

JAMES A. MC DEVITT
United States Attorney - EDWA
TIMOTHY M. DURKIN
Assistant United States Attorney
Post Office Box 1494
Spokane, WA 99210-1494
Telephone: (509) 353-2767

The Honorable LONNY R. SUKO

VICTOR BOUTROS, Trial Attorney
U.S. Department of Justice
Civil Rights Division – Criminal Section
950 Pennsylvania Ave., NW
Washington, D.C. 20530
Tel. (202) 514-3204

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ESTATE OF OTTO ZEHM, Deceased,)	NO. CV-06-224-LRS
and ANN ZEHM, in her Personal)	
Capacity and as Representative of the)	<i>EX PARTE (Restricted to Court)</i>
Estate of Otto Zehm,)	PROFFER OF AUSA TIM M.
Plaintiffs,)	DURKIN IN SUPPORT OF STAY
vs.)	
)	<i>Original Filed Ex Parte (Restricted)</i>
CITY OF SPOKANE, KARL F.)	<i>proposed redacted version will also be</i>
THOMPSON, et al,)	<i>provided to the Court for approval of</i>
Defendants.)	<i>service on parties]</i>

Proposed Intervenor, the United States, through the undersigned counsel of the United States Attorney’s Office (EDWA) and the Department of Justice, Criminal Civil Rights Division (D.C.), submits the following Proffer of Tim M. Durkin in support of and attached to its Statement of Salient Facts in Support of Stay of this civil (civil rights) case so that the criminal case against the same primary named Defendant, Spokane Police Officer Karl Thompson Jr., can be properly resolved first.

PROFFER STATEMENT OF AUSA TIM M. DURKIN

page 1

1 This Statement of Relevant Facts Supporting the United States Motion to
 2 Stay is supported by Rules 24, 16, and 26 of the Federal Rules of Civil Procedure,
 3 Rule 16 of the Federal Rules of Criminal Procedure, the United States'
 4 Memorandum In Support of Stay, the attached *Proffer* of Timothy M. Durkin,
 5 Assistant United States Attorney and exhibits attached hereto, and the records and
 6 materials filed in this civil case and in the related case of *United States v. Karl F.*
 7 *Thompson Jr., Cause No. 09-cr-0088-FVS.*

8 Wherefore, Timothy M. Durkin, Assistant United States Attorney, declares
 9 and states that the following proffer is true and correct to the best of his
 10 knowledge, information and belief. Mr. Durkin represents that he is above the age
 11 of 18, is not a party hereto, is competent to testify to the matters stated herein
 12 which are based on personal knowledge, personal information, and/or information
 13 that has been acquired by the FBI and the DOJ, or the Grand Jury (to the extent
 14 allowed by the Court to disclose) during the course of the federal investigation into
 15 the events of the Defendant Karl F. Thompson's forcible detention of Otto Zehm
 16 on March 18, 2006, which precipitated Mr. Zehm expiring while in the custody of
 17 the Spokane Police Department ("SPD"), and the SPD's investigation that
 18 followed. Mr. Durkin further declares that these statements should be admissible
 19 as a proffer of evidence and/or as an offer of proof at the time of any hearing.

20 **I. SALIENT FACTS SUPPORTING STAY OF CIVIL PROCEEDINGS**

21 This civil (civil rights) lawsuit and its related criminal (civil rights) case of
 22 *United States v. Karl Thompson Jr.* (Cause No. 09-cr-0088-FVS) arise out of the
 23 same set of facts and circumstances, which is the Defendant, Spokane Police
 24 Department (SPD) Patrol Officer Karl Thompson Jr.'s use of an impact weapon (i.e.,
 25 a baton) and a taser to forcefully detain and seize Otto Zehm at a north Spokane Zip
 26 Trip convenience store during the early evening of **March 18, 2006**. *See Proffer of*
 27

PROFFER STATEMENT OF AUSA TIM M. DURKIN

page 2

1 *Timothy M. Durkin, AUSA*, ¶ 1. Mr. Zehm ultimately expired (i.e., brain death) after
2 being forcibly restrained in a hog tie following Officer Thompson’s use of violent
3 force.

4 The following is a general overview of certain underlying events involved in
5 the criminal investigation, prosecution and this related civil case. This overview is
6 also based, in large part, on Officer Thompson’s recorded statement of March 22,
7 2006 (*see attached Exhibit #1*), SPD investigative reports, percipient witness
8 information provided to SPD investigators during its 2006 investigation, the Zip
9 Trip convenience store security video footage, SPD dispatch records, Otto Zehm’s
10 autopsy and/or other identified medical, FBI 302 reports of investigation,
11 employment and grand jury information (provided only to the Court).

12 At the time of the filing of this *Ex Parte* Proffer in Supporting of Stay, the
13 United States will seek authorization from the Court to serve opposing parties with a
14 proposed redacted version of this *Ex Parte* Statement of Facts.

15 The following Proffer in Support of Stay is only an introductory overview
16 and should not to be considered an exhaustive description of all of the facts, events,
17 and “circumstances” surrounding Officer Thompson’s alleged criminal use of force
18 on Mr. Zehm and/or the local and federal investigations that followed.

19 In addition, Mr. Durkin feels obligated to note that notwithstanding the
20 alleged factual recitals herein that the Defendant Karl Thompson, as he sits here
21 today, is presumed innocent of the charged offenses until proven guilty at trial. At
22 the time of the criminal trial, however, which is set for four (4) weeks beginning
23 **February 8, 2010**, the United States does intend to prove beyond a reasonable doubt
24 many of the following alleged facts which the United States submits would show
25 that the Defendant Thompson’s use of force – consisting of multiple baton strikes,
26 including both lethal force (e.g., head strikes) and non-lethal force (e.g., torso and
27 leg strikes); and a taser application - violated Mr. Zehm’s clearly established

PROFFER STATEMENT OF AUSA TIM M. DURKIN

page 3

1 constitutional right to be free from an unreasonable seizure and that the excessive
2 force resulted in a “serious injury” to Mr. Zehm in violation of 18 U.S.C. § 242.

3 The United States also intends to prove at trial, beyond a reasonable doubt, its
4 allegations that the Defendant Officer Thompson committed obstruction of justice in
5 violation of 18 U.S.C. § 1519 by making a “false entry” in a police record,
6 specifically by providing one or more false statements contained in the transcript of
7 a recorded March 22, 2006, interview that the Defendant gave to SPD-MCU
8 Detective Terry Ferguson.

9 **A. U.S. Department of Justice’s Authority & Investigation Interests**

10 1. The Judiciary Act of 1789, ch. 20, sec. 35, 1 Stat. 73, 92-93 (1789)
11 created the Office of the Attorney General (AG), which originally was a one-person,
12 part-time position that required the Attorney General to be "learned in the law" and
13 imposed the duty "*to prosecute and conduct all suits in the Supreme Court in which*
14 *the United States shall be concerned, and to give his advice and opinion upon*
15 *questions of law when required by the President of the United States, or when*
16 *requested by the heads of any of the departments, touching any matters that may*
17 *concern their departments."* *Id.*

18 2. In 1870, Congress, concerned with corruptions in the post civil war era,
19 passed the Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870)
20 setting it up as "an executive department of the government of the United States" with
21 the Attorney General as its head. The “DOJ” officially came into existence on July 1,
22 1870, and was designated the responsibility of handling the legal business of the
23 United States. The Act gives the DOJ control over all criminal prosecutions and civil
24 suits in which the United States has an interest. In addition, the Act gives the
25 Attorney General and the Department of Justice (DOJ) control over federal law
26 enforcement. *Id.*

27 3. The 1870 Act remains the foundation on which the DOJ still operates.

PROFFER STATEMENT OF AUSA TIM M. DURKIN

page 4

1 However, the structure of the Department of Justice has evolved over the years, with
2 the addition of several Deputy Attorneys General (DAGs) and the formation of many
3 dedicated Divisions (i.e., Criminal Civil Rights Division). With these changes and a
4 steadily increasing work load, the DOJ has reportedly become the world's largest law
5 office and is the central agency for the enforcement of federal laws. *Id.*

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

20 5. The DOJ’s Criminal Division and the U.S. Attorneys’ Offices in the
21 United States’ 93 separate federal districts have the responsibility for enforcing more
22 than 900 statutes as well as handling certain civil litigation. In this capacity, the
23 United States Department of Justice, Criminal Civil Rights Section in Washington
24 D.C. and the 93 different United States Attorneys' Offices work as partners in the
25 enforcement of federal criminal civil rights laws, which enforcement area is deemed a
26 DOJ priority. The Federal Bureau of Investigation is the primary investigative
27

PROFFER STATEMENT OF AUSA TIM M. DURKIN

page 5

Exhibit B - Proposed Service Version

Ex Parte Proffer Statement of AUSA Tim Durkin

1 agency for civil rights matters and works in collaboration with the Criminal Civil
2 Rights Section and the U.S. Attorneys' Offices in completing investigations and
3 forwarding their investigative reports and findings for charging and remedial
4 determinations.

5 6. Annually, there are as many as 10,000 complaints and inquiries in the
6 form of citizen correspondence, telephone calls, or personal visits to the Department
7 of Justice, local U.S. Attorney's offices or, most commonly the FBI. Approximately
8 one-third of these complaints are of sufficient substance to warrant investigation,
9 which is almost always conducted by the FBI and its DOJ members. Most cases are
10 typically prosecuted jointly with a Main Justice (DOJ) Criminal Section trial attorney
11 and an AUSA from the district's U.S. Attorney's Office.

12 7. 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 the Grand Jury sitting in the Eastern District of Washington, a two (2) count
15 Indictment was returned **on June 19, 2009**, by the Grand Jury charging the
16 Defendant Officer Karl Thompson with excessive force against the victim Otto
17 Zehm in violation of 18 U.S.C. § 242 and with obstruction by making a false entry in
18 an investigation "record" in violation of 18 U.S.C. § 1519. *See U.S. v. Thompsons*,
19 *Dckt. # 1*.

20 8. On **July 9, 2009**, the Defendant was arraigned and U.S. Magistrate
21 Cynthia Imbrogno issued the District's standard ("voluntary open file") Discovery
22 Order. Mr. Carl Oreskovich, who was previously retained by the City Attorney's
23 Office in October 2008 by the City Attorney's to exclusively represent Karl
24 Thompson's "interest" in the legal proceedings stemming from the defendant's
25 alleged excessive use of force on Otto Zehm on March 18, 2006, was appointed by
26 Magistrate Imbrogno, as CJA counsel, to represent the defendant in the criminal case
27

PROFFER STATEMENT OF AUSA TIM M. DURKIN

page 6

1 at public expense.

2 9. On **July 9, 2009**, and on multiple dates since, the United States has
 3 provided to the Defendant through his attorney, Mr. Oreskovich, more than **13,000**
 4 **pages** of tangible criminal case discovery records and materials, and another **13.54**
 5 **GB** of electronic discovery (i.e., audio, video and electronic data). These materials
 6 include SPD investigation records, SPD personnel and administrative files, FBI 302
 7 Investigation Reports, Grand Jury records, and Grand Jury transcripts (i.e., 20
 8 witnesses' transcripts thus far). *See United States' Notice of Discovery Disclosure*
 9 *summarizing discovery provided to date in U.S. v. Thompson, Cause No. 09-00088-*
 10 *FVS, a copy is attached as **Exhibit #10** (identified as *Exhibit 11* in *Memo in Support*).*

11 10. Magistrate Imbrogno's July 9, 2009, Discovery Order provided that if
 12 the Defendant participated in the receipt of the United States' discovery disclosures
 13 that the Defendant, in turn, had to provide reciprocal discovery. *See Discovery*
 14 *Order, Dckt. # 19*. Notwithstanding Magistrate Imbrogno's Order and repeated
 15 written requests from the United States over the past month requesting reciprocal
 16 discovery, the Defendant has not produced and/or offered for inspection any
 17 evidence and/or discovery that Defendant is aware of and/or plans to use at the time
 18 of the criminal trial. *See also Order Granting in part* (and denying in part)
 19 *Defendant's Motion for Discovery, U.S. v. Thompson, Dckt. # 47*. Further
 20 description of the criminal case proceedings is provided below.

21 **B. Chronological Summary & Procedural History.**

22 11. During the early evening of **March 18, 2006**, the Defendant, Spokane
 23 Police Department (SPD) Patrol Officer Karl Thompson Jr. (age 57.75 yrs., 5'9" in
 24 height and approximately 185 lbs.), was working "power shift" patrol in north
 25 Spokane when he made contact with Otto Zehm (age 37, 5'9" and approximately
 26 185 lbs.) at a Zip Trip convenience store. Defendant Thompson contacted Zehm
 27

51 ***PROFFER STATEMENT OF AUSA TIM M. DURKIN***

page 7

1 relative to a” suspicious circumstance” complaint arising out of a report of his
 2 possibly being involved in the theft of money at a nearby ATM.¹ Zehm had mental
 3 disabilities, worked as a janitor, and was a schizophrenic with delayed cognitive
 4 responses. In reality, Zehm did not take any money and was wrongfully suspected
 5 of taking money from the ATM. *See SPD Investigative Reports, Criminal Def. Disc.*
 6 *#1, in United States Notice of Discovery Disclosures, U.S. v. Karl Thompson Jr.,*
 7 *Cause # CR-09-0088-FVS, Dckt. # 42, attached hereto as Exhibit # 10.*

8 12. Upon contacting Zehm inside the Zip Trip, Defendant Thompson
 9 promptly used his baton and taser to forcibly detain Zehm. Defendant Thompson
 10 stated that he used force after Zehm failed to immediately follow two verbal
 11 commands that were given and only after Zehm allegedly held a plastic 2-liter Diet
 12 Pepsi pop bottle in an aggressive manner (i.e., was about to “assault” or “charge”
 13 Thompson). In response to Defendant’s successive and repeated baton strikes to his
 14 body, Zehm actively resisted. Defendant Thompson claims Zehm was actively
 15 assaultive after his baton strikes. There are other witnesses that describe Zehm as
 16 defensive and trying to evade Thompson’s violent use of force. Officer Thompson
 17 also tasered Zehm and later called for assistance to completely suppress Zehm. *Id.*

18 13. Several other SPD Officers (including named Defendants in this action)
 19 arrived and helped Defendant Thompson forcibly secure Zehm in a prone, “hog tie”
 20 restraint, in which position Zehm remained restrained for approximately 17 minutes,
 21 the last three of which included a plastic non-rebreather mask being applied by
 22 Defendant Raleigh to Zehm’s face to protect officers from possible spitting. *Id.*

23
 24 ¹ For expediency, unless otherwise indicated, individuals identified herein may be
 25 referred by their last name (i.e., Karl Thompson may be referred to as “Defendant” or
 26 “Thompson”; Otto Zehm or his Estate may be referred to as “Zehm” or “Plaintiff;” etc.).
 27 No disrespect is intended by these abbreviated references.

PROFFER STATEMENT OF AUSA TIM M. DURKIN

page 8

**Exhibit B - Proposed Service Version
 Ex Parte Proffer Statement of AUSA Tim Durkin**

1 14. Mr. Zehm ultimately stopped breathing in this restrained position and
2 collapsed. He was rushed to the hospital, but never regained consciousness and died
3 two days later from an anoxic brain injury (i.e., oxygen starved brain). *Id.*

4 15. Later in the evening of **March 18, 2006**, Sgt. Joe Peterson and the
5 SPD's Major Crimes Unit assumed the lead role of investigating the circumstances
6 of Mr. Zehm's death while in the custody of their own SPD officers. That evening,
7 SPD's Acting Chief Jim Nicks triggered the Critical Incident Protocol, which placed
8 the SPD-MCU Detectives in the position of lead investigators in the case. The
9 Spokane County Sheriff's Office was designated to provide "shadow" investigators
10 and reportedly they were to "shadow" and observe their SPD counterparts'
11 investigation activities. *Id.*

12 16. SPD Detective Terry Ferguson, a named Defendant in this action, was
13 designated the lead detective for the SPD's MCU. Det. Mark Burbridge was
14 designated the crime scene detective and was in charge of handling and processing
15 the crime scene, as well as contacting and interviewing percipient witnesses. *Id.*

16 17. At approximately 7:30 p.m. on **March 18, 2006**, Asst. Chief Nicks
17 arrives on scene and is given a briefing by SPD Patrol and MCU personnel. Chief
18 Nicks then arranges a contact with Asst. City Attorney Rocky Treppiedi, the SPD's
19 legal adviser and the City's acting Risk Manager. Mr. Treppiedi is contacted before
20 the Spokane County Prosecutor, who has jurisdiction over all felonies within
21 Spokane County. *See RCW 36.17.020. See also SPD Records, Computer Aided*
22 *Dispatch (CAD) Def. Disc #1.*

23 18. Later in the evening of **March 18, 2006**, Acting Chief Nicks gave a
24 press conference and provided the following description of the Zehm detention
25 events during a TV interview with a KREM 2 reporter.

26 "I'll begin with officers responded to a suspicious persons call, actually
27

1 occurred several blocks from here at a bank and citizens observed this
2 individual near a cash machine concerned about his behavior. Concerned that
3 he might be looking a possibly doing a robbery. The citizen called the police
4 department. Officers responded to the area in order to investigate this
5 person’s actions.

6 We had one officer that came to the store here contacted the suspect inside the
7 store. The officer was alone at the time, confronted the individual. **The**
8 **suspect lunged at the officer during the initial contact and basically a fight**
9 **occurred at that time.**

10 . . .
11 Oh of course, yes [the officers followed procedure], the officers came on
12 scene used the lowest level mean to control him verbally. **The suspect**
13 **attacked the officer.**

14 The Officer was by himself. **The officer used a straight handled baton as a**
15 **defensive technique** . . . tried to use his taser that was ineffective . . .”
16 (emphasis added)

17 *See United States Discovery Disclosure, Disc #33, Exhibit #10 (Nicks’s KREM 2*
18 *interview).*

19 19. On or about **March 21st and March 22rd**, Cpl. Tom Lee, the SPD’s
20 Public Information Officer issues press releases and/or is quoted by media as
21 describing Zehm as having “lunged” at or “attacked” the Defendant Thompson.

22 20. On or about **March 22, 2006**, Defendant Thompson gave a recorded
23 interview to Det. Ferguson. *See attached Exhibit #1.* That same day, Dr. Sally
24 Aiken, Medical Examiner, conducted an autopsy on Zehm. *Exhibit #10, Disc. #1*
25 *and 12.*

26 21. The morning of **March 23, 2006**, footage from two Zip Trip store
27 security camera angles (i.e., camera angles #1 and #2) is reviewed by MCU
Detectives with SPD Brass, reportedly including Acting Chief Nicks, Asst. Chief
Odenthal, Asst. Chief Bruce Roberts, and Asst. City Attorney Rocky Treppiedi. “No
Lunge” or “attack” by Zehm is revealed in either of these video angles. In fact, it

PROFFER STATEMENT OF AUSA TIM M. DURKIN

1 appears that Asst. Chief Odenthal spliced off two (#3 and #4) of the four camera
2 angles. The cameras at these angles (#3 and #4) are digital, whereas camera angles
3 #1 and #2 are analog recorders. *See SPD Investigative records (Det. Ferguson,*
4 *McGregor and Acting Chief Nicks's notebook).*

5 22. On or about **March 29, 2006**, Det. Ferguson consults with Treppiedi
6 regarding the release of Zehm's payroll check (approximate \$500.00) that was in his
7 possession the night of the incident to his mother Anne Zehm or Zehm's counsel. *Id.*

8 23. In **late March 2006**, and on several occasions thereafter, Det. Ferguson
9 conducts her own investigative contacts and interviews without any Spokane County
10 Detective being present, in apparent violation of the SPD's "Critical Incident
11 Protocols." *See SPD MCU Investigation reports and file notes. Id.*

12 24. On or about **May 22, 2006**, Dr. Sally Aiken issues her report on
13 autopsy findings. Dr. Aiken concludes that Mr. Zehm's cause of death was *Hypoxic*
14 *Encephalopathy due to Cardiopulmonary Arrest while restrained (total appendage*
15 *restraint) in prone position for excited delirium.* *See May 22, 2006, Autopsy report,*
16 *Def. Disc. #12, Exhibit 10.* Dr. Aiken also deemed Mr. Zehm's "brain death"
17 (hypoxic encephalopathy) to be a *homicide* under state law since the death was
18 causally related to personal intervention and not the result of a naturally occurring
19 organic demise. *Id.*

20 25. On **May 30, 2006**, Acting Chief Jim Nicks holds a press conference to
21 announce and discuss certain autopsy findings and conclusions, in alleged violation
22 of RCW 68.50.105 (Autopsy privacy act) and a mutual "protective order" that was
23 entered into between the SPD, its civil counsel Mr. Treppiedi, and the Zehm Estate
24 and its counsel with the Center for Justice. *See Def. Discovery Disc #9, Exhibit #10.*

25 26. The MCU continues its investigation activities from **March 18, 2006**,
26 through **May 31, 2006**, when presumably Det. Ferguson, Det. Mark Burbridge and
27

PROFFER STATEMENT OF AUSA TIM M. DURKIN

page 11

Exhibit B - Proposed Service Version

Ex Parte Proffer Statement of AUSA Tim Durkin

1 MCU supervisor Sgt. Peterson, conclude that the SPD's investigation was
2 sufficiently complete to make a "referral" to the Spokane County Prosecuting
3 Attorney's Office. Det. Ferguson sends her case summary "referral" report to the
4 Spokane County Prosecuting Attorney's Office with the statement that there is "no
5 evidence" of any excessive force, "only that amount of force that was reasonably
6 necessary " *See attached **Exhibit #2**, Det. Ferguson's May 31, 2006, report*
7 *concluding no evidence of criminal activity discovered, notwithstanding eye witness*
8 *and video accounts. **Det. Ferguson recommends the declination of any criminal***
9 *charges.*

10 27. In Det. Ferguson's **May 31, 2006**, referral report to Mr. Steve Tucker,
11 Spokane County's elected Prosecuting Attorney, as follows:

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

18 *See Detective Terry Ferguson's May 31, 2006, case investigation summary and*
19 *referral (i.e., no charges) to the Spokane County Prosecuting Attorney, pg. 7,*
20 **Exhibit # 2.**

21 28. In **June 2006**, the United States Department of Justice opens a
22 preliminary case investigation into the circumstances of the force used on Zehm and
23 his proximally related death while in SPD custody. In July 2006, the U.S.
24 Attorney's Office requests a complete copy of Det. Ferguson's investigative file
25 materials. This request would be repeated on several occasions over the next 2.5
26 years and notwithstanding, DOJ would not actually receive a "complete" copy of
27 Det. Ferguson's and the SPD's MCU investigative file materials until a grand jury

PROFFER STATEMENT OF AUSA TIM M. DURKIN

page 12

1 subpoena is issued in the spring of 2009. *See attached **Exhibit #13** (copy of AUSA*
2 *Durkin's March 17, 2009, email to Treppiedi).*

3 29. On **June 7, 2006**, the Center for Justice sends Asst. City Attorney
4 Treppiedi a letter asserting that the City, through Acting Chief Nicks's May 30,
5 2006, press conference concerning Dr. Aiken's autopsy results and findings has
6 violated Washington's Autopsy privacy Act and the parties agreed protective order.
7 *See **Exhibit #3**, a true copy of Center for Justice's letter to Treppiedi.*

8 30. On **June 21, 2006**, Asst. City Attorney Rocky Treppiedi issues a nine
9 page letter to the Center for Justice denying any violations of state law, the parties
10 protective order, and further goes on to defend and exonerate Defendant Thompson
11 from any excessive use of force claims. Mr. Treppiedi goes on to exonerate all of
12 the other law enforcement officers who had contact with Mr. Zehm the evening of
13 March 18, 2006. Acting Chief Nicks, Asst. Chief Odenthal and Asst. Chief Bruce
14 Roberts, who oversaw the MCU and the SPD's investigation division, were all
15 copied in on Mr. Treppiedi's letter exonerating Defendant Thompson. Notably, the
16 SPD's own investigation was not completed at the time that Mr. Treppiedi
17 exonerated Defendant Thompson. *See attached **Exhibit #4**, a true and correct copy*
18 *of Mr. Treppiedi's June 21, 2006, exoneration letter to the Center for Justice.*

19 31. On **June 27, 2006**, per direction of Asst. City Attorney Rocky
20 Treppiedi, Det. Ferguson displayed Mr. Zehm's personal property items at the
21 evidence building to the Zehm Estate's legal representatives. *See SPD Investigation*
22 *Records, Def. Disc #1, Exhibit #10.*

23 32. On **July 10, 2006**, Spokane County Chief Prosecuting Attorney Jack
24 Driscoll requests that the plastic 2-liter Diet Pepsi bottle recovered from the Zip Trip
25 be examined for latent fingerprint examination. This had not been previously
26 pursued by investigators. *See Exhibit 10, Disc #1.*

27
PROFFER STATEMENT OF AUSA TIM M. DURKIN

page 13

Exhibit B - Proposed Service Version

Ex Parte Proffer Statement of AUSA Tim Durkin

1 33. On or about **July 13, 2006**, the SPD finally releases two of the Zip Trip
2 security store video angles in response to public records act requests. Asst. Chief Al
3 Odenthal gives a presentation to the media regarding the content of the two camera
4 angles. The SPD realizes for the first time that the “plastic spit mask” was not
5 provided to Dr. Aiken and had not yet been analyzed. Det. Ferguson re-initiates
6 interviews (once again solo in apparent violation of Critical Incident Protocols) with
7 on-scene officers (i.e., Officers *Thompson*, *Uberuaga*, *Raleigh*, *Voeller*, *McIntyre*,
8 *Dahle*, *Strassenberg*, *Torok*, etc.) concerning the use and application of the non-
9 rebreather mask. *Id.*

10 34. On **July 13, 2006**, Acting Chief Nicks reportedly admits to the media
11 for the first time since the SPD’s March 18, 2006, news announcement (night of
12 incident) and the several media disclosures since, that the security video does not
13 show Zehm “lunging” at or attacking Officer Thompson. *See Spokesman Review*
14 *July 14, 2006, article where in Chief Nicks admits giving “inaccurate” information*
15 *while trying to defend his officers’ actions during the fatal struggle with Otto Zehm.*
16 *Nicks reportedly was also unable to account for why he, Tom Lee, and other SPD*
17 *representatives continued to claim for months (x4) that Zehm “lunged” first at*
18 *Officer Thompson with the plastic soda bottle before Thompson used force. “That’s*
19 *the information that I was provided on scene based on the observations of the*
20 *witnesses and officers,” Nicks is quoted saying. See attached Exhibit #5, a true and*
21 *correct copy of Spokesman Review’s July 14, 2006, article regarding Chief Nicks’s*
22 *alleged admission of inaccurate account.*

23 35. On **July 17, 2006**, Det. Ferguson is advised that the plastic spit mask
24 needs to be forensically examined and considered by the Medical Examiner relative
25 to possible contributing cause of death. The mask was not originally retrieved and
26 maintained as evidence. It was originally bagged and dropped in a bio-hazard waste
27

PROFFER STATEMENT OF AUSA TIM M. DURKIN

page 14

Exhibit B - Proposed Service Version

Ex Parte Proffer Statement of AUSA Tim Durkin

1 collection site. Fortunately, it was later retrieved by Det. Ferguson and others from
2 the County's bio-hazard waste site near the County's Risk Mgmt. Office. *Exhibit*
3 *#10, Disc. #1.* .

4 36. On **July 19, 2006**, Det. Ferguson meets with Chief Criminal Deputy
5 Prosecutor Jack Driscoll who requests that a forensic video analysis be performed of
6 the two security video angles showing the first minute of Officer Thompson's
7 engagement and force on Zehm. *See SPD Records, Def. Disc. Disc #1.*

8 37. On **July 19, 2006**, Det. Ferguson contacts Chief Deputy Prosecutor
9 Jack Driscoll again and Rocky Treppiedi concerning "authority" to open the plastic
10 pop bottle and empty contents so fingerprinting analysis can be performed. *Exhibit*
11 *10, Disc #1.*

12 38. On **July 22, 2006**, Chief Deputy Driscoll meets with Det. Ferguson and
13 forensic videographer Grant Fredericks, and discusses parameters of technical
14 review (i.e., initial contact and exchange between Defendant Thompson and Zehm).
15 *Id.*

16 39. On or about **August 2, 2006**, SPD Chief Nicks and other administrators
17 reportedly learn for the first time that there were actually "four" security video
18 camera angles at the Zip Trip, not just the two that were reportedly shown the
19 morning of March 23, 2006, to SPD Administrators and Asst. City Attorney Rocky
20 Treppiedi. Asst. Chief Nicks is advised that only two camera angles were actually
21 released in July in response to the media's public records request. The failure to
22 disclose all camera angles in SPD's possession would appear to be a violation of
23 Washington's Public Records Act, RCW 42.56.010, et seq. (The PRA is a "strongly
24 worded mandate for broad disclosure of public records" and its provisions are to be
25 liberally construed to promote full access to public records, and exemptions are to be
26 narrowly construed. *Progressive Animal Welfare Soc'y v. Univ. of Wa.*, 125 Wn.2d
27

PROFFER STATEMENT OF AUSA TIM M. DURKIN

page 15

Exhibit B - Proposed Service Version

Ex Parte Proffer Statement of AUSA Tim Durkin

1 243, 250-51, 884 P.2d 592 (1994) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123,
2 127, 580 P.2d 246 (1978)), discussing former RCW 42.17.251 (1992).

3 Washington's courts have uniformly interpreted the PRA's policy to be "that free
4 and open examination of public records is in the public interest, even though such
5 examination may cause inconvenience or embarrassment to public officials or
6 others." See *Smith v. Okanogan County*, 100 Wn.App. 7, 11, 994 P.2d 857 (2000)
7 (quoting former RCW 42.17.340(3) (1992), now codified at RCW 42.56. (2006)).

8 40. Acting Chief Nicks learns about the two additional (digital) camera
9 angles from Treppiedi, who reportedly provides his factual opinion that the two
10 additional (digital) cameras "showed nothing of value." See *SPD Records on Zehm*
11 *Investigation and Asst. Chief Nick's Investigation records, Def. Disc #1 and 57,*
12 *Exhibit #10; and Spokesman Review articles of August 4, 2006. Disc # 9.*

13 41. On or about **August 3, 2006**, SPD PIO Cpl. Tom Lee advises Chief
14 Nicks that the Spokesman and KREM are pursuing stories on the City's failure to
15 disclose the two additional camera angles. Chief Nicks has a meeting with Det.
16 Ferguson and Lt. Stephens. Lt. Stephens advises that he was unaware of the two
17 additional camera angles. Det. Ferguson acknowledges that she was aware of all
18 four angles, but claims (like Asst. City Attorney Treppiedi) that only the analog
19 cameras #1 and #2 (and not the digital cameras of #3-4) had "anything of value." *Id.*

20 42. On **August 3, 2006**, Det. Ferguson is directed to go back and review
21 store security camera angles #3 and #4. Det. Ferguson reportedly reports back that
22 footage from the camera angles does show the plastic Diet Pepsi bottle being held by
23 Zehm over his head/face while he is on the floor in front of the clerk's kiosk and
24 while Thompson is standing over him with a baton in hand. Chief Nicks's review of
25 the two additional camera angles (which crisscross the clerk's kiosk) show
26 additional material regarding Officer Thompson's approach to store and Zehm's
27

PROFFER STATEMENT OF AUSA TIM M. DURKIN

60 **page 16**

Exhibit B - Proposed Service Version

Ex Parte Proffer Statement of AUSA Tim Durkin

1 casual entry. Chief Nicks instructs Lt. Stephens to go back over case with fine tooth
2 comb. *Id.*

3 43. On **August 7, 2006**, Chief Nicks meets with Asst. Chief Al Odenthal
4 and seeks an explanation as to why the two additional video angles were missed.
5 Asst. Chief Odenthal claims that he too was informed that the two other store
6 security camera angles possessed nothing of value. *Id.*

7 44. On **August 8, 2006**, Asst. Chief Odenthal informs Chief Nicks that Det.
8 Ferguson removed the original video discs from the property booking and has
9 provided the “master copy” to Grant Fredericks, the video forensic technician. Det.
10 Ferguson reportedly did this without advising her supervisor. Det. Ferguson
11 reportedly thought that the SPD “chain of command” had approved the release of the
12 original property/evidence to Fredericks because “Rocky told [her] the [County]
13 Prosecutor” made the request. [sic] Once the original evidence was removed from
14 property, there were no copies of the original “video” evidence remaining booked
15 into property, only working copies existed. *Id.* The original evidence is later
16 recovered.

17 45. In approximately **September 2006**, Chief Anne Kirkpatrick is
18 appointed to Spokane’s vacant Police Chief position.

