

*The Honorable FRED VAN SICKLE*

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES,	)	<b>NO. CV-09-0088-FVS</b>
	)	
Plaintiffs,	)	<b>DECLARATION OF JAMES E. NICKS</b>
vs.	)	<b>ASSISTANT CHIEF OF POLICE</b>
	)	<b>SPOKANE POLICE DEPARTMENT</b>
KARL F. THOMPSON, JR.	)	
	)	
Defendant.	)	

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JAMES E. NICKS, Assistant Chief of Police, Spokane Police Department, declares and states under the penalty of perjury under the laws of the United States (28 U.S.C. § 1746) that the following information is true and correct to the best of his knowledge, information and belief. The undersigned further declares that he is above the age of 18, is not a party hereto, is competent to testify to the matters stated herein which are based upon personal knowledge, personal information, and/or a personal review of information that has been acquired by the Spokane Police Department and/or the Department of Justice during the course of their respective investigations into the events of the Defendant Karl F. Thompson’s forcible seizure and detention of Otto Zehm on March 18, 2006, which force (i.e., baton strikes and taser applications) precipitated Mr. Zehm’s cardio-pulmonary arrest while in the custody of the Spokane Police Department (“SPD”).

**DECLARATION OF ASSISTANT SPOKANE POLICE CHIEF JAMES NICKS  
IN RESPONSE TO DEFENDANT’S MOTION TO EXCLUDE TESTIMONY**

1 The undersigned further declares that these statements are provided in good  
2 faith and should be admissible as evidence and/or as a proffer or offer of proof at the  
3 time of hearing or trial:  
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5 **INTRODUCTION**

6 1. I have been actively involved in law enforcement for over 30 years.  
7 During these 30+ years, I have served as a Patrol Officer, Detective, Patrol Sergeant,  
8 Operations Mgmt. Sergeant, Patrol Lieutenant, Operations Mgmt. Lieutenant,  
9 Captain of the Patrol Division, Assistant Police Chief of the Uniform Bureau (Patrol  
10 Division), and Acting Police Chief in charge of all Spokane Police Department  
11 operations. I am currently employed as the Assistant Police Chief, wherein I have  
12 the responsibilities of a chief operations officer and I am the second in command of  
13 the Spokane Police Department. In my current position, I am also responsible for  
14 supervising and administrating all departmental operations, personnel, policies and  
15 procedures, and training. I have oversight of approximately 400 employees.  
16 Attached as *Exhibit A* is a copy of my *Curriculum Vitae (CV)*.

17 2. In addition to the foregoing work experience and duties, for  
18 approximately a ten (10) year period I served as the Assistant Commander and also  
19 the Commander of the Spokane Police Department's Tactical Team, which serves a  
20 dual role in providing crowd management operations (i.e., management of mass  
21 citizens through the use of various levels of force) and as first responders in  
22 providing assistance to Patrol Officers for typically significant and rapidly evolving  
23 law enforcement incidents. Officer Karl Thompson participated in and was a trained  
24 member of the SPD Tactical Team during my tenure.

25 3. For approximately the past 23 years I have served in a supervisory role  
26 with Spokane Police Department. In that capacity, I have had the responsibility of  
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1 supervising and reviewing Spokane Police Officers' use of force incidents and their  
2 reporting of the same. In this capacity, I have participated in and have received  
3 years of defensive tactics training, and am well versed in the application of  
4 Spokane's use of force model and policy.

5 4. For the past 17 years I have served as an administrator for the City of  
6 Spokane Police Department, and have continued to receive training on force policies  
7 and procedures, and the legal principles for determining the objective reasonableness  
8 of a law enforcement officer's use of force under *Graham, Garner, and Harris*. For  
9 the past approximate ten (10) years I have been directly involved in developing,  
10 maintaining and implementing Spokane Police Department policies and procedures  
11 that comply with local, state and national law enforcement standards. This review  
12 includes, among others, the Department's defensive tactics and use of force policies.

