

Case No.
CA-10-3-167

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,
Appellant

v.

KARL F. THOMPSON, JR.,
Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
D.C. No. CR-09-0088-FVS-1

The Honorable Fred Van Sickle, *Senior United States District Judge.*

BRIEF FOR APPELLEE

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II. REQUEST FOR ORAL ARGUMENT

Defendant Thompson respectfully requests oral argument.

III. STATEMENT JURISDICTION AND BAIL STATUS

a. Jurisdiction of the District Court and United States Court of Appeals:

Appellee agrees with Appellant's Statements of Jurisdiction.

b. Bail Status:

Defendant is not in custody, subject to a \$50,000 unsecured appearance bond. R 15.

IV. STATEMENT OF THE ISSUES

Whether the district court abused its discretion by excluding evidence of a detainee's innocence under Federal Rule of Evidence 403 in the criminal prosecution of a law enforcement officer under 18 U.S.C. §§ 242 and 1519.

V. APPLICABLE STATUTES AND RULES

a. 18 U.S.C. § 242. Deprivation of rights under color of law

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use,

attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

b. 18 U.S.C. § 1519. Destruction, alteration, or falsification of records in Federal investigations and bankruptcy

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

c. Fed. R. Evid. 401. Definition of “Relevant Evidence”

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

d. Fed. R. Evid. 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

e. Fed. R. Evid. 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

VI. STATEMENT OF THE CASE

Defendant Karl F. Thompson, Jr., a Spokane Police Department Patrol Officer, was charged in a two count indictment with violations of 18 U.S.C. §§ 242 and 1519. R 1.¹ Count One alleges that Officer Thompson used excessive force during the course of an investigatory stop in violation of 18 U.S.C. § 242 (1996). R 1. A person violates 18 U.S.C. § 242 when he 1) willfully, 2) under color of law, 3) deprives a person of rights protected by the Constitution or laws of the United States. 18 U.S.C. § 242; see also *United States v. Lanier*, 520 U.S. 259, 265 (1997). Count Two alleges that Officer Thompson knowingly made a false entry in a record and document by making a false statement in an interview subsequent to and regarding his use of force. R 1. 18 U.S.C. § 1519 is violated when an individual knowingly makes a false entry in a record, document, or tangible object with the intent to impede, obstruct, or influence an investigation within the jurisdiction of a department or agency of the United States. 18 U.S.C. § 1519 (2002).

The district court has designated the case against Officer Thompson as complex. R 47. Thousands of pages of discovery have been exchanged and approximately seventy (70) pretrial motions have been filed, nearly all prompting

¹ For the purpose of consistency, Appellee will utilize Appellant's method of citing the record and excerpts of the record. Where indicated, the abbreviation "ER" refers to the Excerpts of the Record. The abbreviation "R" refers to the district court docket.

responsive pleadings. ER 495-536. Over four-hundred seventy (470) filings appear on the docket. *Id.* The court has conducted fifteen (15) pretrial hearings on a vast array of issues, including hearing oral argument on the approximate thirty (30) motions *in limine* filed. *Id.* Relevant to this appeal are the numerous motions filed by both parties for the purpose of excluding evidence unknown to Officer Thompson at the time of his confrontation with Otto Zehm.²

² 1) Officer Thompson filed a motion for a subpoena duces tecum for Otto Zehm's mental health records. ER 559-570. The government opposed this motion on the basis that Zehm's mental health was unknown to Officer Thompson at the time of his use of force and therefore irrelevant under *Graham v. Conner*, 490 U.S. 386 (1989). ER 571-598; 2) Officer Thompson filed a motion *in limine* to limit content of the complainants' testimony to the 911 call. ER 599-607. The government opposed this motion, arguing that complainants also witnessed the incident. R 236. The government then filed a cross motion *in limine* to exclude the 911 tape altogether based on the fact that it was outside of the "totality of the circumstances" known to Officer Thompson at the time of his use of force. ER 707-725. Officer Thompson agreed with the government's assessment, reserving his right to introduce the 911 tape for impeachment purposes should the complainants testify at trial regarding the circumstances prompting them to call 911. ER 752-759; 3) The government filed a motion *in limine* to exclude evidence of a 1990 police report involving Otto Zehm whereby he allegedly assaulted a police officer and reached for his gun. ER 685-692. Part of the government's motion relied on the proposition that the 1990 incident is irrelevant to the issues to be decided by the jury, i.e., whether Officer Thompson's use of force was objectively reasonable under the totality of the circumstances.; 4) The government filed a motion *in limine* to exclude evidence regarding Otto Zehm's prior mental health condition, information, and records based upon the *Graham* standard. ER 693-706, 790-806. Defendant Thompson opposed this motion on the basis that the evidence supported his theory of the case that Zehm was in state of excited delirium, proven through expert testimony. ER 760-773; 5) Similarly, the government filed a motion *in limine* to exclude "mental health & specific instances of behavior" based on the *Graham* totality of circumstances known to the officer

Central to this appeal is Officer Thompson's motion *in limine* to exclude after-acquired evidence of Otto Zehm's innocence on the basis that Officer Thompson did not know Zehm was innocent of the suspected crime at time of his use of force. ER 608-616, 738-751. The government opposed this motion. ER 262-279, 649-666.

On June 3, 2010, the district court conducted a pretrial hearing on the motions regarding Zehm's innocence, in addition to other pretrial motions including evidence relating to Zehm's mental health history and the defense's excited delirium theory. ER 43-99. During that hearing, Officer Thompson withdrew his objection to the government's motions *in limine* regarding Zehm's mental health history. ER 72-73. Also at issue was whether observations of Zehm's behavior made by other officers and civilian witnesses at the scene after Officer Thompson's use of force are admissible at trial. ER 73-74. The court ruled that such evidence is admissible "as it relates to the issue of going to a factual dispute."

ER 74. The court explained:

People that are at and around the scene can testify as to the – their observations, whether they're enforcement officers or laypeople, but not someone 30 minutes later, you know, in terms of chronology. We're talking about someone who can testify about events that occurred within reasonable proximity to that. I can't draw a strict line.

standard. ER 726-737. Again, Officer Thompson opposed this motion for the same reason he opposed exclusion of mental health history. ER 774-789.

ER 78.

The court also made a preliminary determination that evidence of Zehm's innocence was inadmissible, then later decided to take the issue under advisement. ER 78, 96. Supplemental briefing was filed addressing the issue. ER 117-124, 818-829, 838-843.

On the first day of trial, June 7, 2010, the court conducted a final pretrial hearing prior to jury selection. ER 17-42. The court determined that evidence of Zehm's ongoing behavior proximately related to the time of Officer Thompson's use of force was admissible. ER 20. The court also ruled that evidence unknown to Officer Thompson, including evidence of Zehm's innocence, was inadmissible. *Id.* at 20-21, 32-34. The court stressed that its ruling was based upon a motion *in limine* and that evidence of Zehm's innocence may become admissible as the case unfolded. ER 34. The United States gave notice of its intent to file a notice of interlocutory appeal regarding the court's decision. ER 30. The jury was then dismissed. ER 40-41. On June 7, 2010, the government filed its notice of interlocutory appeal. ER 102-107.

On June 18, 2010, the district court entered a written order regarding its decision to exclude evidence of Zehm's innocence. ER 1-16. The order provided further justification for exclusion of the evidence under Fed. R. Evid. 403, and demonstrated that the court consciously weighed the probative value of the

evidence against its prejudicial effect. *Id.* The court's order forms the basis from which the United State's has lodged its appeal.

VII. STATEMENT OF FACTS

On the evening of March 18, 2006, two teenage girls drove to a Washington Trust Bank drive-up automated teller machine (ATM) in Spokane, Washington. ER 609, 618, 753. The driver of the car, Allison Smith, inserted her bank card into the ATM and entered her PIN number. *Id.* While attempting to complete the transaction, the girls' car was approached by an unknown and suspicious man. *Id.* The man first stood at the hood of the car and then advanced toward the driver's side window. *Id.* The man's actions scared the girls, prompting them to drive away from the ATM before retrieving any money or cancelling the transaction.³ ER 619.