19 46. On or about **September 21, 2006**, Spokane County Prosecuting
20 Attorney Steve Tucker announces that Dr. Aiken has concluded her review of the
21 non-rebreather mask in connection with Otto Zehm’s death. Dr. Aiken reportedly
22 concludes that her original cause of death (i.e., hypoxic encephalopathy due to
23 cardio pulmonary arrest while restrained in a prone, full appendage restraint for a
24 reported episode of excited delirium.) remains unchanged and that the mask does not
25 appear, based on a test by a runner on a treadmill wearing the mask, to have
26 contributed to Zehm’s respiratory failure. *See Disc. #9, Spokesman’s article.*
27

PROFFER STATEMENT OF AUSA TIM M. DURKIN

61 **page 17**

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

10 48. By the **end of September 2006**, the SPD performed the additional
11 Spokane County Prosecutor directed investigative activities in the late summer-early
12 fall of 2006, but Detective Ferguson did not revise any of her prior findings and
13 conclusions in her May 31, 2006, report exonerating Officer Thompson on his use of
14 force as well as the other Officers involved in Mr. Zehm’s full appendage restraint
15 and proximally related in-custody death. *Id, Disc #1.*

16 49. In approximately **October 2006**, the City Police Department reportedly
17 suspends its investigation pending a charging decision by Spokane County
18 Prosecuting Attorney Steve Tucker. Meanwhile, the DOJ opens a full investigation
19 into the Zehm force – custodial death issue. As a result of the FBI and DOJ pushing
20 forward with a full investigation, Spokane County Prosecuting Attorney Steve
21 Tucker defers making any charging decision until after completion of the FBI’s
22 investigation. *See Def, Disc #9, Exhibit #10 and attached **Exhibit #12**, Spokesman*
23 *Review article of October 5, 2006 (Disc #9).*

24 50. From **March 2006 through the present**, however, Asst. City Attorney
25 Rocky Treppiedi and the City Attorney’s Office actively pursued a pre-suit and pre-
26 indictment investigation on behalf of Defendant Karl Thompson and the other
27

1 named Defendants in this civil civil rights action. *See Exhibit #4 and AUSA*
2 *Durkin's Proffer*.

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

9 52. During the **spring of 2007**, the DOJ scheduled a meeting with Grant
10 Fredericks and learns that Mr. Fredericks's \$5,400 bill for forensic services provided
11 to the SPD was coordinated by Asst. City Attorney Treppiedi and paid for by the
12 City's Risk Mgmt. Division, not the Spokane Police Department. *Id and FBI 302s*.

13 53. In the **spring of 2007**, the DOJ requested Mr. Fredericks perform some
14 additional forensic work on the Zip Trip video. Specifically, the DOJ requested that
15 Mr. Fredericks prepare stills of each frame of each of the four camera angles of the
16 Zip Trip security video for the critical time frame involved (i.e., the approximate
17 first 1:30 minutes showing Defendant Thompson's approach, initial attack, and
18 continued use of force on Zehm).

19 54. Since the United States was dealing with Mr. Fredericks as an expert
20 consultant in connection with the DOJ's continuing investigation, and since the SPD
21 had suspended its investigation, and had not contracted with Mr. Fredericks to
22 provide any further law enforcement related services, it was the DOJ's expectation
23 that the additional forensic work and the still photographs the DOJ requested to be
24 prepared by Mr. Fredericks would be provided exclusively to the DOJ and on a
25 confidential investigation basis. However, when the still photographs, placed into a
26 Power Point program, were provided by Mr. Fredericks, the DOJ was surprised to
27 learn that a copy of the stills and the work performed by Mr. Fredericks on behalf of

PROFFER STATEMENT OF AUSA TIM M. DURKIN

page 19

1 the DOJ was also provided to Asst. City (civil) Attorney *Treppiedi*. *Id.*

2 55. In **August 2007**, the DOJ also learns that Mr. Fredericks will not
3 perform any future forensic services in connection with its investigation on a
4 confidential basis since it is his understanding that he is “under contract” with Rocky
5 Treppiedi and the City Attorney’s Office. Mr. Fredericks conveys that unless and
6 until the City Attorney’s Office releases him from his contract-ethical obligation
7 concerning his forensic work for that office, that he cannot confidentially perform
8 any additional forensic work for the FBI-DOJ in Spokane. *Id.*

9 56. On or about **August 8, 2007**, the U.S. Attorney’s Office arranged a
10 conference call with then City Attorney James Craven, who releases Mr. Fredericks
11 from any further expert or other legal obligation to the City Attorney’s Office
12 relative to that office’s handling of civil legal issues for its clients on the Zehm case.
13 *Id.*

14 57. From the **fall of 2006 through the winter of 2007-2008**, DOJ
15 continued with its forensic investigation activities. *Id.*

16 58. During the **spring of 2008**, the DOJ and the Grand Jury commenced its
17 14 month investigation into the Otto Zehm use of force, custodial death, and possible
18 SPD investigation misrepresentation issues. *Id.*

19 59. In **mid-October 2008**, the United States Attorney’s Office is prepared
20 to issue an official target letter to the Defendant Karl Thompson. Assistant City
21 Attorney Rocky Treppiedi was inquired as to whether Mr. Thompson had private
22 criminal counsel. Mr. Treppiedi indicates that Mr. Thompson did not have separate
23 criminal counsel but that since he represented Mr. Thompson’s interests relative to
24 his use of force, he would be willing to accept the DOJ’s intended letter to Mr.
25 Thompson on his client’s behalf. Mr. Treppiedi’s offer is declined.

26 60. In **early October 2008**, Spokane Police Chief Anne Kirkpatrick is
27 contacted by DOJ representatives and informed that the FBI and the U.S. Attorney’s

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

11 61. On or about **October 20, 2008**, the City Attorney’s Office reportedly
12 submitted a resolution to the Spokane City Council approving the retention of a
13 private, well known criminal defense attorney Carl Oreskovich to represent and
14 defend “the City” in connection with the Zehm Estate’s pending “civil” civil rights
15 action. *See Spokesman Review news article of October 21, 2009, Def. Disc #9,*
16 *Exhibit #10 and attached Exhibit #13, copy of news article.* The City Council,
17 presumably based on the representations of the City Attorney’s Office, approved up
18 to \$45,000 in defense fees and costs associated with Mr. Oreskovich’s “civil”
19 representation of “the City” in the pending Zehm litigation. *Id.*

20 62. On or about **November 17, 2008**, FBI Special Agent Lisa Jangaard and
21 AUSA Tim Durkin met with Carl Oreskovich to discuss the United States offer to
22 allow the Defendant Thompson to appear and testify in front of the grand jury. Mr.
23 Oreskovich informed the DOJ that he “exclusively” represented Carl Thompson and
24 he did not, notwithstanding any City resolution to the contrary, represent “the City,”
25 the Police Department and/or any other SPD administrators or officers. *See AUSA*
26 *Durkin’s Proffer* . Mr. Oreskovich further indicated that he and only he would be
27 representing Mr. Thompson’s “criminal” and “civil” interests in the Otto Zehm

PROFFER STATEMENT OF AUSA TIM M. DURKIN

page 21

Exhibit B - Proposed Service Version

Ex Parte Proffer Statement of AUSA Tim Durkin

1 incident. *Id.*

2 63. Mr. Oreskovich also disclosed to Special Agent Jangaard and AUSA
3 Durkin that the City Attorney's Office had already retained a number of defense
4 experts in connection with its defense of the likely Zehm civil rights lawsuit,
5 including defensive tactics and police procedures expert D.B. Van Blaricom (a
6 former Bellevue PD Chief (retired in approx. 1992) and who the City Attorney's
7 Office has frequently retained to assist it in the defense of civil rights/torts claims-
8 suits against the Spokane PD). Mr. Oreskovich further disclosed that it was
9 represented to him by the City Attorney's Office that the defense experts retained
10 and paid for by the City would be made available to help criminally defend Mr.
11 Thompson in the event any indictment was returned by the Grand Jury. *Id.*

12 64. On **March 14, 2009**, the Plaintiffs herein filed the present action
13 seeking damages for civil rights violations, wrongful death, and state tort law claims.
14 *See Dckt. #1.*

15 65. **From October 2008 through June 2009**, it became apparent to the
16 DOJ that Asst. City Attorney Rocky Treppiedi was briefing and preparing most of
17 the Spokane Police Department and/or the City of Spokane witnesses called to
18 testify before the Grand Jury. It was also learned that Mr. Treppiedi had debriefed
19 witnesses that appeared before the grand jury. *See AUSA Durkin's Proffer.*

20 66. In addition, the DOJ learned that Asst. City Attorney Treppiedi was
21 conducting an "investigation" that appeared to actually "shadow" the investigative
22 activities of the Grand Jury. For instance, in addition to preparing and/or debriefing
23 the majority of SPD witnesses, Mr. Treppiedi also conducted post-GJ testimony
24 interviews of one or more non-SPD witnesses that recently appeared before the
25 Grand Jury. *Id.*

26 67. The DOJ learned, in March 2009, based on conversations and
27 exchanges of correspondence with Mr. Treppiedi and Mr. Oreskovich, that

PROFFER STATEMENT OF AUSA TIM M. DURKIN

page 22

1 notwithstanding Mr. Oreskovich's earlier statement that "he and he alone"
2 represented Mr. Thompson's criminal and civil interests, that Mr. Treppiedi was
3 asserting, notwithstanding the retention of private counsel (Mr. Oreskovich) at
4 public expense, that he and the City Attorney's Office were continuing to represent
5 Mr. Thompson's "interests" arising out of Thompson's use of force on Otto Zehm.
6 Attached here with as **Exhibit #6** is a true and correct copy of Mr. Oreskovich's
7 **February 18, 2009**, letter advising that notwithstanding our prior conversations that
8 Asst. City Attorney Treppiedi and the City Attorney's Office were continuing to
9 represent Karl Thompson's interests in the Zehm incident.

10 68. On or about **May 26, 2009**, the Spokane City Council, presumably
11 based on a resolution and recommendation by the City Attorney's Office, authorizes
12 \$200, 000 in "civil" defense fees and costs for Mr. Oreskovich for his representation
13 and defense of "the City of Spokane" in the Zehm civil suit. *See Spokesman Review*
14 *article of May27, 2009 (www.spokesman.com/stories/2009/may/27/city-approves-*
15 *200000-for-defense-in-zehm-case/).*

16 69. In the **spring of 2009**, the United States learned that Asst. City Attorney
17 Rocky Treppiedi contacted and attempted to interview one of the DOJ's expert
18 witnesses and consultants in its continuing investigation. Upon learning of Mr.
19 Treppiedi's contact with Robert Bragg, a defensive tactics expert and program
20 director of the Washington State Criminal Justice Training Commission's defensive
21 tactics program, AUSA Tim Durkin contacted Mr. Treppiedi and requested that he
22 cease and desist all further contact with the DOJ's expert. Mr. Treppiedi refused this
23 request and expressed a belief that while Mr. Bragg had no involvement in the
24 Defendant Thompson's and/or the SPD's detention of Zehm on the night of March
25 18, 2006, that he felt that Mr. Bragg was nonetheless a "fact witness" that he could
26 directly contacted and interviewed. *See Exhibit #7, infra.*

27 70. On **June 12, 2009**, Mr. Durkin sent Mr. Treppiedi an e-mail outlining

PROFFER STATEMENT OF AUSA TIM M. DURKIN

page 23

Exhibit B - Proposed Service Version

Ex Parte Proffer Statement of AUSA Tim Durkin

1 the DOJ's objection to his attempt to use the civil case and civil discovery processes
2 as an attempt to engage in ex parte contact with another party's expert wherein
3 privileged and/or confidential criminal case investigation information could be
4 obtained. City Attorney Howard Delaney responded indicating that the City would
5 temporarily stay further attempts to engage in ex parte contact with the United
6 States' expert witness until a further review of the issue was performed. Attached
7 herewith as Exhibit #7 is a true and correct copy of the June 12th e-mail exchange
8 with Mr. Treppiedi concerning ex parte interviews with the United States' expert.

9 71. During the course of the United States and Grand Jury's investigation,
10 the United States expressed concerns to Mr. Treppiedi and City Attorney Delaney
11 about what it believed to be "obvious" and "apparent" conflicts relative to Mr.
12 Treppiedi's and the City Attorney Office's "global representation" of "the SPD and
13 all SPD employees" connected to the Otto Zehm incident, and specifically the City
14 Attorney's offices continued representation of the target Karl Thompson.¹ *Id.*

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

20 73. On **June 15, 2009**, AUSA Durkin sent an e-mail to Mr. Treppiedi and
21 City Attorney Howard Delaney, among others, memorializing the United States'

22
23 ¹ The target of the investigation, Karl J. Thompson, Jr., was first notified by
24 former Asst. Chief Oldenthal in July of 2006 that he was the target and/or subject of the
25 DOJ's investigation. Mr. Thompson was provided with an official target letter and
26 notified of an opportunity to appear in front of the grand jury in November 2009. Mr.
27 Thompson, through his counsel, Mr. Oreskovich declined this invitation.

1 Department of Justice's concerns with the City Attorney's Office's actual and/or
 2 apparent conflicts of interest in claiming "global representation" of all SPD
 3 employees relative to the DOJ's investigation and excessive force claims. *See*
 4 attached **Exhibit #8**, a true and correct copy of Mr. Durkin's June 15, 2009 e-mail
 5 outlining "conflicts concerns" with the "global scope" of the City Attorney's
 6 representation of the target and other SPD employees involved in the DOJ's
 7 investigation of the Zehm matter.

8 74. The DOJ further learned that Mr. Treppiedi, given his and the City
 9 Attorney's Office's continued representation (at public expense) of the target of the
 10 United States Department of Justice's criminal civil rights investigation, was
 11 providing traditionally confidential grand jury information (including debriefed
 12 testimony) to Mr. Thompson and his criminal (and Treppiedi's co-civil) defense
 13 counsel Carl Oreskovich. This circumstance was disconcerting since Mr.
 14 Treppiedi's primary client, Chief Kirkpatrick, had voluntarily issued a "gag order" to
 15 SPD employees that was intended to maintain the confidentiality and integrity of the
 16 DOJ's investigation, and to prevent the dissemination of DOJ investigation activities
 17 to the target of the United States investigation (i.e., the Defendant Thompson). *See*
 18 *AUSA Durkin's Proffer and attached Exhibit #9*.

19 75. Mr. Treppiedi was aware of his client's gag order, but claimed that
 20 since he was not an SPD employee that he was not bound by the gag order and/or by
 21 Chief Kirkpatrick's intentions to maintain the confidentiality of the DOJ's/Grand
 22 Jury's investigation. Further, Mr. Treppiedi asserted that since he continued to
 23 represent the criminal target Mr. Thompson that he felt he had an ethical obligation
 24 to provide any and all information that he acquired to Mr. Thompson and/or to Mr.
 25 Thompson's private counsel. Attached as **Exhibit #9**, a true and correct copy of
 26 Mr. Durkin's **June 17, 2009**, e-mail to City Attorney Howard Delaney and Asst.
 27 City Attorney Treppiedi expressing the DOJ's objections and concerns with the City

PROFFER STATEMENT OF AUSA TIM M. DURKIN

page 25

1 Attorney's Office providing traditionally confidential grand jury investigation
2 information to the target of the federal criminal investigation. *Id.*

3 76. On information and belief, and based on a survey of the Criminal
4 Chiefs and other career AUSAs in the U.S. Attorney's Office who have been
5 conducting grand jury investigations and criminal prosecutions during the past
6 approximate 30 years, this is the first time that the target of a federal criminal and
7 grand jury investigation has been provided seemingly direct access to and direct
8 information about traditionally confidential grand jury proceedings by counsel
9 purporting to also represent the interests of a fellow law enforcement agency. *See*
10 *AUSA Durkin's Proffer* .

11 77. On **June 18, 2009**, Asst. City Attorney Treppiedi and Carl Oreskovich
12 filed a unified Answer and affirmative defenses in this civil action. The 56 page
13 Answer, signed by Mr. Treppiedi and Mr. Oreskovich on behalf of the Defendant
14 Thompson (and others) alleges that the Plaintiff Otto Zehm (a mentally disabled
15 janitor with cognitive delay) threatened Defendant Thompson with a plastic pop
16 bottle and therefore was solely responsible for causing: Officer Thompson's use of
17 an impact weapon to strike Mr. Zehm multiple times and taser him; the need to
18 forcibly subdue him in a prone hog tie restraint; and his proximally related brain
19 death. *See Zehm v. Thompson, City of Spokane, et al, Dckt. # 12.*

20 78. One day later, on **June 19, 2009**, the Grand Jury for the Eastern District
21 of Washington returned a Two Count Indictment against Defendant Thompson
22 charging him with criminal violations of Mr. Zehm's constitutional rights (i.e.,
23 excessive force) and with obstruction of justice by providing a false statement in
24 order to justify his excessive force on the victim Zehm. *See U.S. v. Thompson,*
25 *Cause 09-cr-0088-FVS, Dckt #1.*

26 79. On **August 31, 2009**, a Pre-trial Conference was held in front of the
27 Honorable Fred Van Sickle, at which time the Court addressed three motions by the

PROFFER STATEMENT OF AUSA TIM M. DURKIN

page 26

1 Defendant Thompson. First was a motion to continue the trial date, which the Court
2 granted and set a trial date of February 8, 2010 (scheduled for four weeks). The
3 second motion was for a Bill of Particulars on Count Two of the Indictment charging
4 the Defendant with obstruction of justice (i.e., false statement(s) in an investigation
5 record (e.g., Defendant Thompson's recorded statement of March 22, 2006). The
6 Court denied this motion. *See Dckt #47, U.S. v. Thompson, Cause 09-cr-0088-FVS.*

7 80. Defendant's third motion was for criminal case discovery. As outlined
8 herein, the United States has disclosed a substantial amount of criminal case
9 investigation materials to Defendant Thompson and his criminal counsel Mr.
10 Oreskovich. The Court granted in part Defendant's discovery requests which the
11 United States previously agreed that it would disclose. However, the Court did not
12 grant Defendant's discovery requests that were outside the scope of Rule 16 or the
13 United States' agreed disclosures. *Id.*

14 81. On **August 19, 2009**, the Defendant Thompson filed a motion in the
15 civil action seeking to stay of all of Zehm Plaintiffs' discovery demands. However,
16 Defendant Thompson's motion is unilateral in scope and only seeks to prevent the
17 Plaintiffs' from using civil discovery processes against Mr. Thompson. Defendant's
18 motion seek any restriction or limitation on Mr. Thompson's and presumably "all"
19 of his attorneys' use of the liberal civil discovery processes against the Plaintiffs and
20 conceivably the United States, its investigative agents, criminal case witnesses, and
21 experts *See Dckt #19-21, Zehm Estate v. Thompson, et al., Cause 09-cv-0080-LRS.*

22 82. In fact, during the course of Mr. Oreskovich's, Mr. Finer's and AUSA
23 Tim Durkin's conference last week to address the discoverability of the criminal
24 case materials the United States has provided to the Defendant, Mr. Oreskovich
25 informed the United States of his intention to try to have available the full cadre of
26 liberal civil discovery processes to defend Mr. Thompson on the Plaintiffs' and
27 conceivably the United States' claims of excessive force.

PROFFER STATEMENT OF AUSA TIM M. DURKIN

page 27

Exhibit B - Proposed Service Version

Ex Parte Proffer Statement of AUSA Tim Durkin

1 83. Based on assertions and arguments made by Asst. City Attorney
2 Treppiedi at the time of the party’s September 10, 2009, conference call, and based
3 on the foregoing history of interaction between Asst. City Atty. Treppiedi and the
4 DOJ, the United States fully expects Mr. Treppiedi and the City Attorney’s Office
5 will also make full use of the liberal civil discovery processes to try to defend
6 Officer Karl Thompson, who is the City’s principal “civil liability client,” and the
7 other named Defendants as well.

8 84. In contrast, during the past three (3) years, the Zehm family attorneys
9 have provided the City Attorney’s Office with access to witnesses, employers, and
10 health care providers. Understandably, Messrs. Finer and Beggs also want to utilize
11 the liberal discovery processes to obtain information and evidence that will help their
12 clients’ excessive force, wrongful death and other tort claims. However, they have
13 not as yet interfered in any way with the United States DOJ’s or Grand Jury’s
14 investigation and have not attempted to contact DOJ experts or other criminal case
15 witnesses under the guise of “pre-trial civil discovery.”

16
17 **C. The 911 Call Initiating “Suspicious Person” or “Circumstance”**
18 **Complaint.**

19 The United States submits that in order for the Court to fully appreciate the factual
20 as well as legal landscape in this case that a relatively modest recital of the incident and
21 Mr. Thompson’s allegedly false statement may be of assistance.

22 85. At approximately **6:12 p.m. on Saturday, March 18, 2006**, two young
23 ladies (18 years-old) called 911 to report that they were scared by a person that they
24 generally described as a street person who was possibly “high” and who was
25 engaging in bizarre behavior while they were attempting to complete an ATM
26 transaction at Washington Trust Bank’s drive through location on North Ruby Ave.
27 in Spokane The “suspicious person” described was Otto Zehm, a 36 year old male

1 with cognitive and psychological disabilities, but who had been actively employed
2 as a janitor with a local cleaning company that employed functional disabled
3 individuals. *See SPD & MCU investigation file and records, Disc. #1.*

4 86. The young ladies reported to 911 that they believed they terminated the
5 ATM transaction but were concerned that since they had hurriedly left the ATM in
6 their car, and since Mr. Zehm was still “messaging with the ATM,” that he may have
7 taken some money from one of the girl’s ATM accessed account. After reportedly
8 spending several minutes “messaging with” the ATM, Mr. Zehm left the machine
9 location on foot and the alleged victims followed him in their car while continuing to
10 talk with the 911 operator, who ultimately transferred their call to SPD’s Radio
11 Dispatch Unit. The young ladies reported to the 911 operator that Mr. Zehm
12 attempted to elude the women, first running from them and then yelling at them.
13 Notwithstanding, the women continued to follow Mr. Zehm as he took a circuitous
14 route from the bank to the Zip Trip convenience store located at 1714 N. Division..
15 *See SPD & MCU investigation file and record, Disc #1.*

16 87. In response to the 911 “suspicious circumstance” call, the SPD Radio
17 Dispatch Unit dispatched two patrol cars to investigate. The first officer dispatched
18 was SPD Patrol Officer Steven Braun. The second officer dispatched to assist
19 Officer Braun was fellow Patrol Officer Tim Moses. Meanwhile, Officer Thompson
20 was on an evening lunch break at a SPD substation, which is located less than a mile
21 away from the Zip Trip store. Officer Thompson reportedly heard the dispatched
22 call to Officers Braun and Moses on his radio while at the station and decided to
23 respond himself. Officer Thompson was aware that the two other officers were
24 actively responding, but he was the first officer to arrive at the Zip Trip store. *See*
25 *SPD & MCU investigation file and records, Disc #1*

26 88. Officer Thompson, who was not running code (i.e., no lights and siren
27 activated) observed Mr. Zehm casually walk into the convenience store as he was

PROFFER STATEMENT OF AUSA TIM M. DURKIN

page 29

Exhibit B - Proposed Service Version

Ex Parte Proffer Statement of AUSA Tim Durkin

1 pulling his patrol car into the parking lot. After observing Mr. Zehm walk into the
2 store, Officer Thompson observed Mr. Zehm continue to walk to the southwest
3 corner of the store where a 2-liter pop display was located. Also at the end of the
4 merchandise aisle in this vicinity is a large candy display. *See SPD & MCU*
5 *investigation file and records. Disc #1.*

6 89. Officer Thompson quickly stopped his patrol car in a perpendicular
7 position to the gas pumps across from the store's north entrance. He grabbed his
8 straight baton, quickly exited his vehicle, leaving his car running and his car door
9 open, and hurriedly entered the store. After entering, Officer Thompson switched
10 his baton from his left hand to his dominant right hand and raised the baton into a
11 "loaded" or ready strike position as he quickly advanced on Zehm, who still had his
12 back to the officer, and who appears not to have realized that Officer Thompson was
13 rapidly approaching him. *See SPD & MCU investigation file and records, Disc #1.*

14 90. Approximately 2.5 seconds after Mr. Zehm first turned to look to his
15 left and noticed the on-rushing Officer Thompson, and while Mr. Zehm was
16 continuing to retreat away from the rapidly advancing officer, Officer Thompson
17 delivered the first of at least 13 baton strikes to Mr. Zehm's body. *See Zip Trip*
18 *security video and stills, and SPD & MCU investigation file and record, Disc. #16-*
19 *19.*

20 **D. Defendant Thompson's Account of Force Events of March 18, 2006.**

21 91. A detailed summary and analysis of Defendant Thompson's account of
22 what he claims precipitated his use of force on Otto Zehm is set forth in the United
23 States Response to Motion for Bill of Particulars and Memo in Opposition to
24 Defendant's (Criminal) Discovery Demand. *See Dckt. # 40 and 41, U.S. v.*
25 *Thompson, Cause No. 09-cr-0088-FVS, courtesy copies of which are attached hereto*
26 *as Exhibits#11 and 12.*

E. Circumstances of Thompson’s March 22, 2006, Statement.

92. On **March 22, 2007**, SPD – MCU Det. Terry (Boardman) Ferguson met with Defendant Thompson at the Spokane Police Department’s conference room as part of the MCU’s investigation into Officer Thompson’s detention and seizure (i.e., use of force) of Otto Zehm, Mr. Zehm’s in-custody death, and Mr. Zehm’s alleged assault of Officers Thompson and Braun. Also present for the meeting, which consisted of a “pre-interview” and a subsequent “recorded interview” was Spokane County Sheriff’s Office (SCSO) Detective Bill Francis. SCSO Det. Francis was present in the role of a “shadow investigator” to the lead investigator Det. Ferguson.¹ See Disc #1, Exhibit #10.

¹ In 2006, the Spokane Police Department (SPD) was a signatory to a 2003 interlocal interlocal agreement between “Spokane, Kootenai and Surrounding Counties” law enforcement agencies (14 eastern Washington and northern Idaho agencies). This agreement set forth “A Protocol To Investigate Officer-involved Fatal Incidents” among the signing agencies. In all presently known pre-2006 critical incidents involving SPD personnel, the SPD decided, both as the “venue” and “employing” agency, to be the lead investigative agency in all “critical incidents” involving its own officers. Based on information and belief, the SPD is the only signatory to the 1994 and 2003 critical incident protocols that did not allow outside agencies to serve as lead investigators in cases involving SPD officers.

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

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

94. Under the Critical Incident Protocol and the City’s collective bargaining agreement (CBA) with the Guild, Officer Thompson apparently could not to be substantively interviewed about his “critical incident” (i.e., the use of force on Otto Zehm during the early evening of March 18, 2006) for 72 hours following the incident. Consequently, Det. Ferguson made arrangements with Officer Thompson and his Guild representative(s) to perform an interview the morning of Wednesday, March 22, 2004, approximately 88 hours after the subject incident.

95. As indicated, Officer Thompson did not prepare a written incident report, rather he and Braun participated in “voluntary” (i.e., non-*Garrity*) recorded interviews with Major Crimes Detective Terry Ferguson.¹* *See Disc #1, Exhibit*

¹ * Ferguson previously investigated Thompson in a shooting incident in August of 2004 and exonerated him of wrongdoing. On August 7, 2004, Thompson and other SPD officers responded to a family dispute involving an attempted assault with a deadly weapon (handgun) by an intoxicated man named Chris Felch. Felch left the scene in a truck before officers arrived. Thompson saw Felch and used a slow speed maneuver to disable Felch’s truck after a short pursuit.

Although another SPD officer had reached through the driver side window and pressed a gun against Felch’s head, Thompson fired five rounds at Felch from the front of

1 #10.

2 96. The parties met at the SPD Office at approximately 10:30 a.m. on
3 March 22, 2004, and engaged in a preliminary interview that reportedly lasted
4 slightly over two hours. In this preliminary, unrecorded first interview, Detective
5 Ferguson covered questions and areas of inquiry that were to be covered again in the
6 subsequent (second) recorded interview. MCU Det. Ferguson's first, unrecorded
7 interview of Officer Thompson began at approximately 10:33 a.m. and reportedly
8 ended shortly after 12:30 p.m. The parties reportedly took a lunch break after the
9 preliminary interview and returned at approximately 1:30 p.m. to begin the second,
10 official and formally recorded interview. The second, official recorded interview
11 began at approximately 1:34 p.m. and was concluded at approximately 3:27 p.m.
12 The same foregoing individuals attended both the preparatory interview as well as
13 the second, official recorded interview. *See Exhibit #1 and Exhibit #10, Disc #1.*

14 97. On **March 27, 2006**, Defendant Thompson contacted Det. Ferguson to
15 review the now transcribed transcript of his officially recorded interview. Officer
16 Thompson reviewed the transcript record for substantive accuracy as well as
17 typographical errors. During this review, Defendant Thompson provided Det.
18 Ferguson additional, clarifying information and made a minor revision to the

19
20 his truck. Thompson claims he fired because Felch failed to comply with directions to
21 show his hands and appeared to reach toward the passenger side of the truck to retrieve a
22 weapon. Felch was reportedly shot 3 times in upper torso-arm and was taken into custody
23 for 1st Degree Assault, and was transported to the hospital. Based on her SPD
24 investigative reports, State prosecutors concurred with Ferguson's recommendation not to
25 pursue charges against Thompson. Neither Det. Ferguson nor the MCU made an official
26 case referral for criminal charges to the Prosecutor against Felch on two alleged 1st Degree
27 assaults on family members (i.e., fired handgun, which jammed, at family members).

77 ***PROFFER STATEMENT OF AUSA TIM M. DURKIN***

page 33

Exhibit B - Proposed Service Version

Ex Parte Proffer Statement of AUSA Tim Durkin

transcript. Defendant Thompson then signed the official SPD investigative (statement) record, thereby representing that the statements therein and the record itself was a truthful and accurate account of the events of March 18, 2009. See

Exhibit #1.

F. Summary of Defendant Thompson’s Recorded 03/22/06 Statement.

98. The following is derived from *Exhibits #11, 12 and 10*, and is summarized below for the Court’s benefit. In sum, Officer Thompson claimed (among other things) during his recorded investigative interview that: :

- i) He twice issued verbal instructions instructing Zehm to drop the pop bottle during the Defendant’s initial contact with the Defendant;
- ii) Zehm defiantly told him “no;”
- iii) Zehm gave him a look of defiance and positioned the plastic pop bottle in a threatening position, as if ready to charge the officer, thereby prompting Officer Thompson’s preemptive baton strike;
- iv) The first baton strike was a horizontal blow to Zehm’s left upper thigh;
- v) The second baton strike was a horizontal blow to Zehm’s upper right thigh;
- vi) Zehm continued to use the plastic pop bottle in a threatening manner and refused to drop it while Zehm was on the ground, prompting the officer to use the taser;
- vii) Zehm threw punches at the officer while Zehm was on the ground; and
- viii) After being tasered, Zehm stood up and took a boxing stance, and threw more punches at the officer, thereby assaulting him before Officer Braun arrived.

Exhibit #1.

99. Officer Thompson further denied using deadly force (i.e., denied baton strikes to the head-neck area) during the encounter and admitted that strikes above

1 the shoulders are considered deadly force. Officer Thompson agreed that the use of
2 deadly force was not warranted nor justified given the nature of the call and
3 circumstances. *Id.*

4 100. The Defendant has not sought nor requested to make any changes
5 and/or revisions to this official SPD investigative record since he signed it on March
6 27, 2006. *Id.*

7 **G. Percipient Witnesses' & Store's Security Video Version.**

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

11 102. In short, these summaries provide that several patrons in the store
12 described Officer Thompson's first blow and/or a number of later blows to have
13 struck Mr. Zehm in the head, neck and upper torso. Witnesses for the most part
14 described Mr. Zehm as continuously retreating from the advancing officer.
15 Witnesses also described Officer Thompson's attack on Mr. Zehm as "immediate."
16 *See SPD & MCU investigation file and records, Disc #1; Disc #55 (FBI 302*
17 *reports).*

18 103. The store's security video shows Zehm continuously backing away
19 (retreating) from as he faces the continuously advancing Officer Thompson during
20 his initial attack (i.e., the first two vertical baton strikes that caused Zehm to
21 immediately go to the ground). The video also shows that Officer Thompson does
22 not go to the ground on top of Zehm, but rather remains standing, baton in hand,
23 straddling the fallen Zehm. *Id.* Zehm is shown in camera #4 holding the two (2)
24 liter plastic Diet Pepsi bottle above his head-face in an apparent defensive position
25 while Officer Thompson continues, baton in hand, to stand over Mr. Zehm in front
26 of the clerk's kiosk. The video does not show Mr. Zehm punching at Officer
27

1 Thompson. *Id.* Zehm attempts to crawl away from Thompson after he is tasered,
2 but Thompson continues his attack, standing above Zehm, and delivering vertical
3 baton strikes to Zehm as he is attempting to crawl away. In short, Officer
4 Thompson's recorded interview account is contradicted by the percipient witnesses
5 and by the convenience store's security video. Forensic medical evidence also
6 supports the conclusion that Mr. Zehm sustained blunt force trauma, consistent with
7 a baton strike, to his head. *See Autopsy and AUSA Durkin's Proffer.*

8 **H. Defendant Thompson's Charged False "Entry" Under 18 U.S.C. 1519.**

9 104. When the Defendant Thompson signed his transcript on March 27,
10 2006, SPD-MCU investigators already had in their possession several witness
11 accounts and other materials that significantly contradicted Officer Thompson's
12 initial and subsequent versions of his engagement of Mr. Zehm. *See Disc #1 and*
13 *#55.* During the course of the MCU's investigation it acquired additional
14 information and materials that further contradicted Thompson's transcribed
15 statement.

