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11 UNITED STATES DISTRICT COURT
12 EASTERN DISTRICT OF WASHINGTON

13 UNITED STATES,)
14 Plaintiff,) **NO. 09-0088-FVS**

15 vs.)

16 KARL F. THOMPSON, JR.,) **UNITED STATES’ MOTION TO**
17) **ALLOW REFERENCE TO**
18 Defendant.) **ADMISSIBLE EVIDENCE IN**
) **OPENING STATEMENT**

19 The Plaintiff UNITED STATES, through James A. McDevitt, United States
20 Attorney for the Eastern District of Washington (EDWA), and Victor Boutros,
21 Trial Attorney with the United States Department of Justice, Civil Rights Division,
22 and Timothy Durkin, Assistant United States Attorney (EDWA), respectfully
23 submits this motion to make a prior determination of admissibility of evidence so
24 as to allow its use in Opening Statement.
25

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27 **IN OPENING STATEMENT**

I. ARGUMENT

A. Evidence that Zehm committed no crime directly undermines the Defendant's Justification for his initial use of force.

It is undisputed that Zehm had committed no crime when he entered the Zip Trip store on March 18, 2006. Evidence that Zehm had committed no crime is critical to the Government's proof because it tends to show that what the Defendant claims he saw to justify his initial use of force is a lie. It is therefore highly relevant to both of the charges in this case.

Proof that Thompson's justification for his initial use of force was a lie goes to establish that he deprived Zehm of his constitutional right to be free from the use of unreasonable force and that he did so wilfully and with reckless disregard to that right in violation of § 242 as charged in Count 1 of the indictment. Proof that Thompson's justification for his initial use of force was a lie also goes to establish that he made a false entry in his recorded interview with the requisite intent in violation of § 1519 as charged in Count 2 of the indictment.¹

In Thompson's recorded statement, he does not claim that he attacked Zehm because Zehm attacked him first. Rather, Thompson claims that he swung his initial baton strikes down on Zehm because Thompson *anticipated* that Zehm was going to assault him. Thompson knew from his extensive training that the standard for the reasonableness of an officer's use of force under the Fourth Amendment is objective

¹ Count 2 of the indictment charges Thompson with making a false entry in a "record" or "document" in violation of 18 U.S.C. § 1519. The audio recording of Thompson's interview is a "record" and the transcription he adopted and signed is a "document" within the meaning of § 1519.

1 – that is, it depends not on what the officer claims his subjective impression or
2 perception was, but on objective, observable facts. *Graham v. Connor*, 490 U.S. 386,
3 397 (1989) (holding that “the ‘reasonableness’ inquiry in an excessive force case is
4 an objective one” and quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968) for the
5 proposition that “it is imperative that the facts be judged against an objective
6 standard”). Thus, to ground his claim that he had an objectively reasonable belief
7 that he anticipated Zehm was about to assault him, Thompson knew that he needed to
8 articulate specific observations that reasonably led him to that belief.

9 Thompson staked that justification on what he claims he observed of Zehm’s
10 demeanor prior to swinging down his first baton strikes on Zehm. In fact, what he
11 claims he observed about Zehm’s demeanor in the 2.5 seconds before unleashing his
12 first baton strikes is so central that he devotes multiple pages of his transcript to
13 describing it. But first, he sets the stage by suggesting that Zehm, whose back was to
14 Thompson until 2.5 seconds before the first baton strike, was gearing up to ambush
15 Thompson from the moment Thompson entered the store: “When he turned around
16 and saw me entering, he, he did not immediately flee. He picked up an object and it
17 was held in a manner that I realized was in a position that he could use it as a
18 significant weapon against me.” *See* Verbatim Transcript of Defendant Thompson’s
19 Recorded Statement, *Ct. Rec. 60, Exhibit #1*, at 18.

20 The fact that Zehm had committed no crime and had no idea that an officer was
21 coming for him casts enormous doubt on the credibility of Thompson’s story. The
22 jury simply cannot effectively evaluate Thompson’s claim that Zehm was gearing up
23 for a fight with Thompson from the moment Thompson entered the store without
24 knowing the undisputed fact that Zehm had committed no crime and thus had no
25 reason to believe a law enforcement officer was looking for him at all, much less

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1 target him. Hiding that information from the jury would radically undermine the
2 jury's truth-seeking function and invite the jury to draw sinister inferences about
3 Zehm's guilt that both sides know to be false.