13 5. In my capacity as a supervisor and administrator, I have had occasion to  
14 review *hundreds* of Spokane Police Officer use of force incidents for the purpose of  
15 determining whether a particular force application or incident complied with  
16 Spokane Police Department training, policies and procedures, and for the purpose of  
17 determining whether an officer's use of force was objectively reasonable under the  
18 United States Constitution (i.e., application of *Graham* objective reasonableness  
19 legal principles).

20 6. In performing this important and necessary administrative function, I  
21 and others administrators within the SPD have, from time to time, consulted with  
22 other subordinate SPD officers who have received greater specialty training in  
23 specialized areas of defensive tactics. This is not unusual nor does it mean that I  
24 defer the assessment of policy and procedure compliance or the determination of  
25 objective reasonableness to the specialized tactical instructor. One of my primary  
26 responsibilities as a supervisor – administrator is to independently assess an officer's  
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1 particular use of force for the purpose of determining compliance with SPD policies  
2 and procedures, and for the important purpose of determining the objective  
3 reasonableness and lawfulness of the officer's force application for the purpose of  
4 ensuring compliance with the laws of the United States and the state of Washington.  
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### 6 **OVERVIEW OF THOMPSON'S FORCIBLE SEIZURE OF ZEHM**

7 7. This case arises out of Defendant Spokane Police Department (SPD)  
8 Patrol Officer Karl F. Thompson Jr.'s use of force (i.e., an impact weapon (baton  
9 and a taser)) to forcefully detain and seize Otto Zehm at a north Spokane Zip Trip  
10 convenience store during the early evening of March 18, 2006. Defendant  
11 Thompson forcefully seized Mr. Zehm in response to a "suspicious circumstance"  
12 and/or "suspicious person" complaint called in to 911 by two young females (i.e.,  
13 18-year-olds), who reported that Mr. Zehm may have accessed one of their accounts  
14 at a Washington Trust Bank ATM and may have taken money. Their concern was  
15 ultimately forwarded to the SPD Dispatch Center and then passed on to SPD Patrol  
16 Officers.

17 8. Officer Thompson's use of force on Mr. Zehm and Mr. Zehm's  
18 resistive response to the multiple baton strikes (i.e., 13 baton strikes) ultimately led  
19 to additional officers being called to assist Officer Thompson in fully suppressing  
20 Mr. Zehm and completely restraining him in a prolonged prone, four-point  
21 (commonly referred to as a "hog-tie") restraint. After being forcefully restrained for  
22 approximately 17 minutes in this prone, full restraint position, and after application  
23 of a plastic non-rebreather mask due to concerns of Zehm spitting blood, and while  
24 other responding SPD Officers appear to have continued to apply pressure to restrain  
25 Mr. Zehm's neck, back and legs, Mr. Zehm stopped breathing and went into cardio-  
26 pulmonary arrest.  
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1           9.     Resuscitation efforts were made by City Fire Department members on  
2 scene, but they were unable to revive Mr. Zehm on scene and he was ultimately  
3 declared brain dead two days later. Dr. Sally Aiken, Spokane County's Medical  
4 Examiner, determined cause of death was due to *Hypoxic Encephalopathy due to*  
5 *Cardiopulmonary Arrest while restrained (total appendage restraint) in prone*  
6 *position for excited delirium. See May 22, 2006, Autopsy report. Dr. Aiken also*  
7 *deemed Mr. Zehm's "brain death" (hypoxic encephalopathy) to be a homicide under*  
8 *state law since the death was causally related to personal intervention and not a*  
9 *naturally occurring demise.*

10  
11     **OFFICER THOMPSON'S RECORDED STATEMENT & FORCE ACCOUNT**

12           10.    Defendant's official interview by investigators concerning his  
13 involvement in forcibly detaining Otto Zehm took place on March 22, 2006, in the  
14 SPD's conference room. Defendant, along with his attorney (Hillary McClure) from  
15 the Spokane Police Guild, and a representative (SPD Officer Jeff Harvey) of the  
16 Spokane Police Guild, met with an investigator from the SPD (Det. Terry Ferguson)  
17 and the Spokane County Sheriff's Office (Det. Bill Francis).