16 105. These contradictions included, but were not limited to Officer
17 Thompson's description of:

- 18 i) His initial engagement of Mr. Zehm (i.e., Thompson's failure to stop, as
19 he claimed, at a distance of four (4) feet to facially address Mr. Zehm and
20 issue verbal commands);
- 21 ii) The nature and extent of the "verbal commands" claimed to have been
22 issued (i.e., Officer Thompson claims to have issued two direct, successive,
23 loud verbal commands to Mr. Zehm, while in the alleged stopped, addressed
24 and confrontational position);
- 25 iii) Mr. Zehm's alleged immediate, knowing, defiant and verbal response to
26 Defendant's claimed verbal commands (i.e., Officer Thompson claimed that
27 Zehm's responses to his loud, successive verbal commands were "immediate,"
knowing, defiant, and aggressive (among other descriptions));

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

5 v) Mr. Zehm’s asserted knowing and intentionally defiant, aggressive, and
6 non-retreating “about to be assaultive” physical stance with the plastic two
7 liter bottle of Diet Pepsi, which actions Officer Thompson claims to have been
8 taken by Zehm in response to his claimed verbal commands (i.e., Zehm, upon
9 alerting to the continuously advancing Officer Thompson, never took a fixed
10 position of defiance and/or aggress, and records/video only show Zehm
11 retreating from the Defendant Officer); and

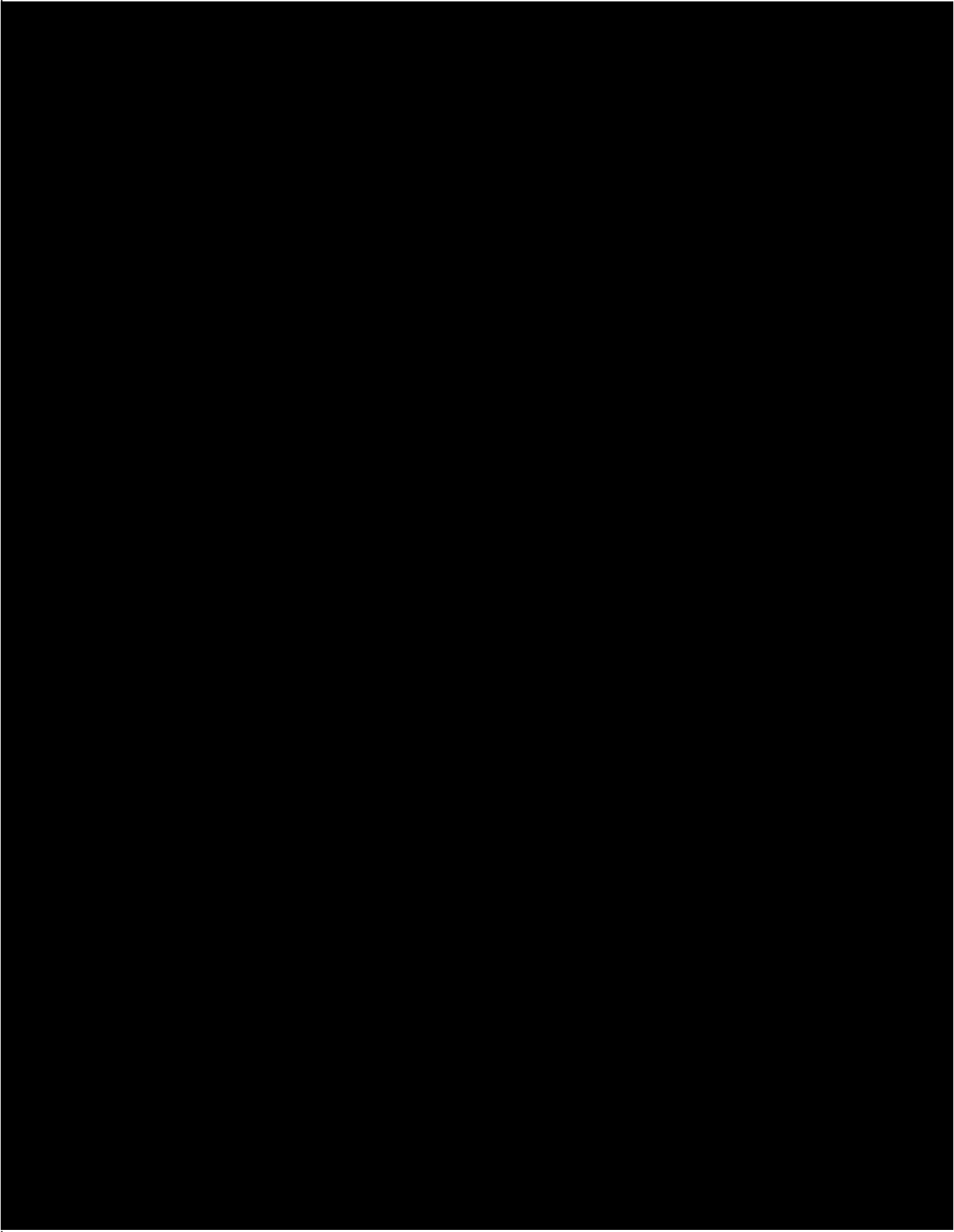
12 vi) The impact location of the baton strikes (i.e., criminal discovery shows
13 several of Defendant Officer Thompson’s strikes were to Zehm’s head, neck
14 and upper torso, in addition to lower torso and extremities Defendant claimed
15 he struck).

16 *See Disc. #1 and #55.* The accounts of the percipient, civilian witnesses that were
17 actually “on scene” at the time of Officer Thompson’s rapid advance and immediate
18 use of force, as well as the Zip Trip security video and other SPD dispatch materials
19 are all in Officer Thompson’s and his criminal counsel’s possession.

20 106. Defendant and his counsel are also in possession of evidence showing
21 that Mr. Zehm suffered blunt force trauma to his head during Officer Thompson’s
22 “detention and seizure” of Mr. Zehm for “questioning” related to a “suspicious
23 circumstance” and the possible theft at a Washington Trust ATM. *See autopsy, Disc
24 #12.*



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

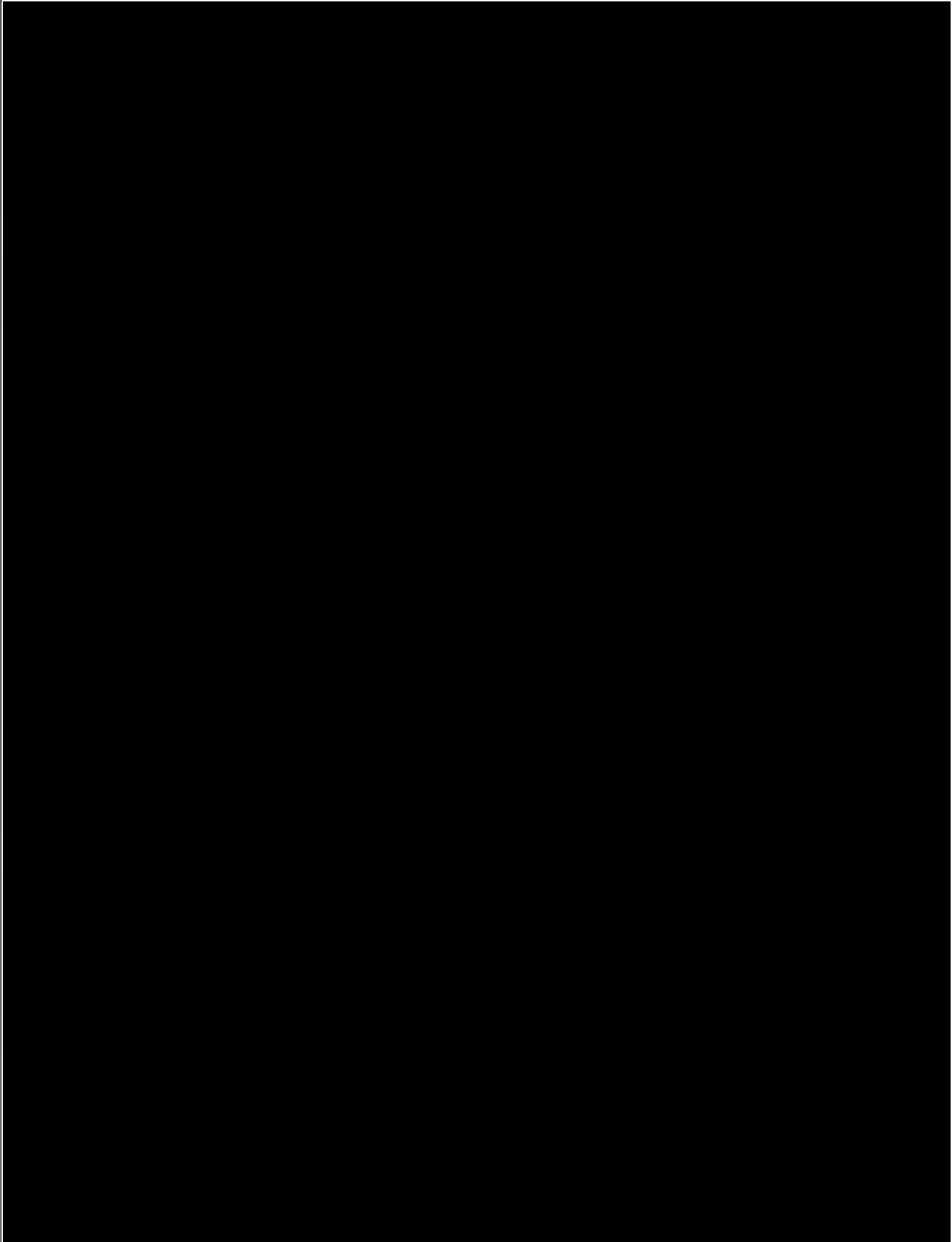


PROFFER STATEMENT OF AUSA TIM M. DURKIN

page 38

**Exhibit B - Proposed Service Version
Ex Parte Proffer Statement of AUSA Tim Durkin**

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

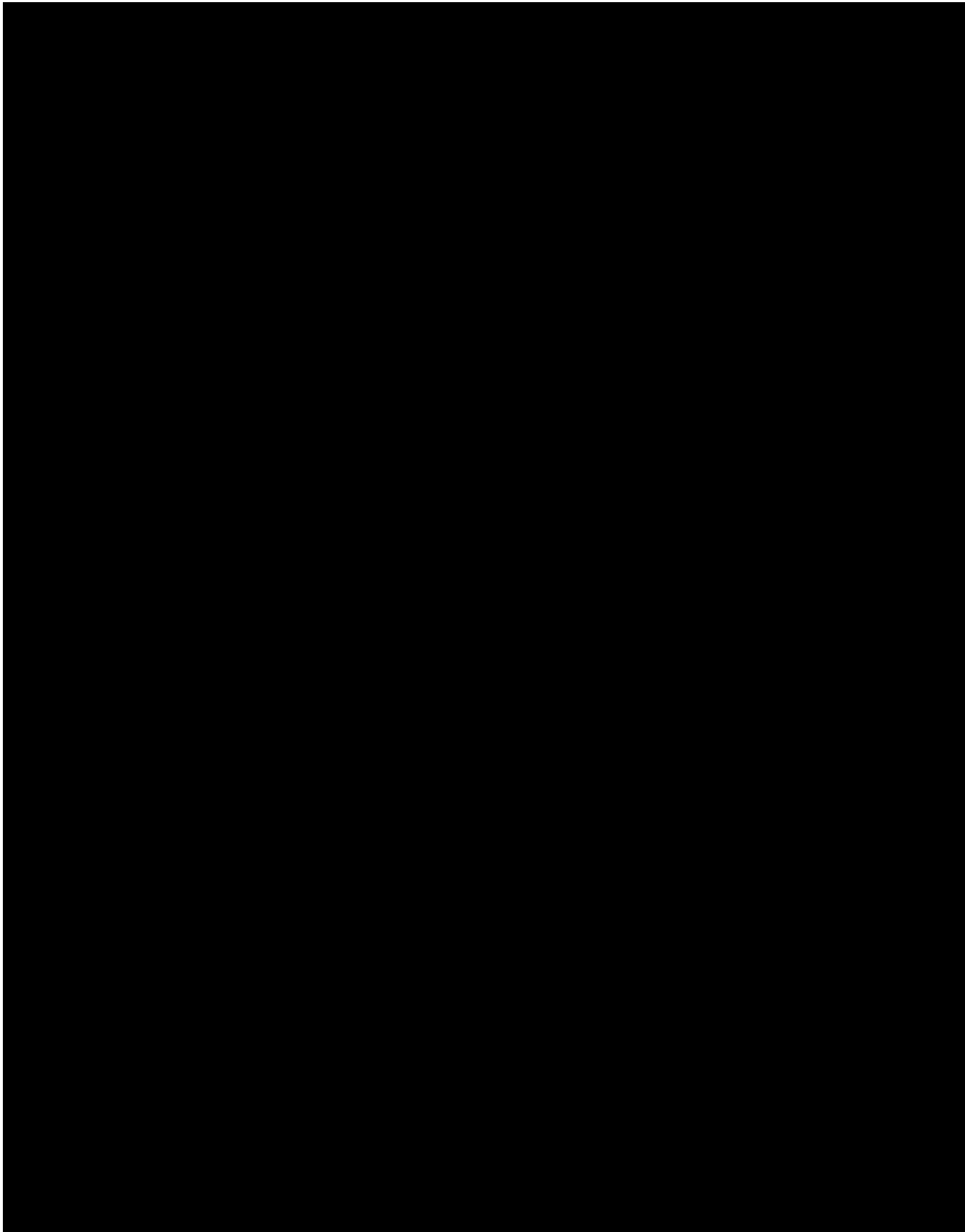


PROFFER STATEMENT OF AUSA TIM M. DURKIN

page 39

**Exhibit B - Proposed Service Version
Ex Parte Proffer Statement of AUSA Tim Durkin**

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

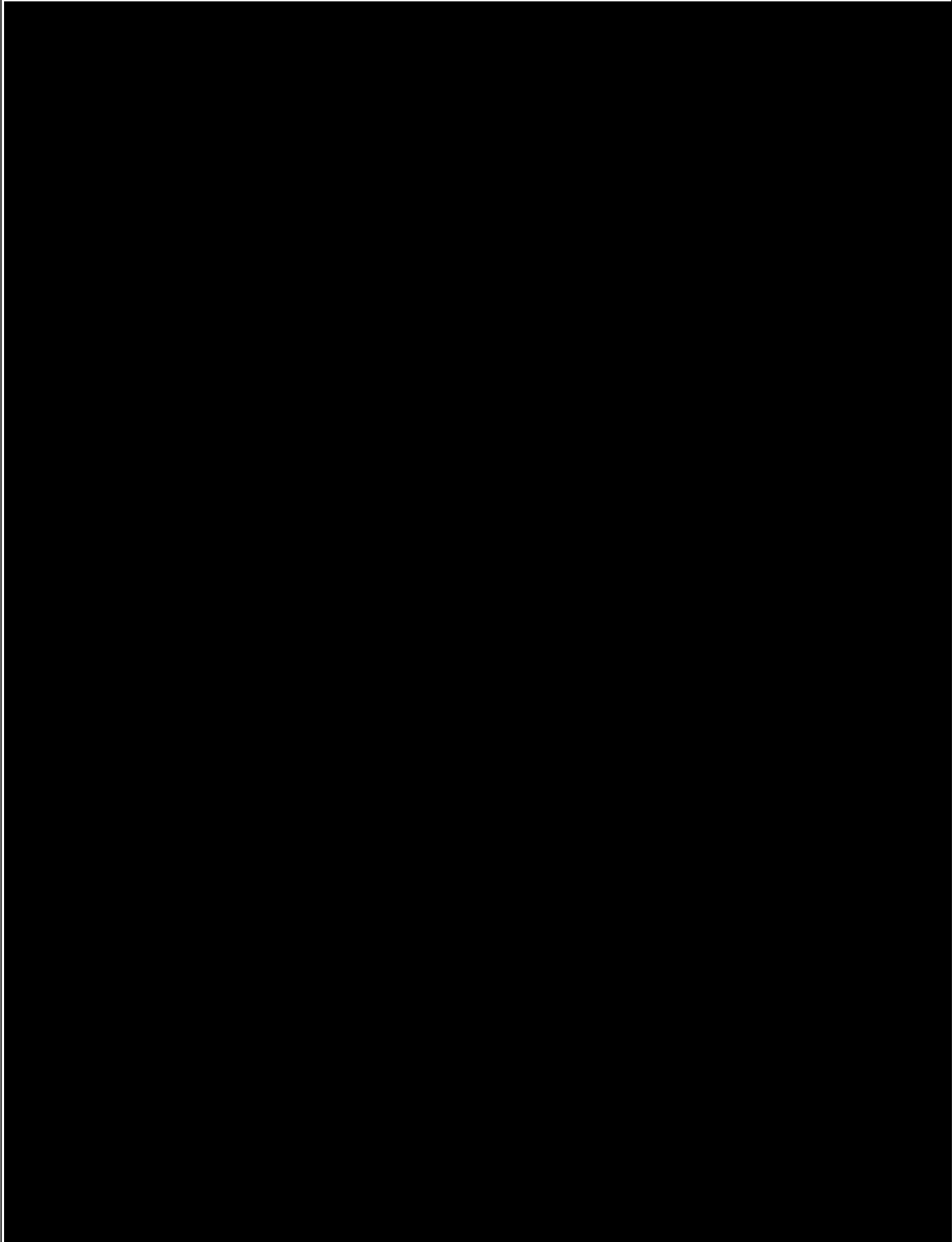


PROFFER STATEMENT OF AUSA TIM M. DURKIN

page 40

**Exhibit B - Proposed Service Version
Ex Parte Proffer Statement of AUSA Tim Durkin**

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

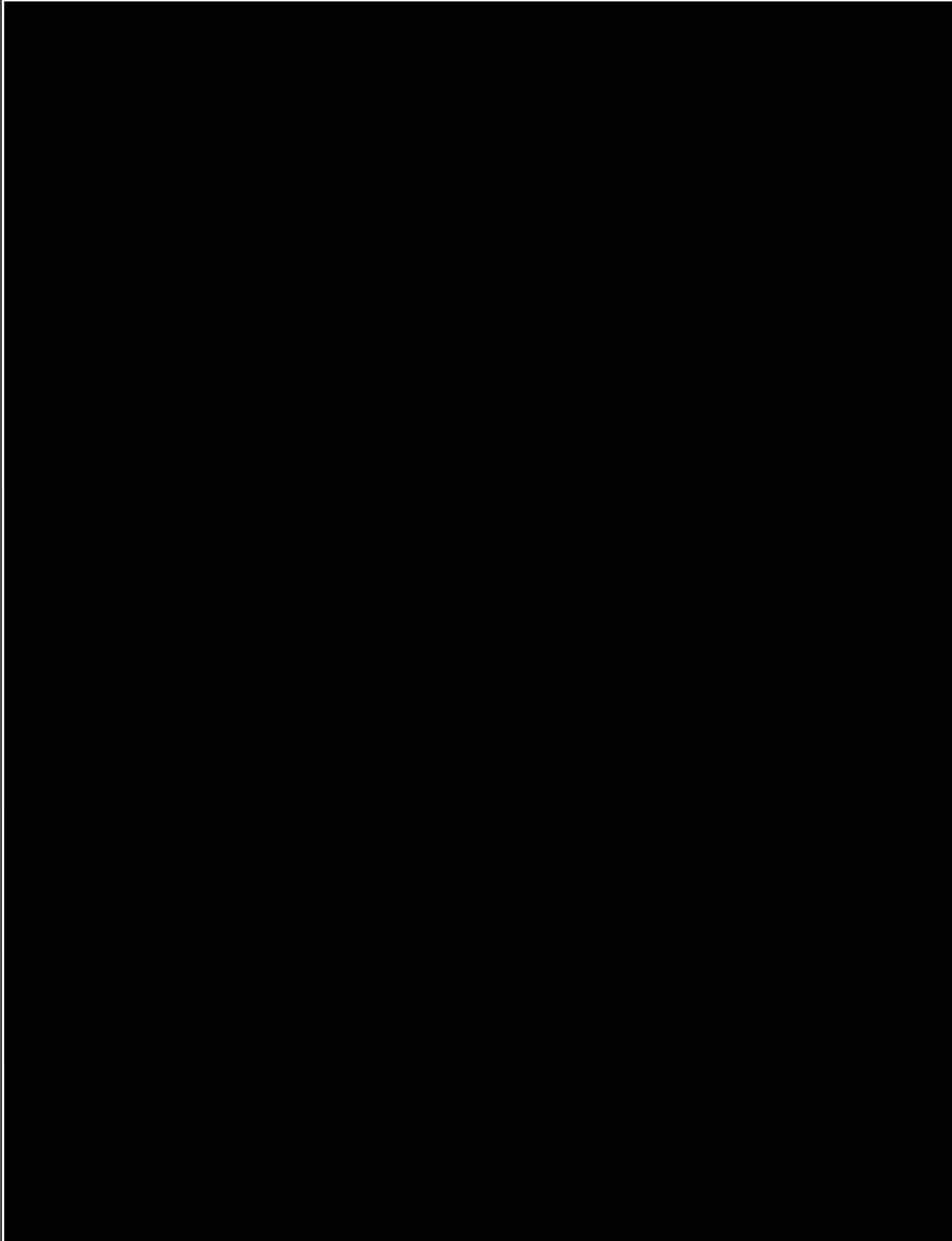


PROFFER STATEMENT OF AUSA TIM M. DURKIN

page 41

**Exhibit B - Proposed Service Version
Ex Parte Proffer Statement of AUSA Tim Durkin**

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



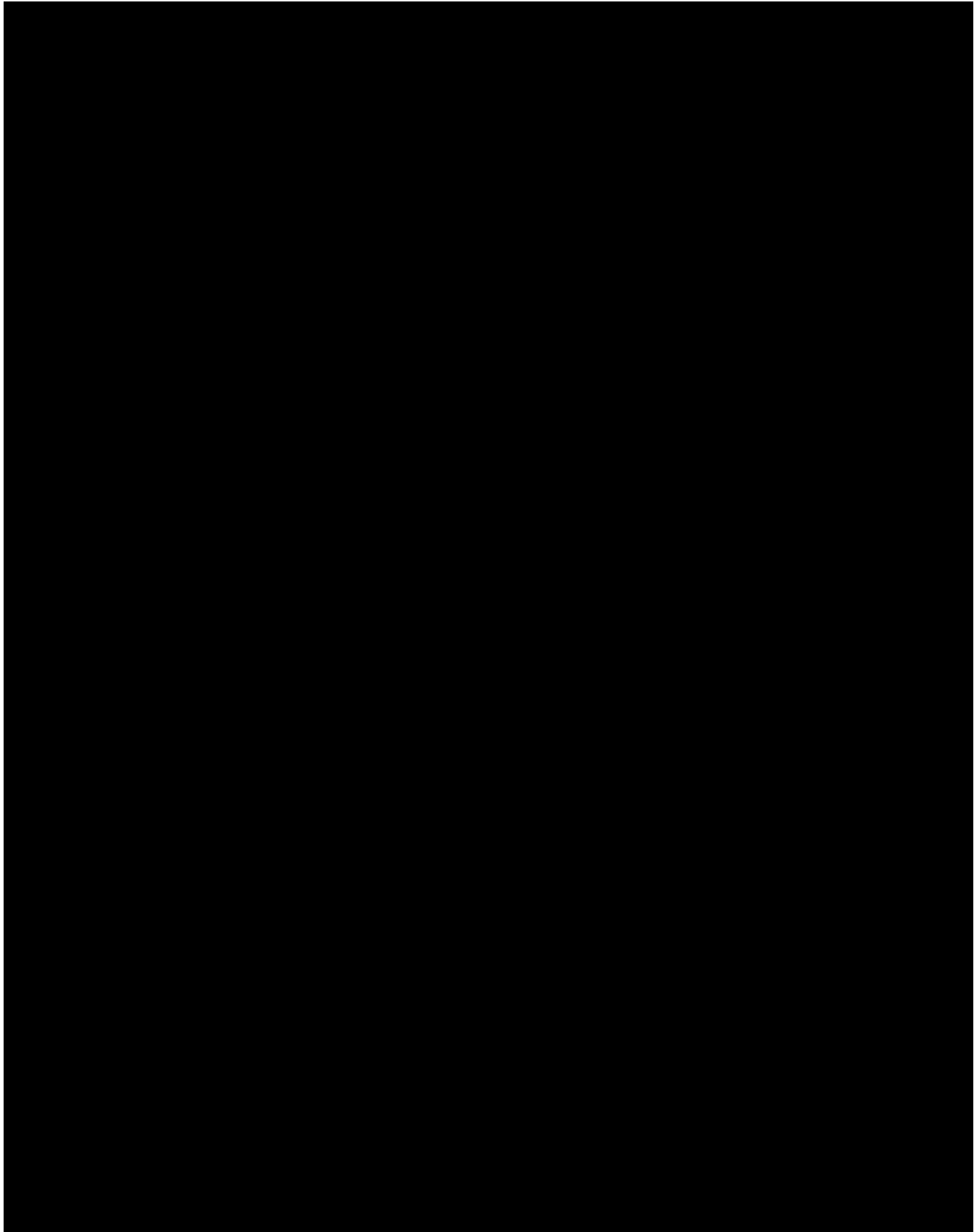
PROFFER STATEMENT OF AUSA TIM M. DURKIN

page 42

102 86

**Exhibit B - Proposed Service Version
Ex Parte Proffer Statement of AUSA Tim Durkin**

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

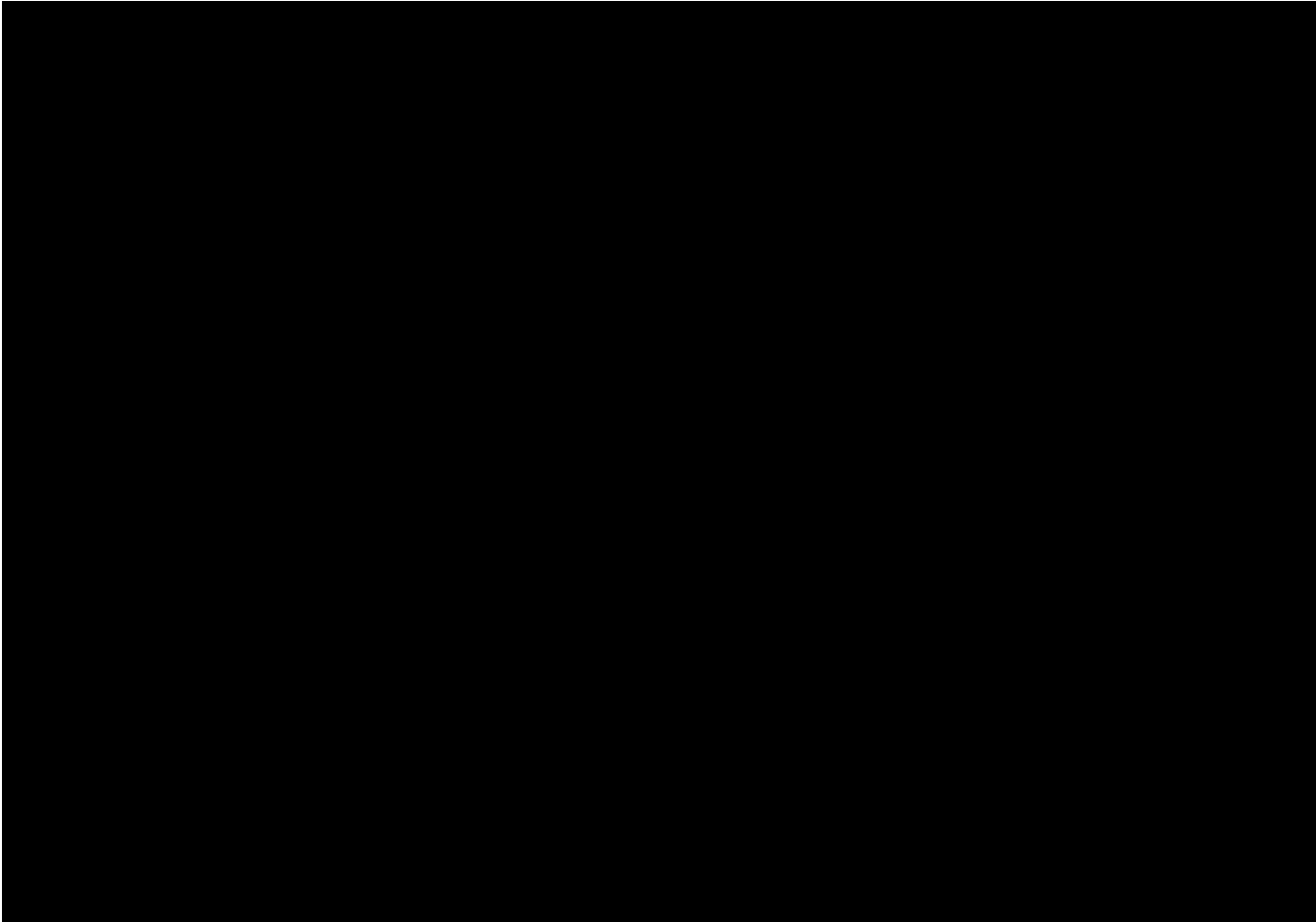


PROFFER STATEMENT OF AUSA TIM M. DURKIN

page 43

**Exhibit B - Proposed Service Version
Ex Parte Proffer Statement of AUSA Tim Durkin**

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



RESPECTFULLY SUBMITTED this 17th day of September 2009.

JAMES A. MCDEVITT
United States Attorney (EDWA)

s/ Timothy M. Durkin
TIMOTHY M. DURKIN
Assistant United States Attorney
Attorneys for Plaintiff United States

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 sent notification to the following CM/ECF participants:

Jeffrey Finer, Esq.
Breann Beggs,
Counsel for Plaintiffs

Carl Oreskovich, Esq.
Counsel for Karl Thompson

Rocco Treppiedi, Asst. City Atty.
Sam Faggiano, Asst. City Atty.
Ellen O’Hara, Asst. City Atty.
Counsel for Karl Thompson, et al

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

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

THE SPOKESMAN-REVIEW July 14, 2006

Police admit inaccurate account of fatal beating

Acting chief says Zehm didn't lunge at officer

Thomas Clouse and Bill Morlin / The Spokesman-Review

Tags: Jim Nicks Otto Zehm Spokane Police Department

Acting Spokane Police Chief Jim Nicks acknowledged Thursday that he gave inaccurate information while trying to defend his officers' actions during a fatal struggle with Otto Zehm, the mentally disabled janitor beaten and hogtied by police four months ago.

The acknowledgement came shortly after a convenience store surveillance video that captured much of the March 18 confrontation was publicly shown for the first time. The footage contradicts key portions of Nicks' earlier defense of the officers' actions.

Spokane County Prosecutor Steve Tucker, who for months had kept the surveillance video sealed, authorized the release of the footage Thursday after being threatened with a public records lawsuit by The Spokesman-Review. Tucker has yet to announce whether he intends to file any criminal charges in connection with the case.

Although the video footage may appear damning, Nicks said it's unfair to draw conclusions without the benefit of all the evidence available, including transcripts of the 911 call, information relayed to responding officers and actions that were obscured from view in the silent video.

"Whenever we have something of this magnitude, we do critique it," Nicks said.

Still, he was unable to account for why he and others in the department continued to claim for months that Zehm "lunged" with a plastic soda bottle at the first officer on the scene, when the video shows the man retreating with his hands in the air.

"That's the information provided to me at the scene based on the observations of the witnesses and officers," Nicks said. "I have tried to provide you the information I had that was as accurate as possible at that point."

Nicks also acknowledged that the video contradicts his earlier statements that officers followed proper procedure after Zehm, 36, was restrained by tying his feet and hands behind his back. Officers are trained to turn “hobbled” suspects onto their sides so they can “breathe without any inhibited body weight,” he said during a May 30 news conference, adding that Zehm was on his side “all” or a “majority” of the time.

In fact, the video shows Zehm spent most of the time on his stomach, which is a position that Spokane County Medical Examiner Sally Aiken listed as a contributing factor in his death. Aiken ruled that Zehm died as a result of homicide, which is death caused by another.

“I made it clear that during the press conference my impression was that he was on his side for a great portion of that time,” Nicks said. “So my impression obviously wasn’t quite accurate. But there was no intent to mislead or misdirect in any shape or form.”

Nicks said he discovered his mistake about a month after the May 30 news conference. Asked what he did to correct the public’s false impression of how the events unfolded, he replied: “I’m telling you right now.”

And, also for the first time, police confirmed that a plastic mask was placed over Zehm’s mouth and nose as he was hogtied on his belly. The oxygen mask was intended to prevent Zehm from spitting on officers, said Deputy Spokane Police Chief Al Odenthal, but it was never attached to an oxygen tank.

Odenthal downplayed the significance of the mask, saying it has a “large hole” that allowed for a free flow of air even though it wasn’t attached to an oxygen tube.

The Spokesman-Review obtained Spokane Fire Department records Thursday afternoon showing that paramedics gave police officers at the scene a clear plastic “non-rebreather” oxygen mask. The mask covers the nose and mouth and has just one hole about the size of a dime where the oxygen tube is supposed to attach.

Breean Beggs, of the Center for Justice, which is representing Zehm’s mother, said he viewed the video frame by frame, and the tape shows a paramedic giving an officer the mask to place on Zehm. About three minutes later, the video shows officers calling for help because Zehm had stopped breathing.

“This is a non-medical opinion,” Beggs said. “Based on the structure of the mask and the short amount of time between placing the mask on him and his breathing difficulties, there

appears to be a connection.”

Paramedics immediately began attempts to resuscitate Zehm, and those efforts continued all the way to the hospital where he never regained consciousness and died two days later.

From the beginning of the case, police have described Zehm as a hostile, violent crime suspect who attacked officers and refused to obey orders.

The video, from inside the Zip Trip convenience store at 1712 N. Division, hardly conveys that image.

Zehm is seen entering the store and casually walking to a back aisle.

Moments later, Officer Karl Thompson comes running toward him after erroneously being told by a police dispatcher that Zehm had stolen money from a woman at a nearby cash machine.

