back to the Officer), Officer Thompson's continued engagement and almost

1 immediate use of force on Mr. Zehm, and Mr. Zehm's continuous retreat from the
2 Officer. Dr. Gill may also testify that Officer Thompson's description of and
3 "story" allegedly justifying his use of force and impact locations is not consistent
4 with the store security video and/or other objective evidence.

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

8
9 **4. Dina Gray - Visual Information Specialist, and Jacob Cabelli -**
10 **Visual Information Specialist, Special Projects Unit - FBI Laboratory,**
11 **Quantico, VA.**

12 Ms. Gray and Mr. Cabelli are computer and forensic technicians employed
13 with the FBI's Special Projects Unit. They are computer modeling experts and
14 specialists and may testify to both fact and expert opinions associated with their
15 traveling to Spokane and conducting a site survey of the Zip Trip convenience store
16 located at 1712 North Division, Spokane, Washington.

17 At the same time, a more accurate total station processing was completed
18 simultaneously by certain specified Washington State Patrol Detectives. Ms. Gray's
19 and Mr. Cabelli's forensic mapping was performed for the purpose of facilitating the
20 completion of both a physical and digital model of the Zip Trip as it reportedly
21 existed the night of March 18, 2006. These expert technicians may testify to their
22 facts and expert opinions relative to the data that was collected on site and/or the
23 forensic computer mapping that they performed to convert the data/mapping into a
24 usable digital format (i.e., 3 dimensional model) and an actual Physical Model of the
25 Zip Trip store (measuring 6'7" by 2'9" with table using a 1" scale). Ms. Gray's and
26 Mr. Cabelli's CVs are incorporated herein as *Exhibit #75*. The 3D model of the Zip
27

1 Trip is incorporated herein as *Exhibit #76* and the Physical Model is incorporated
2 herein as *Exhibit #77*.

3 The United States and Ms. Gray and Mr. Cabelli reserve the right to
4 supplement, modify or change their findings and/or opinions as more forensic
5 information and/or evidence becomes available while this case and discovery
6 progresses.

7
8 **5. Chris Villa, Michael Moore, Kevin Agiurre, Precision Animations,**
9 **Vital Distraction, Coeur d'Alene, ID.**

10 Messrs. Villa, Moore, Agiurre are employed with Precision Animations and
11 Vital Distraction which are 3D visual effects simulation and/or animation production
12 companies with offices located in Los Angeles and Coeur d'Alene, ID. Precision
13 Animations provides educational animations to the medical community and
14 courtroom reenactments, simulations, and animations. A description of these
15 forensic simulators/animators work and experience is incorporated herein as *Exhibit*
16 *#76*. A copy of these computer technicians demonstrative simulation of the Zip
17 Trip convenience store security video will be provided to Defendant upon
18 completion and incorporated herein and *Exhibit #78*.

19 It is anticipated that these computer animators – simulators will testify in a
20 manner consistent with the creation of their 3D video that was modeled from the Zip
21 Trip convenience store security video. The United States and Messrs. Villa, Moore
22 and Agiurre reserve the right to supplement, modify or change their findings and/or
23 opinions as more forensic information and/or evidence becomes available while this
24 case and discovery progresses.

25
26 **6. Additional Forensic Video Analyst and/or Animator/Simulator.**
27

1 The United States reserves the right to call as an expert witness an as yet
2 undisclosed forensic video analysis and/or computer animator who may be called
3 directly and/or as an expert witness in rebuttal to evidence and/or expert opinions
4 that may be presented by the Defendant and which may contract the independent and
5 professional opinions of one or more of the United States initially disclosed experts.
6 The disclosure of any such expert will be timely provided as this case, the
7 Government's continued investigation, Defendant's discovery disclosures and/or the
8 trial in this case progresses.

9
10 **7. Reservation of Right to Call Additional Direct and/or Rebuttal**
11 **Expert Witnesses.**

12 The United States reserves the right to retain such further and other expert
13 witnesses whose assistance becomes more apparent as its continuing investigation,
14 its disclosure of discovery, the Defendants' disclosure of discovery and expert
15 witnesses and opinions, and/or trial in this matter progresses. The disclosure of any
16 such expert and her/his opinions, both direct and/or in rebuttal, will be timely
17 provided as this case, reciprocal discovery disclosures, and/or the trial in this case
18 progresses.

19 RESPECTFULLY SUBMITTED this 22nd day of September, 2009.

20
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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

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

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