18           11.    The interview was conducted in two parts. During the first part, which  
19 the parties agreed not to record, Defendant gave an overview and account of the  
20 facts and circumstances surrounding his use of force against Zehm. After a lunch  
21 break, Defendant participated in a second, official, recorded interview which  
22 generally covered the same alleged facts and circumstances that were reportedly  
23 discussed in the first part of the interview.

24           12.    During the second part of the interview, Defendant was asked if he was  
25 aware that he was being recorded. He stated that he was and gave his permission  
26 for the interview to be recorded. The defendant was also informed that the  
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1 interview was “for the record.” *See ECF 60, Exhibit #1, Thompson’s Recorded*  
2 *Statement.*

3 13. At the end of the interview, Defendant was asked if he wished to add  
4 any information. Defendant responded that he believed that he had covered the  
5 incident thoroughly. Defendant was then told that he would have an opportunity to  
6 review the transcript and he expressed gratitude for the opportunity. *Id.*

7 14. On March 27, 2006, five days after the recorded interview, the  
8 defendant contacted SPD Detective Terry Ferguson to review the transcription of  
9 the officially-recorded interview. The defendant reviewed the transcript for  
10 substantive accuracy as well as typographical errors. During this review, the  
11 defendant provided the investigator with additional, clarifying information (i.e., all  
12 of his baton strikes were “horizontal,” not “vertical”) and he made a minor revision  
13 to the transcript (i.e., fixed one typo). *Id.*

14 15. The defendant then signed the official SPD investigative statement,  
15 which was then made part of the SPD’s official investigative record. For a more  
16 detailed description of Defendant’s recorded March 22, 2006, interview and his  
17 March 27, 2006, review, approval, and adoption of the transcript of the March 22,  
18 2006, interview, and a general overview of alleged false statements, please see  
19 factual recitals in Ct. Recs. #40, pgs.16-21; and #107, pgs.10-13, which are  
20 incorporated herein by reference.

21 16. To my knowledge, Thompson has not sought nor requested to make  
22 any changes and/or revisions to this official SPD investigative record since he  
23 signed it on March 27, 2006.

24 17. When the Defendant Thompson signed his transcript on March 27,  
25 2006, investigators had in their possession several witness accounts and other  
26 materials that significantly contradicted Officer Thompson’s initial and subsequent  
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1 versions of his engagement of Mr. Zehm. During the course of the SPD-MCU's  
2 investigation it acquired additional information and materials that further  
3 contradicted Thompson's transcribed statement. These contradictions include, but  
4 are not necessarily limited to Officer Thompson's description of:

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

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

12 iii) Mr. Zehm's alleged immediate, knowing, defiant and verbal response  
13 to Thompson's claimed verbal commands (i.e., Officer Thompson claimed  
14 that Zehm's responses to his loud, successive verbal commands were  
15 "immediate," knowing, defiant, hostile and aggressive (among other  
16 descriptions));

17 iv) The amount of time Thompson allegedly afforded Mr. Zehm to  
18 perceive, understand, react and comply with his alleged verbal commands  
19 (i.e., Officer Thompson's first baton strike is within approximately 2.5  
20 seconds of first contacting Mr. Zehm);

21 v) Mr. Zehm's asserted knowing and intentionally defiant, aggressive,  
22 and non-retreating "about to be assaultive" physical stance with the plastic  
23 two liter bottle of Diet Pepsi allegedly in a "loaded" position, which actions  
24 Officer Thompson claims Zehm took in response to his alleged verbal  
25 commands (i.e., Zehm, upon alerting to the rapidly advancing Officer  
26 Thompson, never took a fixed position of defiance and/or aggress, and  
27 records/video only show Zehm retreating the entire time from the defendant  
Officer); and

vi) The impact location of the baton strikes (i.e., AMR paramedic medical  
report shows paramedics were informed on scene that Zehm sustained baton  
strikes to his head, neck and upper torso, versus the lower torso strikes  
Thompson claims he delivered); *See AMR Emergency Medical Record.*



1 “Officers of the Spokane Police Department shall be aware of their lawful  
2 authority to use that force reasonably necessary in securing compliance with  
3 their lawful enforcement duties.”