At no time before being struck did Zehm “lunge” or “attack” the officer as police repeatedly claimed. Nor does it show him holding a plastic soda bottle, which authorities have argued was a threat to the officers’ safety. No bottle of soda is visible in Zehm’s hands at any point during the 35-minute video.

The video, which has no accompanying sound, failed to capture portions of the scuffle after Zehm was knocked to the ground by repeated blows from Thompson, who was one of 43 applicants for the job of Spokane police chief.

The footage shows Zehm lying on the floor looking up at Thompson who aimed his Taser and fired. Zehm then began to struggle intensely in a rolling battle on the floor that eventually included seven officers. Odenthal for the first time Thursday said Officer Steve Braun Jr. also applied two more Taser shocks during that struggle.

As officers finally controlled and hogtied Zehm, customers can be seen walking into the store and doing normal business. The video ends with images of paramedics wheeling Zehm out of the convenience store on a gurney.

Questions remain over how and why police were given some information about Zehm that the 911 caller apparently never provided.

At Thursday's briefing, police released an audio copy of the 911 tape between a young-sounding woman who reported seeing a suspicious-acting man approach her Dodge Intrepid as she and a female friend used a drive-up cash machine at a Washington Trust Bank at Ruby and Indiana.

The department also released an audio file of the conversations between the police-radio dispatcher and the first officer sent to track down Zehm, who had walked from the bank to the nearby convenience store.

The dispatcher can clearly be heard saying that Zehm was "acting high." But Beggs, the family's attorney, pointed out that the woman never described Zehm in that way on the tapes.

"There is some screw up in dispatch," Beggs said, regarding wrong information going to the officers. "That is a police screw up, not a witness screw up."

The third item released was the video taken by the bank's security camera at the ATM machine, showing Zehm approach only after the woman's car pulled away. Odenthal said that video suggests, but doesn't confirm, Zehm was attempting to push buttons on the machine.

Police made no attempt to recover fingerprints from the ATM machine, Odenthal said in response to questions.

While officials believe that Officer Thompson was told by a dispatcher that Zehm had stolen the woman's cash from the ATM, no money was found on Zehm, Odenthal said.

Beggs, whose law firm had urged a public apology and a retraction from Nicks for the previous false characterizations of the struggle, thanked the acting chief for finally acknowledging the misstatements.

"To publicly admit you are wrong is difficult," Beggs said. "We appreciate that he granted that request."

Tucker said earlier this week that he hopes to determine whether any criminal charges will be filed in the case by the end of next week.

After the prosecutor renders his decision, Nicks said the department will begin its own separate internal examination of the incident to see if there needs to be policy, training or

equipment changes.

Nicks, who previously said he believes his officers acted appropriately, said he hopes to finally get a resolution. "Sooner is better than later for us," he said, "and for the community at large."

Get more news and information at Spokesman.com

ETTER, McMAHON, LAMBERSON,
CLARY & ORESKOVICH, P.C.

ATTORNEYS & COUNSELORS

WILLIAM F. ETTER*
MICHAEL J. McMAHON*
STEPHEN M. LAMBERSON*
RAYMOND F. CLARY*
CARL J. ORESKOVICH**
RONALD A. VAN WERT***
JENNIFER C. UNDERWOOD
TYLER H.L. TORNABENE

BANK OF WHITMAN BLDG., Suite 210
618 WEST RIVERSIDE AVENUE
SPOKANE, WASHINGTON 99201
(509) 747-9100
FAX (509) 623-1439

TAX ID #91-1291936

RECEIVED

2009 FEB 19 A 9:48

U.S. ATTORNEY
SPOKANE, WA

Idaho Residents Call
(208) 667-6811

OF COUNSEL
R. MAX ETTER, SR. (1910-1993)

* Also admitted in Idaho
** Also admitted in Montana
*** Also admitted in Idaho & Arizona

February 18, 2009

Timothy M. Durkin
Assistant United States Attorney
United States Attorney
Eastern District of Washington
300 United States Courthouse
Post Office Box 1494
Spokane, WA 99210-1494

Re: USA v. Karl F. Thompson, Jr.

Dear Tim:

Thank you for your letter of February 3, 2009. I have had an opportunity to review that letter, both with Officer Karl Thompson, as well as Mr. Treppiedi. There are some portions of your February 3 letter with which I agree, and some with which I don't, perhaps due to miscommunication and misunderstanding. I don't see a good purpose in reiterating what I did or did not say, or arguing the validity of your characterizations of those conversations. Therefore, I don't intend to address your letter point by point.

For simplicity sake, I set forth the following:

I and I alone currently represent Karl Thompson with respect to the criminal investigation.

With respect to the potential civil case, I, along with Mr. Treppiedi and members of the City Attorney's Office, represent Mr. Thompson. I recognize as certain claims are made or certain issues arise that the City Attorney's Office may be conflicted in further representation of Mr. Thompson. When, and if that occurs, you can be assured that appropriate steps will be taken on Mr. Thompson's behalf.

I trust that this letter clearly sets forth the nature of my representation in this case. I understand that Mr. Treppiedi and Mr. Delaney will be discussing directly with you and

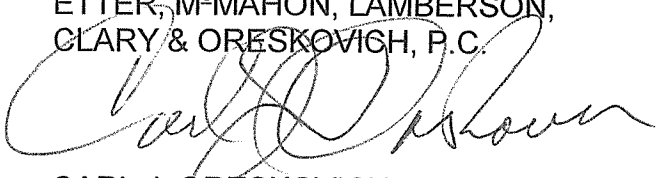
Timothy M. Durkin
February 18, 2009
Page 2

your office your concerns about their continued representation of Mr. Thompson in the civil case.

If you have questions concerning this letter, please feel free to contact me. Until then, I remain

Very truly yours,

ETTER, McMAHON, LAMBERSON,
CLARY & ORESKOVICH, P.C.

A handwritten signature in black ink, appearing to read "Carl J. Oreskovich", written over the typed name below.

CARL J. ORESKOVICH

CJO:rc

[Q:\Carl\Carl's E&M Client Files\Thompson (4526)\Correspondence\Durkin.2.18.09.doc]

Durkin, Tim M. (USAWAE)

From: Durkin, Tim M. (USAWAE)
Sent: Friday, June 12, 2009 11:32 AM
To: 'Treppiedi, Rocky'
Cc: McDevitt, Jim A. (USAWAE); Rice, Thomas O. (USAWAE); Dean, Steven M. (FBI); Harrill, Frank M. (FBI); Boutros, Victor (CRT); Laughlin, Laura M. (FBI); Delaney, Howard
Subject: In Re Zehm Investigation - Robert Bragg - United States Department of Justice's Contracted Use of Force Expert with FBI Involved in United States Department of Justice Investigation

Mr. Rocky Treppiedi
Asst. City Attorney – Civil Division (Torts)
City Attorney's Office
City of Spokane, Spokane, WA

RE: Ex Parte Contact with United States' Defensive Tactics Expert Without U.S. Dept. of Justice's Consent

Dear Rocky:

It's interesting that you claim that you are entitled to contact, ex parte, the United States' retained use of force expert Mr. Bragg for the purpose of interviewing him about the same use of force facts that involve your personal client, SPD Officer Karl Thompson, who is the target of the United States Department of Justice's (DOJ) criminal investigation and a named defendant in the civil suit you are representing him in that involves alleging civil rights violations. Your claim is based on the assertion that, Mr. Bragg is simply a "fact witness" in the civil civil rights suit involving Officer Thompson and other SPD Officers, and therefore you have the right to try to contact him re: the underlying Zehm facts notwithstanding that Mr. Bragg is a retained use of force expert for the Government in its criminal case investigation.

However, when posed with the United States' reasonable request to identify and/or provide a description of the supposed "simple facts" that you claim Mr. Bragg has personal knowledge of, you have refused to describe or provide them. The principal basis for your refusal to describe the "simple material facts" you claim Mr. Bragg has personal knowledge of is that the Government's request improperly invades your "attorney work product."

As you no doubt are aware, "facts personally known" to a percipient witness are not "work product." *Hickman v. Taylor*, 329 U.S. 495 (1947) (defining parameters of work product doctrine); *Casson Sonct. Co., Inc. v. Anco Steel Copr.* 91 F.R.D. 376 (D. Kan. 1980) (same); see also *In re Grand Jury Proceedings*, 867 F.2d 539 (9th Cir. 1989). Further, the City Attorney's Office is required, as part of its discovery disclosure obligation for all of its clients under the court rules, to disclose the supposed direct facts possessed by Mr. Bragg. As such Rocky, it's incongruous to claim that you are entitled to ex parte contact with another party's retained expert on a claimed basis that he possesses "personal knowledge" of "simple material facts" and then refuse to identify those supposed "simple facts" or the basis for the alleged personal or direct knowledge.

A. Mr. Bragg's role as United States' retained expert in defensive tactics. He is not a percipient lay witness.

As you know, Mr. Bragg is a State and nationally recognized use of force expert. He is, and has been for quite some time, the State's program manager for the Washington State Criminal Justice Training Commission's (WSCJT) law enforcement academy, and his office is located at the WSCJT's training facility in Burien, WA.

On March 18, 2006, when Officer Thompson was using an impact weapon (baton) to forcibly engage Otto Zehm in a Spokane Zip Trip store, which force engagement ultimately led other SPD Officers to also use force to detain and place Mr. Zehm into a total appendage restraint, in which restraint he expired, Mr. Bragg was not present in Spokane. Mr. Bragg also was not involved in nor was he consulted by the Spokane Police Department (SPD)-Major Crimes Unit (MCU) during its subsequent criminal investigation of Mr. Zehm (deceased) on alleged 3rd degree assault charges. Nor was Mr. Bragg consulted by the SPD-MCU in its review of its own Officer, Mr. Thompson's use of force.

Consequently, I am unaware of any basis to assert that Mr. Bragg has direct or "personal knowledge" of any "material facts" that would make him, as you claim, a "simple fact witness" of the events leading up to and/or following Officer Thompson's engagement of Mr. Zehm and/or the other SPD Officers' restraint of Mr. Zehm, and/or Mr. Zehm's temporally connected death.

In fact, Mr. Bragg informs me that he is unaware of any "personal knowledge" of the alleged underlying facts involved in the Zehm detention-death incident, regardless of whether you want to characterize those facts as "criminal" or "civil." Mr. Bragg further informs me that the WSCJTC training material that you discussed with him and requested (during your ex parte contact) on positional asphyxia (which is an area of expertise) can be acquired through other direct sources, including but not necessarily limited to: 1) a public records request for the WCJTC's training materials; and/or 2) contacting other WSCJTC instructors who actually taught the asphyxia training you inquired about.

Mr. Bragg also reports that he is unaware of any direct knowledge of "unique lay witness facts" that would make him a "material fact witness" in the Zehm civil suit, and you have refused to provide us with any factual basis that would suggest a contrary conclusion.

B. Ethical Duty Not To Communicate with Adverse (potential or actual) Party's Experts.

More to the point, however, it seems that you still do not appreciate the inappropriateness of engaging in ex parte contact with the United States' expert, which has a legally adversarial investigative case proceeding involving your personal client Officer Thompson.

The court rules on discovery, both civil and criminal, provide the methods for obtaining limited discovery of an opposing party's expert witnesses (i.e., opinions, basis, and "facts" relied upon) and it is equally clear that ex parte communication with such expert witnesses is prohibited: *"(A)n attorney who initiates ex parte communications with an adversary's expert disobeys the rule of professional responsibility which prohibits intentional violations of an established rule of procedure."* *Erickson v. Newmar Corp.*, 87 F.3d 298 (9th Cir. 1996), citing Geoffrey C. Hazard & W. William Hodes, *The Law of Lawyering* § 3.4:402 (2d ed. Supp.1994) (a leading ethics treatise that discusses the ethic duty to avoid all forms of contact with an adverse party's expert).

This prophylactic "anti-contact" rule with another party's experts and represented parties makes sense since it is designed to prevent inadvertent or even unintended work product disclosures during another party's ex parte contact. See also *In Re Firestorm 1991*, 129 Wash.2d 130, 139, 916 P.2d 411 (1996) (trial court may impose appropriate sanctions for ex parte contact with adverse expert pursuant to inherent authority to "control litigation"). In *Lewis v. Telephone Employees Credit Union*, 87 F.3d 1537, 1558-59 (9th Cir. 1996), the 9th Cir. discussed, as they did in *Erickson, supra*, the "arsenal of sanctions" that a Court has available for witness tampering (i.e., unauthorized ex parte contact with adverse party's expert witness). As you know, this arsenal of sanctions for improper ex parte contact with another's expert includes the imposition of monetary sanctions, a finding of contempt, and **attorney disqualification**. In fact, it appears that the attorney *Erickson* that engaged

in improper ex parte contact with another party's expert was ultimately disqualified from any further participation in the proceedings.

Rocky, the fact that you claim you are not seeking "formal discovery" does not remotely exempt you from having to comply with the Court Rules or for that matter the ethical duties that apply to all attorneys practicing in this District. See *Erickson, id.*, LR 1.1(c); Rule 26, and 37, and the discussed inherent authority of the Court to address all discovery abuses, whether formal or informal. *Erickson, id.*, (Court has inherent authority to control all aspects of litigation conduct); *In Re Firestorm 1991, id.*, (Trial court may impose appropriate sanctions for counsel-party's improper conduct pursuant to its inherent authority to "control litigation").

There is also a Washington State Bar Association Ethics Opinion that is instructive here as well. **WSBA Ethics Opinion No. 161** (1975), which I have no doubt the City Attorney's Office ascribes to, provides that in light of an Asst. City Attorney's unique representational relationship of the government, all City Attorneys ". . . *should avoid even the appearance of professional impropriety.*" *Id.*

This opinion also strongly suggests that an Asst. City Attorney should not represent any individual client's interests relative to a criminal matter where "the facts" were investigated by the "representatives of the city employing the city attorney" (i.e., here the Spokane Police Department before the DOJ). *Id.*

C. Improper Use of Civil Discovery Authority as Guise to Obtain Information Related to Criminal Case Matter.

It is also improper for an attorney, under the guise of pursuing civil suit related discovery (whether formal or informal), to engage in ex parte contact with another party's expert and/or try to acquire discovery-information related to a criminal case investigation. Although you do not practice federal criminal law, Rule 16 of the Federal Rules of Criminal Procedure governs the discovery process in criminal matters. Fed.R.Crim.Pro. 16. The Criminal Rules on discovery are also much narrower in scope than the Civil Rules governing discovery. See *Campbell v. Eastland*, 307 F.2d 478 (5th Cir.1962), *cert. den.* 371 U.S. 955 (1963) (holding "a litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery and thereby obtain documents [or information] he would not otherwise be entitled to for use in his criminal suit."). See also *Board of Governors of Fed. Reserve Sys. v. Pharaon*, 141 F.R.D. 634 (EDNY 1991) (staying civil action discovery pending termination of grand jury investigation of defendant in criminal case); and *U.S. v. Mellon Bank, N. A.*, 545 F.2d 869 (3rd. Cir. 1976) (stay should be granted where targeted defendant might improperly exploit civil discovery for advancement of his criminal case).

As you know, the United States has not yet sought to stay the pending civil case involving Mr. Zehm's Estate and your and Carl Oreskovich's personal client, Karl Thompson, among others. However, continued attempts to engage in ex parte contacts with the United States' retained experts and/or any other indication of improper witness tampering related to the criminal investigation will prompt the Department of Justice to pursue all available remedies, including but not necessary limited to a stay, other prophylactic orders, and/or terms.

D. Mr. Bragg's Conclusive Response – No Further Contact until Investigation-Matter Concluded.

Finally, in order to maintain his independence and objectivity, and in the interest of preserving the confidentiality and integrity of the DOJ's still on-going investigation, Mr. Bragg has authorized me to inform you that he does not want any further contact from you or any other representative of the Spokane Police Department concerning matters related in the Zehm case until the United States' case investigation and related proceedings are concluded. While Mr Bragg was courteous and polite to you on the phone last week, he is not comfortable with any further contacts.

At the conclusion of these proceedings, Mr. Bragg can be made available for an interview and/or deposition through the traditional lawful processes.

CONCLUSION

In conclusion, please do not attempt any further *ex parte* contact with any of the experts that the United States' retained to assist it in the Department of Justice's investigation of your personal client, SPD Officer Karl Thompson. If you and/or the City Attorney's Office do not agree with the United States request, the United States may pursue all available remedies to protect the integrity and confidentiality of the DOJ's continuing investigation of Officer Thompson's conduct in the Zehm case.

Last, but not least, my office and other representatives of the Department of Justice (i.e., FBI and Crim. Civ. Rts. Div.) are curious if your principal clients, the Mayor, City Council, and SPD Chief Anne Kirkpatrick and administrators, in addition to your personal client Mr. Thompson, are aware of your and apparently the City Attorney Office's expressed intent to contact the United States' retained criminal investigation experts without the U.S. Department of Justice's authorization and/or consent?

The Department of Justice wants to be certain that the Mayor and Chief Kirkpatrick, and/or the Council President (as may be required) are aware of the position that you and the City Attorney's Office, as their representatives, are taking on their behalf in your dealings with the Department of Justice. *See Rule 1.13 of the Washington Rules of Professional Conduct* requiring corporate counsel to fully inform representatives of client organization (i.e., City of Spokane, Mayor, et al) of all potentially conflictive action that is being pursued by counsel on behalf of individual employee client that may conflict with corporate client's position. *See RPC 1.13.*

The Department of Justice would appreciate receiving confirmation of the City of Spokane's representatives' authorizations and intentions on this issue. *See RCW 35.23.111* (2009), which mandates city attorney to advise city authorities and officers in all legal matters pertaining to the business of the city and perform such other duties *as directed* by the city council.

Please get back to me on this matter at your earliest convenience. Thank you Rocky for your cooperation in this regard.

Sincerely yours,

Tim M. Durkin
Assistant United States Attorney
P.O. Box 1494
Spokane, WA 99210-1494
(509) 353-2767

Notice: This e-mail is the property of sender and/or United States. You are not authorized to use, copy and/or disclose the existence or contents of this e-mail without the express permission of sender. If you are not the intended recipient, please immediately contact sender and destroy and delete the e-mail and any and all copies. Please contact sender should you have any further questions. Thank you.

From: Treppiedi, Rocky [mailto:RTreppiedi@SpokaneCity.org]
Sent: Tuesday, June 09, 2009 3:46 PM
To: Durkin, Tim M. (USAWAE)
Cc: McDevitt, Jim A. (USAWAE); Delaney, Howard; Rice, Thomas O. (USAWAE); Harrill, Frank M. (FBI); Boutros, Victor (CRT)
Subject: RE: In Re Zehm investigation - Robert Bragg - Contracted Use of Force Expert with FBI Involved in United States Department of Justice Investigation

Tim,

With all due respect to the DOJ, the DOJ cannot decide for civil litigants who are and are not fact witnesses to the civil case. If the DOJ has hired him as an “expert witness,” so be it. That does not mean he is not, and cannot be, a fact witness in the civil case. Your response to my email, below, contorts very simple facts.

I did not say Mr. Bragg is a “percipient” witness in the Zip Trip store. However, he is, without question, a fact witness in the civil case. The civil case has many issues in it that go well beyond the DOJ’s inquiry. If, as you state, I have a misunderstanding of Mr. Bragg’s involvement in the DOJ case it is simply because I do not know what his involvement is, nor do I care. The civil defense counsel will not ask him anything about your investigation. I told him that. I told you that.

Nevertheless, with all due respect, the attorneys for the defendants in the civil case are under no obligation to describe to you or the DOJ (or anyone else) why we need to (or want to) speak to any particular person in a civil case. The attorney work product doctrine is simple and clear in that respect. Mr. Bragg is probably in a situation very similar to that of many other fact witnesses in your investigation. The simple fact that the DOJ may have spoken to the witness does not preclude any other litigant from talking to the witness.

The defense counsel in the civil suit have an ethical obligation to investigate the factual allegations made by the plaintiff and respond to the complaint. We are doing so consistent with our ethical obligations, within the law.

The DOJ has no lawful right to prevent us from speaking to fact witnesses, including Mr. Bragg. The DOJ cannot tell a witness that he/she cannot speak to an attorney about whatever the witness knows about facts in a case.

Please confirm for us that you will not instruct Mr. Bragg that he cannot speak with the City Attorney’s office about the facts in the civil case. We understand the limitations about his role -- whatever it is -- in the DOJ investigation. If you would like to confer with Howard, Mr. McDevitt and I about this, Howard and I would be willing to confer with you at your earliest convenience.

Thank you.
Rocky.

From: Durkin, Tim M. (USAWAE) [mailto:Tim.Durkin@usdoj.gov]
Sent: Tuesday, June 09, 2009 14:24
To: Treppiedi, Rocky
Cc: McDevitt, Jim A. (USAWAE); Delaney, Howard; Rice, Thomas O. (USAWAE); Harrill, Frank M. (FBI); Boutros, Victor (CRT)
Subject: RE: In Re Zehm investigation - Robert Bragg - Contracted Use of Force Expert with FBI Involved in United States Department of Justice Investigation

p.s. Rocky:

Please do not mark your communications to me on this topic as privileged.

Since you are a civil liability defense attorney, not law enforcement, and have undertaken the personal representation of a Spokane Police Officer who is the target of a criminal investigation, as well as a potential adverse party to the United States government, I unaware of any “confidentiality” privilege that could remotely apply to your communications on this topic. If you have contrary legal authority in support of such a proposition, please kindly provide it for my review and consideration.

Otherwise, please do not designate communications from you as confidential as I want to avoid the appearance that I have tacitly approved your designation that these materials are confidential and exempt from disclosure.

Thank you for your cooperation in this regard.

Tim M. Durkin
Assistant United States Attorney
P.O. Box 1494
Spokane, WA 99210-1494
(509) 353-2767

Notice: This e-mail is the property of sender and/or United States. You are not authorized to use, copy and/or disclose the existence or contents of this e-mail without the express permission of sender. If you are not the intended recipient, please immediately contact sender and destroy and delete the e-mail and any and all copies. Please contact sender should you have any further questions. Thank you.

From: Durkin, Tim M. (USAWAE) [mailto:Tim.Durkin@usdoj.gov]
Sent: Tuesday, June 09, 2009 14:07
To: Treppiedi, Rocky
Cc: McDevitt, Jim A. (USAWAE); Delaney, Howard; Rice, Thomas O. (USAWAE); Harrill, Frank M. (FBI); Boutros, Victor (CRT)
Subject: RE: In Re Zehm investigation - Robert Bragg - Contracted Use of Force Expert with FBI Involved in United States Department of Justice Investigation

Rocky:

I'll be happy to review this matter further, per your request. However, you appear to have a misunderstanding of Mr. Bragg's role and involvement in the United States Department of Justice's criminal investigation.

As indicated, Mr. Bragg is a retained "expert witness" of the Department of Justice, not a "fact" witness. To our knowledge, Mr. Bragg is not a percipient witness to any of the material facts involved in Officer Karl Thompson's use of force on Otto Zehm on March 18, 2009, or for that matter the other SPD Officers' restraint of Mr. Zehm following that engagement, or for that matter the medical-clinical aspects of Mr. Zehm's subsequent death. Therefore, I find it interesting that you are suggesting that he is a "fact" witness in the civil suit that you are defending on behalf of Karl Thompson (who is the target of the DOJ's criminal investigation) and others, along with Mr. Thompson's personal criminal counsel Carl Oreskovich.

Second, and consistent with our prior discussions with Mr. Bragg, he has requested to maintain the confidentiality of his expert witness involvement in the Zehm investigation until the investigation is concluded and/or charges are pursued. To the extent you believe that Mr. Bragg is an otherwise "percipient fact witness" to the events and sequences of Mr. Zehm's detention and/or his temporally related death, please describe those specific facts that would make Mr. Bragg an ordinary "fact witness" in the Zehm civil litigation as opposed to an expert witness.

Given the foregoing Rocky, and absent further clarifying facts-information from you, I submit that you, the City Attorney's Office, and your clients have an ethical obligation to not attempt any further contact with Mr. Bragg.

Please provide me with the subject description at your earliest convenience. Thank you for your cooperation and assistance in this regard.

p.s. You did call me Friday and yesterday, and we have played phone tag, but never once did you mention or reference that you had engaged in ex parte contacts with DOJ's retained experts over the past couple of weeks and last Friday. I learned of your ex parte contacts from these expert witnesses.

Tim M. Durkin
Assistant United States Attorney
P.O. Box 1494
Spokane, WA 99210-1494
(509) 353-2767

Notice: This e-mail is the property of sender and/or United States. You are not authorized to use, copy and/or disclose the existence or contents of this e-mail without the express permission of sender. If you are not the intended recipient, please immediately contact sender and destroy and delete the e-mail and any and all copies. Please contact sender should you have any further questions. Thank you.

From: Treppiedi, Rocky [mailto:RTreppiedi@SpokaneCity.org]
Sent: Tuesday, June 09, 2009 12:24 PM
To: Durkin, Tim M. (USAWAE)
Cc: McDevitt, Jim A. (USAWAE); Delaney, Howard; Rice, Thomas O. (USAWAE); Harrill, Frank M. (FBI); Boutros, Victor (CRT)
Subject: RE: In Re Zehm investigation - Robert Bragg - Contracted Use of Force Expert with FBI Involved in United States Department of Justice Investigation

Confidential & Privileged Legal Materials
[No Disclosure Authorized Without Express Consent of Client(s) & City Attorney.]

Tim,

Mr. Bragg is a fact witness in the civil case. As such, I believe I have every legal and ethical right to talk to him.

As you know, I (along with other counsel) represent the City and several police officers who have been sued in the civil case. We have every right to talk to Mr. Bragg him about the Commission, the training it provides and authorizes, etc., whether he is also a witness in some other manner in your investigation.

I contacted Mr. Bragg without knowing he has a role in the DOJ's matter. He informed me during my discussion with him (after we had talked about a specific area of training and after I asked about a second area of training) that he was contacted by the DOJ. I told him I don't want to know what the DOJ contacted him about, who he spoke to, etc., but that I have questions of my own regarding issues in the civil suit. He said he has never worked in a criminal case like this and wasn't sure what he could talk about. I told him I don't want to talk at all about the criminal case, just the issues I had questions about in the civil case, and that I'd talk with you about how he can do so, and left it at that. I called you shortly after I spoke to him but you were unavailable, and left you a message, as there are several other issues to discuss. I tried unsuccessfully to reach you again yesterday.

The DOJ cannot interfere with lawyers and fact witnesses in a civil case. If the DOJ retained Mr. Bragg for a particular purpose, so be it, but that does not prevent me from talking to him as a fact witness, and does not authorize the DOJ to unilaterally restrict him, as a fact witness, in this or any other civil suit. The DOJ cannot simply tell a fact witness not to talk to lawyers in a civil suit. If you have authority that states the DOJ can do so, please provide it to us. The DOJ may tell a witness not to talk to others about your investigation (and as I've said, I won't ask Mr. Bragg about it), but otherwise the DOJ cannot interfere. The fact witnesses are not owned and/or controlled by the DOJ.

As defense counsel in the civil suit, we do not need the Fed. R. Civ. P. discovery rules to allow us to conduct an investigation into the facts of the suit we're defending. To the contrary, we have an obligation to investigate the facts before we file an answer and any affirmative defenses with the plaintiffs and court. While the discovery rules allow us to compel discovery at certain times and in a certain manner, they do not prohibit us in any way from talking to witnesses, etc. (In fact, the civil rules have adopted a different approach than you suggest, and now require disclosure to avoid or reduce the time and expense of formal discovery.)

We ask that you reconsider your directive to Mr. Bragg to refrain from talking to us, or to provide us with the specific authority that allows the DOJ to direct him not to speak to us at all. As previously stated, we will not make any inquiries about Mr. Bragg's involvement in your case.

Thank you.
Rocky

Rocco N. Treppiedi
Assistant City Attorney
Office of the City Attorney
City of Spokane
808 W. Spokane Falls Blvd.
5th Floor, Municipal Bldg.
Spokane, WA 99201-3326
(509) 625-6225
FAX (509) 625-6277
rtreppiedi@spokanecity.org

NOTICE: This communication may contain privileged or other confidential information. If you are not the intended recipient, or believe that you have received this communication in error, please do not print, copy, retransmit, disseminate, or otherwise use the information. Also, please indicate to the sender that you have received this email in error, and delete the copy you received. Thank you.

From: Durkin, Tim M. (USAWAE) [mailto:Tim.Durkin@usdoj.gov]
Sent: Monday, June 08, 2009 16:54
To: Treppiedi, Rocky
Cc: McDevitt, Jim A. (USAWAE); Delaney, Howard; Rice, Thomas O. (USAWAE); Harrill, Frank M. (FBI); Boutros, Victor (CRT)
Subject: In Re Zehm investigation - Robert Bragg - Contracted Use of Force Expert with FBI Involved in United States Department of Justice Investigation

Rocky:

I have been informed that you have contacted and spoken with Robert Bragg of the Washington Criminal Justice Training Commission.

Please be advised that Mr. Bragg has been consulted and retained as an expert in an on-going United States Department of Justice investigation. Since you represent the target of that investigation, Mr. Karl Thompson, in an individual capacity, please do not contact Mr. Bragg again. At the conclusion of the DOJ's investigation, Mr. Bragg can be made available for interview-deposition in an appropriate manner and process.

Please also direct all further inquiries concerning Mr. Bragg's professional expertise and/or his involvement in this investigation to my office.

Please also promptly provide me with a full disclose of the substance of your conversation with Mr. Bragg this past Friday. Please also acknowledge receipt of this notification at your earliest convenience.

Thank you for your anticipated cooperation and assistance in this regard.

Sincerely,

Tim M. Durkin
Assistant United States Attorney
P.O. Box 1494
Spokane, WA 99210-1494
(509) 353-2767

Notice: This e-mail is the property of sender and/or United States. You are not authorized to use, copy and/or disclose the existence or contents of this e-mail without the express permission of sender. If you are not the intended recipient, please immediately contact sender and destroy and delete the e-mail and any and all copies. Please contact sender should you have any further questions. Thank you.

Tracking:

160

U.S. v. THOMPSON

EXHIBIT 007

Durkin, Tim M. (USAWAE)

From: Durkin, Tim M. (USAWAE)
Sent: Monday, June 15, 2009 10:06 AM
To: Rocky Treppiedi (RTreppiedi@spokanecity.org)
Cc: McDevitt, Jim A. (USAWAE); Rice, Thomas O. (USAWAE); Ellis, Robert A. (USAWAE); Laughlin, Laura M. (FBI); Boutros, Victor (CRT); Harrill, Frank M. (FBI); Jangaard, Lisa (FBI); 'Delaney, Howard'; Dalton, Pat; Joe Harrington
Subject: In Re Zehm Investigation - Actual and/or Apparent Conflict of Interest in Claiming Global Representation of All SPD Employees

Rocky Treppiedi, Esq.
City Attorney
City of Spokane Attorney's Office
Spokane, WA,

RE: Apparent and Actual Conflict of Interest in Claiming to Represent "All" City Officials/Employees connected to the United States Department of Justice's Criminal Civil Rights Investigation on the Otto Zehm case.

Dear Rocky:

As you know, the Federal Bureau of Investigation (FBI), the United States Attorney's Office for the Eastern District of Washington, and the Criminal Civil Rights Division of the Department of Justice (collectively referred to as "DOJ") are currently conducting an investigation into possible federal criminal activity that occurred on March 18, 2006, when Spokane Police Department (SPD) patrol officer Karl Thompson used force on Mr. Otto Zehm to take him into SPD custody, and in whose custody Mr. Zehm shortly thereafter died.

In December of 2008 and previously this year, you verbally informed me that you personally represent "all" City of Spokane officials, Spokane Police Department (SPD) administrators, all individual SPD officers and detectives, all other City employees, as well as the target of the federal investigation, and all of these respective and varied clients' interests in the Otto Zehm incident, the subsequent SPD criminal investigation, the civil claim by the Zehm Estate, and the United States federal criminal investigation.

I informed you during these conversations that the DOJ objected to your overly broad characterization of "global representation" of everyone associated with the City and further expressed to you DOJ's concern that you have a significant "conflicts of interest" in trying to globally represent not only the City of Spokane, the Police Department, its Chief and administrators on the Zehm matter, and their interests relative to the criminal and civil investigations (criminal and civil), but also the individual officers involved, the detectives, and the individual Officer who was a subject of the SPD's criminal investigation and who is now the target of the DOJ's investigation.

As you know, in 2006 the SPD performed a criminal investigation of Mr. Zehm's conduct and a review of its own officer's use of force on Mr. Zehm. The SPD concluded, according to SPD Detective Terry Ferguson's May 31, 2006, case referral to the Spokane County Prosecuting Attorney's Office, "... *there is no investigative finding of criminal activity on the part of the involved [SPD] officers.*" [Sic] See SPD Det. Terry Ferguson's May 31, 2006, report and case referral to Spokane County prosecutors.

We discussed in our prior conversations the DOJ's separate, independent federal investigation and the potential that information may be developed that could call into question certain aspects of the SPD's investigation and its ultimate findings and conclusion. We also discussed that you actually participated in the SPD's investigation, both on *a personal level* (i.e., directing, among other things, Det. Ferguson to remove original evidence from the property room for processing by a non-law enforcement video expert, who you later authorized payment for through the City's Risk Mgmt. (civil liability) division, which was then under your direction) and professionally (i.e., you were the first attorney the SPD contacted the night of incident, seemingly to obtain civil liability legal advice relative to the Zehm in-custody death incident). We also discussed some general prohibitions that prevent an assistant civil city attorney who represents the City SPD from also representing the shared criminal/civil interests of the SPD Officer was an exonerated subject in the SPD's investigation, but who now is the object of the DOJ's investigation.