At approximately 6:15 pm, the girls called 911. ER 618. They remained nearby and continued to maintain visual surveillance of the man while he remained at the ATM. ER 461. The girls told the 911 operator that the man was trying to get in their car and that he took their money from the ATM. ER 618. Additionally, the

³ The United States contends that the suspect did not scare the girls; rather, he simply made them feel "uncomfortable," as stated in the CAD report. Appellant's Brief p. 25, n. 21. However, the government has produced an erroneous record to this Court. Both the audio recording of the radio dispatch broadcast and the transcript of the broadcast provided to this Court are missing portions of the communication whereby the dispatcher informs police officers that, "the complainants are advising that they have left their card in the machine when the suspect scared them off... and the suspect has used their money." *Compare* ER 617-622 (citing SPD Radio Traffic Recording), and ER 205-206, 241.

girls provided a physical description of the man, reporting that he was white, in his forties, with long reddish-blond hair, wearing a black coat, jeans, and boots. *Id.* The girls also reported that the man appeared to be “high.” *Id.*

Spokane Police were dispatched at approximately 6:16 p.m. ER 240. At that time, Patrol Officer Karl F. Thompson, Jr. (“Defendant”) was at a nearby COPS station eating dinner.⁴ ER 460. He heard the first radio traffic concerning the call on his portable radio, which he made a practice of keeping on during break times so that he could monitor emergency traffic and respond to assist other officers, if needed. *Id.* Officer Thompson heard the radio dispatcher broadcast that the suspect was running toward a restaurant which he knew to be in close proximity to the COPS station. *Id.* Due to the fact that Officer Thompson was in a location where he could respond quickly to the call, he proceeded to his patrol car and brought up

⁴ On March 18, 2006, Officer Karl F. Thompson, Jr. was 58 years of age and had 28 + years of commissioned experience as a police officer. He also served in the Vietnam War. Officer Thompson began his law enforcement career with the Los Angeles Police Department, serving 5 ½ years in a special assignment on the Special Weapons and Tactics Team (SWAT). In Los Angeles, Officer Thompson also served as a hostage negotiator. In 1979, Officer Thompson moved to Kootenai County, Idaho, where he began working with the Kootenai County Sheriff’s Department. There, he worked as a deputy, then State Police Detective, and also as a Sheriff’s Department Administrator at the rank of Captain. In 1997, Officer Thompson joined the Spokane Police Department (“SPD”). In Spokane, he has served as a Patrol and School Resource Officer. Additionally, he has undertaken special assignments including the Tactical Team (TAC), Crisis Intervention Team, Critical Incident Management Team, and hostage negotiator. Officer Thompson has also worked as a SPD Field Training Officer. ER 452.

the call information on his car computer, otherwise known as a CAD report. ER 460-461.

Based on the information available in the CAD report, Officer Thompson learned that the call was being categorized as a “suspicious circumstance,” and assigned a level 2 priority. ER 240, 461. Under Spokane Police Department policies in place during March of 2006, calls were numbered using a priority code of 1-5. Priority 1 is the highest code for a crime in progress where life or property is in imminent danger. The second highest code, priority 2, indicates an emergency response and officers are required to proceed immediately. Priority 2 calls require multiple officers to respond. Only when a call is classified as a priority 3 or lower, are officers informed that the call is non life-threatening.

The CAD report also informed Officer Thompson that the suspect was a white male, in his forties, with long reddish blonde hair, wearing a black jacket, jeans, and boots. ER 240. The report indicated that the suspect appeared to be “high.” *Id.* It described the fact that the man approached the girls while at an ATM after one of them put her card in and entered her PIN. *Id.* Because of the suspect’s actions, the girls drove off and left the bank card in the machine. *Id.* Additionally, the CAD report informed officers that the suspect was “messaging” with the ATM, had “things in his [*sic*] hands” that “look[ed] like money,” and “ran” away from the ATM “with their money.” *Id.*

Radio dispatch provided much of the same information as the CAD report. ER 241-242. The dispatcher also provided information that “the complainants are advising that they have left their card in the machine when the suspect scared them off... and the suspect has used their money.” ER 618 (citing SPD Radio Traffic Recording); *but cf.* ER 205-206, 241.

The information obtained by Officer Thompson from the CAD report and also broadcast via radio led him to believe that while the call was first categorized as a suspicious circumstance, that a crime had been committed or a premature robbery attempt had occurred.⁵ ER 461. Due to the nature of the call and his proximity to the call area, Officer Thompson checked himself in service at 6:21 pm signaling that he was responding. ER 240. At that time, two other officers, Steve Braun Jr. and Timothy Moses, were already dispatched. *Id.* At 6:22 pm, Officer Steve Braun Jr. informed police dispatch that he was also in the area. ER 241. At 6:22 pm, an additional officer, Daniel Strassenberg, also checked himself into the call. ER 240.

Officer Thompson drove directly to the call area. ER 462. While en route, information was updated on the CAD report and broadcast by radio regarding the suspect’s whereabouts. *Id.* Officers were advised that the girls were driving a white

⁵ The fact that a call is given an initial categorization and later evolves into a different classification is common place in the field as additional information becomes available.

Dodge Intrepid. ER 206. Information was also corrected that the driver of the car did not leave her bank card in the ATM and was able to retrieve the card before the suspect approached the girls. ER 206, 240. In response to the updated information, one of the officers asked the dispatcher, "...just to confirm: he took her money?" ER 206, 241. At 6:23:31, the dispatcher responded: "Affirm." *Id.* Within the next thirty seconds, Officer Thompson spotted the suspect along with the girls' white Dodge Intrepid at a Zip Trip convenience store located near the area where the 911 call originated. ER 206, 462. The male matched the physical description provided to Officer Thompson as the man who approached the girls at the ATM and took their money. ER 462.

Officer Thompson drove his fully marked police car into the convenience store parking lot and parked perpendicular to the gas pumps. ER 206, 462. At the same time, the suspect (later identified as Otto Zehm) looked directly at Officer Thompson's vehicle and at 6:24:02, entered the Zip Trip convenience store through the north entrance.⁶ ER 206. Officer Thompson, wearing his full police

⁶ The man who approached the girls at the ATM and who was later involved in the confrontation with SPD officers inside the Zip Trip convenience store was identified after the incident as Otto Zehm. At the time of the incident, Otto Zehm was 36 years old, stood 5'9" tall and weighed 190 pounds. Zehm was diagnosed with paranoid schizophrenia/schizoaffective disorder, bipolar type, polysubstance abuse, and antisocial personality traits. Zehm had a history of discontinuing medication to control his illness. By March 18, 2006, Zehm had discontinued his use of medication or cut his dosage in half against medical advice for a period of time spanning one month or more. On previous occasions when Zehm

uniform and holding his baton, exited his vehicle quickly and followed Zehm into the store at approximately 6:24:13. *Id.* At the time Officer Thompson confronted Zehm, he believed that he had a reasonable suspicion to conduct an investigatory stop in light of the fact that Zehm was suspected to have committed the crime of theft or attempted robbery.⁷ ER 460-467, 542, 544.

Based on Officer Thompson's familiarity with the building and the fact that Zehm had seen him pull up to gas pumps, he was concerned that the building's two additional exits might provide a means for Zehm to flee and a foot pursuit to ensue. ER 463. As a result, Officer Thompson sought to close the distance between himself and Zehm by catching up to him inside the store as quickly as possible. *Id.* Upon entering the store Officer Thompson observed that there were a number of customers present inside, including children, which increased his level of safety concerns. ER 466-468. He was aware that he was entering a situation of confinement and that he was the only officer at the scene. ER 466. A number of

discontinued use of his medication, he was forced into involuntary commitment. In mid February of 2006, Zehm's employer observed unusually erratic and disturbing behavior from Zehm including mental confusion, distraction, disorientation, nonsensical responses, and verbal aggression. As a result, the employer decided on March 7, 2006 that Zehm was no longer capable of working until he received a psychological evaluation. After that date, the employer did not have any further contact with Zehm. Zehm never presented for a psychiatric evaluation and missed a doctor's appointment for medication management. ER 761-762, 775-777.