4 In his attempt to justify his initial baton strikes, Thompson also relies heavily
5 on what he claims he observed in the 2.5 seconds when Zehm first turned to see
6 Thompson rushing at him with his baton raised:

7 Q. If you had to describe either the look on his face or his – the way that he
8 spoke, would you be able to do that?

9 A. I think so. The look certainly was a look that did not display any fear. Uh,
10 did not display any confusion. Uh because the eye contact -- there was no
11 breaking of eye contact. His eyes did not look down at the floor. He did not
12 look around. He did not appear disoriented in that he was not looking around.
13 His voice didn't waiver. He wasn't, uh, his, his lips were set, in that he wasn't
14 licking his lips. Um, everything, his facial appearance was to me, was one that
15 was deliberate, that was resolute, and, and noncompliant, defiant. I think
16 defiant would be an accurate term."

17 *See* Verbatim Transcript of Defendant Thompson's Recorded Statement, *Ct. Rec. 60*,
18 *Exhibit #1*, at 18-19. It is undisputed that Thompson never explained to Zehm why
19 Thompson was there or why he needed to talk to Zehm; it is undisputed that
20 Thompson never said he needed to ask Zehm some questions about what happened at
21 the ATM – in fact, he never mentioned the ATM at all; and it is undisputed that Zehm
22 had committed no crime and therefore would have no reason to think a police officer
23 was going to approach, confront or attack him. Without this information, the jury is
24 in no position to meaningfully judge Thompson's claim that Zehm displayed no
25 "confusion" or "fear" when a police officer he did not know was for some unknown
26 reason rushing at him with a baton raised.

27 To prove that Thompson's claim that Zehm displayed no confusion is false, the

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1 Government is also entitled to put on evidence that Zehm *never* understood why he
2 had been attacked. Zehm died believing that Thompson attacked him for something
3 connected to the candy and pop he was perusing and planning to purchase when
4 Thompson delivered his first series of back-to-back baton strikes. Specifically, the
5 Government is entitled to put on evidence and forecast in its opening statement that
6 Zehm's last known words were: "All I wanted was a Snickers." That Zehm was
7 confused till the very end about why he had been attacked is clearly relevant to the
8 jury's assessment of Thompson's claim that Zehm displayed no confusion when
9 Thompson first rushed at him.

10 The fact that Zehm had committed no crime and had no reason to think he was
11 in trouble with the law is also an important fact for the jury to consider in
12 determining whether Zehm picked up a plastic bottle of soda pop to purchase as a
13 beverage, as was his custom, or whether he picked it up aggressively, to use as a
14 weapon, as Thompson claims. Thompson states:

15 The individual holding the bottle was holding it uh in a very uh tense uh
16 manner. In other words, he wasn't passively holding it. Um, because of the
17 position of it at his chest, his shoulder muscles were also tensed. Uh, we made
immediate eye contact when he turned around.

18 ...
19 [Zehm was] holding [the plastic bottle of soda pop] parallel in front of his chest
20 at chest level, his arms were, were back towards his body. His elbows were
21 down in what I would describe as a loaded position or where your muscles are
22 tensed back um. It's the first thing I recognized and number one, it was a very
23 unusual way in which to hold a bottle. The second thing I recognized is that
24 this person now has the capability of being in a position that can, where he can
25 attack me. His muscles are now tensed. Um, he has positioned this bottle that
26 he can...where he can either throw the bottle at me with a sudden thrust from
27 both hands from his chest or he can hold it...where he if he wanted to retain
the grasp of the bottle he could use it as a blunt uh, essentially a club to try and
hit me in the face uh with it.

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1 See Verbatim Transcript of Defendant Thompson's Recorded Statement, *Ct. Rec. 60*,
2 *Exhibit #1*, at 16, 18. The jury simply cannot meaningfully assess whether in a 2.5
3 second period Zehm turned and immediately held the plastic bottle of soda pop in a
4 "tense," "loaded position," muscles flexed, ready to attack by throwing the bottle
5 with a sudden thrust or using as a club without knowing that he had committed no
6 crime and had no reason to believe an officer was going to confront him. That is
7 clearly relevant evidence with the tendency to make a fact of consequence more or
8 less probable. See FED. R. EVID. 401. It is therefore presumptively admissible. See
9 FED. R. EVID. 402.