I informed you of the DOJ's position and my Office's belief that you have a conflict of interest in representing all of the varied interests of the "multiple corporate and personal clients" that you claim to globally represent. *See RPC 1.7 and 1.13(a) and (b)*. In response, you denied the existence of any conflict and further expressed an opinion that it was unethical for another attorney to suggest or point out his/her belief that opposing counsel has one or more "conflicts" in their representation of multiple organization-corporate and individual clients, including one who is the object of the DOJ's investigation. You will recall that I informed you that I felt that I had an ethical obligation and duty to bring these actual and/or apparent conflicts to your attention. *See RPC 8.3* which provides that counsel "should report" conflicts and unethical conduct.

I informed you then and am informing you now that it is the DOJ's position that you have significant conflicts of interest in and among the multiple and varied City of Spokane clients (i.e., "everyone") you claim to represent relative to the Zehm incident and subsequent investigations (both criminal and civil). Regardless of your global claim of representation, it also remains the DOJ's position that it has the right and explicit authority under Washington's Rules of Professional Conduct to speak directly with any "non speaking agents" of the City of Spokane (i.e., Spokane Police Department Officers, Detectives, etc.) without prior notification to the City Attorney's civil Office and/or the City Attorney's consent. *See RPC 4.2 and Wright by Wright v. Group Health Hosp.*, 103 Wash.2d 192, 200 (1984).

As you know, the DOJ's investigation is focused on whether the subject SPD Officer used unconstitutionally excessive force to take Mr. Otto Zehm into custody and whether any related conducted resulted in federal criminal offenses. I have previously informed you that no other City of Spokane employees are currently "targets" or "subjects" of the DOJ's investigation. Therefore, it is imperative that the DOJ secure full cooperation from the City's (SPD) employees and their corporate counsel since the DOJ is trying to ensure that it is receiving accurate information and truthful testimony in its continuing investigation, which information will be relied upon to accurately determine whether any federal criminal offenses have been committed.

Overly Broad Claim of Global Legal Representation.

Your assertion that you represent all of the City's employees, including the target of the DOJ's investigation, is overly broad. We assume that you rely on *Rule 4.2 of the Washington Rules of Professional Conduct* as the basis for your suggestion that government agents may not contact or speak to Spokane employees without the City's civil legal department's consent. *RPC 4.2* provides that an attorney "shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law or a court order." The plain language of Washington's rule is reinforced by the American Bar Association's Formal Opinion No. 95-396 (July 28, 1995) which states, in analyzing analogous provisions of ABA Model Rule 4.2, that "**a lawyer representing the organization cannot insulate all employees from contacts with opposing lawyers by asserting a blanket representation of the organization.**"

In fact, Washington's Supreme Court has spoken directly to the issue and held in *Wright v. Group Health Hosp.*, 103 Wash.2d 192, 200 (1984) that ex parte contacts can be made with an adverse organization's employees, both current and past, with the exception of those employees who have "speaking authority" to legally bind the organization. *Id.* In concluding that it could not find any reason to prevent contact with employees merely on the basis that they witnessed an event and/or were the employee whose act or omission caused the event leading to the action, the *Wright* court specifically observed that the purpose of the limited anti-contact rule is not to protect a corporate party from the revelation of prejudicial facts. *Id.* at 200. The *Wright* court correctly found that the rule's function is to preclude only the interviewing of those corporate employees who have the legal authority to bind the corporation (i.e., speaking or managing agents). *Id.*

Washington's and the 9th Circuit's courts have taken a flexible and relatively conservative approach to determining who has speaking authority for a corporation (i.e., in this context, a public municipal corporation). *Wright, supra, see also Kadiak Fisheries Co. v. Murphy Diesel Co.*, 70 Wash.2d 153 (1967) (holding that a maintenance manager for commercial fishing company did not have "speaking authority."); *Palmer v. Pioneer Assoc., Ltd.*, 338 F.3d 981, 987-88 (9th Cir. 2003) (holding that executive chef must have be specifically authorized to speak for corporation in order to be "binding"). Therefore, under the legal reasoning in RPC 4.2 and *Wright v. Group Health Hosp, supra*, you do not represent all City of Spokane employees and the DOJ does not have to coordinate or contact the City Attorney's Office to contact non-speaking agent employees who may have information connected with the Zehm incident and the DOJ's investigation.

We also note that your claim of "blanket representation" of the City entity and every employee has been broadly repudiated by other legal organizations and commentators. *See, e.g.,* American Bar Association's (ABA) Formal Opinion No. 95-396 (July 28, 1995). Further, the rules of professional conduct and relevant case law demonstrate that a real or apparent conflict of interest prevents you from representing both the City and all its employees. As noted in Washington's Rule 1.13(a) ("Organization as Client"), "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." (emphasis added).

There is also a Washington State Bar Association Ethics Opinion that is instructive here as well. **WSBA Ethics Opinion No. 161** (1975), which I have no doubt the City Attorney's Office ascribes to, provides that in light of an assistant civil city attorney's unique representational relationship of the government, all city attorneys ". . . *should avoid even the appearance of professional impropriety.*" *Id.* This opinion also strongly suggests that an asst. city attorney should not represent any individual client's interests relative to a matter where "the [underlying] facts" [sic] were investigated by the "representatives of the city employing the city attorney" (i.e., here the Spokane Police Department). *Id.*

Under the rules, a lawyer may represent individual employees only with the informed written consent of both the organization and the individual employee. *See* **RPC 1.13(g)** and **1.7**. Furthermore, when there is an "adversity of interest" between a lawyer for an organization and the organization's employee(s), the Washington Rules indicate that the organization's lawyer cannot provide legal representation for the individual employee(s) involved. *See* **RPC 1.13**, Comment 10. So, despite suggestions and/or reputations to the contrary, the DOJ does not believe that you can collectively serve as counsel for the City and the SPD in the Zehm matter, and also as the personal counsel of all of the individual officers that comprise the Spokane Police Officer's Guild, including and more specifically, the SPD Officer that was the subject of the SPD's criminal investigation and who is now the object of the DOJ's investigation.

Communication with SPD & all Other SPD Employees is Authorized.

Moreover, even if some City (SPD) employees might otherwise be off-limits under **Rule 4.2**, contact with the City's employee is nonetheless authorized here. Under its express terms, **RPC 4.2** does not apply to communications by government agents or attorneys prior to the commencement of a criminal action. *See* **RPC 4.2**, Comment 5 ("*Communications authorized by law may also include investigative activities of lawyers*

representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings.”). Id.

In the instant case, no Indictment has yet been sought while the DOJ’s investigation is on-going. Thus the DOJ’s continuing investigation fits under Comment 5’s exception to the general anti-contact rule with civilly represented clients and/or speaking agents. See also *United States v. Ford*, 176 F.3d 376, 382 (6th Cir. 1999) (“ethical rules should not be construed to conflict with the public’s vital interest in ensuring that law enforcement officers investigate uncharged criminal activity”); *United States v. Johnson*, 68 F.3d 899, 902 (5th Cir. 1995) (Rule 4.2 does “not apply to government conduct prior to indictment”); *United States v. Ryans*, 903 F.2d 731, 740 (10th Cir. 1990) (Rule 4.2’s “proscriptions do not attach during the investigative process before the initiation of criminal proceedings”);

Accordingly, any pre-indictment contacts and/or ex parte interviews of City of Spokane employees, regardless of the department involved, does not run afoul of RPC 4.2. See, e.g., *In re Disciplinary Proceedings Regarding Doe*, 876 F. Supp. 265, 269 (M.D. Fla. 1993) (Rule 4.2 “does not apply to non-custodial communications with corporate employees during criminal investigations . . . that have not become formal proceedings initiated by the making of an arrest, the filing of a complaint or the return of an indictment”).

CONCLUSION

We hope that the foregoing authorities are given due consideration in connection the DOJ’s investigation position and the DOJ’s renewed request that the City’s organizational representative clients (e.g., Council President, the Mayor and the Chief of Police) and the City Attorney’s Office (e.g., Mr. Delaney) revisit the “conflicts” issues that the DOJ believes exists between and among “all” of the clients you and the City Attorney’s Office claims to represent.

We also that the City Attorney’s Office and City’s organizational representatives clients (e.g., Council President, the Mayor and the Chief of Police) will have the foregoing legal authority in mind when they meet to review and determine the nature and scope of the City Attorney Office’s civil representation relative to the DOJ’s criminal investigation, including determining the level of commitment that the City Attorney’s Office is going to provide to the DOJ in terms of maintaining confidential investigation information that the DOJ has secured, the DOJ’s investigation activities, and the testimony that it has been provided.

We hope that once the City Attorney’s Office consults with its principal clients and has considered the legal authority discussed above that the City’s official representative clients and the City Attorney’s Office will appropriately adjust the your legal position regarding the above referenced matters. We further hope that you will not interfere with legitimate federal investigation processes as outlined in my prior e-mail to you last Friday morning, since such interference raises serious law enforcement concerns

Rocky, if you believe there is legal authority that holds contrary to the foregoing stated position points, please kindly provide this authority to me so that my office and other DOJ representatives can immediately review and consider the authority as it relates to the DOJ’s continuing investigation. Otherwise, the DOJ plans to continue forward with its Zehm civil rights investigation in the manner previously conducted and as further outlined above.

Please contact me should you have any further questions or concerns relative to this matter. Thank you for your cooperation and assistance in this regard.

Sincerely,

Tim M. Durkin
Assistant United States Attorney

P.O. Box 1494
Spokane, WA 99210-1494
(509) 353-2767

Notice: This e-mail is the property of sender and/or United States. You are not authorized to use, copy and/or disclose the existence or contents of this e-mail without the express permission of sender. If you are not the intended recipient, please immediately contact sender and destroy and delete the e-mail and any and all copies. Please contact sender should you have any further questions. Thank you.

Tracking:

165

U.S. v. THOMPSON⁵

EXHIBIT 008

Durkin, Tim M. (USAWAE)

From: Durkin, Tim M. (USAWAE)
Sent: Wednesday, June 17, 2009 7:40 AM
To: 'Delaney, Howard'
Cc: McDevitt, Jim A. (USAWAE); Laughlin, Laura M. (FBI); Rice, Thomas O. (USAWAE); Ellis, Robert A. (USAWAE); Harrington, Joseph H. (USAWAE); Dean, Steven M. (FBI); Harrill, Frank M. (FBI); Boutros, Victor (CRT); 'RTreppiedi@spokanecity.org'
Subject: United States DOJ's Civil Rights Investigation - SPD Officer Karl Thompson's Use of Force on Otto Zehm & Mr. Zehm's In-Custody Death

Mr. Howard Delaney, Esq.
 City Attorney
 Office of Spokane
 Spokane, WA

RE: City Attorney Office's Commitment to Confidentiality of U.S. Dept. of Justice On-going Criminal Case Investigation & City's Commitment Re: Future Federal Investigations.

Dear Howard:

Thank you for your e-mails this past Monday morning requesting that my conveyance of the DOJ representatives' concerns with the Spokane City Attorney Office's apparent interference with the DOJ's criminal civil rights investigation in the Otto Zehm in-custody death matter be stayed until the City Attorney's Office could review the legal concerns expressed and then respond.

You also requested in your e-mail a delay in responding to the DOJ's request for a meeting with the City's principal representatives in this matter, e.g., Council President Mr. Joe Shogan, Mayor Mary Verner, and Spokane Police Chief Anne Kirkpatrick, who are also the City Attorney Office's principal clients.

Please be advised that the DOJ is very much interested in hearing the City Attorney Office's response to the legal and ethical concerns the DOJ has raised, including but not necessarily limited to following:

- i) The City Attorney Office's ex parte contacts with the DOJ criminal investigation experts;
- ii) Conflicts of interests created by one of your assistant civil attorney's claims of "global representation" of seemingly "every City employee" connected to the Zehm incident;
- iii) The apparent, if not actual conflict your assistant civil attorney has in representing both the Spokane Police Department's and its stated interests versus the contrasting personal interests of SPD Patrol Officer Karl Thompson, who is the subject under review in the DOJ's criminal investigation; and
- iv) Your assistant civil attorney's conflict in channeling sensitive and otherwise confidential DOJ criminal investigation information/activities directly to Karl Thompson and his criminal counsel Carl Oreskovich (who notably, the City Attorney's Office retained to represent Mr. Thompson civilly).

While the DOJ is very much interested in hearing back from the City Attorney's Office on the above legal and related ethical issues, the DOJ absolutely does not want any further delay in the scheduling of its requested

meeting the principal representatives of the City, Council Chief Joe Shogan, Mayor Mary Verner, and SPD Police Chief Anne Kirkpatrick. In that regard, please immediately forward to your principal clients' this request for a meeting with United States Department of Justice's for early next week.

In the interim, the DOJ wants to make clear its urgent and pressing concerns with the City Attorney Office's conduct as it relates to the DOJ's present criminal (civil rights) investigation and the importance the DOJ places on knowing whether that conduct will continue and will impact the DOJ's relationship with the City in future investigations.

In this regard, you will recall that on **November 24, 2009**, that you met at the United States Attorney's Office to discuss concerns that the United States Department of Justice ("DOJ"), comprised of the FBI, DOJ's Criminal Civil Rights Division (D.C.), and the U.S. Attorney's Office for the Eastern District of Washington, had with the City of Spokane Attorney's Office (Civil Division).

Our concern dealt with the City Attorney Office's level of commitment to maintaining the confidentiality and integrity of the DOJ's criminal investigation activities in the Zehm case, as well as concerns about representative conflicts and other potential interferences with the DOJ's investigation activities. The specific concerns expressed to you were that an assistant civil attorney in your office, who serves as the Spokane Police Chief's general civil legal and liability counsel and who, due his position, has access to otherwise confidential and sensitive law enforcement information, was channeling otherwise sensitive and confidential DOJ investigative activities and witness information to the subject of the DOJ's investigation, SPD Patrol Officer Karl Thompson. The DOJ also expressed its significant concern that this assistant civil attorney was providing sensitive DOJ investigation information not only directly to Officer Thompson, but also to Mr. Thompson's privately retained criminal defense counsel, Carl Oreskovich (who your assistant city attorney arranged to retain, at city expense, to also represent Mr. Thompson's civil interests in the Zehm Estate's civil suit).

We further expressed the DOJ's concern that your assistant civil attorney was disseminating information directly to the criminal target in direct contradiction of his and your office's principal client, SPD Chief Anne Kirkpatrick's stated interest. Chief Kirkpatrick had previously expressed an unequivocal commitment to the DOJ, on behalf of the City Police Department, to keep confidential all of the DOJ's investigative activities and information gathering involving the SPD, the City, and its officers.

We further discussed with you the concern that your assistant civil attorney was engaging in a pattern of disclosing the DOJ's criminal investigation activities on the claimed basis that he had a "legal obligation" to provide Mr. Thompson, the subject of the criminal inquiry, whatever information the assistant civil attorney had access to as SPD's general and civil liability counsel. Your assistant civil attorney claimed he owed a legal obligation to disclose the DOJ's investigation information/activities because he "still" represented Officer Thompson's personal interests in the Zehm case and in the related investigation matters, notwithstanding that the City had already retained separate private counsel (i.e., Mr. Oreskovich) to represent these interests.

We expressed concerns to you about the conflicts your assistant civil attorney had in placing the interests of the subject of criminal case investigation above the expressed wishes and commitment of Spokane Police Department's Chief, Anne Kirkpatrick. We also expressed concerns that your assistant city civil counsel had placed his interests in the "civil liability" case above the completion of the FBI's and the DOJ's search for the truth in its criminal investigation.

As you know, the City Attorney's primary duty is to represent the interests of the City Council, the Mayor and the City's Officers, including the Chief of Police. See **RCW 35.23.111** (2009) (mandating city attorney to advise city authorities and city officials in all legal matters pertaining to the business of the city and to perform such other duties as directed by the city council . . .).

WSBA Ethics Opinion No. 161 (1975), is also instructive here, and it provides that in light of an assistant civil city attorney's unique relationship of the legal representative of a local governmental entity, all city attorneys ". . . *should avoid even the appearance of professional impropriety.*" *Id.* This opinion also strongly suggests that an asst. city attorney should not represent any individual client's interests in a matter where "the [underlying] facts" [sic] were investigated by the "representatives of the city employing the city attorney" (e.g., here the Spokane Police Department). *Id.*

We discussed during our November 2008 meeting the DOJ's concerns about the apparent, if not obvious conflict between your asst. civil city attorney's representation of his principal and foremost client, SPD Chief Anne Kirkpatrick and hers and SPD's expressed commitment to maintaining the confidentiality of the DOJ's investigative activities versus his representation of the individual subject of the DOJ's criminal civil rights investigation, and the assistant city civil counsel stated intention not to comply with Chief Kirkpatrick's and the SPD's confidentiality wishes, and further, his openly stated intention to continue to channel information on otherwise confidential and sensitive federal law enforcement investigative activities, and resulting developments to Mr. Thompson and his private criminal defense attorney, Carl Oreskovich.

We discussed these "conflicts" and "confidentiality" issues in the context of and mutual understanding that Mr. Thompson was/is already represented by personal private "civil" counsel, Carl Oreskovich (who again, is being paid at City's expense). As you know, Mr. Oreskovich also serves as Mr. Thompson's personal private criminal defense counsel.

We also expressed our concern that your assistant city civil counsel was "shadowing" the Grand Jury's traditionally private investigation activities and that this information was likewise being shared with the subject of the investigation and his criminal defense counsel. We were concerned that the subject of a serious criminal investigation was being provided confidential information at public taxpayer expense. We were also concerned that the subject, in stark contrast to most other DOJ or Grand Jury investigations, was gaining access to and being provided with otherwise confidential investigative information on the basis that the criminal case subject was being personally represented by your assistant city civil counsel at public expense.

During our November 24, 2008, meeting, you intently listened and acknowledged the DOJ's concerns. You also verbally "re-affirmed" to us a commitment, as the City's Attorney, to provide full and complete cooperation in the DOJ's continuing criminal investigation and review of Patrol Officer Karl Thompson's use of force on Otto Zehm. You also expressed a commitment to comply with your client Chief Kirkpatrick's confidential "gag order" that she previously issued to all involved SPD personnel. As you know, Chief Kirkpatrick's "gag order" requires all SPD personnel to maintain the confidentiality of the information provided (including testimony) to the DOJ during the course of its investigation and prevents them from discussing or disseminating DOJ investigative information to anyone.

In summary, we discussed at our November 2008 meeting the parameters of **Rule 1.13 of the Rules of Professional Responsibility (RPC 1.13)** and our concern that your assistant civil attorney and, through him, your office had a conflict in representing the organizational interests of the City of Spokane, its Council, Mayor Verner, and Chief Kirkpatrick on the one hand, and then also the personal interests (whether criminal or civil) of Mr. Thompson, the individual object of the criminal investigation, on the other. You informed us that you would review this issue within your office and with your clients, and that you would provide our Office with a prompt response to the DOJ's multi-conflict concerns and investigative concerns. Our Office did not hear directly back from you on these issues.

However, **on December 17, 2008**, I did receive a phone call from your assistant city civil counsel involved and we discussed two things. One, the assistant city civil counsel stated that he had your "full support;" and two, he had the authority to make the decision as to whether or not to continue to represent the criminal target, Karl Thompson's personal interests relative to the Zehm case and the DOJ's criminal investigation.

Your assistant civil attorney further specified that while Chief Kirkpatrick's "gag order" applied to all SPD personnel, the "gag order" did not apply to him as a civil attorney in your office. Your assistant civil attorney further expressed that he had no intention of complying with Chief Kirkpatrick's and the SPD's confidentiality wishes reflected in her "gag order" and that he had the right to continue to disclose otherwise confidential DOJ criminal investigation activities/information to Mr. Thompson since he still would be representing the targeted individual's personal interests.

Your assistant civil attorney did not disclose, however, whether the City's principal clients, the City Council, the Mayor and/or the Police Chief had been fully briefed and fully informed of the DOJ's perceived conflict, as required under RPC 1.13. Your assistant civil counsel also did not disclose whether the Mayor, the City Council, and its Police Chief had likewise approved and endorsed the assistant civil attorney's position on the channeling of the DOJ's criminal investigation information to Mr. Thompson and his publicly paid personal civil and criminal counsel, Mr. Oreskovich.

There have been a number of more recent incidents (some are reflected in the previous e-mails) that have brought these important issues once again to the forefront.

Given the United States Department of Justice's interests in trying to maintain the confidentiality and integrity of its investigations, and the certain probability that the DOJ will have to engage in future reviews and possible criminal investigations of other alleged incidents of officer and/or official misconduct; and the City and the SPD Administrations' historical commitment to full and complete cooperation and confidentiality in the DOJ's investigation, and the City legal department's seeming lack of recent cooperation, interference, and open refusal to comply with the DOJ's confidentiality requests, representatives of the United States Department of Justice would like to promptly meet with your clients so that these and other pressing issues can be reviewed, addressed and resolved.

Finally, the DOJ takes exception to any suggestion that its criminal investigation and its request for full cooperation and confidentiality during that investigation negatively affects impacts in any way the City Attorney Office's ability to prepare the defense for the "City" and other officers in the Zehm suit. The DOJ's pursuit of a criminal investigation to discover all salient and material facts bearing upon the truth of what occurred in and following the Zehm arrest/in-custody death incident does not negatively affect or nor impair in any manner the City legal department's ability and/or the City's right to properly prepare its and the other Officers' civil defenses.

In conclusion, we are not interested in pursuing any personal attacks over this legal and investigative dispute. Rather, the DOJ wants to address and resolve the apparent lack of commitment that it has recently experienced with a member of the City Attorney's Office concerning confidentiality and cooperation in the DOJ's investigation, which conduct historically contrasts with the full level of support and commitment to confidentiality that the DOJ has historically received from the City's Police Department, its Mayor and the City Council, who are and remain the City's principal decision makers.

Therefore, please promptly forward to Mayor Mary Verner, Chief Anne Kirkpatrick, and Council President Joe Shogan, the DOJ's request for a meeting next week to discuss these pressing and other urgent issues.

The scheduling of this meeting can be coordinated through U.S. Attorney, James McDevitt's executive assistant, Ms. Penny Pass. Ms. Pass can be reached at our office at 353-2767.

Thank you Howard for your cooperation and assistance in this regard.

Sincerely yours,

Tim M. Durkin
Assistant United States Attorney
P.O. Box 1494
Spokane, WA 99210-1494
(509) 353-2767

Notice: This e-mail is the property of sender and/or United States. You are not authorized to use, copy and/or disclose the existence or contents of this e-mail without the express permission of sender. If you are not the intended recipient, please immediately contact sender and destroy and delete the e-mail and any and all copies. Please contact sender should you have any further questions. Thank you.

From: Delaney, Howard [<mailto:HDelaney@SpokaneCity.org>]
Sent: Monday, June 15, 2009 10:28 AM
To: Durkin, Tim M. (USAWAE); Treppiedi, Rocky
Cc: McDevitt, Jim A. (USAWAE); Rice, Thomas O. (USAWAE); Ellis, Robert A. (USAWAE); Laughlin, Laura M. (FBI); Boutros, Victor (CRT); Harrill, Frank M. (FBI); Jangaard, Lisa (FBI); Dalton, Pat; Harrington, Joseph H. (USAWAE)
Subject: RE: In Re Zehm Investigation - Actual and/or Apparent Conflict of Interest in Claiming Global Representation of All SPD Employees

Mr. Tim M. Durkin
Assistant United States Attorney
P.O. Box 1494
Spokane, WA 99210-1494

Dear Tim:

By this e-mail I am instructing Mr. Treppiedi, and respectfully requesting that you, discontinue the running e-mail legal / ethical debate until the Office of the City Attorney as an opportunity to conduct the course of activity outlined in my e-mail to you of several minutes ago. Given my confirmation that our office has not contacted Mr. Bragg since Mr. Treppiedi discovered that he had been retained by the DOJ as an expert witness, and my specific instruction to Mr. Treppiedi that he not contact Mr. Bragg pending a resolution of these matters, it occurs to me that there is no real harm from from a hiatus in the dialog.

Your anticipate cooperation in these regards is very much appreciated.

Regards,

Howard F. Delaney
City Attorney
Office of the Spokane City Attorney
808 W. Spokane Falls Blvd
Spokane, WA 99201
(509) 625-6225 Telephone
(509) 625-6277 Facsimile
hdelaney@spokanecity.org

NOTICE: This communication may contain privileged or other confidential information. If you are not the intended recipient, or believe that you have received this communication in error, please do not print, copy, retransmit, disseminate, or otherwise use the information. Also, please indicate to the sender that you have received this email in error, and delete the copy you received. Thank you.

From: Delaney, Howard [<mailto:HDelaney@SpokaneCity.org>]
Sent: Monday, June 15, 2009 10:15 AM
To: Durkin, Tim M. (USAWAE)
Cc: McDevitt, Jim A. (USAWAE); Laughlin, Laura M. (FBI); Rice, Thomas O. (USAWAE); Dean, Steven M. (FBI); Harrill,

Frank M. (FBI); Boutros, Victor (CRT); Treppiedi, Rocky; Dalton, Pat

Subject: RE: In Re U.S. Department of Justice's Criminal Civil Rights Investigation(s) - Request for Meeting With City's Official Representatives

Mr. Tim M. Durkin
Assistant United States Attorney
P.O. Box 1494
Spokane, WA 99210-1494

Re: Your e-mail of June 14, 2009

Dear Tim:

Please accept this electronic correspondence as an acknowledgment of my receipt of your e-mail of June 14, 2009, which follows this reply. Based upon the gravity of the issues I have been able to identify from a cursory review of the matter, and the potential impacts on the City's preparation of its defense in the civil case, the Office of the City Attorney will act expeditiously to:

1. Conduct a more detailed review of your e-mail and related chain of correspondence;
2. Prepare an appropriate response to the legal and ethical issues raised both therein and thereby; and
3. Review your request for a meeting with my clients.

Mr. Treppiedi has assured me that despite the fact he does not concur with your legal position related to the City's ability to interview Mr. Bragg, he has not contacted Mr. Bragg since being informed that Mr. Bragg has been retained as an expert witness by the DOJ. Further, if it is any comfort to you, I have instructed Mr. Treppiedi to work around Mr. Bragg's potential testimony (factual or otherwise) until the issues presented are resolved. As such, I assume there is no sense of emergency driving a need to meet and confer before the end of next week sometime.

Regards,

Howard F. Delaney
City Attorney
Office of the Spokane City Attorney
808 W. Spokane Falls Blvd
Spokane, WA 99201
(509) 625-6225 Telephone
(509) 625-6277 Facsimile
hdelaney@spokanecity.org

NOTICE: This communication may contain privileged or other confidential information. If you are not the intended recipient, or believe that you have received this communication in error, please do not print, copy, retransmit, disseminate, or otherwise use the information. Also, please indicate to the sender that you have received this email in error, and delete the copy you received. Thank you.

From: Delaney, Howard [<mailto:HDelaney@SpokaneCity.org>]

Sent: Monday, June 15, 2009 10:28 AM

To: Durkin, Tim M. (USAWAE); Treppiedi, Rocky

Cc: McDevitt, Jim A. (USAWAE); Rice, Thomas O. (USAWAE); Ellis, Robert A. (USAWAE); Laughlin, Laura M. (FBI); Boutros, Victor (CRT); Harrill, Frank M. (FBI); Jangaard, Lisa (FBI); Dalton, Pat; Harrington, Joseph H. (USAWAE)

Subject: RE: In Re Zehm Investigation - Actual and/or Apparent Conflict of Interest in Claiming Global Representation of All SPD Employees

Mr. Tim M. Durkin
Assistant United States Attorney
P.O. Box 1494
Spokane, WA 99210-1494

Dear Tim:

By this e-mail I am instructing Mr. Treppiedi, and respectfully requesting that you, discontinue the running e-mail legal / ethical debate until the Office of the City Attorney as an opportunity to conduct the course of activity outlined in my e-mail to you of several minutes ago. Given my confirmation that our office has not contacted Mr. Bragg since Mr. Treppiedi discovered that he had been retained by the DOJ as an expert witness, and my specific instruction to Mr. Treppiedi that he not contact Mr. Bragg pending a resolution of these matters, it occurs to me that there is no real harm from from a hiatus in the dialog.

Your anticipate cooperation in these regards is very much appreciated.

Regards,

Howard F. Delaney

City Attorney

Office of the Spokane City Attorney

808 W. Spokane Falls Blvd

Spokane, WA 99201

(509) 625-6225 Telephone

(509) 625-6277 Facsimile

hdelaney@spokanecity.org

NOTICE: This communication may contain privileged or other confidential information. If you are not the intended recipient, or believe that you have received this communication in error, please do not print, copy, retransmit, disseminate, or otherwise use the information. Also, please indicate to the sender that you have received this email in error, and delete the copy you received. Thank you.

From: Durkin, Tim M. (USAWAE) [<mailto:Tim.Durkin@usdoj.gov>]

Sent: Monday, June 15, 2009 10:06 AM

To: Treppiedi, Rocky

Cc: McDevitt, Jim A. (USAWAE); Rice, Thomas O. (USAWAE); Ellis, Robert A. (USAWAE); Laughlin, Laura M. (FBI);

Boutros, Victor (CRT); Harrill, Frank M. (FBI); Jangaard, Lisa (FBI); Delaney, Howard; Dalton, Pat; Joe Harrington

Subject: In Re Zehm Investigation - Actual and/or Apparent Conflict of Interest in Claiming Global Representation of All SPD Employees

Rocky Treppiedi, Esq.

City Attorney

City of Spokane Attorney's Office

Spokane, WA,

RE: Apparent and Actual Conflict of Interest in Claiming to Represent "All" City Officials/Employees connected to the United States Department of Justice's Criminal Civil Rights Investigation on the Otto Zehm case.

Dear Rocky:

As you know, the Federal Bureau of Investigation (FBI), the United States Attorney's Office for the Eastern District of Washington, and the Criminal Civil Rights Division of the Department of Justice (collectively referred to as "DOJ") are currently conducting an investigation into possible federal criminal activity that occurred on March 18, 2006, when Spokane Police Department (SPD) patrol officer Karl Thompson used force on Mr. Otto Zehm to take him into SPD custody, and in whose custody Mr. Zehm shortly thereafter died.

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

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

12 UNITED STATES DISTRICT COURT
13 EASTERN DISTRICT OF WASHINGTON

14 UNITED STATES,)
15 Plaintiff,) **NO. 09-0088-FVS**
16 vs.) **NOTICE OF DISCOVERY**
17) **DISCLOSURES BY**
18 KARL F. THOMPSON, JR.,) **PLAINTIFF UNITED STATES**
19 Defendant.)