⁷ Government experts Joseph Callanan and Randy Roper have concluded, along with defense experts, that Officer Thompson had reasonable suspicion to conduct an investigatory stop on Otto Zehm. ER 542, 544.

items within the store, such as cans and glass containers, could be used as potential weapons by the suspect and were within an arms reach. *Id.* Additionally, Officer Thompson observed the fact that Zehm was wearing a heavy leather coat which might conceal weapons and would also compromise the effectiveness of a taser application, should the use of a taser become necessary. ER 465.

While running into the store Officer Thompson lost sight of Zehm as Zehm walked toward the store's southwest corner. ER 463-464. Shelving obstructed Officer Thompson's view of the suspect until reaching the west side of the store. ER 465. When Officer Thompson regained sight of Zehm, Zehm had his back towards him and was facing a beverage display. *Id.* As Officer Thompson began closing the distance between him and the suspect, Zehm turned around and made immediate and direct eye contact with Officer Thompson. ER 468. The total amount of time that it took Officer Thompson to round the northwest corner and reach Zehm in the southwest corner was approximately 2.5 seconds. ER 206.

Officer Thompson saw that Zehm was gripping a two-liter soda bottle with both hands, one at each end, chest level, holding it parallel to the ground. ER 466. Officer Thompson perceived that Zehm's arms were positioned so that they were tucked in toward his body. *Id.* His elbows were down and his muscles tensed, in what Officer Thompson thought to be a loaded position. *Id.* The manner in which Zehm positioned the bottle concerned Officer Thompson because the four-pound

container had the capability of being used as a blunt weapon, or could be thrown at Officer Thompson as a distraction device affording Zehm time to retrieve a weapon concealed beneath his coat. *Id.*

As he closed the distance to Zehm, Officer Thompson ordered, in an authoritative voice, “Drop it.” ER 468. Zehm, maintaining eye contact, immediately responded, “Why?” in a forceful tone. *Id.* The fact that Officer Thompson was a fully dressed police officer holding a baton in a manner that suggested he was ready to strike appeared to be of no consequence to Zehm. *Id.* Officer Thompson replied, “Drop it now.” *Id.* Zehm responded, twice as loudly, “No.” *Id.* Officer Thompson perceived Zehm’s words, body language, and actions as aggressive, defiant, and resolute. *Id.*

Despite his verbal commands and Officer Thompson’s obvious projection of force, Zehm was noncompliant. ER 468-469. Officer Thompson knew that he needed to control Zehm and physically detain him with handcuffs so that he, along the other responding officers, could continue to investigate whether evidence showed that Zehm had committed a crime at the ATM and whether he was armed. ER 467. After Zehm responded “no,” Officer Thompson believed that Zehm was preparing to strike him with the soda bottle. ⁸ *Id.*

⁸ Officer Thompson has never asserted that Zehm tried to “ambush” him as the government has suggested. Appellant’s Brief p. 20. Such a suggestion is a

According to Zip Trip security video time stamps, Officer Thompson delivered his first baton strike to Zehm's upper left thigh at approximately 6:26:14. ER 384-385. The strike was intended to incapacitate Zehm by dropping him to the floor. ER 469. Unfortunately, the baton strike did not force Zehm's compliance. ER 470. Instead, Zehm pivoted to his right, turned away from Officer Thompson, and continued to hold onto the bottle. *Id.* Officer Thompson then grabbed Zehm's collar and delivered a second baton strike to his right leg. *Id.*

Throughout the following 35 seconds, Officer Thompson and Zehm continued to struggle. ER 384-385. Despite Officer Thompson's continued verbal commands, Zehm continued to resist, prompting Officer Thompson to attempt another compliance technique using his taser. ER 472. The taser application did not appear to be effective because at least one of the probes did not attach and Zehm displayed no signs that an electrical charge was successfully delivered. ER 472. Officer Thompson continued to deliver baton strikes to Zehm's legs, attempting to control him. ER 471-476. At no time did Officer Thompson deliver any intentional strikes to Zehm's head, neck, or upper torso.⁹ ER 471. Zehm

distortion of Officer Thompson's statement which clearly indicates what he perceived prior to and during his confrontation with Zehm.

⁹ Officer Thompson's training informed his decision not to intentionally strike Zehm in the head. If intentional head strikes are delivered to the head, such strikes are considered deadly force. Officer Thompson recognized that this situation did not warrant use of deadly force.

continued to actively fight all efforts made by Officer Thompson to control him and made a series of growls, roars, and screams which indicated to Officer Thompson that this was a person with a high level of commitment to resist and/or attack him. ER 471-476.

At approximately 6:28:28,¹⁰ Officer Steve Braun entered the west door of the Zip Trip and immediately began helping Officer Thompson attempt to control Zehm. ER 384-385. Despite Officer Braun's size, the two officers were still unable to physically restrain Zehm.¹¹ *Id.*, ER 476-477. Officer Braun delivered a number of power jabs to Zehm's left rib cage and to his left shoulder in an attempt to force Zehm to release his hands from his body so that handcuffs could be applied. *Id.* The jabs were unsuccessful. ER 477. Officer Braun used his taser in an attempt to force Zehm to release his arms. *Id.* Again, the taser was ineffective. *Id.* Officer Thompson then delivered additional baton strikes to Zehm's legs. ER 384-385. At 6:25:47, Officer Braun called into SPD radio dispatch reporting that Zehm was "fighting pretty good." ER 206, 242. Two seconds later, at 6:25:29, Officer Thompson called in a "Code 6" indicating that the officers needed assistance and that that all available units should proceed to the scene immediately with full lights and sirens. *Id.*, ER 479-480.

¹⁰ This time is according to Zip Trip security video timestamps.

¹¹ Officer Braun is 6'5" and 285 pounds.

In less than a minute's time, an additional four to five police officers arrived. ER 206, 384. With the help of numerous other officers working in unison, Officer Jason Uberuaga was able to successfully perform a straight wrist lock maneuver on Zehm, giving him leverage to roll Zehm over and put handcuffs on him. ER 384, 479.

Once the handcuffs were attached, a physically exhausted Officer Thompson went outside to catch his breath. ER 479. In total, Officer Thompson delivered thirteen baton strikes to Zehm during a 1 minute and 15 second time frame, while Zehm continuously resisted Officer Thompson's attempt to control him. ER 206, 384. During this struggle Zehm displayed an unusual amount of strength and stamina. ER 481. Zehm's physicality and strength endured throughout the fight despite the fact that the altercation was exhausting to Officer Thompson. ER 479-482. Additionally, Zehm seemed impervious to pain, as he did not display any pain-filled response to the compliance techniques attempted by Officer Thompson. ER 469-482. Ultimately, Zehm's lack of compliance, physical strength, and unresponsiveness to police pain compliance techniques prolonged the physical altercation with Officer Thompson, who struggled to get him under control. *Id.* In fact, Officer Thompson was never able to control him. *Id.* Zehm was only restrained after back-up police officers who arrived worked in concert to control him. ER 778.

After Officer Thompson was relieved while other officers attempted to control Zehm, Zehm continued to violently resist. ER 384, 818-829. An additional set of handcuffs were applied because officers were concerned that he was pulling so hard against the first pair that they might come off. ER 764. Officers put leg restraints on Zehm in an attempt to minimize his movements because he was kicking violently. *Id.*, ER 480. Not only was Zehm a continuing threat to the safety of officers within his kicking range, but he was also a threat to himself by thrashing his head and body on the floor and against shelving units. Once the leg restraints were applied, Zehm continued to kick so forcefully that the restraints became loose and had to be reapplied. ER 480. Zehm continued to yell, making unintelligible, animalistic and guttural noises. *Id.* Many of the officers on the scene, along with various fire personnel who responded, witnessed Zehm's continuous violent resistance which continued for a period of twenty two minutes. ER 384, 818-822.

Zehm stopped breathing at the scene and went into cardiac asystole. R 282-1, ER 778. He died two days later in the hospital. *Id.* According to the autopsy report the official cause of death was excited delirium. *Id.* Zehm's death was not caused by any application of force by Officer Thompson. *Id.*

On March 22, 2006, Officer Thompson waived his *Garrity* rights and voluntarily participated in an interview with SPD Detective Terry Ferguson. ER

451. During the interview, Officer Thompson explained the totality of facts and circumstances confronting him at the time of his confrontation with Zehm. ER 451-485.