4 *Id.*

5 22. SPD Code of Ethics Standard 2.2 further provides:

6 “Members of the Spokane Police Department shall truthfully, completely,  
7 and impartially report, testify, and present evidence in all matters of an  
8 official nature.”

9 *Id.*

10 23. SPD General Rules of Conduct, XXVII, section A, further provides:

11 “Filing false report: No member shall make a false official report nor  
12 knowingly enter or cause to be entered in any Department books, records, or  
13 reports any inaccurate or false or improper police information or other  
14 material matter or other misrepresentation of facts. A member must speak  
15 the truth at all times and under all circumstances. A member who departs  
16 from the truth either in giving testimony, in an official written report or in  
17 connection with an official order received by him/her or in his/her official  
18 duty shall be considered in violation of this rule.” (Emphasis added).

19 *Id.*

20 24. Still further, the SPD’s General Rules of Conduct, Section XXVII, B  
21 also provides:

22 “False statement or report to superior: Members of the Department shall not  
23 make a false statement, falsify any written or verbal report made to a  
24 superior, nor intentionally withhold material matter from such report or  
25 statement.”

26 *Id.* These polices and rules regarding official report writing and the ethical duties  
27 concerning the truthfulness of SPD reports applied to all SPD Officers and  
Investigators in 2006.

28 25. Officer Thompson elected to give an interview, with counsel present,  
29 given 88 hours after the event, taken by SPD Detective Terry Ferguson during the  
30 course of the SPD’s criminal investigation of the in-custody death incident, which

1 statement was later transcribed, reviewed and approved by the defendant, and as  
2 such is an official SPD investigative record. Defendant Thompson's statement  
3 was free and voluntarily given in lieu of providing a written report of his forcible  
4 detention of Otto Zehm.

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6 **DEFENSE COUNSEL INTERVIEW RE: FACT & EXPERT TESTIMONY**

7 26. On or about June 4, 2010, after first meeting with Rocco Treppiedi,  
8 Asst. City of Spokane Attorney, I participated in a defense interview in the case of  
9 *United States v. Karl Thompson Jr.* that was conducted by defense attorneys Steve  
10 Lamberson and Carl Oreskovich of the Etter, McMahon, et al, law firm. Their  
11 associate attorney Courtney Garcea was also present. I am familiar with Messrs.  
12 Oreskovich and Lamberson since it is my understanding that Mr. Oreskovich and  
13 his firm have been designated by the City Attorney's Office as *Special Counsel* to  
14 the City of Spokane and that they have provided legal advice and counsel to the  
15 defendant Karl Thompson and to the City Attorney's Office in connection with the  
16 City of Spokane's defense of the civil suit of *Estate of Otto Zehm v. City of*  
17 *Spokane, Thompson, Nicks, et al.* See *Estate of Otto Zehm, et al, v. City of Spokane,*  
18 *Thompson, Nicks, et al, Cause No. 09-cv-0080-LRS.* I am familiar with Messrs.  
19 Oreskovich and Lamberson, and previously met with Mr. Oreskovich in 2008 at a  
20 meeting arranged and organized by Asst. City Attorney Treppiedi concerning the  
21 civil suit of *Estate of Otto Zehm, et al, v. City of Spokane, Thompson, Nicks, et al.*

22 27. In addition to Messrs. Oreskovich, Lamberson, Ms. Garcea, and Asst.  
23 City Atty. Treppiedi being present for the interview, Assistant United States  
24 Attorney Joseph Harrington and FBI Special Agent Lisa Jangaard were also in  
25 attendance.

26 28. During this defense interview, I disclosed to Messrs. Lamberson and  
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1 Oreskovich, and Ms. Garcea, that I had met with U.S. Department of Justice (DOJ)  
2 officials concerning the United States prosecution. I informed them that I had also  
3 received a subpoena that required me to appear and testify at the then pending June  
4 7, 2010, trial.