20 Plaintiff UNITED STATES, through James A. McDevitt, United States
21 Attorney for the Eastern District of Washington (EDWA), Victor Boutros, Trial
22 Attorney with the United States Department of Justice, Criminal Civil Rights
23 Division, and Timothy Durkin, Assistant United States Attorney (EDWA),
24 respectfully submits the following Notice of Discovery Disclosures that it has made
25 to the Defendant through his criminal defense counsel.
26
27

1 **I. NOTICE OF DISCOVERY DISCLOSURES**

2

3 **A. Summary of Discovery Disclosures.**

4 Since **July 9, 2009**, the day of Defendant's arraignment, the United States has
5 provided the Defendant with ten (10) installments of discovery disclosures
6 consisting of approximately fifty-five (#55) separate DVDs/CDs. The discovery on
7 these fifty-five (#55) CDs/DVDs are generally described below:

8 **Def. Disc # General Description of Discovery Material**

- 9
- 10 1. *Spokane Police Department (SPD) Patrol Division & Major Crimes Unit's*
11 *Reports re: "suspicious person-circumstance (i.e., Otto Zehm); alleged 3rd*
12 *degree assaults, and In-Custody Death (March – Dec. 2006);*
- 13 2. *Spokane Police Department's Policies & Procedures (2006);*
- 14 3. *SPD's background investigation of Karl Thompson (1997);*
- 15 4. *SPD's personnel file on Karl Thompson (2006);*
- 16 5. *SPD Field Training Officer reviews of Karl Thompson (1998);*
- 17 6. *SPD Training Records of Karl Thompson (2006);*
- 18 7. *SPD Specialty Team Records on Karl Thompson (2006);*
- 19 8. *SPD Shift Records (2006);*
- 20 9. ***SPD Media Disclosures and Media Reports following Otto Zehm's March***
21 ***2006 in-custody death;***
- 22 10. *SPD Crime Scene photographs following Otto Zehm's March 18, 2006 in-*
23 *custody death at the North Division Zip Trip convenience store, Spokane;*
- 24 11. *Zip Trip Crime Scene photos;*
- 25 12. *Zehm Autopsy & PD photos;*
- 26 13. *Zehm ME Autopsy photos;*
- 27 14. *Grant Fredericks video analysis & rpt. (9/06);*
15. *Grant Fredericks DVD of VHS overlay (data file);*
16. *PowerPoint of still photos of Camera #1 Zip Trip security video;*
17. *PowerPoint of photos of Zip Trip Security Camera #2;*
18. *PowerPoint photos of Camera #3;*
19. *PowerPoint still photos of Camera #4;*
20. *Zip Trip security video #1 of 2 (530 MB);*
21. *Zip Trip security video #2 of 2 (150 MB);*
22. *911 (redact) & Dispatch-Cams # 1 & 2 (386 MB);*

23. 911 call (uncompressed) (wav file);
24. *Dispatch Radio audio (uncompressed) (wav)*;
25. Post incident scene video (700 MB);
26. *Off. Thompson recorded interview (289 MB)*;
27. Off. Braun recorded interview (157 MB);
28. LAPD and Kootenai County Employment Records; In-service Training Manual, Thompson's SPD Police Chief Application; Additional car to car texts; SPD Markups (2006 to present); Sgt. Torok Performance Reviews;
29. E-252 Car to Car Text messages
30. KREM-2 Zehm News Video (668 MB);
31. *KREM-2 Interview (raw footage) of Acting SPD Chief James Nicks (609 MB)*;
32. *KREM-2 interview of Rocky Treppiedi (14.3 MB)*;
33. *KREM-2, Audio Clip of Chief Nicks interview (3.60 MB)*;
34. *Spokesman Review website audio clip of Chief Nicks Interview (1.28 MB)*;
35. *KREM-2 News Clips and various News Clips interviews (3.49 GB)*;
36. Various Newspaper Articles re: statements and interviews (188 KB)
37. Zip Trip Store Blue Print (141 MB)
39. FBI (Quantico) Enhanced Video Angles (837 MB)
40. FBI (Quantico) CART Still Images - (1,652 MB)
42. Four Camera Angle - Quad Still Photographs taken from security store video taken from video (1,634 pgs.);
43. *Select Still Photographs – Camera Angles 1, 2 and 4 from security store video (950 MB)*
44. FBI Lab Zip Trip Drawings (08/17/09) (61.1 MB)
46. Surveillance Video – Zip Trip (1 of 2) (McGregor) (586 MB)
47. Surveillance Video – Zip Trip (2 of 2) (McGregor) (165.3 MB)
48. Washington Trust ATM Video (McGregor) (2.7 MB)
49. Evidence Photographs – Zip Trip (McGregor) (766 pgs.)
50. Grant Fredericks' DVD of VHS Audio/video overlay (129.1 MB)
51. *SPD Conversion of Open Eye Investigator work product (3.5 GB)*
52. Audio and Video Timeline work of G. Fredericks (129.1 MB)
53. Zip Trip Photographs (Spokane Fire Dept.) (21.2 MB)
54. 911 Call (redacted SPD radio dispatch) (wav files) (552 KB)
55. FBI 302 Investigation Reports (percipient witness interviews) (15.55 MB)
56. Grand Jury Transcripts – witness testimony by ten (10) witnesses: SPD Officers; SPD Major Crimes Unit Detectives; SCSO Detective; and Asst. SPD Chief; (*approx. 565 pgs./15.55 MB*).
57. Grand Jury Exhibits & Records (*approx. 669 pgs./17.06 MB*);

1 58. Grand Jury Transcripts – witness testimony by ten (10) witnesses: SPD
2 Officers and supervisors; Spokane Fire Department personnel, percipient
witnesses, and Spokane County Forensic Unit personnel;

3 The foregoing fifty-five (#55) CD/DVD discs contain almost **13,000 pages** of
4 discovery and another **13.5 gigabytes (GB)** of electronic discovery materials (i.e.,
5 records, drawings, photos, videos, audios, etc.). *See* attached **Exhibit C**, which
6 contains true and correct copies of the United States ten (10) discovery transmittals
7 and some e-mail notifications to the Defendant.

8 The United States anticipates providing another 7,500 to 10,000 pages of pre-
9 trial discovery disclosures, as well as several more gigabytes of electronic discovery
10 materials. A significant portion of the anticipated discovery disclosure will include
11 grand jury materials that the Court recently approved for disclosure to Defendant
12 and his counsel. *See Ct. Rec. # 28*. The United States also anticipates providing
13 Defendant with its initial expert disclosures within the next week or so.

14 In the mean time, however, and as outlined above, Defendant has already been
15 provided with significant detailed discovery, including records and reports prepared
16 by SPD Officers that were on-scene following Officer Thompson's use of force on
17 Mr. Zehm the evening of March 18, 2006. Also in the Defendant's possession are
18 SPD-MCU reports on the MCU's post-incident criminal investigative activities (*see*
19 *Discovery Disclosure* outlined above). These materials include, among other things,
20 summaries of witness interviews that MCU detectives performed during the course
21 of conducting its investigation from March 18, 2006, through approximately
22 September 2006. *See Disc. #1 above, among others*.

23 Defendant and his counsel also have in their possession crime scene evidence,
24 autopsy records, photographs, and related medical materials. *Id.* In addition,
25 Defendant has been provided with multiple versions of the Zip Trip security video
26 (i.e., all four camera angles), including copies of actual footage, still photographs of
27

1 each frame of the footage, PowerPoint files containing the stills of the security
2 videos, and FBI enhanced versions of both the video and the stills. (*See Discs Nos.*
3 *1, 9-21, 24-25, 31-32, 38, 41-44, 46-47, 49-51, and 53*).

4 The above disclosures also include, even though such disclosures are not
5 required under the Jenks Act at this stage of the case, a significant portion of FBI
6 302 investigative reports containing summaries of witness interviews. In addition,
7 the United States has provided Defendant with the transcripts of twenty (20)
8 witnesses who appeared and gave testimony in front of the Grand Jury. Once again,
9 these disclosures were made notwithstanding that the Jenks Act does not impose any
10 obligation to disclose these witness statements pre-trial. *See also* the United States
11 *Memorandum in Opposition to Defendant's Discovery Motion*.

12
13 **B. Discovery Correspondence of August 20, 2009.**

14 In addition to the fifty-five DVDs/CDs of discovery, the United States has
15 also provided Defendant with an **August 20, 2009**, letter that summarizes the
16 discovery disclosures provided to date and also addressed planned future
17 disclosures. *See Exhibit B* attached to United States Memo in Opposition to Bill of
18 Particulars. *Dckt. #40*. This letter covers in significant detail the nature of the
19 discovery provided as well as short description of the critical approximately "two
20 minute" time frame of events relating to the forceful detention, seizure, arrest,
21 treatment, and conduct of a single individual, Mr. Zehm.

22 When it boils down to it, this case does not involve a particularly complex set
23 of facts. The facts occurred over a short interval of time (i.e., approximately 110
24 seconds) and are not very complicated. Count Two's allegations, which charge the
25 Defendant with making a false entry in a police investigative record, are more than
26 sufficient to provide the Defendant notice of the allegations pending against him so
27

1 that he can prepare a defense. Perhaps more significant, the Defendant has in his
2 possession the “report” (i.e., his 35 page recorded statement – see *Exhibit A* to
3 *United States Memo in Opposition to Bill of Particulars*) wherein he describes his
4 actions and the victim Mr. Zehm’s alleged conduct during the “two minutes” that the
5 Defendant is now charged with using excessive force on Mr. Zehm, which report
6 (Exhibit A) forms the basis for Count Two’s charge.

7 Moreover, discovery already in Defendant’s possession includes statements
8 and grand jury testimony from eyewitnesses and law enforcement witnesses, who
9 saw and heard events purportedly described therein. Further, the Defendant has
10 been provided with a copy of the videotape of the incident described in Count One
11 of the Indictment. Further still, Defendant has been provided with forensic
12 examinations of the store security video tape as well as stills of each frame of the
13 video footage that was captured from each of four (4) cameras that were operating.

14 By simply comparing the police report with the videotape and witness
15 statements, the Defendant can easily determine which portions of his police report
16 are false. This discovery adequately provides the Defendant with all the information
17 necessary to prepare his defense.

18 And to cap it off, the United States provided Defendant and his counsel with a
19 lengthy and detailed discovery letter that provides an overview of several of
20 Defendant’s alleged false statements and a summary of the foregoing discovery. See
21 *Exhibit B*, *AUSA Tim Durkin’s August 20, 2009, pre-trial discovery letter*
22 *(addressing Discovery and Bill of Particulars issues)*. This letter, coupled with the
23 other discovery provided to the defendant (see *Section A - Summary of Discloses*
24 *Discovery, supra*), as well as the plain language of Count Two of the Indictment, is
25 more than sufficient to put the Defendant on notice of the elements of the charged
26 offense and the government’s theory of the case. See *United States v. Rodrigues*,
27 237 Fed. Appx. 178 (9th Cir. 2007), citing *United States v. Long*, 706 F.2d 1044,

1 1054 (9th Cir. 1983) (pre-trial letter can function as a bill of particulars to provide
2 more specifics regarding allegations in indictment); *see also United States v.*
3 *Hernandez*, 330 F.3d 964, 975 (7th Cir. 2003) (Bill of Particulars is unnecessary
4 when the information Defendant needs to prepare a defense is available through
5 “some other satisfactory form,” such as discovery).

6
7 **C. Conditions & Limitations on Government’s Disclosures.**

8 Per Rule 16 and the United States Attorney’s Office practice in this District, a
9 defense set of discovery has been provided to Defendant’s counsel on the condition
10 that, absent further court order or other compulsory process or discovery obligation
11 to third parties, the Defendant and his counsel agree not to disclose nor provide
12 “any” of the above discovery materials to any other person not involved in this
13 criminal case. *See Exhibit C, disclosure letters and e-mails containing terms and*
14 *conditions of disclosures.* This prohibition extends to “any person” or “entity” that
15 is not a member of the Etter & McMahon law firm or a retained “expert witness” in
16 this criminal case.

17 The United States has notified Defense counsel that any dissemination and/or
18 viewing outside of these parameters is unauthorized and will serve as grounds for
19 seeking the immediate return of all discovery, the destruction of all copies, and the
20 making of alternative arrangements for the Defendant, his counsel, and any retained
21 investigator-expert to inspect and review the criminal discovery at the U.S.
22 Attorney’s Office.

23 The United States has also made it clear that these records cannot be given to,
24 reviewed by, and/or shared with any of Mr. Thompson’s “civil attorneys” or, for that
25 matter, counsel for the Zehm Estate without further court order, compulsory process,
26
27

1 and/or court rule imposed discovery obligations.¹

2 This agreement does not prevent Defense counsel from showing and
3 reviewing the above discovery items with the Defendant, not does it prevent defense
4 counsel from discussing the discovery's contents. These terms and conditions do,
5 however, prevent discovery items from being left in the possession of the Defendant
6 and thereby unnecessarily increasing the risk of unauthorized dissemination. See
7 Rule 16 and foregoing discovery conditions. To date, Defendant's criminal defense
8 counsel has agreed to abide by the terms and conditions for the Government's
9 criminal case discovery disclosures.

10
11 **D. No Reciprocal Discovery To Date.**

12 To date, the United States has not received a single document in reciprocal
13 discovery disclosures from the Defendant. Although Defendant has moved to
14 continue the trial date until the spring of 2010, Defendant's counsel with the City
15 Attorney's Office have been investigating this case on his behalf for more than three
16

17
18 ¹ The Defendant Karl Thompson is also represented and being defended in the
19 victim Otto Zehm's Estate's federal civil rights (excessive force – §1983) action by
20 three (3) different Asst. City Attys.: i) Rocco Treppiedi, ii) Ellen O'Hara, and iii)
21 Salvatore Faggiano; in addition to Mr. Oreskovich, who represents Mr. Thompson in
22 both the civil and criminal action. *See Cause No. 09-CV-0080-LRS), the Honorable*
23 *Lonny Suko presiding.*

24 The City Attorney's Office has been actively defending Mr. Thompson on the
25 Zehm's "civil rights" claim for over three years. *See Rocky Treppiedi's June 21,*
26 *2006, letter exonerating Mr. Thompson from any civil rights culpability, even*
27 *though at the time the Spokane Police Department had not yet "officially" concluded*
its criminal investigation at: www.spokesmanreview.com/sections/zehm/documents.
Mr. Treppiedi also had the June 21, 2006, letter exonerating Mr. Thompson posted
on the City of Spokane's website and provided to the media.

1 (3) years. Even Mr. Oreskovich, who was retained last October to represent Mr.
2 Thompson's "excessive use of force" interests (both criminally and civilly), has been
3 involved in the defense of claims concerning Mr. Thompson's alleged "excessive
4 use of force" for the past ten (10) months.

5 To date, the United States has provided the Defendant with almost **13,000**
6 **pages** of hard discovery and approximately another **13.5 GBs** of electronic
7 discovery. Defendant's reciprocal discovery disclosures are mandatory under Rule
8 16(b). *See* Fed.R.Crim.P. 16(b). The Government would appreciate the Court
9 addressing this issue at the time of the parties' August 31, 2009, pre-trial conference.

10 **III. CONCLUSION**

11
12 The United States discovery disclosures are progressing in an orderly and
13 timely fashion. The United States will continue to make disclosures as the discovery
14 is processed. The United States further agrees to provide timely supplements to its
15 disclosures in the event more information and records are the United States'
16 preparation of this case and its investigation continues.

17 RESPECTFULLY SUBMITTED this 29th day of August 2009.

18 JAMES A. MCDEVITT
19 United States Attorney - EDWA

20 s/ Timothy M. Durkin
21 TIM M. DURKIN
22 Assistant U.S. Attorney - EDWA
23 Attorneys for Plaintiff United States
24
25
26
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 sent 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

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

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

12 UNITED STATES DISTRICT COURT
13 EASTERN DISTRICT OF WASHINGTON

14 UNITED STATES,)
15 Plaintiff,) **NO. 09-0088-FVS**
16 vs.) **UNITED STATES’ MEMORANDUM**
17) **IN OPPOSITION TO BILL OF**
18 KARL F. THOMPSON, JR.,) **PARTICULARS ON OBSTRUCTION**
19 Defendant.) **CHARGE (Count 2)**

20 Plaintiff, the UNITED STATES, through James A. McDevitt, United States
21 Attorney for the Eastern District of Washington (EDWA), Victor Boutros, Trial
22 Attorney with the United States Department of Justice, Criminal Civil Rights
23 Division, and Timothy Durkin, Assistant United States Attorney (EDWA),
24 respectfully submits the following memorandum in opposition to Defendant’s
25 motion for a Bill of Particulars on Count 2 of the Grand Jury’s June 19, 2009,
26 Indictment charging Defendant with obstruction of justice under 18 U.S.C. § 1519.
27

1 **I. INTRODUCTION**

2 This case arises out of Defendant Spokane Police Department (SPD) Patrol
3 Officer Karl F. Thompson Jr.'s use of force (i.e., an impact weapon – baton) to
4 forcefully detain and seize Otto Zehm at a north Spokane Zip Trip convenience store
5 during the early evening of March 18, 2006. Defendant Thompson forcefully seized
6 Mr. Zehm in response to a “suspicious circumstance” complaint called in by two
7 young females, ages 19 and 18, who reported that Mr. Zehm may have accessed one
8 of their accounts at a Washington Trust Bank ATM and taken money.

9 Officer Thompson's use of force on Mr. Zehm and Mr. Zehm's resistive
10 response to the repeated baton strikes impacting Mr. Zehm's body ultimately led to
11 additional officers being called to assist Officer Thompson in completely restraining
12 Mr. Zehm. Mr. Zehm was ultimately restrained in a prolonged prone, four-point
13 (commonly referred to “hog-tie”) restraint. After being forcefully restrained for
14 approximately 17 minutes in this full restraint position, Mr. Zehm stopped breathing
15 and experience sudden cardiac arrest,. Resuscitation efforts were made on scene, but
16 the consequences of the arrest resulted in Mr. Zehm being declared brain dead two
17 days later. Dr. Sally Aiken, Spokane County's Medical Examiner, determined cause
18 of death was due to *Hypoxic Encephalopathy due to Cardiopulmonary Arrest while*
19 *restrained (total appendage restraint) in prone position for excited delirium. See*
20 *May 22, 2006, Autopsy report.* Dr. Aiken also deemed Mr. Zehm's “brain death”
21 (hypoxic encephalopathy) to be a *homicide* under state law since the death was
22 causally related to personal intervention and not a naturally occurring demise.

23 The night of the incident and for approximately 2.5 months later, investigators
24 with the SPD's Major Crimes Unit (MCU) conducted a criminal investigation into
25 the reasonableness of the force used on Mr. Zehm by its own police officers. On
26 May 31, 2006, the SPD MCU investigators concluded:

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

6 *See Detective Terry Ferguson’s May 31, 2006, case investigation summary and*
7 *referral (i.e., no charges) to the Spokane County Prosecuting Attorney.*

8 In response to the case referral, the Spokane County Prosecuting Attorney’s
9 Office directed the SPD-MCU investigators to perform several additional
10 investigation activities, including the retention of a forensic videographer to examine
11 the first couple minutes of Officer Thompson’s engagement of and use of force on
12 Mr. Zehm. The SPD performed these additional investigative activities in the late
13 summer-early fall of 2006, but did not revise any of the findings and conclusions in
14 Det. Ferguson’s May 31, 2006, exoneration referral. The SPD suspended its
15 investigation in approximately October 2006. There is no record indicating that the
16 SPD-MCU performed any “side by side” analysis of Defendant Thompson’s
17 interview statements to the percipient civilian witness accounts and the now
18 forensically examined video. *See Discovery Disc. #1, infra; cf. Disc. # 32.*

19 The United States Department of Justice (DOJ) conducted its own
20 investigation in 2006 and following a lengthy investigation by the DOJ, and the
21 Grand Jury sitting in the Eastern District of Washington, a two (2) count Indictment
22 was returned by the Grand Jury on June 19, 2009, charging the Defendant Officer
23 Karl Thompson with excessive force against the victim Otto Zehm in violation of 18
24 U.S.C. § 242 and with obstruction by making a false entry in an investigation
25 “record” in violation of 18 U.S.C. § 1519.

26 The United States intends to prove at trial that the Defendant Thompson’s use
27

1 of force, i.e., multiple baton strikes, including both deadly force (e.g., head strikes)
 2 and non-lethal force (e.g., leg and torso strikes), violated Mr. Zehm’s constitutional
 3 rights and resulted in a “serious injury” in violation of 18 U.S.C. § 242. The United
 4 States also intends to prove that the Defendant Officer Thompson committed
 5 obstruction of justice by making a “false entry” in a police record, specifically the
 6 transcript of his recorded March 22, 2006, interview with SPD-MCU detective Terry
 7 Ferguson, in violation of 18 U.S.C. 18 U.S.C. § 1519.

8 **II. LAW & DISCUSSION**

9 **A. False “Record” Charge (18 U.S.C. § 1519) – Count 2 of Indictment.**

10 On June 19, 2009, the Grand Jury in the United States District Court, Eastern
 11 District of Washington, returned an Indictment against the Defendant Karl F.
 12 Thompson Jr., charging him in Count 2 as follows:

13 **COUNT TWO**

14 Between on or about **March 22, 2006**, and on or about **March**
 15 **27, 2006**, in the Eastern District of Washington, the Defendant, **KARL**
 16 **F. THOMPSON, JR.**, then a police officer with the Spokane Police
 17 Department, knowingly made a false entry in a record and document,
 18 to wit: by making a false statement in an interview recorded on March
 19 22, 2006, a transcription of which was reviewed and signed by **KARL**
 20 **F. THOMPSON, JR.** on March 27, 2006, with the intent to impede,
 21 obstruct and influence, the investigation of a matter within the
 22 jurisdiction of a department and agency of the United States, that is,
 23 the Federal Bureau of Investigation, and in relation to and
 24 contemplation of such investigation, involving the violation of
 25 constitutional rights described in Count One of this indictment, all in
 26 violation of Title 18, United States Code, Section 1519.
 27 *See* Grand Jury’s June 19, 2009, Indictment, Count 2 (Ct. Rec. #1). The statute
 charged in Count 2, 18 U.S.C. § 1519, is a subsection of Chapter 73 of Title 18 of
 the United States Code, which was created to address obstruction of justice
 violations and § 1519 imposes criminal liability on any person who knowingly

1 alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in
2 “any” record, document, or tangible object with the intent to impede, obstruct, or
3 influence the investigation or proper administration of any matter within the
4 jurisdiction of any department or agency of the United States “or in relation to or
5 contemplation of any such matter or case[.]” *Id.*

6 The statute’s legislative history expressly indicates that it was designed to be
7 used in “a wide array of cases.” *See* 148 Cong. Rec. S7, 418 (daily ed. July 26,
8 2002) (explaining that § 1519 “. . . could be effectively used in a wide array of cases
9 where a person destroys or *creates evidence with the intent to obstruct an*
10 *investigation* or matter that is, as a factual matter, within the jurisdiction of any
11 federal agency or bankruptcy ... [and] it also covers acts either in contemplation of or
12 in relation to such matters.” [sic]) (statement of Senator Leahy). *Id.*

13 18 U.S.C. § 1519’s legislative history makes it apparent that it was designed
14 “to apply broadly to any acts to destroy or fabricate physical evidence so long as
15 they were done with the intent to obstruct, impede *or influence* the investigation ...
16 of any matter ... [or] in relation to or contemplation of such a matter or
17 investigation.” *United States v. Kun Yun Jho*, 465 F.Supp.2d 618, 635-36 (E.D.Tex.
18 2006); *see also U.S. v. Hoffman-Vaile*, 568 F.3d 1335, 1342-43 (11th Cir. 2009)
19 (Scope of statute prohibiting obstructive activity respecting “any matter within the
20 jurisdiction of any department or agency of the United States” extends to grand jury
21 investigations); *U.S. v. Hunt*, 526 F.3d 739, 743 (11th Cir. 2008) (Law enforcement’s
22 willful excessive force is a federal crime under § 242, which is within the
23 jurisdiction of the FBI and “A person of ordinary intelligence would understand a
24 police report to be a ‘record’ or ‘document’”); and *U.S. v. Perez*, - F.3d -, 2009
25 WL 2357637 (2nd Cir. August 3, 2009) (addressing broad scope of related § 1512
26 obstruction provision and its broad application to Corrections Officers who provided
27

1 false information during an “official proceeding” (e.g., administrative use of force
2 review)).

3 In *Jho, supra*, the court noted further that § 1519 was specifically meant to
4 eliminate any technical requirement, which some courts had read into other
5 obstruction statutes, that the obstructive conduct be tied to a pending or imminent
6 proceeding. The *Jho* court also eliminated any distinction between court
7 proceedings, investigations, regulatory or administrative proceedings, and less
8 formal government inquiries. *Id. See also U.S. v. Perez, id; U.S. v. Hunt, id; U.S. v.*
9 *Hoffman-Vaile, id.* In sum, the intent of the obstruction statute is simple: “***People***
10 ***should not be destroying, altering or falsifying documents to obstruct any***
11 ***government function.*” *Jho, id (emphasis added).***

12 The required elements for Count 2’s obstruction charge under 18 U.S.C. §
13 1519 is: 1) the defendant knowingly altered, destroyed, mutilated, concealed,
14 covered up, falsified, or made a false entry in any record, document, and tangible
15 object; 2) The defendant did so with the intent to impede, obstruct, and/or influence
16 an investigation and/or the proper administration of any matter; and 3) the matter
17 was within the jurisdiction of any department or agency of the United States. *See*
18 *generally United States v. Lessner*, 498 F. 3d 185, 196 (3d Cir. 2007) (also noting
19 Congressional intent that § 1519 apply broadly and that defendant’s disposal of
20 appointment book was a form of obstruction (i.e., “destruction”) that fell within the
21 proscriptions of the statute); *United States v. Ionia Management S.A.*, 526 F. Supp.
22 2d 319, 329-30 (D.Conn. 2007) (“In comparison to other obstruction statutes, Sec.
23 1519 by its terms does not require the defendant to be aware of a federal proceeding,
24 or even that a proceeding be pending. *Cf.* 18 U.S.C. 505.”); *U.S. v. Hunt, id.*

25 The subject “false record” containing materially false, inaccurate, deceptive,
26 incomplete, and/or misleading statements is, as patently described in Count 2 of the
27

1 Indictment, the transcript of the Defendant's recorded interview taken by SPD-MCU
2 Detective Terry Ferguson during the early afternoon of **March 22, 2006**. See
3 attached **Exhibit No. 1** (a true and correct copy of the transcript of Karl Thompson's
4 March 22, 2006, recorded interview with MCU Detective). This false "record," with
5 multiple and various false statements, was reviewed by Officer Thompson for
6 accuracy on **March 27, 2006**, in Detective Ferguson's presence. After providing
7 further clarifying information and making some minor changes to the transcript,
8 Defendant Thompson approved, adopted and signed the official investigative record.
9 *Ex. #1.*

10 **B. Indictment Sufficient to Alert Defendant to Nature of Charge.**

11 Rule 7(f) of the Federal Rules of Criminal Procedure simply provides that a
12 "court may direct the filing of a bill of particulars." A defendant is not entitled to a
13 bill of particulars as a matter of right, *Wong Tai v. United States*, 273 U.S. 77, 82
14 (1927), and should be granted only where necessary:

15 . . . to inform the defendant of the nature of the charge against him with
16 sufficient precision to enable him to prepare for trial, to avoid or minimize the
17 danger of surprise at the time of trial, and to enable him to plead his acquittal
18 or conviction in bar of another prosecution for the same offense when the
19 indictment itself is too vague, and indefinite for such purposes.

20 *United States v. Ayers*, 924 F.2d 1468, 1483 (9th Cir. 1991), quoting *United States v.*
21 *Giese*, 597 F.2d 1170, 1180 (9th Cir), cert. denied, 444 U.S. 979 (1979). These
22 purposes are accomplished, however, where the Indictment provides sufficient detail
23 of the charges. *United States v. Mitchell*, 744 F.2d 701, 705 (9th Cir. 1984).

24 An indictment is sufficient if it alleges the essential elements of the charged
25 crime and in a manner that permits the defendant to prepare a defense and plead
26 double jeopardy in any future prosecution for the same offense. *Hamling v. United*
27 *States*, 418 U.S. 87, 117 (1974); see also *United States v. Hooker*, 841 F.2d 1225,

1 1227 (4th Cir. 1988). As long as the indictment fulfills these purposes, a bill of
2 particulars is unnecessary and its denial does not constitute an abuse of discretion.
3 *United States v. Jackson*, 757 F.2d 1486, 1491 (4th Cir.), cert. denied, 474 U.S. 994
4 (1985); *United States v. Ayers*, 924 F.2d 1468 (9th Cir. 1991).

5 If, as here, the indictment fully complies with the requirements of the Fifth
6 and Sixth Amendments and Fed. R. Crim. P. 7(c), a bill of particulars is not to be
7 used to provide detailed disclosure of the government's evidence in advance of trial.
8 *United States v. Giese*, supra; *United States v. Automated Medical Laboratories,*
9 *Inc.*, 770 F.2d 399, 405 (4th Cir. 1985). As another circuit stated:

10 A bill of particulars, unlike discovery, is not intended to provide the defendant
11 with the fruits of the government investigation. . . . Rather, it is intended to
12 give the defendant only that minimum of information necessary to permit the
13 defendant to conduct his own investigation.

14 *United States v. Smith*, 776 F.2d 1104, 1111 (3d Cir. 1985) (citations omitted;
15 emphasis in original); see also *United States v. Burgin*, 621 F.2d 1352, 1359 (5th
16 Cir.) (bill of particulars "is not designed to compel the government to detailed
17 exposition of its evidence or to explain the legal theories upon which it intends to
18 rely at trial"), cert. denied, 449 U.S. 1015 (1980); *Hemphill v. United States*, 392
19 F.2d 45, 49 (8th Cir.) ("[a]cquisition of evidentiary detail is not the function of the
20 bill of particulars"), cert. denied, 393 U.S. 877 (1968); *United States v. Fischbach*
21 *and Moore, Inc.*, 576 F. Supp. 1384, 1389 (W.D. Pa. 1983) ("[i]t is well established
22 that a bill of particulars is not to be used by the defendant as a discovery tool, . . . by
23 which defendants obtain disclosure of every detail of the theory and preparation of
24 the government's case. . . ."), aff'd, 750 F.2d 1183 (3d Cir. 1984), cert. denied, 470
25 U.S. 1029 (1985).

26 To convict Thompson for violating 18 U.S.C. § 1519, the Government must
27 prove, beyond a reasonable doubt that: 1) Defendant Thompson knowingly falsified

1 an entry into a document – in this case the Defendant’s transcribed statement about
2 the Otto Zehm incident; 2) the statement falsified related to a matter within the
3 jurisdiction of a federal agency - in this case the United States Department of Justice
4 (DOJ) and Federal Bureau of Investigation (“FBI”) who have original jurisdiction to
5 investigate civil rights violations; and 3) Thompson falsified the entry into the
6 record, intending to impede, obstruct, or influence the investigation of a matter that
7 is within the DOJ’s/FBI’s jurisdiction (e.g., investigation of alleged excessive force
8 – 18 U.S.C. § 242 and 2); *See also* 18 U.S.C. § 1505, 1512, 1518; and *United States*
9 *v. Hunt*, 526 F.3d 739, 743 (11th Cir. 2008).

10 Count 2 of the Indictment clearly alleges the requisite elements of the offense
11 and sufficiently notifies Defendant of the nature of the charge so as to permit him to
12 prepare any defense. *See Count 2 of Indictment; U.S. v. Giese, supra*, and a Bill of
13 Particulars is unnecessary.

14 **C. Motion Seeks Discovery Defendant Not Entitled to Receive.** In his
15 motion for a Bill of Particulars, Defendant seeks information that has already been
16 disclosed, will be disclosed, or which would constitute pretrial discovery to which
17 Defendant is not entitled. As this court is aware, a defendant is not entitled to a bill
18 of particulars as a matter of right. *Wong Tai v. United States*, 273 U.S. 77, 82
19 (1927). A bill of particulars is not intended to serve as the equivalent of answers to
20 interrogatories in a civil case. Rather, a bill of particulars is a defendant's means of
21 obtaining specific information about charges brought in a vague or broadly-worded
22 indictment. *United States v. Debrow*, 346 U.S. 374, 378 (1953)), rev'd on other
23 grounds, 113 S. Ct. 1111 (1993).

24 A bill of particulars is not to be used as an investigative vehicle for the
25 defense. *United States v. Salazar*, 485 F.2d 1272 (2d Cir. 1973), cert. denied, 415
26 U.S. 985 (1974). It cannot be used to elicit the complete nature of the government's
27

1 evidence. *Giese*, 597 F.2d at 1181. Nor is it to be used as a set of interrogatories
2 with respect to the government's evidence. *Cooper v. United States*, 282 F.2d 527
3 (9th Cir. 1960). Further, a bill of particulars may not be used to compel the
4 government to disclose evidentiary details or 'to explain the legal theories upon
5 which it intends to rely at trial.' *United States v. Burgin*, 621 F.2d 1352, 1359 (5th
6 Cir.), cert. denied, 449 U.S. 1015 (1980); see also *United States v. Buckner*, 610 F.2d
7 570, 574 (9th Cir. 1979), cert. denied, 445 U.S. 961 (1980) (government not
8 required to disclose its theory of charge).

9 The United States should not be required to respond to a bill of particulars
10 here. What the defendant seeks to accomplish with a bill or particulars is a specific
11 road map to the evidence the government plans to introduce at trial and to confine
12 the government's proof in advance of trial. This is not something Defendant is
13 entitled to receive nor does the law require it to be provided. *Giese, supra*.
14 Defendant is only entitled to fair notice of the charges, which he and counsel have
15 already received from the Grand Jury's Indictment. *See Count 2 of Indictment*.

16 **1. Defendant Has Not Established Entitlement to Bill of Particulars.**

17 As set forth above, a defendant is entitled to a bill of particulars only where it is
18 necessary to inform the defendant of the charge against him with sufficient precision
19 to enable him to prepare a defense, avoid surprise at trial, or to enable him to plead
20 his acquittal or conviction as a bar to further prosecution. *Giese*, 597 F.2d at 1180.
21 That showing has not been made here.

22 **2. There is Sufficient Specificity on Count 2 charge in United States'**
23 **August 20, 2009, Pre-trial Correspondence to Defense Counsel.** The Ninth
24 Circuit is clear that pre-trial correspondence can function as a bill of particulars, if
25 more specifics regarding the allegations are presented, taken along with the
26 indictment in the case. *United States v. Rodrigues*, 237 Fed. Appx. 178 (9th Cir.
27

1 2007), citing *United States v. Long*, 706 F.2d 1044, 1054 (9th Cir. 1983) (“In
2 determining if a bill of particulars should be ordered in a specific case, a court
3 should consider whether the defendant has been advised adequately of the charges
4 through the indictment and all other disclosures made by the government.”).
5 Further, the Ninth Circuit has emphasized that substantial discovery obviates the
6 need for a bill of particulars. See *Giese*, 597 F.2d at 1180; *United States v. Long*,
7 706 F.2d 1044, 1054 (9th Cir. 1983).

8 On August 20, 2009, the United States, in response to the defendant’s written
9 request for a bill of particulars, set forth more specificity as to the bases for the
10 “false entry” and false record charge in Count 2 of the Indictment. See attached
11 **Exhibit #2**, a true and correct copy of AUSA Tim Durkin’s 11 page letter to Carl
12 Oreskovich. In this correspondence, exact statements and entries in the false record
13 are identified and highlighted. The Defendant has also received volumes of
14 discovery regarding his actions and conduct specified in Count 2 of the Indictment.
15 See **Exhibit #2** and Thompson’s statement, *Exhibit #1*.

16 **3. Defendant’s Citations Do Not Support Bill of Particulars Here.**

17 Defendant cites to a “10th Circuit” and a “4th Circuit” decision in support of his
18 request for a bill of particulars. These decisions, which are actually District Court
19 decisions within those Circuits, do not support the issuance of a bill here.

