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The Honorable Fred Van Sickle

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11
12 UNITED STATES DISTRICT COURT
13 EASTERN DISTRICT OF WASHINGTON

14 UNITED STATES,)
15 Plaintiff,) **NO. 09-cr-0088-FVS**
16 vs.) **First Supplement to**
17) **United States Initial Disclosure of**
18 KARL F. THOMPSON, JR.,) **Expert Witnesses**
19 Defendant.)

20
21 Plaintiff, United States of America, by and through James A. McDevitt, United
22 States Attorney for the Eastern District of Washington, and the undersigned attorney
23 of the U.S. Department of Justice submits the following information/notice under
24 Fed.R.Crim.P. 16(a)(1)(G) on the following witnesses, one or more of which the
25 United States may call to offer expert testimony at the time of trial.

I. RULE 16(a) Expert Disclosures

1 The United States has previously identified certain defensive tactics expert
2 witnesses and has previously provided summaries of their anticipated expert
3 opinions as well as written reports. The following law enforcement personnel are
4 combined “fact – expert” witnesses, who, due to their training, education and/or
5 experience, may be called at the time of trial and may be allowed to provide expert
6 testimony evidence in the area of defensive tactics, use of force, and/or appropriate
7 police procedures, for the purpose of aiding and assisting the jury in its
8 understanding of the various concepts and/or issues involved in the case:
9

10 **1. Robert Boothe, Senior Patrol Officer, Spokane Police Department,**
11 **Spokane.**

12 For approximately the past fourteen (14) years, Patrol Officer Robert Boothe
13 has been the lead defensive tactics instructor for the Spokane Police Department.
14 Officer Boothe has received both Level I and Level II defensive tactics instructor
15 certification from the Washington Criminal Justice Training Commission. This
16 program is supervised and administrated by Robert Bragg, another defensive tactics
17 expert disclosed by the United States.
18

19 Officer Boothe was also one of the Defendant’s use-of-force instructors at the
20 Basic Law Enforcement Academy, Spokane, and trained Officer Thompson in
21 acceptable defensive tactics and lawful use of force levels. In addition to providing
22 factual testimony, it is anticipated that Officer Boothe, if called at trial, is qualified
23 to provide one or more of the following expert testimonials:
24

- 25 • SPD Detective Terry Ferguson of the Major Crimes Unit solicited Officer
26 Boothe’s analysis of the defensive techniques that Officer Thompson applied
27 on Otto Zehm. However, Detective Ferguson only provided Officer Boothe
with limited information (i.e., two (2) video angles) about the incident and her

1 own overview and recital of the underlying “suspicious circumstances” call
2 she stated Officer Thompson was investigating;

- 3 • Based on a more detailed review of Officer Thompson’s recorded statement,
4 in comparison to what is reflected on the Zip Trip store security video, there
5 was no objective basis authorizing the use of an impact weapon targeted at
6 Mr. Zehm’s head, neck, or above the shoulders (i.e., no lethal force
7 authorized);
- 8 • Spokane Police Department use of force policy is defined on a “reasonable
9 officer” standard. This is the same standard used by the Courts to determine
10 the lawfulness of an officer’s use of force;
- 11 • In order for a Spokane Police Department officer to use an impact weapon on
12 a subject (i.e., a baton), the subject has to be “assaultive” or there must be an
13 “objectively reasonable” basis to perceive that the subject is “about to be
14 assaultive.” An officer’s “subjective” belief that is not reasonably supported
15 by “objective evidence” will not support an officer’s unreasonable use of
16 force;
- 17 • The use of a taser on a subject is objectively unreasonable unless the subject is
18 “actively assaultive” or there is an objectively reasonable apprehension that an
19 “assault is imminent.” The firing of a taser at Otto Zehm, who was actively
20 resistant but not actively assaultive, was objectively unreasonable and is
21 contrary to the Department’s defensive tactics training, and violated Spokane
22 Police Department policies;
- 23 • Based on the video, Otto Zehm is retreating the entire time that Officer
24 Thompson is advancing upon him and attacking him with his baton;
25 Therefore, Otto Zehm is “actively resistant” but was not “assaultive.” It was
26 not objectively reasonable for Officer Thompson to believe that Mr. Zehm
27 was “about to charge” or “about to be assaultive” toward Officer Thompson.
Therefore, there was no reasonable threat to Officer Thompson and Officer
Thompson’s use of an impact weapon was objectively unreasonable and
violated Spokane Police Department use of force policies;
- After Otto Zehm was knocked to the ground, it does not appear from the video
that Otto Zehm used the Pepsi bottle as a weapon against the Officer. Rather,