Officer Thompson reiterated his belief that he had reasonable suspicion to conduct an investigatory stop on Zehm. *Id.* Officer Thompson has never claimed that he knew Zehm was guilty or not guilty of the crime of theft or robbery. *See* 451-485. Rather, Officer Thompson has always maintained that the purpose of confronting Zehm was to control him so more investigation could follow. ER 467, 470. Unfortunately, Zehm resisted Officer Thompson's attempt to control him which necessitated the use of force to accomplish Zehm's compliance. ER 206, 384.

After the incident, investigation revealed the fact that Zehm did not commit the crime of theft or robbery. As a result of this confrontation, Officer Thompson has been charged under 18 U.S.C. § 242 for allegedly using excessive force against Zehm during the confrontation inside the Zip Trip store and under 18 U.S.C. § 1519 for allegedly making false statements during an interview with SPD investigators.

VIII. SUMMARY OF ARGUMENT

The district court properly exercised its discretion in excluding after-acquired evidence of Otto Zehm's innocence pursuant to Federal Rule of Evidence 403. The court's written order identified the correct application of Rule 403 and appropriately weighed the evidence's probative value against its prejudicial effect. In reaching its conclusion, the court correctly applied the *Graham v. Conner*, 490 U.S. 386 (1989) standard which requires the objective reasonableness of an officer's actions be judged based upon the facts and circumstances known to him at the moment force is used.

The district court cited this Court's ruling in *Boyd v. City and Cnty. of San Francisco*, 576 F.3d 938 (9th Cir. 2009) for the proposition that evidence which is unknown to an officer when he decides to use force may be relevant to assess the credibility of an officer's account of a confrontation. Defendant Thompson contends that because this Court's ruling in *Boyd* was based upon the abuse of discretion standard of review, its application is not intended to be so broad. Additionally, because the disputed evidence was largely admitted in conjunction with the trial court's decision to allow expert testimony regarding the suicide-by-cop theory, the Court's ruling is not applicable to this case.

In relying upon *Boyd*, the district court concluded that evidence of Zehm's innocence may be relevant under Fed. R. Evid. 401. This Court has previously held

that a person's failure to flee or resist arrest is not a reliable indicator that he is innocent of the offense in which he is charged. *United States v. Scott*, 446 F.2d 509, 510 (9th Cir. 1971). Whether a person is innocent of a crime is not logically linked or relevant to whether that person would resist arrest. Additionally, when reasonable suspicion exists to conduct an investigatory stop, which carries with it the right to use force, the actual guilt or innocence of the detainee is irrelevant to the amount of force which may be used. *Graham*, 490 U.S. at 396 (citing *Terry v. Ohio*, 392 U.S. 1, 22-27 (1968)); *Shulgan v. Noetzel*, 2008 WL 1730091, at * 7 (E.D. Wash. 2008) (quoting *United States v. Sokolow*, 490 U.S. 1, 10 (1989)); *Kopf v. Skyrn*, 993 F.2d 374, 379 (4th Cir. 1993). As a result, evidence of Zehm's innocence used to support the government's theory that he was non-resistant, or alternatively, to demonstrate Officer Thompson's actions were excessive, is not relevant and is inadmissible under Fed. R. Evid. 401.

Despite the court's failure to recognize that evidence of innocence is irrelevant to whether Zehm resisted arrest or that excessive force was used, it correctly determined that the evidence is inadmissible under Fed. R. Evid. 403. In so ruling, the court appropriately held that evidence of Zehm's innocence would improperly divert the jury's attention to what Zehm was thinking rather than how he actually behaved. ER 11-12. Further, the court properly held that evidence of Zehm's innocence would unfairly prejudice Officer Thompson's right to have his

conduct judged from an on-scene perspective based upon the information he had available to him when the conduct occurred. ER 12-14. Evidence of innocence causes the jurors to view Officer Thompson's actions with the 20/20 vision of hindsight, and thus has an "undue tendency to suggest decision on an improper basis." Fed. R. Evid. 403. Additionally, because jurors would be unable to overcome the fact that an innocent man died after a confrontation with police officers, evidence of Zehm's innocence is unfairly prejudicial.

In balancing the probative value of the evidence against its prejudicial effect, the district court duly noted that the government has alternative means to test the adequacy of Officer Thompson's account without unfairly prejudicing Officer Thompson. ER 14. The court did not overstate the availability of other evidence, but has relied upon representations made by the government to the court. In particular, the government has represented to the court they will offer civilian witness accounts and security-camera video footage regarding Zehm's actions that will contradict Officer Thompson's version of events. ER 313-314. Additionally, the government has disclosed a human factors expert who will testify as to Zehm's behavior and actions. R 56. The government has adequate evidence to challenge Officer Thompson's account of events without relying on highly prejudicial evidence of Zehm's innocence.

Further, the court did not error in its exercise of discretion in holding that a carefully crafted jury instruction would not remove the taint of prejudice from juror deliberations. Whether the prejudicial effects of evidence can be adequately mitigated by a limiting or cautionary instruction is committed to the discretion of the trial court. *United States v. Layton*, 767 F.2d 549, 556 (9th Cir. 1985). Having appropriately considered the probative value of the evidence against its prejudicial effect under Fed. R. Evid. 403, the court did not abuse its discretion in finding that a limiting instruction would be unsuccessful.

The government argues that excluding evidence of Zehm's innocence prejudices its ability to obtain a jury instruction that Zehm had the right to use proportional self-defense against Officer Thompson's use of force. However, the government fails to acknowledge that a person does not have the right to resist police detention, even if they are innocent of the crime in which they are suspected of. *Luchtel v. Hagemann*, --- F.3d ----, 2010 WL 3911282, at * 5 (9th Cir. 2010) (citing *United States v. Willfong*, 274 F.3d 1297, 1301 (9th Cir.2001) (“[A] person does not have the right to resist arrest even if the charges are false or the arrest unlawful.”)). Therefore, the government will not be prejudiced by the exclusion of evidence relating to Zehm's innocence in support of its theory that he had the right to resist detention because such a jury instruction is not supported by the law.

Finally, the Court has not abused its discretion in allowing evidence of Zehm's continued, violent resistance while excluding evidence of his innocence. Zehm's resistance was continuous and not limited to a fractional frame of time. Evidence relating to Zehm's continued resistance provides a direct, physical description of Zehm's behavior and corroborates Officer Thompson's version of events. To the contrary, evidence relating to Zehm's innocence is nothing more than mere guesswork as to his alleged mental state and provides no direct, physical evidence that Zehm was non-resistant. Additionally, evidence relating to Zehm's continued resistance is relevant in determining the nature and cause of the alleged head, neck, and upper torso injuries suffered by Zehm. Defendant Thompson will offer evidence that Zehm's behavior after Defendant Thompson's last baton strike directly contributed to or caused these injuries. Therefore, evidence relating to his continued resistance is probative and admissible to challenge the government's theory that those injuries were caused by Officer Thompson.

IX. ARGUMENT

- a. **Evidentiary rulings are reviewed for abuse of discretion. The district court did not abuse its discretion by excluding evidence of Zehm's innocence under Fed. R. Evid. 403.**

The district court's decision to exclude evidence of Zehm's innocence under Fed. R. Evid. 403 did not constitute an abuse of discretion. Fed. R. Evid. 403 provides, in pertinent part:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...

Fed. R. Evid. 403. Rule 403 requires a weighing process, whereby the probative value of the proffered evidence is balanced against its potential for unfair prejudice or confusion of the issues. *Layton*, 767 F.2d at 553.

This weighing process is for the trial court to perform and the decision to admit or exclude potentially prejudicial evidence is committed to the court's sound discretion. *Id.* (citing *Longenecker v. Gen. Motors Corp.*, 594 F.2d 1283, 1286 (9th Cir. 1979)); see also *Boyd*, 576 F.3d at 948 (citing *United States v. Blitz*, 151 F.3d 1002, 1008 (9th Cir. 2008)). The Supreme Court has held:

A district court is accorded a wide discretion in determining the admissibility of evidence under the Federal Rules. Assessing the probative value of [the proffered evidence], and weighing any factors counseling against admissibility is a matter first for the district court's sound judgment under Rules 401 and 403.

Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 383 (2008) (quoting *United States v. Abel*, 469 U.S. 45, 54 (1984)). Under Rule 403, a district court's evidentiary rulings are only reversed when the reviewing court is "convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances." *Boyd*, 576 F.3d at 943 (citing *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000)). Evidentiary rulings *in limine* are afforded the same deference as evidentiary rulings made during trial. *Layton*, 767 F.2d at 554-55.

So long as the record reflects that the district court sufficiently weighed the probative value of the proffered evidence against the prejudicial effect prior to excluding it, the requirements of Rule 403 have been met. *Boyd*, 576 F.3d at 943 (citing *United States v. Verduzco*, 373 F.3d 1022, 1029 n. 2 (9th Cir. 2004), quoting *United States v. Sangrey*, 586 F.3d 1312, 1315 (9th Cir. 1978)). The district court is not required to "explicitly state that the probative value of [the evidence] was not substantially outweighed by the danger of unfair prejudice," or "engage in a 'mechanical recitation of Rule 403's formula on the record as a prerequisite to admitting [or not admitting] evidence....'" *Sangrey*, 586 F.2d at 1315; see also *United States v. Morris*, 827 F.2d 1348, 1350 (9th Cir. 1987). Rather, if the district court provides a reasonable justification for its ruling under Rule 403, the highly deferential standard of review for evidentiary rulings has been met. *Boyd*, 576 F.3d at 949.

In the district court's order excluding evidence of Zehm's innocence, it correctly identified the application of Rule 403. ER 10-15. The court recognized that potentially relevant evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues. ER 11.

The court weighed the probative value of the disputed evidence and appropriately determined that the probative value was far outweighed by the risk of diversion and unfair prejudice. ER 11-13. The government argues that because the court allegedly failed to view the evidence in light most favorable to the proponent, the court made a reversible legal and factual error. Appellant's Brief p. 23-27. However, the record clearly shows that the district court engaged in Rule 403's balancing test. *See Boyd*, 576 F.3d at 948. The court's order, while not mechanically reciting all of the nuances of Rule 403, demonstrates that it consciously weighed the probative value of the evidence against its prejudicial effect and concluded that the prejudicial effect outweighed Officer Thompson's right to have the jury judge his actions under the *Graham* standard. ER 1-16. Additionally, the court repeatedly stressed that because the ruling was *in limine*, it may be revised as the case unfolds. ER 5, 15. The district court provided a reasonable justification for its ruling, meeting the highly deferential standards of

Rule 403. Therefore, this Court should find that the district court did not abuse its discretion.

This Circuit recognizes that a district court's pretrial *in limine* evidentiary rulings are afforded the same deference as rulings during trial. *See Layton*, 767 F.2d at 554-55. The government's assertion that this Court should afford less deference to the district court's evidentiary ruling because it arises from an interlocutory order is incorrect as a matter of law. *Id.* Additionally, the government's assertion that the district court is in the same position to assess evidence of Zehm's innocence as is this Court is a misstatement of the facts. At this point in the proceeding, approximately 70 pretrial motions have been filed, nearly all prompting responsive pleadings. ER 495-536. A total of 15 pretrial hearings have been held. *Id.* The district court has considerable knowledge of the facts and circumstances surrounding this case and by no means reached its decision regarding the disputed evidence based upon a cold record.

b. The court correctly identified and applied *Graham v. Conner* as the standard in which Officer Thompson's actions will be judged.

The district court correctly defined *Graham's* reasonableness standard, holding that "the objective reasonableness of an officer's action is based upon what the officer knew when the disputed conduct [i.e., use of force] occurred." R 412. In so holding, the district court properly exercised its discretion by excluding evidence of Zehm's innocence, indicating that Officer Thompson has the right to

have jurors evaluate his conduct from the perspective of a reasonable officer at the scene. R 412.

The Supreme Court's ruling in *Graham* is long standing precedent in which excessive force claims are judged. *See Graham*, 490 U.S. 386. Under the *Graham* standard, "[t]he reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396.

Graham's reasonableness test is not mechanical and cannot be strictly defined. *Id.* (citing *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)). Excessive force cases require that the reasonableness inquiry be fact intensive, according careful attention to the specific details and circumstances of each particular case, as known to the officer at the time force was used. *Graham*, 490 U.S. at 396 (citing *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)); *Luchtel*, --- F.3d ----, 2010 WL 3911282, 13 n. 3. Case-specific considerations include, but are not limited to, "the severity of crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396 (citing *Tennessee*, 471 U.S. at 8-9). Because officers are routinely confronted with a vast array of situations, other facts and circumstances known to the officer may also become relevant to the reasonableness inquiry. *See Smith v. City of Hemet*, 394 F.3d 689,

701 (9th Cir. 2005) (“the reasonableness of a seizure must...be assessed by carefully considering the objective facts and circumstances that confronted the... officers.”). Additionally, footnote 12 in *Graham* indicates that “in assessing the credibility of an officer’s account of the circumstances that prompted the use of force, a factfinder may consider, along with other factors, evidence that the officer may have harbored ill-will toward the citizen.” 490 U.S. at 399 n. 12. Notably, whether an officer harbors ill-will is also within the totality of the circumstances known to him at the time he decides to use force.

A police officer’s right to make an arrest or investigatory stop coincides with the right to use some degree of force or threat thereof to effect it. *Graham*, 490 U.S. at 396 (citing *Terry*, 392 U.S. at 22-27). Whether a law enforcement officer’s use of force is reasonable must take into account that the nature of their profession necessitates the ability to make “split second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.” *Graham*, 490 U.S. at 397.

The *Graham* standard is not violated when reasonable suspicion to conduct an investigatory stop exists, even if the suspect is later determined to be not guilty of the crime he is suspected of committing. *See id.* at 396 (citing *Hill v. California*, 401 U.S. 797 (1971)). Applying this principal to excessive force claims, “the same standard of reasonableness *at the moment* applies: ‘Not every push or shove, even

if it may later seem unnecessary in the peace of a judge's chambers' violates the Fourth Amendment." *Graham*, 490 U.S. at 396 (internal citation omitted) (emphasis added). Even in situations where an officer reasonably, but mistakenly, perceives "that a suspect was likely to fight back...the officer would be justified in using more force than in fact was needed." *Saucier v. Katz*, 533 U.S. 194, 205 (2001), 533 U.S. 194 (2001), *overruled on other grounds by Pearson v. Callahan*, --- U.S. ---, 129 S. Ct. 808 (2000.) Under the standard set forth in *Graham*, information gained after the use of force which negates its justification is not relevant in excessive force cases. Simply, the officer's actions must be objectively reasonable based upon the information known to him at the time force was used.

Officer Thompson has the right to have the jury judge his actions based upon the facts and circumstances known to him at the time of the confrontation with Zehm. In this case, the undisputed facts known to Officer Thompson at the time of the confrontation with Zehm are those facts contained in the CAD report and information gained over the police radio dispatch broadcast. Both of these sources of information, which shaped Officer Thompson perception of the "facts and circumstances" confronting him, clearly indicated that: 1) the man he confronted in the Zip Trip store was the man who approached the girls' car at the ATM; 2) the man scared the girls prompting them to drive away from the ATM without cancelling the cash withdraw; 3) the man had messed around with the ATM; and 4)

ran from the scene with the girls' money. Also relevant under *Graham* are considerations of whether Zehm posed a threat to the safety of the officer(s) and others, including the undisputed fact that Officer Thompson observed customers, including small children, inside the Zip Trip store. Based upon these undisputed facts, Officer Thompson believed that he had reasonable suspicion to stop Zehm and investigate him for the crimes he was suspected of committing.

The government has challenged the court's reliance on *Graham* and asserts that its standard requires "a two-stage analysis."¹² Appellant's Brief p. 32-40. The government's attempt to sever the *Graham* standard into a two-part test is erroneous and not supported by case law.¹³

The government contends that the first prong of *Graham's* reasonableness test requires the jury to find the totality of the circumstances existing just prior to the officer's use of force which implicates both the officer's and others' accounts. *Id.* This analysis is flawed because it ignores the touchstone of *Graham's* reasonableness inquiry which focuses on whether the officer's actions are

¹² Notably, the government's proposed jury instructions do not suggest that the *Graham* standard is a two-part test. Instead, the government proposes that "To determine whether Defendant Thompson used unreasonable force, you should consider all of the circumstances of the alleged incident from the point of view of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." R 340.