20 In *United States v. Rogers*, 617 F. Supp. 1024 (D. Colo. 1985), the District
21 Court directed, in a case dealing with a 30 count indictment charging multiple
22 defendants with a conspiracy and several counts for mail fraud, racketeering,
23 fraudulent interstate transactions, aiding the filing of false or fraudulent tax returns,
24 obstruction of justice, subornation of perjury, perjury, and forfeiture, the government
25 to provide a more particularized description of the specific false “overt acts” and
26 “records” involved in the charged conspiracy, particularly as to “substance, time,
27

1 date, place and manner” of the alleged defendant and co-conspirator false statements
 2 for which the individual defendants could be held responsible. *Id* at 1026-28. There
 3 is no conspiracy charge here and the Grand Jury as returned a single Count false
 4 entry-obstruction charge which specifically identifies the substance of the recorded
 5 statement involved, and the time, place and manner it was given.

6 *United States v. Trie*, 21 F.Supp.2nd 7 (D.D.C. 1998), involved a conspiracy
 7 between Defendant and persons known and unknown to the grand jury, and 15
 8 counts of election fraud. Defendant was charged with causing the Democratic
 9 National Committee (DNC) to file false quarterly reports with the Federal Election
 10 Commission. The indictment only made general reference to the “false statements”
 11 contained within the false DNC’s significant quarterly reports. *Id*. In contrast, no
 12 such ambiguity exists here. The Indictment and discovery is sufficient here, and
 13 Defendant is not left to guess what the government intends to prove at trial.

14 The Indictment here is clear in describing the specific record involved, and the
 15 time, place, victim, and the factual scenario for which the defendant is under
 16 indictment, and for which the defendant will have to prepare for trial. There is no
 17 legal requirement that the government specify line by line, each and every false entry
 18 that constitutes obstruction under Section 1519. *Giese, supra*.

19 **D. Discovery Records & Materials Disclosed Regarding Count No. 2.**

20 As of the writing of this brief, the United States has provided Defendant and
 21 his counsel Mr. Oreskovich with approximately 51 CDs/DVDs containing the
 22 following discovery disclosures:

23	<i>Def. Disc #</i>	<i>General Description of Discovery Material</i>
24	1.	<i>Spokane Police Department (SPD) Patrol Division & Major Crimes</i>
25		<i>Unit’s Reports re: Otto Zehm’s alleged assaults and In-Custody Death (2006-</i>
26		<i>2007);</i>
27	2.	<i>Spokane Police Department’s Policies & Procedures (2006);</i>
	3.	<i>SPD’s background investigation of Karl Thompson (1997);</i>

4. SPD's personnel file on Karl Thompson (2006);
5. SPD Field Training Officer reviews of Karl Thompson (1998);
6. SPD Training Records of Karl Thompson (2006);
7. SPD Specialty Team Records on Karl Thompson (2006);
8. SPD Shift Records (2006);
9. ***SPD Media Disclosures and Media Reports following Otto Zehm's March 2006 in-custody death;***
10. SPD Crime Scene photographs following Otto Zehm's March 18, 2006 in-custody death at the North Division Zip Trip convenience store, Spokane;
11. Zip Trip Crime Scene photos;
12. ***Zehm Autopsy & PD photos;***
13. ***Zehm ME Autopsy photos;***
14. ***Grant Fredericks video analysis & rpt. (9/06);***
15. ***Grant Fredericks DVD of VHS overlay (data file);***
16. ***PowerPoint of still photos of Camera #1 Zip Trip security video;***
17. ***PowerPoint of photos of Zip Trip Security Camera #2;***
18. ***PowerPoint photos of Camera #3;***
19. ***PowerPoint still photos of Camera #4;***
20. ***Zip Trip security video #1 of 2 (530 MB);***
21. ***Zip Trip security video #2 of 2 (150 MB);***
22. 911 (redact) & Dispatch-Cams # 1 & 2 (386 MB);
23. 911 call (uncompressed) (wav file);
24. ***Dispatch Radio audio (uncompressed) (wav);***
25. Post incident scene video (700 MB);
26. ***Off. Thompson recorded interview (289 MB);***
27. Off. Braun recorded interview (157 MB);
28. LAPD and Kootenai County Employment Records; In-service Training Manual, Thompson's SPD Police Chief Application; Additional car to car texts; SPD Markups (2006 to present); Sgt. Torok Performance Reviews;
29. E-252 Car to Car Text messages
30. KREM-2 Zehm News Video (668 MB);
31. ***KREM-2 Interview (raw footage) of Acting SPD Chief James Nicks (609 MB);***
32. ***KREM-2 interview of Rocky Treppiedi (14.3 MB);***
33. ***KREM-2, Audio Clip of Chief Nicks interview (3.60 MB);***
34. ***Spokesman Review website audio clip of Chief Nicks Interview (1.28 MB);***
35. ***KREM-2 News Clips and various News Clips interviews (3.49 GB);***
Various Newspaper Articles re: statements and interviews (188 KB)

- 1 Zip Trip Store Blue Print (141 MB)
 2 FBI (Quantico) Enhanced Video Angles (837 MB)
 3 FBI (Quantico) CART Still Images - (1,652 MB)
 4 42. Four Camera Angle - Quad Still Photographs taken from security store
 5 video taken from video (1,634 pgs.);
 6 43. **Select Still Photographs** – Camera Angles 1, 2 and 4 from security store
 7 video (950 MB)
 8 44. FBI Lab Zip Trip Drawings (08/17/09) (61.1 MB)
 9 46. Surveillance Video – Zip Trip (1 of 2) (McGregor) (586 MB)
 10 47 Surveillance Video – Zip Trip (2 of 2) (McGregor) (165.3 MB)
 11 48 Washington Trust ATM Video (McGregor) (2.7 MB)
 12 49 Evidence Photographs – Zip Trip (McGregor) (766 pgs.)
 50 Grant Fredericks’ DVD of VHS Audio/video overlay (129.1 MB)
 51 **SPD Conversion of Open Eye Investigator work product (3.5 GB)**
 52 Audio and Video Timeline work of G. Fredericks (129.1 MB)
 53 Zip Trip Photographs (Spokane Fire Dept.) (21.2 MB)
 54 911 Call (redacted SPD radio dispatch) (wav files) (552 KB)

13 The foregoing 51 CD/DVD discs contain approximately **10,600 pages** of discovery
 14 and another **13.538 gigabytes (GB)** of other electronic discovery materials (i.e.,
 15 records, drawings, photos, videos, audios, etc.). The United States anticipates, at
 16 this point, disclosing another ten to fifteen thousand pages of pre-trial discovery
 17 materials, as well as several more gigabytes of electronic discovery materials. A
 18 significant portion of this discovery disclosure will include grand jury materials that
 19 the Court recently approved for disclosure to Defendant and his counsel. *See Ct.*
 20 *Rec. # 28.*

21 In the mean time, however, and as outlined above, Defendant has already been
 22 provided with significant detailed discovery, including records and reports prepared
 23 by SPD Officers that were on-scene following Officer Thompson’s use of force on
 24 Mr. Zehm the evening of March 18, 2006. Also in the Defendant’s possession are
 25 SPD-MCU reports on the MCU’s post-incident criminal investigative activities (*see*
 26 *Discovery Disclosure* outlined above). These materials include, among other things,
 27

1 summaries of witness interviews that MCU detectives performed during the course
2 of conducting its investigation from March 18, 2006, through approximately
3 September 2006. *See Disc. #1 above, among others.*

4 Defendant and his counsel also have in their possession crime scene evidence,
5 autopsy records, photographs, and related medical materials. *Id.* In addition,
6 Defendant has been provided with multiple versions of the Zip Trip security video
7 (i.e., all four camera angles), including copies of actual footage, still photographs of
8 each frame of the footage, PowerPoint files containing the stills of the security
9 videos, and FBI enhanced versions of both the video and the stills. (*See Discs Nos.*
10 *1, 9-21, 24-25, 31-32, 38, 41-44, 46-47, 49-51, and 53*).

11 By the time of the currently set August 31, 2009, pre-trial, the United States
12 anticipates disclosing another few thousand pages of hard discovery that is being
13 processed. These materials will likely include, even though such disclosure is not
14 required under the Jenks Act at this early stage of the case, a significant portion of
15 FBI 302 investigative reports. As previously indicated, the United States also
16 anticipates providing Defendant's counsel with significant portions of grand jury
17 records and materials, which materials will likely include transcripts of some of the
18 witnesses who testified before the Grand Jury during the course of its approximately
19 14 month investigative proceedings. Once again, these disclosures will be made
20 notwithstanding that the Jenks Act does not impose any obligation to disclose these
21 witness statements pre-trial. *See also* the United States *Memorandum in Opposition*
22 *to Defendant's Discovery Motion.*

23 Further still, it appears that one or more protective orders may be required
24 before the United States can fully disclose a substantial number of records
25 containing, among other items, the victim Mr. Zehm's Privacy Act protected medical
26 information and financial records.

1 **E. Overview of Facts Related to Count 2: False Entry- Record**

2 Notwithstanding Defendant not being entitled to a *bill of particulars* here, the
 3 United States provides the following overview (without limitation) in the interest of
 4 giving Defendant even more information as to the “... nature of the charge . . . to
 5 enable him to prepare for trial, to avoid or minimize the danger of surprise . . . and to
 6 enable him to plead. . . “ double jeopardy in defense of another prosecution for the
 7 same offense” charged in Count 2.

8 1. **Circumstances of Thompson’s March 22, 2006, Statement.** On
 9 **March 22, 2007**, SPD – MCU Det. Terry (Boardman) Ferguson met with Defendant
 10 SPD Patrol Officer Karl F. Thompson Jr. at the Spokane Police Department’s
 11 conference room as part of the MCU’s investigation into Officer Thompson’s
 12 detention and seizure (i.e., use of force) of Otto Zehm, Mr. Zehm’s in-custody death,
 13 and Mr. Zehm’s alleged assault of Officers Thompson and Braun. Also present for
 14 the meeting, which consisted of a “pre-interview” and a subsequent “recorded
 15 interview” was Spokane County Sheriff’s Office (SCSO) Detective Bill Francis.
 16 SCSO Det. Francis was present in the role of a “shadow investigator” to the lead
 17 investigator Det. Ferguson.¹

18
 19 ¹ In 2006, the Spokane Police Department (SPD) was a signatory to a 2003 interlocal
 20 agreement between “Spokane, Kootenai and Surrounding Counties” law enforcement
 21 agencies (14 eastern Washington and northern Idaho agencies). This agreement set forth
 22 “A Protocol To Investigate Officer-involved Fatal Incidents” among the signing agencies
 23 In all presently known pre-2006 critical incidents involving SPD personnel, the SPD
 24 decided, both as the “venue” and “employing” agency, to be the lead investigative agency
 25 in all “critical incidents” involving its own officers. Based on information and belief, the
 26 SPD is the only signatory to the 1994 and 2003 critical incident protocols that did not
 27 allow outside agencies to serve as lead investigators in cases involving SPD officers.

The protocol provides, however, that criminal investigations into officer involved fatal

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

8 Under the Critical Incident Protocol and the City’s collective bargaining
9 agreement (CBA) with the Guild, Officer Thompson apparently could not to be
10 substantively interviewed about his “critical incident” (i.e., the use of force on Otto
11 Zehm during the early evening of March 18, 2006) for 72 hours following the
12 incident. Consequently, Det. Ferguson made arrangements with Officer Thompson
13 and his Guild representative(s) to perform an interview the morning of Wednesday,
14 March 22, 2004, approximately 88 hours after the subject incident.

15 The parties met at the SPD Office at approximately 10:30 a.m. on March 22,
16 2004, and engaged in a preliminary interview that reportedly lasted slightly over two
17 hours. In this preliminary, unrecorded first interview, Detective Ferguson covered
18 questions and areas of inquiry that were to be covered again in the subsequent
19 (second) recorded interview. MCU Det. Ferguson’s first, unrecorded interview of

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

1 Officer Thompson began at approximately 10:33 a.m. and reportedly ended shortly
2 after 12:30 p.m. The parties reportedly took a lunch break after the preliminary
3 interview and returned at approximately 1:30 p.m. to begin the second, official and
4 formally recorded interview. The second, official recorded interview began at
5 approximately 1:34 p.m. and was concluded at approximately 3:27 p.m. The same
6 foregoing individuals attended both the preparatory interview as well as the second,
7 official recorded interview. *See Exhibit #1.*

8 On **March 27, 2006**, Defendant Thompson contacted Det. Ferguson to review
9 the now transcribed transcript of his officially recorded interview. Officer
10 Thompson reviewed the transcript record for substantive accuracy as well as
11 typographical errors. During this review, Defendant Thompson provided Det.
12 Ferguson additional, clarifying information and made a minor revision to the
13 transcript. Defendant Thompson then signed the official SPD investigative
14 (statement) record, thereby representing that the statements therein and the record
15 itself was a truthful and accurate account of the events of March 18, 2009. *See*
16 *Exhibit #1*. Notably, the Defendant has not sought nor requested to make any
17 changes and/or revisions to this official SPD investigative record since he signed it
18 on March 27, 2006.

19 **2. Defendant Thompson's False "Entry" & False Statement.** When the
20 Defendant Thompson signed his transcript on March 27, 2002, SPD-MCU
21 investigators already had in their possession several witness accounts and other
22 materials that significantly contradicted Officer Thompson's initial and subsequent
23 versions of his engagement of Mr. Zehm. *See Disc. #1, supra.* During the course of
24 the MCU's investigation it acquired additional information and materials that further
25 contradicted Thompson's transcribed statement. These contradictions included, but
26 were not limited to Officer Thompson's description of:
27

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

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

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

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

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

23 vi) The impact location of the baton strikes (i.e., discovery shows several
24 of Defendant Officer Thompson's strikes were to Zehm's head, neck and
25 upper torso, versus lower torso and extremities Defendant claimed he struck).

26 *See Disc. #1, supra, previously disclosed SPD-MCU Investigative File & Reports.*

27 The accounts of the percipient, civilian witnesses that were actually "on scene" at the
time of Officer Thompson's rapid advance and immediate use of force, as well as
and the Zip Trip security video and other SPD dispatch materials are already in
Officer Thompson's and his counsel's possession.

Defendant and his counsel are also in possession of evidence showing that Mr.

1 Zehm suffered blunt force trauma to his head during Officer Thompson's "detention
2 and seizure" of Mr. Zehm for "questioning" related to a "suspicious circumstance"
3 and the possible theft at a Washington Trust ATM. *See autopsy, Disc. #1.*

4 In summary, the Indictment properly charges that the Defendant Spokane
5 Police Officer Karl Thompson with knowingly making a false entry or statement in a
6 "record" (i.e., his recorded, transcribed police report - interview) about Mr. Zehm's
7 behavior and the Officer's claimed justifications for his initial and continued force
8 against Zehm, as well as the nature of the force used. *See U.S. v. Hunt., supra.*

9 **III. CONCLUSION**

10 The verbatim transcript of Thompson's recorded statement on the Zehm
11 incident, which he reviewed and signed, constitutes a "record for purposes of 18
12 U.S.C. § 1519 because it serves as Thompson's police report. *See U.S. v. Hunt, 526*
13 *F.3d at 743* ("A person of ordinary intelligence would understand a police report to
14 be a 'record' or 'document'). Count 2 charges Defendant with making a false
15 entry in a "record" (i.e., his report) with the intent to impede the administration of
16 justice. In view of the clarity of the charge, the discovery produced and
17 forthcoming, the pre-trial correspondence provided by the United States, and this
18 detailed response, the United States respectfully submits that a bill of particulars is
19 not necessary to inform Defendant of the nature of the charges and to prepare for
20 trial.

21 RESPECTFULLY SUBMITTED this 25th day of August 2009.

22 JAMES A. MCDEVITT
23 United States Attorney - EDWA

24 *s/ Timothy M. Durkin*
25 TIM M. DURKIN
26 Assistant U.S. Attorney - EDWA
27 Attorneys for Plaintiff United States

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

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

13 UNITED STATES DISTRICT COURT
14 EASTERN DISTRICT OF WASHINGTON

15 UNITED STATES,
16 Plaintiff,

) NO. 09-0088-FVS

17 vs.

) UNITED STATES' MEMORANDUM
) IN RESPONSE TO DEFENDANT'S
) DISCOVERY MOTION

18 KARL F. THOMPSON, JR.,

19 Defendant.
20

21 The Plaintiff UNITED STATES, through James A. McDevitt, United States
22 Attorney for the Eastern District of Washington (EDWA), Victor Boutros, Trial
23 Attorney with the United States Department of Justice (DOJ), Criminal Civil Rights
24 Division, and Timothy Durkin, Assistant United States Attorney (EDWA),
25 respectfully submits the following memorandum in response to the Defendant's
26 expansive motion for discovery.
27

I. PROCEDURAL & DISCOVERY OVERVIEW

1
2 On **June 19, 2009**, the Grand Jury sitting in and for the Eastern District of
3 Washington returned a two count Indictment against the Defendant charging him with
4 willfully violating the victim Otto Zehm's constitutional rights, resulting in a serious
5 injury, in violation of 18 U.S.C. § 242 and with obstruction of justice (e.g., "False
6 statement") under 18 U.S.C. § 1519. *See Dckt. #1.*

7 On **July 9, 2009**, the Defendant was arraigned and U.S. Magistrate Cynthia
8 Imbrogno issued the District's standard ("voluntary open file") Discovery Order. This
9 order provides that should the United States not wish to proceed with "voluntary open
10 file" discovery that it could file of notice opting out of "open file" discovery. *Dckt. #*
11 *19.* On **July 9, 2009**, the United States did provide, however, its initial discovery
12 disclosure to the Defendant comprising of approximately **3,400 pages**.

13 On **July 10, 2009**, the United States timely filed notice of its intention not to
14 engage in "open file" discovery (i.e., not disclose of "all investigative material").
15 *Dckt. # 21.* Notwithstanding Plaintiff's election not to engage in "open file"
16 discovery, the United States nonetheless voluntarily provided Defendant's counsel
17 with five (5) supplemental discovery disclosures (e.g., on **July 9th**, **July 31st**, **August**
18 **3rd**, **August 11th**, and **August 17th**) which contained approximately another **7,400**
19 **pages and 13.54 gigabytes** (GBs) of "discovery materials" (i.e., electronic records,
20 documents, photographs, videos, audios, PowerPoint programs, diagrams, CAD, etc.).
21 To date, approximately **10,600 pages** of tangible records and materials, and **13.54 GB**
22 of electronic discovery have been provided to the Defendant.

23 Notably, Magistrate Imbrogno's July 9, 2009, Discovery Order further provided
24 that if the Defendant requested or received discovery disclosures from the Plaintiff
25 that the Defendant, in turn, had to provide reciprocal discovery. Notwithstanding
26 Magistrate Imbrogno's Order and repeated written and oral discovery demands, the
27 Defendant has failed to produce and/or offer the inspection of any discovery of any

1 evidence that Defendant is aware exists and/or plans to use at the time of trial.

2 The United States is aware that the Defendant has considerable pre-indictment
3 discovery in his possession and/or under the custody and control of his multiple
4 attorneys. *See Dckt. #19*. By way of example, the United States was informed in
5 **November 2008** that experts had been retained for the Defendant through the City of
6 Spokane's Attorney's Office and Risk Management Division that would be relied
7 upon to help defend any criminal excessive use of force charge that might be filed.
8 Further, three (3) attorneys within the Spokane City Attorney's Office personally
9 represent the Defendant and the City Attorney's Office has been providing legal
10 representation for the Defendant since 2006 and since then has been actively
11 conducting a pre-indictment, pre-suit investigation for Defendant's behalf.

12 Notwithstanding the three plus years of pre-indictment and pre-suit
13 investigation by Defendant and his public as well as private attorneys; the experts
14 previously retained for his defense; the substantial discovery that the United States has
15 provided these past two months; the disclosure obligations imposed by Magistrate
16 Imbrogno's Discovery Order directing reciprocal discovery, and the United States'
17 repeated demands, Defendant has failed to disclose a single document of discovery.

18 On **August 6, 2009**, the Defendant moved to continue the trial date until the
19 spring of 2010. The United States has no objection to the requested trial continuance.
20 In addition to the trial continuance motion, however, the Defendant also filed a motion
21 seeking further and even more expansive pre-trial discovery from the United States.
22 Notwithstanding the absence of any defense discovery disclosures, the United States
23 has continued to make discovery disclosures to the Defendant's motion. The United
24 States also provided Defendant with an **August 20, 2009**, letter that summarized
25 discovery disclosures to date and addressed planned future disclosures. *See Exhibit B*
26 attached to United States brief in opposition to bill of particulars. *Dckt. #40*.

27 At this point, the United States anticipates disclosing another ten to fifteen

1 thousand pages of pre-trial discovery, as well as several more gigabytes of electronic
2 discovery . A significant portion of this discovery will include grand jury materials
3 that the Court recently approved for disclosure to the Defendant. *See Dckt. # 28.*

4 In the mean time, the Defendant has already been provided Defendant with
5 significant detailed discovery (i.e., *51 CDs/DVDs containing approximately 10,600*
6 *pages hard discovery and another 13.54 electronic discovery*), which includes
7 records and reports by SPD Officers that were on-scene following Officer
8 Thompson's use of force on Mr. Zehm; summaries of witness interviews SPD
9 detectives performed during its investigation that lasted from March 18, 2006, through
10 approximately September 2006. *See Def. Discovery Disc. #1 above (among others).*
11 Defendant and his counsel also have in their possession crime scene evidence, autopsy
12 records, photographs, and related medical materials. *Id.* In addition, Defendant has
13 been provided with multiple versions of the Zip Trip security video (i.e., all four
14 camera angles), including copies of actual footage, still photographs of each frame of
15 the footage, PowerPoint files containing the stills of the security videos, and FBI
16 enhanced versions of both the video and the stills. (*See Discs Nos. 1, 9-21, 24-25, 31-*
17 *32, 38, 41-44, 46-47, 49-51, and 53*).

18 By the time of the currently set August 31, 2009, pre-trial, the United States
19 anticipates disclosing another few thousand pages of hard discovery that is being
20 processed. These materials will likely include, even though such disclosure is not
21 required under the *Jenks Act* at this stage, a significant portion of FBI's 302
22 investigative reports. As previously indicated, the United States also anticipates
23 providing Defendant's counsel with significant portions of grand jury records and
24 materials, which materials will likely include transcripts of some of the witnesses that
25 testified before the Grand Jury during its approximately 14 month investigation.
26 proceedings. Once again, these disclosures will be made notwithstanding that *Jenks*
27 does not impose any obligation to disclose these witness statements pre-trial. *See also*

1 the United States *Memorandum in Opposition to Defendant's Motion for Bill of*
2 *Particulars, pgs. 1-2; 12-15.*

3 Further still, it appears that one or more protective orders may be required
4 before the United States can fully disclose a substantial number of records containing
5 the victim Mr. Zehm's Privacy Act protected medical information and other Privacy
6 Act protected material.

7 **III. LAW & DISCUSSION**

8 The Defendant has filed a lengthy list containing overbroad discovery requests,
9 which request more closely resembles an organized civil discovery demand.
10 Defendant's motion is puzzling, considering the detailed indictment charging him as
11 well as the government's early, substantial, comprehensive and continuing discovery
12 disclosures.

13 Indeed, the United States has already voluntarily provided Defendant with and/or
14 access to more discovery than is required under the federal rules, federal statutes, and
15 controlling case law. Furthermore, the United States has and will continue to abide by
16 its on-going discovery duties under Rule 16.

17 Defendant's motion is overly broad and makes few conclusory requests in an
18 effort to pursue a "fishing expedition", from which defendants hope to discover some
19 shred of helpful evidence and the entirety of the government's case and theories of
20 prosecution. In several of Defendant's requests, he has omitted any reference to any
21 applicable or controlling law, and on others he has made no attempt to meet the
22 applicable legal standards and requirements necessary for seeking such discovery.

23 **A. Rule 16 Criminal Case Discovery Obligations.**

24 Federal rules, statutes and the case law have carefully circumscribed criminal
25 discovery. It is not -- and cannot be -- as broad as civil discovery, nor as broad as
26 defendant's motion wish to make it. This tenant of criminal law is especially true in
27 the case at bar, because granting Defendant's motions would be an unprecedented

1 broadening of the criminal discovery rules and would open the floodgate for similar
2 burdensome discovery requests in future cases involving criminal civil rights and
3 obstruction cases, making them difficult to prosecute in an orderly and timely fashion
4 if tied up with invasive and multiple discovery requests.

5 Because the United States has already and/or will be producing a substantial
6 amount of documents and materials within its possession, and will continue to do so as
7 other materials and/or information relevant to the current charges comes into the
8 government's possession, Defendant's discovery motion should be determined to be
9 moot and summarily denied. However, the United States sets forth the following in the
10 interest of providing Defendant a more detailed response to his multifaceted and
11 invasive discovery demand, .

12 Fed Crim. R. 16 governs the United States' discovery obligations in this case and
13 provides in relevant part:

14 **(a) Government's Disclosure.**

15 **(1) Information Subject to Disclosure.**

16 **(A) Defendant's Oral Statement.** Upon a defendant's request, the government
17 must disclose to the defendant the substance of any relevant oral statement
18 made by the defendant, before or after arrest, in response to interrogation by a
19 person the defendant knew was a government agent if the government intends
20 to use the statement at trial.

21 **(B) Defendant's Written or Recorded Statement.** Upon a defendant's request,
22 the government must disclose to the defendant, and make available for
23 inspection, copying, or photographing, all of the following:

24 (i) any relevant written or recorded statement by the defendant if:

25 (a) the statement is within the government's possession, custody, or control;
26 and

27 (b) the attorney for the government knows or through due diligence could
know; that the statement exists ;

(ii) the portion of any written record containing the substance of any relevant
oral statement made before or after arrest if the defendant made the statement in
response to interrogation by a person the defendant knew was a government
agent; and

1 (iii) the defendant's recorded testimony before a grand jury relating to the
2 charged offense.

3 **(D) Defendant's Prior Record.** Upon a defendant's request, the government
4 must furnish the defendant with a copy of the defendant's prior criminal record
5 that is within the government's possession, custody, or control if the attorney
6 for the government knows or through due diligence could know that the record
7 exists.

8 **(E) Documents and Objects.** Upon a defendant's request, the government must
9 permit the defendant to inspect and to copy or photograph books, papers,
10 documents, data, photographs, tangible objects, buildings or places, or copies or
11 portions of any of these items, if the item is within the government's possession,
12 custody, or control and:

- 13 (i) the item is material to preparing the defense;
- 14 (ii) the government intends to use the item in its case-in-chief at trial; or
- 15 (iii) the item was obtained from or belongs to the defendant.

16 **(F) Reports of Examinations and Tests.** Upon a defendant's request, the
17 government must permit a defendant to inspect and to copy or photograph the
18 results or reports of any physical or mental examination and of any scientific
19 test or experiment if:

- 20 (i) the item is within the government's possession, custody, or control;
- 21 (ii) the attorney for the government knows or through due diligence could
22 know that the item exists; and
- 23 (iii) the item is material to preparing the defense or the government intends to
24 use the item in its case-in-chief at trial.

25 **(G) Expert Testimony.** Upon a defendant's request, the government must give
26 the defendant a written summary of any testimony the government intends to
27 use in its case-in-chief at trial under Federal Rules of Evidence 702, 703, or
28 705. The summary must describe the witness's opinions, the bases and reasons
29 for those opinions, and the witness's qualifications.

30 **(2) Information Not Subject to Disclosure.** Except as Rule 16(a)(1) provides
31 otherwise, this rule does not authorize the discovery or inspection of reports,
32 memoranda, or other internal government documents made by an attorney for
33 the government or other government agent in connection with investigating or
34 prosecuting the case. Nor does this rule authorize the discovery or inspection of
35 statements made by prospective government witnesses except as provided in 18

1 U.S.C. § 3500.

2 **(3) *Grand Jury Transcripts.*** This rule does not apply to the discovery or
3 inspection of a grand jury's recorded proceedings, except as provided in Rules
4 6, 12(h), 16(a)(a) and 26.2.

5 **B. Materiality Element for All Other (specified or unspecified)**

6 **Criminal Discovery Requests.**

7 With regard to Defendant's criminal discovery requests that are not covered
8 by Rule 16(a), *Brady, Jenks, Giglio, Henthorn, et al*, the United States submits that
9 they constitute nothing more than a general request for information pursuant to
10 Federal Rule of Criminal Procedure 16(a)(1)(C), and Defendant has not described
11 the materials sought (other than broad categories) and has not provided any
12 argument that the requested information is "material" to the preparation of
13 Defendant's defense.

14 These omissions warrant the Court's summary denial of any remaining or
15 unspecified discovery demands. See *United States v. Cadet*, 727 F.2d 1453, 1466
16 (9th Cir. 1984)(quoting *United States v. Conder*, 423 F.2d 904, 910 (6th Cir.), cert.
17 denied, 400 U.S. 958 (1970)). "As a matter of general construction '[t]he measure of
18 discovery permitted by the Rules of Criminal Procedure is not intended to be as
19 broad as in a civil case.'" *United States v. Ross*, 511 F.2d 757, 762 (5th Cir.), cert.
20 denied, 423 U.S. 826 (1975)(citations omitted). The scope of disclosure under Rule
21 16(a)(1)(C) is "necessarily circumscribed by the Rule's materiality requirement."
22 *United States v. Buckley*, 586 F.2d 498, 506 (5th Cir.), cert. denied, 440 U.S. 982
23 (1979).

24 Under Rule 16(a)(1)(C), "materiality means more than that the evidence in
25 question bears some abstract logical relationship to the issues in the case." *Ross*, 511
26 F.2d at 762. Furthermore, "[t]here must be some indication that the pretrial
27 disclosure of the disputed evidence would have enabled the defendant significantly

UNITED STATES' RESPONSE TO DEFENDANT'S DISCOVERY MOTION

Page 8

1 to alter the quantum of proof in his favor." *Id.* at 763. The Defendant bears the
2 burden of demonstrating that a requested item meets the standard of materiality, 8
3 Moore's Federal Practice § 16.05[1] (1990), as the government need not prove a
4 negative, i.e., that documents are not material. See, e.g., *United States v. Barnett*,
5 587 F.2d 252, 258 (5th Cir.), cert. denied, 441 U.S. 923 (1979). Indeed, in order to
6 obtain discovery under Rule 16(a)(1)(C), the Defendant must make a *prima facie*
7 *showing of materiality* by presenting facts which tend to show that the government
8 is ii) in possession of the information and ii) the information would be helpful to the
9 defense. See *United States v. Little*, 753 F.2d 1420, 1445 (9th Cir. 1984); *Cadet*, 727
10 F.2d at 1466, 1468; *Buckley*, 586 F.2d at 506.

11 The following do not meet the necessary *prima facie* showing of materiality:
12 (1) "blanket demands;" (2) general descriptions of the material sought; (3)
13 conclusory arguments as to materiality; (4) a request for all relevant evidence; or (5)
14 a hunch that documents will reveal similar fact patterns occurring in the past. See,
15 e.g., *United States v. Carrasquillo-Plaza*, 873 F.2d 10, 12 (1st Cir. 1989); *Little*, 753
16 F.2d at 1445; *Cadet*, 727 F.2d at 1468; *United States v. Flores*, 540 F.2d 432, 438
17 (9th Cir. 1976); *Ross*, 511 F.2d at 763; *Shoher*, 555 F. Supp. at 353. Courts have
18 repeatedly rejected as insufficient to satisfy the burden of proving materiality general
19 demands like those of the defendants. See, e.g., *Ross*, 511 F.2d at 763 (commenting
20 on Rule 16(b), the predecessor of 16(a)(1)(C)).

21 Whether labeled as Rule 16 or Brady, several of Defendant's requests in
22 general are fatal, particularly since the Defendant makes no attempt whatsoever to
23 show that the documents he requests even exist, let alone how the unidentified,
24 unspecified documents will be material to the preparation of his defense. Without
25 such a showing, the Court must deny the Defendants' Rule 16(a)(1)(C) motions.

26 The First Circuit has responded to broad discovery requests in the following
27 way, which the United States submits is the proper response to Defendant's current

UNITED STATES' RESPONSE TO DEFENDANT'S DISCOVERY MOTION

Page 9

1 discovery motions:

2 [Defendant] simply insists that the supposedly vast resources and the
3 large number of trained personnel available to the prosecutor should have
4 been utilized for [defendant's] benefit to facilitate a review of all
5 possibly relevant records held by government or government-regulated
6 agencies. **This position goes well beyond any requirements of the
7 law.**

8 *United States v. Edgewood Health Care Center*, 608 F.2d 13, 15 (1st Cir. 1979)
9 (emphasis added), cert. denied, 444 U.S. 1046 (1980).

10 **C. Defendant's Nineteen (19) Various Discovery Requests.**

11 With the foregoing criminal discovery limitations in mind (*see Section A and B*
12 *above*), the United States provides the following more detailed response to Defendant's
13 expansive, multi-category discovery request.

14 **1. Defendant's Statements to Government Agent(s) or Before Grand**
15 **Jury (Defendant's Request Categories #1 and 2).** The Defendant was not arrested
16 and also declined to be examined by DOJ attorneys and/or agents. Further still, while
17 the Defendant was offered an opportunity to appear and testify before the grand jury,
18 the Defendant declined the United States Department of Justice's invitation.

19 Consequently, the United States' is presently unaware of any statement or by the
20 Defendant or other discovery that might be responsive to this discovery request. To the
21 extent there are any other statements by the Defendant that arguably falls within this
22 category (i.e., Defendant statements to government investigators), they have already
23 been disclosed (e.g., SPD reports and transcript of Defendant's recorded interview of
24 March 22, 2009, see *Exhibit #1 to U.S. Memo Opposing Bill of Particulars*).