5 29. Messrs. Lamberson and Oreskovich inquired about my law  
6 enforcement career and experience. I informed defense counsel that I had been a  
7 patrol officer for approximately six years before moving up the ranks to Patrol  
8 Sergeant and ultimately to Acting Chief of Police. Given their legal relationship  
9 with and representation of the City of Spokane and the Spokane Police Department,  
10 defense counsel were aware of my current position of Assistant Chief of Police.

11 30. While I did disclose that I have never held an official position as a Use  
12 of Force Training Instructor, I also informed Messrs. Oreskovich and Lamberson  
13 that I have continued to receive regular training in use of force policies and  
14 procedures, and in defensive tactics instruction and training.

15 31. I also informed Messrs. Lamberson and Oreskovich that I spent several  
16 hours reviewing materials (i.e., CAD, Dispatch record, security video and stills,  
17 defendant's recorded statement, etc.) related to this incident in preparation for my  
18 anticipated testimony in the upcoming trial. I further disclosed that I had spent  
19 several hours reviewing various case materials, including the security video and  
20 Karl Thompson's recorded statement, with Spokane's current Police Chief Anne  
21 Kirkpatrick. I spent time reviewing these materials with Chief Kirkpatrick for the  
22 purpose of securing her input and obtaining a peer review of my own findings and  
23 conclusions concerning the objective reasonableness of the defendant officer's  
24 actions.

25 32. I am aware that the Supreme Court's decision in *Graham v. Connor*,  
26 490 U.S. 386, 397 (1989), requires that an officer's use of force must be  
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1 "'objectively reasonable' in light of the facts and circumstances confronting [him]."  
2 The Court also said that the determination of whether the officer's actions were  
3 objectively reasonable under the totality of circumstances confronting them is to be  
4 "judged from the perspective of a reasonable officer on the scene rather than with  
5 the 20/20 vision of hindsight." *Id.* at 396-97. The *Graham* court said that the  
6 objective reasonableness analysis requires balancing the "nature and quality of the  
7 intrusion" on a person's liberty with the "countervailing governmental interests at  
8 stake" to determine whether the use of force was objectively reasonable. Allowance  
9 is also given to the fact that police officers "are often forced to make split-second  
10 judgments," and therefore not every push or shove, even if it may seem unnecessary  
11 in the peace of a judge's chambers, is a violation of the Fourth Amendment. It is  
12 also true, however, that where some force is justified, the amount of force actually  
13 used by an office may be excessive.

14 33. I am also aware that the Courts have stated that "reasonableness test" is  
15 not capable of precise definition or mechanical application, and that its proper  
16 application requires careful attention to the facts and circumstances of each  
17 particular case, which requires a fact finder to pay "careful attention to the facts and  
18 circumstances of each particular case" and to consider: the severity of the crime at  
19 issue, whether the suspect poses an immediate threat to the safety of the officers or  
20 others, and whether the subject is actively resisting arrest or attempting to evade  
21 arrest by flight. I am aware that the foregoing factors are not exclusive and that the  
22 law provides that a fact finder is allowed to consider additional factors that may be  
23 present in a particular case, including whether a warning was given before force  
24 was used; the availability of alternative methods of capturing or subduing a suspect  
25 (although the least amount of force is not a requirement); whether back up officers  
26 are on the way; and whether the individual is mentally ill or emotionally disturbed,  
27

1 as opposed to an armed and dangerous criminal. In sum, the law requires fact  
2 finder to examine the “totality of the circumstances” of each unique case and to  
3 consider whatever specific reasonableness factors may be appropriate.

4 34. I am also aware that the Court considers the most important factor  
5 under *Graham* to be whether the suspect posed an immediate threat to the safety of  
6 the officers or others. Along these lines, I am aware that an officer must have an  
7 objectively reasonable belief, not just “a belief,” in the existence of a threat before  
8 utilizing force during a seizure. The officer must reasonably belief force is  
9 necessary based on the nature of the threat – not just merely the officer’s subjective  
10 fears. Thus, *Graham*’s objective reasonableness analysis takes into account both  
11 the nature of the perceived threat and the soundness of the officer's basis for making  
12 that assessment.