1 Otto Zehm appears to be using the Pepsi bottle defensively. Given this, it was
2 objectively unreasonable and a violation of Spokane Police Department policy
3 for Officer Thompson to utilize a taser on a passively and/or actively resistant,
but not assaultive (or about to be assaultive) Otto Zehm;

- 4 • Based on the video, Otto Zehm did not, as Officer Thompson claimed stand
5 up in the south aisle, take a boxing position, and throw punches at the Officer.
6 Officer Thompson's recorded statement describing Mr. Zehm in this manner
is inconsistent with the Zip Trip store's security video;
- 7 • Based on Officer Thompson's description of Zehm, in comparison to the
8 events objectively captured by the security video, Officer Thompson's use of
9 force is not objectively reasonable;
- 10 • Any baton strikes by Officer Thompson targeted at Mr. Zehm's head, neck,
11 and/or above Mr. Zehm's shoulders is deemed "lethal force," which level of
12 force would not have been warranted or objectively reasonable in this case;

13 The foregoing opinions are based on Officer Robert Boothe's extensive law
14 enforcement experience, his years in training and performing reviews of force
15 incidents, the SPD's investigation, Officer Thompson's statement to SPD
16 investigators, Officer Thompson's law enforcement training and experience, and the
17 objectively recorded Zip Trip store security video. Officer Boothe's background,
18 training, written report, SPD-MCU investigative report, and his prior sworn Jencks
19 Act statement has been previously produced to Defendant's counsel.

20
21 **2. Jason Uberuaga, Patrol Officer, Spokane Police Department,**
22 **Spokane, Washington.**

23 Mr. Uberuaga has a degree in Criminal Justice from Gonzaga University. He
24 has attended and has been certified as a defensive tactics instructor through the
25 Washington State Criminal Justice Training Commission. Officer Uberuaga also has
26 been a member of the SPD's Tactical Response Team and Dignitary Security Team.
27

1 Based on Officer Karl Thompson's interview statement in comparison to the
2 Zip Trip security store video, among other evidence to be admitted at the time of
3 trial, the United States anticipates that Officer Uberuaga, if called, may provide, in
4 addition to any factual testimony, one or more of the following summarized expert
5 testimonials:

- 6 • Much of the articulated basis for Officer Thompson's use of force, as claimed
7 in his recorded statement, is inconsistent to the action captured on the Zip Trip
8 security store video;
- 9 • Officer Thompson also did not "stop" at any time to give his claimed verbal
10 commands to Otto Zehm;
- 11 • From the time that Otto Zehm turned and responded to Officer Thompson's
12 rapid advance, with baton ready to strike, Otto Zehm did not take a position of
13 aggression against Officer Thompson;
- 14 • Specifically, in response to Officer Thompson's rapid advance, Otto Zehm did
15 not take a "charged position";
- 16 • From the time that Otto Zehm turns and observes Officer Thompson's rapid
17 advance, with baton in a ready strike position, Otto Zehm continuously
18 retreats away from Officer Thompson;
- 19 • Officer Thompson's statement that Otto Zehm only turned away from the
20 Officer after he delivered his first baton strike, allegedly to Zehm's left upper
21 thigh, and that he then grabbed the back of Zehm's coat collar to deliver a
22 second baton strike, allegedly to Zehm's right upper thigh, is not consistent
with the Zip Trip store's security video;
- 23 • Officer Thompson's recorded statement claiming that Otto Zehm, after being
24 knocked to the ground by Officer Thompson's two (2) baton strikes and then
25 being tased, got back up on his feet and engaged in a boxing stance in the
26 south aisle, from which standing boxing stance Zehm allegedly threw punches
27 at Officer Thompson, is not supported by the events captured by the
objectively recorded Zip Trip security video;