25 The United States will provide statements of the Defendant pursuant to Fed. R.
26 Crim. P. 16(a)(1)(A) and (B). However, Rule 16 discovery does not include oral
27 statements of a defendant which are not in response to interrogation. *United States v.*
Von Stoll, 726 F.2d 584 (9th Cir. 1984). Additionally, the government need not disclose

1 any voluntary oral statements. Nor is disclosure required unless defendant knew that he
2 was talking to a government agent. Moreover, the Jencks Act, 18 U.S.C. §3500,
3 prohibits pretrial disclosure of witnesses' statements even when such statements contain
4 quotations allegedly attributable to the defendant. *United States v. Hoffman*, 794 F.2d
5 1429 (9th Cir. 1986).

6 To the extent Defendant's discovery request seeks defendant's oral statements to
7 non-governmental third parties, they are not discoverable unless they are *Brady*
8 material. *United States v. Hoffman*, 794 F.2d 1429, 1431-33 (9th Cir. 1986)(court's
9 discovery order for defendant's oral statements to third parties overturned on appeal);
10 *United States v. McClure*, 734 F.2d 484, 492-93 (10th Cir. 1984); *United States v.*
11 *Pollack*, 534 F.2d 964, 975-76 (D.C. Cir.), cert. denied, 429 U.S. 924 (1976); *United*
12 *States v. Bronk*, 604 F. Supp. 743, 746 (W.D. Wis. 1985).

13 To the extent applicable, the United States will supplement pursuant to Rule
14 16(c) its disclosure of further responsive and discoverable statement materials that may
15 come into the government's possession while this case, the on-going investigation,
16 and/or trial preparation continues. Therefore, this request should likewise be denied as
17 moot.

18 **2. Defendant's & Witnesses' Criminal Histories (Def. # 3, 11, 14, 18).** The
19 United States has either provided or will be providing all criminal history information
20 that it currently has in its possession. Therefore, these discovery requests (#3,11, 14, 18)
21 should be denied as moot.

22 **3. Rule 16(a)(1)(E) – "Documents and Tangible Objects" (Def. # 4, 5, 7,**
23 **9, 10, 11, 12, 13, 16, 17, 18 and 19).** Far from being the "broad" discovery device
24 Defendant apparently believes it to be, Crim. Rule 16 narrowly defines discovery, in
25 keeping with the proposition that criminal discovery is much more limited than its civil
26 counterpart. See *United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980), cert.
27 denied, 449 U.S. 1126 (1981).

1 At this writing, the government has produced and/or will produce well in advance
 2 of trial all information which falls within Rule 16(a)(1)(C)'s parameters, namely:
 3 “documents ... [and materials] which are within the possession, custody or control of the
 4 government, and which are material to the preparation of the defendant's defense or are
 5 intended for use by the government as evidence in chief at the trial, or were obtained
 6 from or belong to the defendant.” *See* Fed. R. Crim. P. 16(a)(1)(C).

7 Should the government receive additional tangible records, materials, and/or as
 8 this case and the United States on-going investigation and trial preparation continues,
 9 the United States will supplement its disclosure in accordance with its continuing duty
 10 under Rule 16(c). Therefore, the Court should deny this discovery as moot.

11 **4. Expert Reports, Drafts, Exams, Tests & Experiments (Def. #5, 6, 15).**

12 The United States has already disclosed all of the SPD’s investigative file materials that
 13 may have some materials responsive to these discovery request categories. With regard
 14 to further substantive disclosure of expert reports, exams, tests, and/or experiments, the
 15 United States will timely disclose these materials well in advance of trial and in
 16 accordance with the obligations set forth in Rule 16(a)(1)(G) and (F). As the Court is
 17 aware, rebuttal experts and their materials are not required to disclosed pre-trial. *Id.*

18 Therefore, the Court should deny this discovery request (#5, 6, 15) as moot.

19 **5. Request For Statements, Notes, Reports re: Jenks Act, Brady, and**
 20 **FRE 801(d)(2)(E) Materials (Def. #7, 8, 9, 11, 12, 16, 18, 19).** It is the general rule in
 21 non-capital cases that the Defendant has no right to discover the names and addresses of
 22 prospective government witnesses prior to trial. *United States v. Steel*, 759 F.2d 706,
 23 709 (9th Cir. 1985). Thus, a defendant has no right to a list of witnesses from the
 24 government. *United States v. Dreitzler*, 577 F.2d 539 (9th Cir. 1978), *cert. denied*, 440
 25 U.S. 921 (1979); *Yeargain v. United States*, 314 F.2d 881 (9th Cir. 1963). Although the
 26 Court does have authority to direct the pre-trial exchange of witnesses, this case is not
 27 involve the multitude of witnesses – victims and 30 years of conduct involved in *U.S. v.*

1 *Grace*, 526 F.3d 499 (9th Cir. 2008).

2 Further, equally important, there has not been any particularized showing here
3 to demonstrate a significant need of such production. To require early and premature
4 disclosure of the names of potential government witnesses would be to give little, if
5 any, meaning to the Jencks Act, 18 U.S.C. §3500, the purpose of which is, in part, to
6 protect witnesses from harm or influence. Likewise, statements of prospective
7 government witnesses are not discoverable pursuant to Fed. R. Crim. P. 16(a)(2). See
8 *United States v. Mills*, 641 F.2d 785 (9th Cir.), *cert. denied*, 454 U.S. 902 (1981).

9 The Jencks Act further limits compulsory pretrial discovery of statements made
10 by prospective government witnesses and makes them unavailable until such
11 witnesses have testified at trial. 18 U.S.C. §3500(a); *United States v. Taylor*, 802 F.2d
12 1108, 1118 (9th Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987) (court order contrary
13 to Jencks Act was unenforceable).

14 To the extent the United States can or could assert *Jenks* (i.e., no waiver by
15 providing substantial, if not “open file” discovery of significant number of witness
16 “statements”), Defendant’s expansive discovery request for “statements,” whether
17 couched as a Rule 16, *Jenks*, *Brady*, or FRE 801(d)(2)(E) motion, are simply not
18 discoverable, unless the materials involved actually meet the statutory definition of
19 “statement” in 18 U.S.C. § 3500. If such documents contain Brady information,
20 Defendant is entitled to the timely disclosure of the Brady information, but not the
21 government's work product. See Fed. R. Crim. P. 16(a)(2).

22 Most of the Defendant's discovery request categories for "statements" are, in
23 essence, *Jencks Act* requests labeled as something else. Defendant's broadly-worded
24 requests attempts to extend criminal discovery beyond that required by the Jencks Act,
25 Brady or Rule 16. Unless the material the Defendant seeks meets the definition of
26 "statement" in the Jencks Act, the Court must deny the defendants' requests for
27 statements, reports, and notes.

1 As the Court is aware, the *Jencks Act* strikes a balance between the
2 government's interest in limiting a defendant's access to its files and a defendant's
3 entitlement to reports and statements relevant to a witness' testimony at trial. In order
4 to achieve both these goals, the Act requires that a defendant first meet the burden of
5 specifying with reasonable particularity . . . that a certain document exists, that there is
6 a reason to believe that the document is a statutory 'statement,' and that the
7 Government failed to provide it in violation of the Act. *United States v. Robinson*,
8 585 F.2d 274, 280-81 (7th Cir. 1978), cert. denied, 441 U.S. 947 (1979). Defendant
9 has failed to meet this burden here as he has not identified with any degree of
10 particularity any *Jencks* statement that the government must produce. Additionally, the
11 Defendant has not cited law in support of his overly expansive and suggested broad
12 definition of "statement." Further, notes are not openly discoverable. See *U.S. v.*
13 *Bobadilla-Lopez* (9th Cir.1992), *rev. den.* (1993) (holding that incomplete notes are
14 not statements and are not discoverable); *U.S. v. Alvarez*, (9th Cir. 1996) (holding that
15 agent's radio transmissions are also incomplete statements under Jenks, are subject to
16 distortion, and are not discoverable).

17 If Defendant is seeking discovery of what are essentially non-hearsay statements
18 that may be used against them at trial, in accordance with Federal Rule of Evidence
19 801(d)(2)(E), there is no support for such a request. See, e.g., *United States v.*
20 *Mayberry*, 896 F.2d 1117, 1122 (8th Cir. 1990) (co-conspirators' statements admissible
21 under 801(d)(2)(E) not discoverable under 16(a)(1)(A)); *United States v. Tarantino*, 846
22 F.2d 1384,1417-18 (D.C. Cir. 1987), cert. denied, 488 U.S. 867 (1988); *In re United*
23 *States*, 834 F.2d 283, 286 (2d Cir. 1987)(same); *United States v. Roberts*, 811 F.2d 257,
24 258-59 (4th Cir. 1987) (same) (en banc); *United States v. Green*, 144 F.R.D. 631, 638
25 (W.D.N.Y. 1992)(same).

26 Although the law does not require the government to produce Defendant's
27 statements to others or 801(d)(2)(E) statements, the government's generous production

UNITED STATES' RESPONSE TO DEFENDANT'S DISCOVERY MOTION

Page 14

1 and planned future disclosures include documents responsive to Defendant's overbroad
2 requests. To the extent these sections of Defendant's discovery requests impliedly
3 demand production of FBI 302 Reports and government interview reports, the
4 government responds *infra* under Section 9 of this brief.

5 Certainly, any *Brady* material within an otherwise *Jenks* protected statement
6 will be disclosed in sufficient time for the Defendant to use the favorable material
7 effectively in the preparation or in the presentation of his case. *See Brady v.*
8 *Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and its 9th Circuit
9 progeny.

10 Notwithstanding the *Jenks Act* protection from pre-trial disclosure, the United
11 States has already provided Defendant with a significant amount of witness-officer
12 statements. *See SPD Investigative File disclosure, Def. Discovery Disc. #1*. The
13 United States reserves, however, its right to assert *Jenks Act* disclosure protections to
14 certain selected witness statements. In the event, *Jenks* is asserted, it will be applied
15 only to a limited number of witnesses and the United States is contemplating that the
16 subject *Jenks* statements involved will still be disclosed in advance of trial (e.g., when
17 other trial materials are disclosed).

18 **6. Witness List (Def. #8).** With respect to Defendant's request for witness
19 list, he is not entitled to a witness list at this stage of the proceedings. *See*
20 *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977); *United States v. Edwards*, 47 F.3d
21 841, 843 (7th Cir. 1995); *United States v. Metropolitan Enterprises, Inc.*, 728 F.2d
22 444, 451 (10th Cir. 1984). While the Court may require pre-trial disclosure and/or
23 exchange of witness lists, this case does not involve an unmanageable number of lay
24 witnesses, expert witness, or victims. *See U.S. v. W.R. Grace*, (involving 30 years of
25 conduct, disclosure of hundreds of victims, experts, and others). The discovery in this
26 case is more than sufficient for Defendant to identify persons with personal
27 information about the events involved.

1 The United States proposes the mutual disclosure a witness lists and addresses
2 two weeks before trial and/or disclosure in accordance with the Court's Order.
3 Therefore, the Court should deny this discovery (Def. #8) request as moot.

4 **7. Substance of Witness's (or Person's) Knowledge Of Facts (Def. #8).**

5 The Defendant is not entitled to a "summary" of the nature of a witness's
6 testimony. Further, if he's not entitled to a "summary" of the substance of a person's
7 knowledge or anticipated testimony, then he certainly is not entitled to know the identity
8 of "every" person that has "knowledge" of one or more facts of the charged offense.

9 Notwithstanding, a witness list will be provided to Defendant when the United
10 States files in pretrial materials (i.e., Trial Brief, Jury Instructions, Requested Voir Dire,
11 and Motion In Limine) two weeks before trial

12 As indicated above, approximately 10,400 pages of "hard copies" of discovery
13 and another 13.54 GB of electronic discovery have been produced. Defendant has also
14 been informed that a protective order is likely needed in order to disclose medical
15 records of the victim Otto Zehm and other similarly protected records. The hard pages
16 of discovery produced already detail local law enforcement's investigation activities.
17 These records also include statements made by Defendant and other persons with
18 knowledge. Accordingly, the Court should deny this request (Def. #8) as moot.

19 **8. Investigative Officer Reports (Def. #9).** The SPD's investigative file
20 materials have been disclosed to Defendant. The United States anticipates disclosing
21 substantially all otherwise discoverable (pre-trial) reports before or shortly after the
22 currently set pre-trial (save a certain limited number of *Jenks Act* statements, which will
23 still be disclosed shortly before trial). Notes, however, are not discoverable absent
24 showing of materiality and exceptional need. *United States v. Ramos*, 27 F.3d 65, 69-70
25 (3d Cir. 1994)(agents notes or 302 reports not discoverable); *United States v. Carroll*, 26
26 F.3d 1380, 1391 (6th Cir. 1994)(same); *United States v. Williams*, 998 F.2d 258, 269
27 (5th Cir. 1993)(same), cert denied, 127 L. Ed. 2d 230 (1994); *United States v. Willis*,

UNITED STATES' RESPONSE TO DEFENDANT'S DISCOVERY MOTION

Page 16

1 997 F.2d 407, 413-14 (8th Cir. 1993)(same), cert. denied, 126 L. Ed. 2d 670 (1994);
 2 *United States v. Shannahan*, 605 F.2d 539, 542 (10th Cir. 1979); see also *United States*
 3 *v. Pierce*, 893 F.2d 669, 674-75 (5th Cir. 1990)(attorney interview notes), cert. denied,
 4 506 U.S. 1007 (1992).

5 The majority of Defendant's discovery request here (#9) is moot and the
 6 remainder should be denied.

7 **9. All mental & Psychiatric Records of Individuals Identified as**
 8 **Witnesses, Investigating Officers, Cooperation Individuals (Def #10).** Absent a
 9 showing of materiality as required under Rule 16 (or as required under *Brady* or other
 10 discovery principles.), this request must be denied. *See also Section B, supra.*

11 **10. Brady, Exculpatory, Impeachment & Inconsistent Statement**
 12 **Materials (Def. # 11, 16, 17, & 18).** The government will comply with *Brady v.*
 13 *Maryland*, 373 U.S. 83 (1963) and *United States v. Agurs*, 427 U.S. 97 (1976) in
 14 disclosing exculpatory material within its possession which is material to the issue of
 15 guilt or punishment. *United States v. Gardner*, 611 F.2d 770, 774 (9th Cir. 1980).
 16 Thus, the defendant will be advised of any known material impeachment evidence,
 17 felon records, and probation or parole status, if any, of any of the government's
 18 witnesses. Defendant will also be advised of any written or oral agreements with
 19 government witnesses, if any, before their testimony, and defense counsel will be
 20 free to explore the witnesses' understanding of any written or oral agreements on
 21 cross examination. *United States v. Rinn*, 586 F.2d 113 (9th Cir. 1978), *cert. denied*,
 22 441 U.S. 931 (1979).

23 The "rationale underlying *Brady* is not, however, to supply a defendant with
 24 all the evidence in the Government's possession which might conceivably assist the
 25 preparation of his defense, but to assure that the defendant will not be denied access
 26 to exculpatory evidence known only to the Government." *U.S. v. Shoher*, 555
 27 F.Supp. 352 (citations omitted). Thus, although *Brady* obliges the government to

UNITED STATES' RESPONSE TO DEFENDANT'S DISCOVERY MOTION

Page 17

1 turn over evidence in its possession that is both favorable to the defendant and
2 material to his guilt or punishment, *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987),
3 it does not obligate the government "to provide defense counsel with unlimited
4 discovery of everything known by the prosecutor." *United States v. Agurs*, 427 U.S.
5 97, 106, 109 (1976). Likewise, the government is not required "to facilitate the
6 compilation of exculpatory material that, with some industry, defense counsel could
7 marshal on their own." *U.S. v. Shoher*, 555 F. Supp. 346, 352 (S.D.N.Y. 1983).

8 Brady neither grants defendants neither unfettered access to the government's
9 files nor assures Defendants *in camera review* of those files to see if suspected
10 exculpatory evidence exists. See *United States v. Bagley*, 473 U.S. 667 (1985);
11 *United States v. Michaels*, 796 F.2d 1112 (9th Cir.1986), cert. denied, 479 U.S. 1038
12 (1987); and *United States v. Endicott*, 803 F.2d 506, 514 (9th Cir.1986).

13 The government is not obliged to disclose every bit of information that might
14 possibly affect the jury's decision; it need only disclose information favorable to the
15 defense that meets the appropriate standard of materiality. *United States v. Gardner*,
16 *supra*, at 774-75 (9th Cir. 1980). The Supreme Court describes the test for materiality
17 as whether or not the evidence "creates a reasonable doubt that did not otherwise exist."
18 *United States v. Gardner, supra*, at 774. Furthermore, *Brady* does not require the
19 government to create exculpatory material that does not exist, *United States v.*
20 *Sukumolachan*, 610 F.2d 685, 687 (9th Cir. 1980), but "only requires that the
21 government supply a defendant with exculpatory information of which it is aware."
22 *United States v. Flores*, 540 F.2d 432, 438 (9th Cir. 1976).

23 The government further notes that technically neither *Brady nor Agurs* creates
24 a pretrial right to discovery. *United States v. Agurs, supra. United States v. Allain*,
25 671 F.2d 248, 255 (7th Cir. 1982); *United States v. Beasley*, 576 F.2d 626, 630 (5th
26 Cir. 1978), cert. denied, 440 U.S. 947 (1979); *Talamante v. Romero*, 620 F.2d 784,
27 787 (10th Cir.), cert. denied, 449 U.S. 877 (1980); See also *Kyles v. Whitley*, 115 S.

UNITED STATES' RESPONSE TO DEFENDANT'S DISCOVERY MOTION

Page 18

1 Ct. 1555, 1567 (1995) (Brady does not mandate open file discovery) and *U.S. v.*
2 *Flores*, 540 F.2d 432, 438 (Brady does not create any pre-trial discovery privileged
3 not contained in the Federal Rules of Criminal Procedure).

4 Indeed, the Ninth Circuit has held that when the defense seeks material which
5 is both Jencks Act and *Brady* material, the Jencks Act controls. *United States v.*
6 *Jones*, 612 F.2d 453 (9th Cir. 1979), *cert. denied*, 445 U.S. 966 (1980). In
7 particular, since impeachment evidence, such as agreements between the
8 government and any participant, reflects only on the credibility of witnesses, not on
9 the preparation of any defense, such materials are clearly not disclosable at the time
10 of discovery. *United States v. Rinn*, *supra*, at 119. *Accord*, *United States v. Ruiz*,
11 536 U.S. 622, 631 (2002) (Supreme Court's trial-related rights to exculpatory and
12 impeachment information in *Brady* and *Giglio*, do not create a pre-plea right to
13 discovery). Therefore, this discovery (#11, 16, 17 18) request must also be denied
14 as moot.

15 **11. Tangible Materials, Recordings, and Videos (Def. # 12-13).**

16 The United States has already produced a substantial amount of discovery and
17 electronic materials, and agrees to continue to provide the Defendant these kind of
18 materials as the discovery in this case is processed and the government's on-going
19 investigation and trial preparation continues. *See also Section 3 (Tangible Documents,*
20 *etc., supra.* Therefore, this request should be denied as moot.

21 **12. Rule 404(b) Evidence (Def. #19).**

22 In accordance with Federal Rule of Evidence 404(b), the government will timely
23 provide the Defendant and the Court notice of its intention to use 404(b) at least two
24 weeks before trial. Plaintiff has already disclosed to Defendant all of his employment,
25 personnel, discipline, and internal affairs records it has received from LAPD, Kootenai
26 County Sheriff's Office, and the SPD. Therefore, the Court should also deny this
27 request as moot.

III. CONCLUSION

The United States has already made and will continue to make substantial pre-trial discovery disclosures, and will produce and/or make available all materially discoverable materials in its possession. However, the Defendant seeks, in part, expansive discovery and materials he is not entitled to receive under the criminal rules. Therefore and based on the foregoing memorandum, the United States respectfully requests the Court to deny Defendant's current discovery demands.

RESPECTFULLY SUBMITTED this 25th day of August 2009.

JAMES A. MCDEVITT
United States Attorney (EDWA)

s/ *Tim M. Durkin*
TIMOTHY M. DURKIN

Assistant U.S. Attorney
Attorneys for Plaintiff United States

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

Durkin, Tim M. (USAWAE)

From: Durkin, Tim M. (USAWAE)
Sent: Tuesday, March 17, 2009 11:32 AM
To: 'Treppiedi, Rocky'
Cc: Jangaard, Lisa (FBI)
Subject: RE: Zehm - Requested SPD Investigation Materials
Attachments: RE: Zehm, Otto - Preliminary Civil Rights Investigation by United States Department of Justice; RE: Zehm, Otto - Preliminary Civil Rights Investigation by United States Department of Justice; RE: Zehm, Otto - Preliminary Civil Rights Investigation by United States Department of Justice; Zehm, Otto - Preliminary Civil Rights Investigation by United States Department of Justice; RE: Zehm, Otto - Preliminary Civil Rights Investigation by United States Department of Justice

Rocky:

Thanks for your note and follow up on this discussion item from last Friday.

I appreciate Det. Ferguson's perceptions, but the FBI has not received copy of her case file materials nor has it had independent access to the case file. In fact, the copies that were made from produced from her file/Police Records were prepared either her or under the direction of Asst. Chief Odenthal. *See attached e-mail exchanges which reflect some of our conversations re: SPD records and Detective Ferguson's case file.*

As indicated in one or more of the attached, we did receive certain copies of records from Det. Ferguson's file, which were filed with police records (see attached), but DOJ has never been provided with a complete copy of Det. Ferguson's work materials and/or "investigative file."

SA Jangaard did make some requests for additional records from Det. Ferguson, but it was Ms. Ferguson who produced copies of those requested records (i.e., Det. Ferguson's "notes"). Ms. Jangaard did not take possession of the Detective's case file and then copy the notes.

Regardless of the apparently misunderstanding, we very much appreciate Det. Ferguson making us a complete copy of all records that she has related to her work in the Otto Zehm investigation (i.e., a complete copy of her entire case file and any other investigative records-materials-files that she may have on the Otto Zehm investigation). My understanding is that Det. Ferguson's copy production will include the Major Crimes' log for the evening of March 18, 2006.

Please also be sure to have Ms. Ferguson bring all records/materials that have been created and/or generated her or other SPD members or agents since the SPD's initial production of investigative materials that occurred on or about July 13, 2006 (see attached e-mail confirming receipt of initial records production to Resident Sr. Supervisory Agent Frank Harrill).

Thank you Rocky for yours and Det. Ferguson's cooperation and assistance in this regard.

Tim M. Durkin
Assistant United States Attorney
P.O. Box 1494
Spokane, WA 99210-1494
(509) 353-2767

Notice: This e-mail is the property of sender and/or United States. You are not authorized to use, copy and/or disclose the existence or contents of this e-mail without the express permission of sender. If you are not the intended recipient, please immediately contact sender and destroy and delete the e-mail and any and all copies. Please contact sender should you have any further questions. Thank you.

From: Treppiedi, Rocky [mailto:RTreppiedi@SpokaneCity.org]
Sent: Tuesday, March 17, 2009 8:07 AM
To: Durkin, Tim M. (USAWAE)
Subject: requested material

I spoke to Det. Ferguson about the log sheet and her case file. She said the FBI reviewed her file and copied what they were interested in a long time ago; they copied everything they wanted/needed. She's having the whole thing copied for you. She'll get the log sheet to you as well. Rocky.

Durkin, Tim M. (USAWAE)

From: Durkin, Tim M. (USAWAE)
Sent: Thursday, July 13, 2006 10:14 AM
To: Rocky Treppiedi (RTreppiedi@spokanecity.org)
Cc: Harrill, Frank M (LEO); Jangaard, Lisa C (LEO)
Subject: Zehm, Otto - Preliminary Civil Rights Investigation by United States Department of Justice

Rocky:

This is in follow up to our several telephone conversations and calls concerning the above matter.

As we previously discussed, the United States Department of Justice has opened a preliminary investigation of the Otto Zehm in-custody death and the FBI and my office needs to obtain a copy of all law enforcement materials related to the incident.

You indicated in our phone conversation this morning that you were meeting with Spokane PD Chief Jim Nicks this morning to discuss the current status of the Zehm matter, including the City Police Department's response to the United States Department of Justice's request for a copy of all "investigative materials" in the Zehm matter (i.e., meant to include all SPD-SCSO-WSP investigative records, including but not limited to law enforcement incident reports, officer use of force reports, Taser data-reports, all supervisory admin reports (sans any Internal Affairs-Professional Standards reports), all witness statements, all video, all audio recordings (i.e, CAD printout, 911 recordings/records/reports, SPD Dispatch recordings/records/reports, Officer radio recordings, medical examiner records, and any other law enforcement investigative records, photos, recordings related to the Otto Zehm arrest and in-custody death).

As we discussed, Main Justice in Washington D.C., specifically the Criminal Civil Rights Division and the headquarters of the FBI, both divisions under the direction of the U.S. Attorney General, has requested that a preliminary civil rights investigation be performed on the in-custody death of Otto Zehm. In conjunction with our office, Special Agent Lisa Jangaard of the FBI's Spokane Office has been designated the case agent to perform this preliminary investigation.

I also informed you that preliminary civil rights investigations are generally and routinely performed by the Department of Justice in most, if not all, deaths and/or serious injuries resulting from law enforcement's use of force (including, but not limited to in-custody deaths like Mr. Zehm's).

Consequently, please get back to me, after you have consulted with Chief Nicks, on how the City PD wants to respond to the Department Justice's request for a complete copy of the Otto Zehm law enforcement and investigative materials.

Thank you for your cooperation and assistance in this regard.

Timothy M. Durkin
Asst. United States Attorney
Eastern Fed. District of WA
Spokane, WA 99201
(509) 353-2767

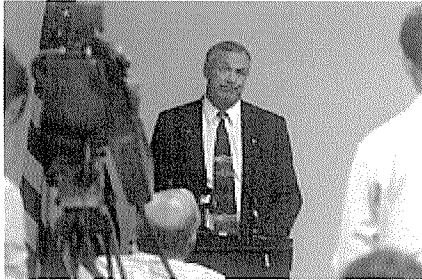
THE SPOKESMAN-REVIEW

October 5, 2006 in City

New evidence delays Zehm decision

Thomas Clouse / Staff writer

Tags: Otto Zehm Spokane Police Department



Spokane County Prosecuting Attorney Steve Tucker answers questions during a press conference at the Broadway Center Building in Spokane about his decision to postpone any charging decision in the Otto Zehm case.

The FBI has found new evidence in the fatal struggle between mentally ill janitor Otto Zehm and seven Spokane police officers, prompting Spokane County Prosecutor Steve Tucker to again delay a decision on possible charges.

FBI detectives have located and interviewed one witness Spokane police detectives never found. And, the FBI also got differing witness accounts from what local detectives put in their reports about what happened March 18 during the fatal confrontation, Tucker said.

“They feel they might have some more information that will be helpful in making a good decision,” Tucker said of the FBI investigators. “I haven’t seen any of the witness statements. I don’t know how they conflict. So, I’m waiting.”

Tucker’s announcement again delays his charging decision, which now could extend into next year. And the new witness and conflicting statements raise more questions about the thoroughness of the investigation done by Spokane police.

Deputy Chief Al Odenthal praised detectives at a July 13 news conference for their hard work in tracking down all the witnesses that were inside the Zip Trip, at 1712 N. Division St., on the night that two young women erroneously reported that Zehm stole money from their bank account at an ATM.

On Wednesday, Odenthal reiterated his belief that detectives had found all the people inside the store, pointing out that the department made several appeals for the witnesses to come forward.

As for the differing statements from the same witnesses, Odenthal added: "It's not unusual for stories to change over time.

"If the story was exactly the same (as what they previously told SPD detectives) we'd be concerned," Odenthal said. "That shows rehearsal."

Police officials blacked out all the names of the witnesses in the police reports released to the public, and efforts by The Spokesman-Review to contact witnesses have been unsuccessful.

But several people were inside the store March 18 when seven officers responded to the erroneous call. Officer Karl Thompson was the first to arrive and immediately engaged Zehm, 36, who grabbed a 2-liter bottle of soda and retreated down an aisle as Thompson began to strike him with a police baton.

Six more officers arrived and struggled to subdue Zehm. Eventually, the officers were able to bind Zehm's ankles to his wrists and they mostly kept him on his stomach, which police officials have said violates training because that position restricts breathing.

Then about three minutes after a police officer placed an oxygen non-rebreather mask over Zehm's mouth and nose, he stopped breathing. Paramedics rushed Zehm to Deaconess Medical Center where he never regained consciousness and died two days later.

Brean Beggs, one of the attorneys at the Center for Justice, again expressed his appreciation that the FBI is doing an independent investigation.

"We are glad that Tucker is cooperating and not going to make any decisions until he sees the results of the independent investigation," said Beggs, who is helping represent Zehm's mother. "We hope in the future that we will get to the independent investigation a lot sooner. It doesn't matter how well-intentioned or how professional you are, it's difficult to investigate your own team."

Tucker agreed.

"The federal people have no interest, really, in the local decisions and things. So they are very independent and can go about their own work and do their investigation without any bias whatsoever," Tucker said. "It's tough to investigate your own people."

Despite Spokane Mayor Dennis Hession's public announcement on July 27 that the FBI had initiated a preliminary review of the Zehm case, Tucker said he didn't know until two weeks ago that the FBI was investigating.

Frank Harrill, the special agent in charge of the FBI's Spokane office, called the probe a "comprehensive inquiry" looking to see if Zehm's civil rights were violated during the struggle with police.

Harrill couldn't estimate how long the FBI investigation will take, but another source said it likely will be next year before the federal review is complete.

Tim Byrne, 47, said he was good friends with Zehm, who recently had been unemployed from his job as a janitor and had stopped taking medication for his mental illness.

"Otto was a great kid," Byrne said. "It's bad it happened. Let's tell the cops not to let it happen again."

Tucker called Zehm's death a "terrible tragedy."

"Otto Zehm should not be dead. No one should die from a police encounter," Tucker said. "There is a combination of circumstances that resulted in his death."

Medical Examiner Sally Aiken previously ruled that Zehm died as a result of homicide, which generally means that he died at the hands of another person. But Tucker said he didn't have enough evidence to hold any of the officers criminally responsible.

Just last week Tucker obtained an enhanced copy of the surveillance tape from the Zip Trip, which was completed by a forensic video expert. Tucker said he watched the tape, which cost the Police Department about \$5,000, on his big-screen television at home.

"From what I had seen at the time, I didn't feel like there was enough to convince a jury beyond a reasonable doubt and get a conviction for assault," Tucker said.

Then Tucker met Monday with an assistant U.S. attorney and FBI investigators who told him "there might be more evidence that I haven't seen," Tucker said. "It was more of a warning that they are going to do their own video, and kind of a mistrust of the video that was redone here."

The federal investigators were checking with their protocols to determine what information

they can share with Tucker about the “inconsistencies” from the witness statements, Tucker said.

“I’m trying to keep an open mind until I see it all,” Tucker said.

Tucker, who is facing Democrat Bob Caruso in the Nov. 7 general election, said his candidacy had no impact on delaying his decision.

On Tuesday, Caruso said that if he wins the election he would call a grand jury to investigate the Zehm death.

Grand juries haven’t been used in the state in more than 50 years, Tucker said. Most prosecutors don’t use them because they take the decisions out of prosecutors’ hands.

“If it’s a bad decision, then the electorate can vote us out,” Tucker said.

Caruso, 68, who didn’t become an attorney until seven years ago, said that’s exactly what he hopes local voters will do.

“Spokane is too good for this stuff. That’s why I’m running,” Caruso said.

He said he has heard good things about Spokane County Sheriff Ozzie Knezovich, who is facing Democrat James Flavel on Nov. 7, and new Spokane Police Chief Anne Kirkpatrick, who declined to comment on the Zehm case until Tucker makes a decision.

“We could have the finest police chief and sheriff in the whole world,” Caruso said. But “without a prosecutor who is willing to prosecute crime and not waffle on these investigations, we’ve got nothing.”

Staff writers Bill Morlin, Benjamin Shors and Jody Lawrence-Turner contributed to this report.

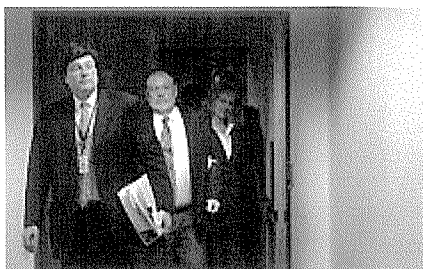
Get more news and information at Spokesman.com

THE SPOKESMAN-REVIEW

October 21, 2008 in City

Defense funds OK'd in case Zehm suit filed

Tags: Otto Zehm



Oreskovich

The Spokane City Council on Monday voted unanimously to pay as much as \$45,000 to a local attorney to defend the city against a possible lawsuit stemming from the death of Otto Zehm, who died in police custody in 2006.

The action allows the city to hire Carl Oreskovich for the case.

The death of the 36-year-old mentally disabled janitor triggered demands from the public for a full-time police ombudsman, launched a federal criminal investigation, and prompted a \$2.9 million damage claim against the city.

But while the claim, filed by the Center for Justice on behalf of the Zehm estate, has been received by the city, no lawsuit has been filed.

Monday's vote was "a preparedness issue," said City Councilman Mike Allen. "It's just being prudent."

Troopers on leave during diploma probe

A Spokane-based Washington State patrolman is among nine troopers placed on paid administrative leave last week pending the outcome of internal inquiry into whether they used fake diplomas to get pay raises.

Trooper Daniel Mann, of the Spokane office, is among those under investigation. The others are a trooper in Seattle; two sergeants and two troopers in Vancouver, Wash.; a pair of troopers in Wenatchee; and a sergeant in Kelso, Wash., WSP Capt. Jeff DeVere said.