13 35. Based upon my review of Thompson's recorded statement and account  
14 of the force incident, I informed Messrs. Lamberson and Oreskovich that he may  
15 have believed that he was responding to a possible attempted robbery or theft at the  
16 ATM and that he had a duty to investigate and perform a *Terry* stop of Zehm, which  
17 could have involved physical detention for questioning or for officer safety, if  
18 reasonably indicated.

19 36. I also informed Messrs Oreskovich and Lamberson, however, that I  
20 found several glaring inconsistencies in Thompson's statement describing Zehm’s  
21 behavior as aggressive and about to be assaultive in comparison to the objective  
22 recording of the force event captured by the Zip Trip store’s security cameras -  
23 video. Defendant’s description of Zehm’s aggressive-assaultive behavior is not  
24 supported by the objective security video recordings. These inconsistencies  
25 include, among others, Thompson failure to stop and give verbal commands to  
26 Zehm as claimed and no observable instances where Zehm stood his ground and  
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1 actively boxed-assaulted Thompson during the altercation as defendant claimed.

2 37. Mr. Lamberson inquired whether an officer is allowed to make  
3 commands on approach to an individual and I responded that officers are expected  
4 to provide verbal commands and ask questions. However, I expressed serious  
5 concerns with the significant inconsistencies in Thompson's statement where he  
6 provided descriptions that allegedly justified the use of an impact weapon (baton)  
7 on Zehm, but these descriptions are not reasonably supported by the objective  
8 evidence captured by the security store video.

9 38. Mr. Lamberson also inquired whether I had reviewed SPD  
10 investigation reports prepared by Rob Boothe and Larry Bowman arising from the  
11 SPD's investigation shortly after the March 18, 2006, incident. I confirmed that I  
12 had and I recalled that Boothe had initially concluded that Thompson's defensive  
13 tactics, used against Zehm were reasonable and within Spokane Police Department  
14 policy. However, I informed Mr. Lamberson that I was not comfortable with the  
15 completeness of the information that was made available to both Boothe and  
16 Bowman by SPD investigators prior to the generation of their reports. I am also  
17 aware of the United States' disclosure of Officer Booth's anticipated expert  
18 testimony, which I understand is based on prior sworn testimony provided by  
19 Officer Boothe in front of the Grand Jury. This anticipated testimony is  
20 summarized as follows:

- 21 • SPD Detective Terry Ferguson of the Major Crimes Unit solicited Officer  
22 Boothe's analysis of the defensive techniques that Officer Thompson applied  
23 on Otto Zehm. However, Detective Ferguson only provided Officer Boothe  
24 with limited information (i.e., two (2) video angles) about the incident and  
25 her own overview-recital of the underlying "suspicious circumstances" call  
she stated Officer Thompson was investigating;
- 26 • Based on a more detailed review of Officer Thompson's recorded statement,  
27 in comparison to what is reflected on the Zip Trip store security video, there

1 was no objective basis authorizing the use of an impact weapon targeted at  
2 Mr. Zehm's head, neck, or above the shoulders (i.e., no lethal force  
authorized);

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

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

11 *See Summary of Officer Robert Boothe's expert disclosures, United States'*  
12 *Supplement to Expert Disclosures, ECF 140.*

13 39. Mr. Lamberson questioned whether Zehm's failure to drop the soda  
14 bottle could be perceived as non-compliance. I agreed that it could, assuming that  
15 Zehm was properly commanded to drop the soda bottle and was given a sufficient  
16 amount of time to comply, and failed to comply, that this could be perceived as  
17 non-compliance. I added that police officers are instructed to "hit back first" and  
18 explained that if a police officer has an objectively reasonable basis to believe that a  
19 person is threatening him or others harm, the officer can preemptively hit/strike the  
20 subject first. However, based on a careful review of the call circumstances and  
21 objective security video, coupled with a review of Thompson's statement, Zehm's  
22 behavior rose only to that of an "active resister," not assaultive or about to be  
23 assaultive. Therefore, use of an impact weapon did not serve a legitimate law  
24 enforcement purpose.