10 The undisputed fact that Zehm had committed no crime and had no reason to
11 believe a law enforcement officer would approach or attack him also undercuts
12 Thompson's claim about Zehm's supposed "stance." In another attempt to justify his
13 initial first series of baton strikes, Thompson describes the way he claims Zehm was
14 standing in the 2.5 seconds prior to Thompson's first baton strikes:

15 Q. Prior to turning over the tape, you were describing uh the subject
16 reactions/actions to the grabbing of his jacket. Was there anything else that
17 occurred just prior to that?

18 A. Yes, one thing that I um, that I, I don't believe I had yet described in
19 addition to the position he was holding the bottle in uh was the stance that he
20 uh he held that was again, I believe I did say that it was not a passive stance. It
21 was a very resolute stance. Um, the left leg was slightly in front of his other
22 leg which is again typical. His whole body suggested um that it was tensed
and prepared to respond either by pushing uh, throwing or charging me.

23 See Verbatim Transcript of Defendant Thompson's Recorded Statement, *Ct. Rec. 60*,
24 *Exhibit #1*, at 20. Thompson describes Zehm, who had his back to Thompson until
25 2.5 seconds before Thompson's first strike, as turning and immediately adopting an

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1 aggressive, “resolute” stance, with one leg in front of the other, suggesting that his
2 body was tensed and ready to push or throw the plastic bottle of soda pop at
3 Thompson or charge him with it. The credibility of Thompson’s claim is pivotal to
4 whether Thompson was justified in his first series of back-to-back baton strikes and
5 whether he lied in his statement. The jury is entitled to assess the credibility of that
6 claim, knowing that Zehm was an innocent man, who had no idea that an officer
7 would be approaching or attacking him.

8 In short, Thompson paints a picture of Zehm as a man who sees Thompson
9 enter the store, and with his back to Thompson, decides to ambush him with a plastic
10 bottle of soda pop. Two-and-half-seconds before the initial baton strikes, Zehm
11 turns, and Thompson claims Zehm immediately leans into an aggressive stance,
12 holding the pop bottle in a horizontal loaded position, with muscles tensed, eyes
13 fixed, lips set, with a non-compliant defiant look on his face, ready to push or throw
14 the plastic bottle of soda pop at Thompson or charge him with it.

15 The inescapable inference from Thompson’s story is that Zehm has decided to
16 target and attack Thompson from the moment Thompson enters the store. A critical
17 piece of the Government’s evidence to prove that this justification is false is the
18 undisputed fact that Zehm is innocent and therefore would have no reason to target
19 the officer or to even know the officer was coming to investigate him, much less
20 confront or attack him.

21 To illustrate the point, suppose an officer charged with a § 242 count for
22 excessive force and a § 1519 count for lying in his report claims his force was
23 justified because the suspect verbally threatened to knife the officer in perfect
24 German, a language that the defendant-officer knew and understood. In such a case,
25 undisputed evidence that the suspect did not speak any German would clearly be

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1 admissible to show that the Defendant's claimed justification for his use of force was
2 not true. In this example, the defendant-officer's claimed justification entails
3 something about what the suspect knew – in this case, the German language.

4 Similarly, Defendant Thompson's claimed justification that Zehm saw
5 Thompson enter the store, kept his back to Thompson, selected a plastic bottle of
6 soda pop as a weapon, then suddenly turned and adopted an aggressive and defiant
7 stance at the onrushing, baton-wielding officer, all while displaying no confusion or
8 fear entails something about what Zehm knew – that Zehm knew that Thompson was
9 coming to get him and decided to attack him from the moment Thompson walked
10 into the store. Just as the undisputed fact the suspect in the hypothetical example did
11 not know German is admissible to undermine the defendant officer's implication
12 about the suspect's knowledge, so, too, the undisputed fact that Zehm had committed
13 no crime and had no reason to think he had done anything to prompt an officer to
14 confront him is admissible to undermine Defendant Thompson's implication about
15 Zehm's knowledge.