¹³ The United States does not cite one case supporting the *Graham* standard as a two-part test.

objectively reasonable in light of the facts and circumstances confronting him. *Graham*, 490 U.S. at 397. In other words, *Graham* does not require that the “totality of the circumstances” be assessed; only the particular facts and circumstances known to the officer just prior to the time force is used.

Had the Supreme Court wished to create a two-part test, it would have done so. After all, *Graham*’s holding rejected the application of the *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973), four-part test for claims under the Eighth Amendment to excessive force claims under the Fourth Amendment. *Graham*, 490 U.S. at 391-98. When analyzing the four-part test, the Supreme Court certainly could have crafted a two-part test for Fourth Amendment claims if that is what it intended.

In this case, the reasonableness of Officer Thompson’s actions should be judged based on the singular Fourth Amendment “reasonableness inquiry” that is relied upon in countless excessive force cases. This test simply requires the trier of fact to determine whether Officer Thompson’s actions were objectively reasonable in light of the facts and circumstances perceived by him just prior to his use of force. The government’s artificial attempt to bifurcate the *Graham* standard is not supported by case law and the district court did not err as a matter of law in applying the correct interpretation of *Graham* to this case.

c. The Ninth Circuit's holding in *Boyd v. City and County of San Francisco*, regarding evidence of suicide-by-cop, does not extend to evidence of innocence.

The government asserts that this Court's decision in *Boyd* applies broadly to excessive force cases and allows courts to admit evidence unknown to an officer when what the officer perceived just prior to the dispute is in question. Appellant's Brief p. 31. To the contrary, Defendant Thompson contends that the *Boyd* holding is not meant to be so broad and is otherwise inapposite to this case. *Boyd*, 576 F.3d at 944-45.

In *Boyd*, this Court determined that the district court did not abuse its discretion by allowing evidence regarding the decedent's criminal history, including an arrest three-days prior to the disputed incident, and the use of drugs. *Id.* at 949. Admissibility of each piece of evidence unknown to the officer was largely based on the fact that the evidence was presented in the context of a suicide-by-cop defense which the defendants proffered through expert testimony. *Id.* at 948.

Essential to the district court's justification for allowing evidence unknown to the officers at the time of the disputed incident was its earlier determination that the defendants could offer a suicide-by-cop defense. *Id.* Based upon the suicide-by-cop theory, evidence which was not otherwise relevant became both relevant and

admissible to support the defendants' contention that the decedent attempted to provoke the police shooting. *Id.*

Significantly in *Boyd*, this Court applied the abuse of discretion standard of review. As the Court explained, “[t]he decision to admit potentially prejudicial evidence under Rule 403 is ‘committed to the sound discretion of the trial court.’” *Id.* at 948 (internal citations omitted). If the record demonstrates as a whole that the trial judge “adequately weighed the probative value and prejudicial effect of proffered evidence before its admission...the demands of Rule 403 have been met.” *Id.* (citing *Verduzco*, 373 F.3d at 1029, n. 2, quoting *Sangrey*, 586 F.2d at 1315; *Harman*, 211 F.3d at 1175 (“Normally, the decision of a trial court is reversed under the abuse of discretion standard only when the appellate court is convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances.”)). Because the trial court provided reasonable justification for allowing each piece of evidence, its determinations were sufficient to meet the “highly deferential standard of review for evidentiary hearings.” *Boyd*, 576 F.3d at 949.

The narrow ruling in *Boyd* is not applicable to this case. Officer Thompson is not arguing a suicide-by-cop defense and Zehm's “motivation or intention to provoke” Officer Thompson's use of force against him is not at issue. *Stringer v. City of Pablo*, 2009 WL 5215396, at * 3 (N.D. Cal. 2009). In this case, the

government contends that Zehm's actions leading up to Officer Thompson's use of force is in dispute and that evidence showing that Zehm was innocent makes it more probable that he would not resist detention or be non-compliant with police officers' commands. However, the government has not provided any evidence, through expert testimony or otherwise, that Zehm's innocence would affect the way he acted when confronted by Officer Thompson. *See id.* In fact, the government has not articulated any meaningful basis demonstrating the causal connection between innocence and nonresistance. In contrast, evidence unknown to the officers that was presented in *Boyd* directly supported the defendants' theory that the decedent intended to die at the hands of police. *Id.*

Further, this Court made clear that its determination in *Boyd* afforded the trial court broad discretion in determining that evidence unknown to the officers at the time of the incident was admissible. *Boyd*, 576 F.3d at 948-49. Because the record reflected that the court consciously weighed the probative value of the evidence against the prejudicial effect, this Court was highly deferential to the trial court's evidentiary rulings. *Id.* Had the trial court created a record that showed it consciously weighed the probative value of the evidence against the prejudicial effect and ultimately determined that the disputed evidence was inadmissible, presumably this Court would have afforded it the same deference. The record in this case shows that the district court carefully and consciously weighed the

probative value of evidence regarding Zehm's innocence against its prejudicial effect and determined that the prejudice far outweighed any probative value. ER 9-16. In particular, the trial court aptly found that evidence regarding Zehm's innocence would unfairly prejudice Officer Thompson's right to have his conduct judged from an on-scene perspective based upon the information he had when the conduct occurred. As such, this Court should uphold the district court's ruling because the court's determination is justified under the circumstance and within its sound discretion.

Other cases cited by the government in support of the contention that evidence not known by an officer at the time of the use of force may be relevant and admissible to assess disputed facts are likewise distinguishable. In *Alpha v. Hooper*, 440 F.3d 670 (5th Cir. 2006), the Fifth Circuit held that the district court did not abuse its discretion in allowing evidence that the decedent was on methamphetamine at the time of the officer's use of force because the officer testified that he believed prior to the shooting that the suspect was under the influence of methamphetamine. *Id.* at 671-72. Evidence regarding the fact that drugs were found on the decedent immediately after the shooting was therefore relevant because it corroborated a fact put directly at issue by the police officer's account of events. In other words, because the Officer justified his use of force on

his belief that the suspect was on drugs, evidence relating to that fact was probative to determine whether his actions were justified.

Similarly, in *Bradford v. City of Modesto*, 2009 WL 3489413 (E.D. Cal 2009), the court allowed evidence that the plaintiff was unarmed at the time officers used force against him because it directly contradicted the officers' account of why force was necessary. The officers contended that the use of force was justified because they believed the plaintiff moved his hand toward his waistband as if he was grabbing a weapon, prompting them to shoot. *Id.* at * 4. However, because the plaintiff was able to provide direct physical evidence challenging the officers' account of the incident (i.e., that he was unarmed), the court determined that the evidence was admissible. *Id.*

Both of these cases are inapposite here because the courts' admission of after-acquired evidence went directly to an issue put into question by the officers' account of events. For example, in *Hooper*, because the officer testified that he perceived that the decedent was on drugs, the fact that he had drugs on his person was directly relevant to corroborate the officer's story. In *Bradford*, because the officers claimed that the use of force was prompted because they perceived the plaintiff was going to make a move for his waistband where a weapon may have been concealed, evidence that the plaintiff was not armed was relevant to challenge the officers' account. In this case, the government is asserting that because Officer

Thompson claims that Zehm was resistant, evidence that he was innocent is relevant to contradict his version of evidence. However, evidence of innocence does not directly challenge any assertion made by Officer Thompson, especially in light of the fact that Officer Thompson has never claimed that Zehm was either innocent or guilty of the crime(s) he was suspected of or attempted to justify his use of force based on an assertion of Zehm's guilt.

The government takes great liberty in suggesting that evidence of innocence contraindicates a person's resistance and/or non compliance with police, without providing any supporting authority. Such evidence does not provide evidence of Zehm's behavior, but merely speculates as to his mental state. To the contrary, admissible evidence challenging Officer Thompson's account of events that goes directly to Zehm's physical behavior may take the form of Zehm's body movements and actions. In this case, the government can offer contradiction evidence through witness testimony, expert opinion, and video surveillance of the confrontation.

d. Innocence is not relevant to resistance.