25 40. Further, Zehm appears on the security video to be in more of "flight"  
26 mode as opposed to a "fight" mode, and Zehm's behavior appears to be trying to  
27 find a way out of the situation. Based on the objectively captured security video,  
Zehm only appears to be using the soda bottle as a mechanical means to resist

1 Officer Thompson. Based on the reasonable officer standard, Officer Thompson  
2 would have been reasonably able to use only that force necessary and allowed at  
3 the active resister level. This force would have included hair holds, oleoresin  
4 capsicum ("OC") spray, and drive stun taser application, not the application of  
5 baton strikes or the firing of taser probes. Thompson's use of his baton was not an  
6 appropriate or authorized use of force within the Spokane Police Department's  
7 policy since Zehm did not reasonably appear to be assaultive toward Thompson.

8 41. Mr. Lamberson also asked me about Zehm allegedly punching up at  
9 Officer Thompson in the south aisle while Zehm was on his back. I informed Mr.  
10 Lamberson that I did not observe the alleged punching during any of part of the  
11 altercation as described by Officer Thompson in his statement.

12 42. Mr. Lamberson also asked me about "Monday Morning  
13 Quarterbacking" Officer Thompson's involvement in the force incident. I agreed  
14 that my post-incident review could be considered, as Mr. Lamberson put it,  
15 Monday morning quarterbacking. However, that term denotes to me the  
16 requirement of performing an "after the fact" objective reasonableness review of  
17 the totality of circumstances that existed, based on the "reasonable officer"  
18 standard. *See previous Graham discussion.* If Messrs. Lamberson and Oreskovich  
19 connote *Monday morning quarterbacking* to mean "second guessing" the officer  
20 based on information that was not known to the officer and does not impeach his  
21 account of the force event, then that would be an inappropriate form of second  
22 guessing. *See Boyd v. City and County of San Francisco.* However, my duties as a  
23 supervisor and administrator require me to perform an objective reasonableness  
24 assessment of Officer Thompson's conduct in light of the actual totality of  
25 circumstances that were present when he forcibly seized Otto Zehm for the dual  
26 purpose of determining compliance with Spokane Police Department policy and  
27

1 procedure, and the lawfulness of the force used under the laws of the United States  
2 and the State of Washington.

3 43. Mr. Lamberson also showed me during the interview a copy of the  
4 expert disclosure report that was prepared and filed by the United States Attorney's  
5 Office based on my sworn grand jury testimony. This expert disclosure is  
6 summarized below:

- 7 • "Asst. Chief Nicks would have expected the SPD-MCU investigators to  
8 perform appropriate follow up to the AMR paramedics March 18, 2006,  
9 report of their on-scene call response and interaction with one or more SPD  
10 Officers and/or supervisors, which the paramedics reported as follows:

11 "Hx: SPD stated pt [Zehm] was attempting to rob someplace close to the  
12 gas station, and then fled [sic] that scene and ended up inside the gas  
13 station where he was confronted by SPD. *SPD stated pt became very  
14 combative and was tasered twice and hit in the upper torso, neck and head  
15 by a night stick per SPD.* SPD stated pt was then put into hand cuffs and  
16 placed prone on the ground. SPD called SFD for removal of the taser  
17 barbs."

18 . . .

19 SPD-MCU investigators did not perform any follow up on this report that  
20 appears to document one or more SPD officers reporting on-scene an  
21 account of baton strikes to Zehm's "head, neck and upper torso" by the  
22 detaining Officer (i.e., Thompson).

- 23 • Further, SPD-MCU investigators did not identify, disclose nor discuss the  
24 contents of this on-scene medical history report in the SPD's case referral to  
25 the County Prosecutor and stated:

26 "There is no evidence of criminal activity"

27 It also appears that this report would have been in the possession of the City  
Attorney's Office, since the City Attorney's Office handled the media's  
public records request for the SPD's and MCU's investigation filed in May  
2006.