16 Importantly, evidence of Zehm's innocence is not only relevant to Thompson's
17 initial baton strikes. It is relevant to the rest of the chain of force he used against
18 Zehm. Thompson's initial series of back-to-back baton strikes set into motion a
19 domino effect that would end with an innocent man's head and body battered and
20 beaten on the floor of the center aisle. The law is firmly established that a defendant
21 may not use unreasonable force against a person and then cite the escalation he
22 caused as a ground for justifying additional force against that person. *See Duran v.*
23 *City of Maywood*, 221 F.3d 1127, 1130-31 (9th Cir. 2000) (affirming a jury
24 instruction allowing a finding of liability because the "police officer's use of
25 excessive and unreasonable force caused an escalation of events that led to the

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1 [victim's] injury"). *See also Alexander v. City and County of San Francisco*, 29 F.3.d
2 1355 (9th Cir. 1994) (holding that an officer cannot create an escalation from an
3 unlawful use of force and then cite the response precipitated by that escalation as a
4 justification for further force).

5 Thompson's lie about the justification for his initial baton strikes therefore
6 disqualifies his claimed justifications for standing over Zehm and firing taser probes
7 into him or the next flurry of baton strikes up the aisle or the final flurry of seven
8 baton strikes in eight seconds in the center aisle. Thompson may not use unlawful
9 force to set into motion a cascading chain of events he then relies on to justify
10 additional force. For these reasons, and the reasons and authority previously set forth
11 in the United States' Response to the Defendant's Motion to Exclude After-Acquired
12 Evidence (Doc # 232), fully incorporated herein by reference, the Government
13 respectfully requests that the Court admit the evidence of Zehm's innocence and the
14 evidence of Zehm's last words illustrating that he was confused to the very end about
15 why he had been attacked. This evidence the Government seeks a pretrial order
16 admitting and authorizing the Government to reference in its opening statement
17 includes:

- 18 • Testimony from Allison Smith, one the teenage girls in the car that called
19 911 prompting the call, that at Officer Timothy Moses's request, she
20 checked and affirmed that Zehm never accessed her account or stole any
21 money from it.
- 22 • Bank records demonstrating that Zehm never accessed or stole any money
23 from Smith's account.
- 24 • Testimony that Zehm's final words were, "All I wanted was a Snickers,"
25 demonstrating that he was confused to the very end about why he had been
26 attacked.

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1 **B. The Government seeks authorization to use during its opening**
2 **statement images, names, and positions of key individuals in the case to help the**
3 **jury keep track of the relevant players.**

4 Because this is likely to be a long trial involving a large volume of witnesses
5 and relevant individuals, the Governments seeks authorization from the Court to
6 display images, names and positions of key individuals in the case to help the jury
7 keep track of the relevant people.

8 **C. The Government seeks authorization to use display relevant autopsy**
9 **photos during its opening statement.**

10 The defense previously stipulated to the foundation for the autopsy photos in
11 this case, and they are clearly relevant to the charges at issue and will be used in the
12 Government's case-in-chief. Accordingly, the Government believes it may use
13 relevant autopsy photos in its opening statement, but seeks confirmation from the
14 Court.

15 **D. The Government seeks authorization to use during its opening**
16 **statement images and video captured by Zip Trip Security cameras on the night**
17 **of the incident.**

18 Images and video captured by the Zip Trip Security cameras on the night of the
19 incident will be an important part of this case. The Government seeks authorization
20 from the Court to use relevant portions during its opening statement to aid the jury's
21 ability to process and understand the evidence the Government will introduce.

22
23
24 **E. The Government seeks authorization to display the AMR Patient**
25 **Care Report during its opening statement.**

1 For reasons and authority previously set forth in the United States' Motion in
2 Limine to admit the AMR Patient Care report (Doc # 253), fully incorporated herein
3 by reference, the Government has demonstrated the necessary foundation to admit the
4 AMR Patient Care report into evidence. The Government seeks a pretrial ruling
5 admitting the AMR Report into evidence and requests permission to use the AMR
6 Report during its opening statement.

7
8 **I. CONCLUSION**

9 For the foregoing reasons, the Court should grant the United States' motion in to
10 admit evidence so that it can be properly referenced in opening statement.

11 RESPECTFULLY SUBMITTED this 1st day of June 2010.

12 JAMES A. MCDEVITT
13 United States Attorney - EDWA

14 s/ Victor Boutros
15 VICTOR BOUTROS
16 Trial Attorney, U.S. Dept. of Justice
17 Criminal Civil Rights Division

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

19 I hereby certify that on the date of the official electronic filing of the foregoing
20 pleading with the Clerk of the Court using the CM/ECF System, that the CM/ECF System
21 sent notification to the 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

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