In holding that evidence of Zehm's innocence is inadmissible, the district court concluded that such evidence may be probative in determining whether a suspect is likely to resist a police officer. ER 9-11. Under Fed. R. 401, "relevant evidence" is evidence that has a tendency to make the existence of any fact that is

of consequence to the determination of the action more probable or less probable than it would be without the evidence. Fed. R. Evid. 401. However,

[r]elevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case....Whether the relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand.

Fed. R. Evid. 401, advisory committee's notes. When no relationship exists between the evidence and a matter properly provable at trial, it is deemed irrelevant and inadmissible. *See* Fed. R. Evid. 402.

Evidence of a person's innocence has no logical relationship to whether he will resist arrest and is therefore irrelevant under Rule 401. As this Court has previously held, "[e]xperimental observations do not give substantial assurance that either failure to flee or failure to resist arrest makes it more likely than not that the person arrested is innocent of the offense with which he is charged." *Scott*, 446 F.2d at 510. Evidence of a person's innocence does not reliably indicate how a person will respond when confronted by law enforcement officers and is not logically linked to "principles evolved by experience or science." It is certainly possible that a person who has committed a crime will not resist arrest, while a person who has not committed a crime may in fact flee or be uncooperative. Any attempt to tie one response to a corresponding state of mind is based upon speculation. Therefore, because this Court has previously determined that evidence

regarding a person's innocence does not reveal whether that person is likely to resist detention; such evidence is not relevant under Fed. R. Evid. 401. As a result, evidence of Zehm's innocence is inadmissible under Fed. R. Evid. 402.

In the context of an investigatory stop, evidence of an act that may be innocent in itself is irrelevant to the overall determination of whether reasonable suspicion exists for conducting the stop. *United States v. Arvizu*, 534 U.S. 266, 274-75 (2002). The government's experts agree, Officer Thompson had the right to conduct an investigatory stop which requires "reasonable suspicion to believe that criminal activity 'may be afoot.'" *Id.* at 273 (citing *Sokolow*, 490 U.S. at 7, quoting *Terry*, 392 U.S. at 30 (1968)). In assessing whether reasonable suspicion exists, the "totality of the circumstances" of each case must be analyzed to determine whether "the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *Arvizu*, 534 U.S. at 273 (citing *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)).

When an investigatory stop is conducted in response to a 911 call, police are entitled to rely on the information provided during the call. *United States v. Terry-Crespo*, 356 F.3d 1170, 1176 (9th Cir. 2004). Police officers, in attempting to make an investigatory stop, are allowed to use force to effect it. *Graham*, 490 U.S. at 396 (citing *Terry*, 392 U.S. at 22-27); see also *United States v. Buffington*, 815 F.2d 1292, 1300 (9th Cir. 1987); *United States v. Thompson*, 558 F.2d 522, 524

(9th Cir. 1977) (The use of force during an investigatory detention does not automatically transform the stop into an arrest.) An officer is not required to determine whether a suspect is innocent or guilty prior to making an investigatory stop and “[t]he reasonable suspicion inquiry does not depend upon ‘whether particular conduct is ‘innocent’ or ‘guilty,’ but the degree of suspicion that attached to particular types of noncriminal acts.” *Shulgan*, 2008 WL 1730091, at *7 (quoting *Sokolow*, 490 U.S. at 10).

Information learned by Officer Thompson through police dispatch was originally provided by a 911 call and the totality of circumstances confronting Officer Thompson was sufficient to justify an investigatory stop. Therefore, even if Officer Thompson observed certain behavior by Zehm which may have indicated he was innocent, the totality of the circumstances confronting Officer Thompson still gave rise to reasonable suspicion to conduct an investigatory stop. Evidence that Zehm was innocent is irrelevant in determining whether the stop and subsequent use of force was justified because the so-called innocent acts were overcome by the facts known to Officer Thompson.

e. The district court did not abuse its discretion in holding that evidence of innocence is unfairly prejudicial.

Despite the district court’s erroneous conclusion that evidence of Zehm’s innocence may be probative of Zehm’s resistance, it correctly ruled that the disputed evidence is inadmissible under Fed. R. Evid. 403. Likewise, any probative

value of the evidence under the 18 U.S.C. § 1519 charge is also substantially outweighed by the evidence's prejudicial effect. As stated above, evidence is inadmissible under Rule 403 when its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Fed. R. Evid. 403.

1. Evidence of Zehm's innocence will confuse the issues properly before the jury.

The jury will be asked to decide whether Officer Thompson's use of force was excessive by determining whether his actions were objectively reasonable in light of the facts and circumstances known to him at the time of his confrontation with Zehm. *Graham*, 490 U.S. at 397. Part of this analysis may involve a determination of whether Zehm was actively resisting and whether Officer Thompson reasonably feared for his safety or the safety of others. *Id.* at 396. In order to make this determination, the jury will be asked to assess Zehm's observable behavior when confronted by Officer Thompson. The jury will not be asked to assess Zehm's thought processes or mental state. In other words, the only relevant determination will be whether, based upon a reasonable officer's on-scene perspective, Officer Thompson's use of force was justified under the circumstances known to him, including Zehm's observable behavior. If the government is allowed to present evidence of Zehm's suspected mental state, confusion over his thought processes will arise. This result will improperly divert the jury's attention

from Zehm's observable behavior and focus attention on what he may or may not have been thinking. This allows the jury to determine the issue of excessive force using the 20/20 vision of hindsight, an outcome prohibited by *Graham*.

2. Evidence of Zehm's innocence will unfairly prejudice Officer Thompson's right to have the jury assess his behavior using the *Graham* standard.

Facing a criminal charge under 18 U.S.C. § 242, Officer Thompson has the right to have his actions judged under the *Graham* standard. The government has acknowledged that Officer Thompson had reasonable suspicion to conduct an investigatory stop on Zehm based upon the facts and circumstances known to him. ER 542, 544. However, it now seeks to introduce highly prejudicial evidence to contradict this fact. The government's attempt to undercut the *Graham* standard is puzzling, especially in light of the fact that it has filed numerous pretrial motions and responses asserting that in assessing excessive force cases *Graham* prohibits the introduction of evidence unknown to an officer at the time force is used. The government is effectively asking this Court to allow it to pick and choose the totality of the circumstances surrounding the use of force so that it can allow the jury to consider extremely prejudicial evidence unknown to an officer when the decision to use force is made.

Allowing the jury to assess evidence of Zehm's innocence will allow it to decide the issue of excessive force with more information than known to Officer

Thompson when the confrontation ensued. If the jury is allowed to know that Zehm did not commit a crime at the ATM, it will be difficult for it to assess the circumstances confronting Officer Thompson from the perspective of an objectively reasonable police officer. It is likely that a jury will discount the seriousness of the circumstances known to Officer Thompson and other Spokane Police officers in responding to the call and challenge Officer Thompson's right to stop Zehm. Additionally, it will be nearly impossible for the jury to overcome the fact that an innocent man, involved in a confrontation with the Spokane Police Department, died two days after the incident.¹⁴ The prejudicial effect of this information is even greater given the fact that Officer Thompson is not charged with causing Zehm's death.

Under Fed. R. Evid. 403, evidence is unfairly prejudicial if it has an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed. R. Evid. 403, advisory committee's note. If the jury is allowed to know that Zehm was innocent, such evidence will have the undue tendency to tempt jurors to evaluate Officer Thompson's conduct based on "the 20/20 vision of hindsight." *Graham*, 490 US. at 396. Such a result is expressly prohibited under *Graham* and is thus unfairly prejudicial under Rule 403. Additionally, in learning that Zehm was innocent, the jury will not be able to

¹⁴ The jury will be shown autopsy photographs of Zehm and will otherwise be aware that he died.

overcome the emotional impact of such evidence in light of the fact that he died subsequent to the confrontation. Because the disputed evidence has an undue tendency to suggest the jury's decision on an emotional basis, the evidence is unfairly prejudicial and is inadmissible.

f. The government is not prejudiced under Count 2 because it has alternative means to contradict Officer Thompson's version of events.