- 1 • Officer Thompson’s statement that he perceived the retreating Zehm to take a
2 “charged position,” which position Officer Thompson claims he felt Zehm
3 was going “charge him,” is not supported by the Zip Trip store security video,
4 which only shows Zehm retreating from Officer Thompson’s rapid advance;
- 5 • Officer Thompson’s stated perception that Otto Zehm took a fixed, loaded,
6 defiant position, with “the plastic pop bottle,” which Officer Thompson stated
7 was the basis for allegedly perceiving that Zehm was “about to charge” him, is
8 contradicted by the Zip Trip store security video and not objectively
9 reasonable;
- 10 • Based on the store security video, it would be objectively unreasonable to use
11 an impact weapon upon a retreating, non-compliant or actively resistant
12 Zehm, and the use of an impact weapon violates Spokane Police Department’s
13 use of force model, policies and training;
- 14 • The delivery of any baton strike targeted above Otto Zehm’s shoulders (i.e.,
15 head and neck) constitutes lethal force, and the use of any lethal force on Otto
16 Zehm was not objectively reasonable nor supportable under the
17 circumstances;
- 18 • Although the security video conflicts with Officer Thompson’s description of
19 Otto Zehm’s behavior, I will defer to Officer Thompson’s “subjective beliefs”
20 as to why he used force;
- 21 • Despite Officer Thompson’s subjective beliefs-statements to the contrary, the
22 Zip Trip security video does not support Officer Thompson’s physical
23 description that: i) He stopped at a distance of four feet to give verbal
24 commands to Zehm; ii) that Zehm stood his ground and was defiant in
25 response to the alleged verbal commands; iii) that Zehm was physically
26 “aggressive” toward him; and/or iv) that Zehm was “about to charge” him.
27

The foregoing opinions are based upon the Officer’s extensive law enforcement experience, his years in training and review of force incidents, Officer Thompson’s statement and his law enforcement training and experience, and the Zip Trip store’s

1 security video. Officer Uberuaga's education, training, and experience; his detailed
2 SPD Incident Report, and his previously sworn Jencks Act statement has been
3 previously produced to Defendant's criminal counsel.

4 **3. Scott Lesser, Detective, Spokane Police Department, Spokane,**
5 **Washington.**

6 Detective Lesser is a twenty-three (23) year veteran with the Spokane Police
7 Department. He is also the Spokane Police Department's certified taser instructor.
8 Detective Lesser is currently the lead instructor for the taser program in the Spokane
9 Police Department. Detective Lesser attended an advanced taser instruction
10 certification course in July 2002 and received an additional instructor's certification
11 for the M26 taser on July 10, 2002. In January 2004, Detective Lesser received
12 additional taser instruction for the M26 and X26 tasers. He was recertified as an
13 instructor on January 14, 2004. A copy of Detective Lesser's detailed report, Det.
14 Ferguson's report of interacting with Det. Lesser, Det. Lesser's prior sworn Jencks
15 statement and testimony, and a summary of his work experience and training has
16 been previously provided to Defendant's counsel.

17
18 If called to testify at the time of trial, it is anticipated that Detective Lesser,
19 in addition to factual testimony, may provide one or more of the following expert
20 witness testimonials:

- 21
- A download of Officer Thompson's taser showed that it was discharged (i.e.,
22 the trigger was pulled) at approximately 13:25:15 hours on March 18, 2006.
23 This was likely a test discharge when the Officer came on duty. The second
24 discharge occurred at approximately 19:21:49 hours, when Officer Thompson
25 reportedly fired his taser at Otto Zehm. Detective Lesser noted the date
26 stamp on Defendant Thompson's taser was correct; however the time stamp
27 was not. With regard to Officer Steve Braun, Jr.'s taser, Detective Lesser
examined the taser and confirmed that there were four (4) applications on
March 18, 2006. The first application was at approximately 18:13:04, which