The district court properly noted that the government has alternative means to prove Zehm's behavior in attempt to contradict Officer Thompson's version of events. "The availability of other means of proof may also be an appropriate factor" under the Rule 403 balancing test. Fed. R. Evid. 403, advisory committee's notes. The advisory committee's notes "leave no question that when Rule 403 confers discretion by providing that evidence 'may' be excluded, the discretionary judgment may be informed...by placing the result of that assessment alongside similar assessments of evidentiary alternatives." *Old Chief v. United States*, 519 U.S. 172, 184 (1997) (citing 1 McCormick 782, n. 41) (suggesting that Rule 403's "probative value" signifies the "marginal probative value" of the evidence relative to the other evidence in the case); 22 C. Wright & K. Graham, *Federal Practice and Procedure* § 5250, pp. 546-547 (1978) ("The probative worth of any particular bit of evidence is obviously affected by the scarcity or abundance of other evidence on the same point").

In reaching its decision that the government has additional means of proof, the court did not rely on a defense-favorable version of the facts. Rather, it relied upon prior representations made by the government to the court as to evidence it intends to offer at trial. *See e.g.* ER 284-340, 382-384, 553-555, 623-648. The government has previously disclosed to the court that “Officer Thompson’s recorded interview account is contradicted by percipient witnesses and the convenience store’s security video.”¹⁵ ER 314. The government has provided a “detailed discussion and summary of civilian witnesses’ accounts and security video footage in comparison to [Officer] Thompson’s account” to the court. ER 313 (citing R 60, exhibits ## 10, 11, 12). Additionally, the government has disclosed a human-factors expert who will opine regarding Zehm’s actions and behavior. ER 553-555, 623-648. A video-animation depicting the totality of the government’s version of events is also available if the proper foundation is laid. ER (R 424).

The government is not prejudiced by the court’s ruling. Clearly, the government has alternative means of proof to demonstrate Zehm’s behavior. To argue that the court inappropriately assumed that the government had this evidence

¹⁵ The government contends that civilian witnesses describe Zehm as defensive and continuously retreating. ER 313. Additionally, witnesses allegedly describe Zehm as having no time to react to Officer Thompson’s presence or reply to his alleged verbal commands. *Id.* (citing FBI 302 report). Similarly, the government describes the video surveillance footage as depicting Zehm as continuously backing away and in a defensive position. ER 313-314.

available is disingenuous. Therefore, under Fed. R. Evid. 403, the court properly considered the availability of alternative means of proof in determining that evidence of Zehm's innocence is overly prejudicial and did not abuse its discretion by excluding the evidence.

g. The district court properly held that a limiting instruction would be unsuccessful.

In ruling that evidence of Zehm's innocence is inadmissible, the Court appropriately determined that a limiting instruction would not remove the taint of prejudice. The Supreme Court has cautioned that "[t]he government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." *Bruton v. United States*, 391 U.S. 123, 129 (1968) (quoting *Delli Paoli v. U.S.*, 352 U.S. 232, 248 (1957), *overruled in part by Bruton v. United States*, *supra* (Frankfurter, J., dissenting)). The Court in *Bruton* went on to note that it is a "naïve assumption that prejudicial effects can be overcome by instructions to the jury[;] all practicing lawyers know to be unmitigated fiction." *Bruton*, 391 U.S. at 129 (quoting *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring)). Ultimately, the question of whether the prejudicial or distracting effects of evidence can be adequately mitigated by a limiting instruction is left to the sound discretion of the district court. *Layton*, 767 F.2d at 556.

Here, the court properly determined that the disputed evidence's prejudicial impact and potential for diversion rendered a limiting instruction of "dubious value." *United States v. Prescott*, 581 F.2d 1343, 1352 (9th Cir. 1978). Additionally, Defendant Thompson asserts that the emotional impact of the evidence cannot be mitigated by a jury instruction. In some contexts, such as this, "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton*, 391 U.S. at 135. Because the record reflects that the court weighed the adequacy of a limiting instruction and determined that it would be to no avail, the district court did not abuse its discretion.

h. The government is not entitled to a jury instruction on self-defense or proportional use of force.

The government's assertion that it is prejudiced by the court's exclusion of evidence regarding Zehm's innocence in its ability to obtain a jury instruction on self-defense and/or proportional force is incorrect as a matter of law. This Court has recently recognized that a person does not have the right to resist police detention even if the charges are false or the arrest is unlawful. *Luchtel*, --- F.3d ---, 2010 WL 3911282, at * 5 (citing *Willfong*, 274 F.3d at 1301 ("[A] person does not have the right to resist arrest even if the charges are false or the arrest unlawful.")). Therefore, even if Zehm was innocent of theft or robbery, he still did

not have the right to resist Officer Thompson's attempt to conduct an investigatory stop. The government cannot obtain an instruction on self-defense or proportional use of force based on Zehm's innocence because Zehm had no right to resist.

i. The district court properly determined that evidence of Zehm's conduct after Officer Thompson's physical involvement is admissible.

The government also asserts that the district court abused its discretion by making inconsistent rulings concerning the admission of Zehm's continued struggle with SPD officers while at the same time excluding evidence of Zehm's innocence of the underlying crime. The government chose not to appeal the additional ruling. Rather, it argues that the alleged inconsistencies support reversal of the instant order (Appellant's Brief p. 48, n. 29).

Contrary to the government's assertion, the district court's rulings are not inconsistent in the least. Evidence of Zehm's ongoing struggle with Spokane Police officers is not "after acquired evidence." Rather, it is evidence of a continued struggle that first began between Zehm and Officer Thompson, then was joined by Officer Braun, then joined by four additional police officers who assisted Officer Thompson in handcuffing Zehm, and continued with the remaining officers after Officer Thompson had disengaged. The evidence of the continued struggle is probative as to the cause of the injuries sustained by Zehm, i.e., whether the injuries were caused by baton strikes from Officer Thompson or suffered in the prolonged struggle with the other officers.

Zehm engaged in a continuous struggle with the officers for over twenty-two minutes. Although Officer Thompson's contact with Mr. Zehm began with their individual struggle, and continued until the time of the handcuffing with numerous officers at the scene, there was no intervening break or no time lapse during the continuous struggle. Of significance is the district court's recognition that the constituted "post incident" events are a matter of seconds. ER 77. As the district court noted this issue was raised in a motion *in limine* and the Court could not draw a strict timeline, but as a matter of direction to counsel indicted that it would allow the observations of law enforcement officers or lay people about events that occurred within a reasonable proximity to Officer Thompson's interaction but not some, thirty minutes later. ER 78. In sum, the Court did not allow evidence of "after acquired knowledge" but only that knowledge within the immediate proximity of the events.

Additionally, the testimony regarding Zehm's behavior after Officer Thompson's involvement is significant because the government asserts, in part, that Officer Thompson used unreasonable force including baton strikes to the head. Evidence at trial relied upon by the government will be autopsy findings, including bruising and abrasions on Zehm to substantiate the alleged strikes. Expert opinion testimony will be offered concerning the cause of these injuries. The location, cause and severity of the injury is in fact in dispute in the case, including whether

the alleged injury was caused during Officer Thompson's singular engagement with Zehm or during Zehm's continuous struggle with the police officer at the scene. Therefore, testimony regarding Zehm's continued violent behavior is relevant and admissible for the purpose of proving the nature and cause of this alleged head, neck and upper torso injuries.

X. CONCLUSION

The district court did not abuse its discretion by excluding evidence unknown to Officer Thompson at the time of his use of force, i.e., evidence of Zehm's innocence. The district court provided a reasonable justification for its ruling under Fed. R. Evid. 403; therefore, the highly deferential standard of review for evidentiary rulings has been met. Appellee respectfully requests this Court affirm the district court's order finding that evidence of Zehm's innocence is inadmissible.

Dated this 4th day of November, 2010.

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STATEMENT OF RELATED CASES

Counsel for Appellee certifies that no cases are pending in this Court that are related to the issues presented in the instant appeal.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 4, 2010.

The participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the forgoing document by First-Class Mail, postage prepaid to the following non-CM/ECF participant: Victor Boutros, U.S. Dept. of Justice, Civil Rights Division.

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CERTIFICATION OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 (1)(7)(C), this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,561 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated November 4, 2010

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