1 is reportedly when Officer Braun, at Officer Thompson's request fired his
2 taser at Zehm; the second five (5) second application was at 18:14:10, when
3 Thompson reportedly directed Braun to drive stun Zehm; the third, five (5)
4 second discharge was at 18:14:21, and a fourth, five (5) second discharge was
5 at 18:14:29. The time of the discharges are not consistent with the actual time
6 that Officer Thompson engaged Zehm and then had Officer Braun taser Zehm.
7 The fourth taser discharge is inconsistent with Officers Thompson's and
8 Braun's statements;

- 9 • Upon firing the probes of a taser, the probe spread is one (1) foot of separation
10 for every seven (7) feet of distance between the taser and the target. The
11 further apart the probes spread, the more effective the application. The
12 optimal application is from a distance of twelve (12) to twenty (20) feet. The
13 reason for this is when probes are in close proximity, only a small portion of
14 the body is affected by the taser's electrical current. The taser has two
15 defensive aspects: 1) it disrupts the subject's motor nervous system or
16 muscles; and 2) inflicts pain to try to gain compliance;
- 17 • Upon impact, the taser's electrical current travels over the area between the
18 two probes. The fired probe is still effective if only one of them penetrates
19 skin and the other penetrates clothing. Taser International studies have shown
20 that electricity will travel through clothing, but will not inflict optimal force;
- 21 • The application of a drive stun is not as effective as firing probes. The
22 distance between the probes in a drive stun is approximately 1.5 inches, which
23 means that only a small area of the body is affected by the drive stun;
- 24 • With a successful probe (firing) application there will be a small sized hole
25 where the probe(s) enter the skin. A drive stun will usually leave a redness
26 similar to that of a minor burn;
- 27 • The firing of probes is only authorized on an "assaultive person";
- The application of a drive stun can be used with an "active resister";
- Spokane Police Department's policy provides that for an officer to fire /
deploy taser probes, the suspect must be displaying "assaultive behavior"
toward the officer or other subjects;

- Defendant Officer Thompson was trained on the Spokane Police Department's policy and has received appropriate taser deployment training;
- In 2005, Detective Lesser trained Officer Thompson on the Spokane Police Department's taser policy and the appropriate taser application, and the level of force a subject must present before an officer can utilize either a taser probe firing or a drive stun;

The foregoing opinions are based on Detective Lesser's extensive law enforcement experience, his years in performing reviews of force incidents and Detective Lesser's report in the underlying SPD investigation.

4. James E. Nicks, Assistant Chief, Spokane Police Department, Spokane, Washington.

Asst. Chief Nicks is a former Patrol Officer, Sergeant, supervisor of Patrol Officers, Detective, and Lieutenant in charge of supervising the SPD Patrol Division. Asst. Chief Nicks also has experience as a Shift Commander and a Patrol Captain. He also has experience as the Supervisor of SPD's Administrative Services. He has served as a Bureau Commander and as Asst. Chief for the past approximate eight (8) years. In January of 2006, Asst. Chief Nicks was appointed as the interim police chief until the current SPD Police Chief Anne Kirkpatrick was hired in September of 2006. Assistant Chief Nicks's background, experience and education have been previously provided to Defendant. Assistant Chief Nicks's previously sworn Jencks Act statement and written notes have been previously produced to Defendant's counsel.

If called to testify at trial, the United States anticipates that Asst. Chief Nicks may, in addition to his factual testimony, provide expert testimony in the form of

1 one or more of the following opinions:

- 2
- 3 • The Defendant Officer Thompson has years of training in defensive tactics,
4 dealing with emotionally disturbed individuals and hostage negotiations.
5 Officer Thompson is a highly trained law enforcement officer and should have
6 outstanding communications skills;
 - 7 • Asst. Chief Nicks would have expected the Spokane Police Department
8 investigation to have provided its in-house use of force instructors with a
9 thorough disclosure of the evidence concerning the “totality of the
10 circumstances” and to have secured opinions on: a) Was the use of force
11 lawful; b) Was the use of force objectively reasonable; and c) Was the use of
12 force in compliance with Spokane Police Department policy. The SPD Major
13 Crimes Unit investigation team did not perform these tasks;
 - 14 • The SPD Major Crimes Unit also failed to perform a side-by-side analysis and
15 comparison of Officer Thompson’s recorded statement against the objectively
16 recorded Zip Trip store security video;
 - 17 • Based on Officer Thompson’s statement in comparison to the Zip Trip store
18 security video, Officer Thompson’s baton strikes were not mostly
19 “horizontal” as claimed. Rather the baton strikes were more vertical and
20 applied in a downward manner. These vertical strikes are inconsistent with
21 the defensive tactics training provided to him on the use of a baton;
 - 22 • Based on the Zip Trip security store video, Officer Thompson did not stop to
23 engage in a verbal exchange with Otto Zehm (i.e., give orders) before the
24 rapid delivery of Officer Thompson’s first two baton strikes;
 - 25 • Based on the video, Otto Zehm is retreating the entire time from the rapidly
26 advancing Officer Thompson and does not take a position of aggress and/or
27 engagement toward Officer Thompson, and does not appear “about to charge”
and/or about to be assaultive” toward Officer Thompson;
 - Based on the video, during Officer Thompson’s initial engagement of Otto
Zehm, Mr. Zehm appears to be “passive resistant” and is not assaultive toward
the officer. Therefore Officer Thompson was not authorized under SPD Use
of Force policies to utilize an impact weapon on and/or strike Zehm;

- 1 • Based on the security video, Otto Zehm did not take a boxing stance and/or
2 throw punches at Officer Thompson in the south aisle. The objective video
3 evidence is inconsistent with Officer Thompson’s statement to SPD
4 investigators;
- 5 • When an officer is engaged in a “Terry stop,” the training emphasis is on
6 communication and notification that the subject is being temporarily detained
7 for further questioning relative to a “suspicious circumstance.” Officer
8 Thompson’s aggressive advance and rapid use of an impact weapon on Otto
9 Zehm, who was not assaultive nor reasonably appeared “about to charge” or
10 “be assaultive,” violated Spokane Police Department Use of Force policies;
- 11 • Based on the security video, Officer Thompson’s use of an impact weapon
12 was not objectively reasonable, was assaultive, and was of a level of force
13 higher than that authorized by the Spokane Police Department’s policies and
14 procedures governing law enforcement’s use of force on public citizens;
- 15 • It would be objectively unreasonable for Officer Thompson to use lethal force
16 against Otto Zehm. Lethal force isn’t even on the page here and would
17 constitute an unlawful assault;
- 18 • Based on the recorded events of the video and the inconsistencies in Officer
19 Thompson’s statement to Spokane Police Department investigators, Officer
20 Thompson’s use of a taser was not authorized and violated the Spokane Police
21 Department’s use of force policies;
- 22 • Asst. Chief Nicks is familiar with Spokane County’s Medical Examiner, Dr.
23 Sally Aiken, and would defer to her opinions on the existence of objective
24 medical evidence supporting the conclusion that Mr. Zehm sustained blunt
25 force trauma to the head, which blunt force trauma was consistent with one or
26 more baton strikes by Officer Thompson;

27 The foregoing opinions are based on Assistant Chief Nicks’ extensive law
enforcement experience, his years in performing reviews of force incidents, the
SPD’s investigation, Officer Thompson’s recorded statement and his law
enforcement training and experience, the Zip Trip store security video, Dr. Aiken’s

1 autopsy report, and expert opinion on blunt force injuries. All of these records and
2 materials are in Defendant's and his counsel's possession.

3
4 **II. Conclusion**

5 The United States reserves the right to supplement and/or modify these
6 additional expert disclosures as this case, discovery and the United States' on-going
7 investigation continues.

8 RESPECTFULLY SUBMITTED this 25th day of March 2010.

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

11 s/ *Tim M. Durkin*
12 TIMOTHY M. DURKIN
13 Assistant U.S. Attorney
14 Attorneys for Plaintiff United States
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Certificate of ECF and/or Mailing

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

Carl Oreskovich, Esq.

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

s/ Timothy M. Durkin

Timothy M. Durkin

Assistant United States Attorney

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