- The Defendant Officer Thompson has years of training in defensive tactics,

1 dealing with emotionally disturbed individuals and hostage negotiations.  
2 Officer Thompson is a highly trained law enforcement officer and should  
3 have outstanding communications skills;

- 4 • Asst. Chief Nicks would have expected the Spokane Police Department  
5 investigation to have provided its in-house use of force instructors with a  
6 thorough disclosure of the evidence concerning the “totality of the  
7 circumstances” and to have secured opinions on: a) Was the use of force  
8 lawful; b) Was the use of force objectively reasonable; and c) Was the use of  
9 force in compliance with Spokane Police Department policy. The SPD  
10 Major Crimes Unit investigation team did not perform these tasks;
- 11 • The SPD Major Crimes Unit also failed to perform a side-by-side analysis  
12 and comparison of Officer Thompson’s recorded statement against the  
13 objectively recorded Zip Trip store security video;
- 14 • Based on Officer Thompson’s statement in comparison to the Zip Trip store  
15 security video, Officer Thompson’s baton strikes were not mostly  
16 “horizontal” as he claimed. Rather the baton strikes were more vertical and  
17 applied in a downward manner;
- 18 • Based on the Zip Trip security store video, Officer Thompson did not stop to  
19 engage in a verbal exchange with Otto Zehm before the rapid delivery of his  
20 first two baton strikes;
- 21 • Based on the video, Zehm is retreating the entire time from the rapidly  
22 advancing Thompson and does not take a position of aggress and/or  
23 engagement, and does not appear “about to be assaultive” toward  
24 Thompson;
- 25 • Based on the video, during Officer Thompson’s initial engagement of Otto  
26 Zehm, Mr. Zehm appears to be “active resistant” and is not assaultive toward  
27 the officer. Therefore Officer Thompson was not authorized to utilize an  
impact weapon on and strike Zehm;
- Based on the security video, Otto Zehm did not take a boxing stance and/or  
throw punches at Officer Thompson. This is inconsistent with Officer  
Thompson’s statement to SPD investigators;

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

19 *See United States Supplemental Expert Disclosures, ECF 140.* I confirmed for Mr.  
20 Lamberson that the disclosures described above contained opinions that I had  
21 provided in the form of sworn testimony before the grand jury.

22 44. In response to questioning, I told Messrs. Lamberson and Oreskovich  
23 that I did not generally have an issue with a "rapid advance" (on a subject).  
24 However, it is my professional opinion that Officer Thompson’s use of the baton  
25 was an inappropriate use of force based on the objective evidence of the event, the  
26 Spokane Police Department policies and procedures, and *Graham* principles.  
27

1 When asked by Mr. Oreskovich if policies were "guidelines," I agreed but added  
2 that if an officer deviates from these policies, which have been developed and are  
3 based upon a "reasonable officer" standard, the deviation is considered an  
4 "exceptional technique" and the officer must be able to reasonably articulate and  
5 objectively justify any force used outside of SPD policy.

6 45. In sum, my opinions are not subjective or personal. Rather, they are  
7 professional opinions, based on my training, education and over 30 years of  
8 experience as an active law enforcement officer, supervisor and administrator.  
9 They are also based on the objective evidence showing the totality of  
10 circumstances confronting Officer Thompson when he forcibly seized Zehm. Yes,  
11 this is admittedly an "after the fact" analysis, but this is what law enforcement  
12 supervisors-administrators are required to do in order to determine whether an  
13 officer has complied with departmental policy and procedure. This "after the fact  
14 analysis" is also required under *Graham* in order to determine whether a  
15 reasonable officer in the same and actual circumstances confronting Officer  
16 Thompson would have reasonably concluded that Zehm presented a credible threat  
17 to the officer's safety, thereby justifying the particular force used by Officer  
18 Thompson (i.e., baton strikes and firing of taser probes).

19 46. Here, Thompson's stated reasons for using an impact weapon on  
20 Zehm is not supported by objective evidence. Officer Thompson's baton strikes  
21 were not within SPD policy, were unnecessary, were not appropriate and were  
22 unreasonable under the circumstances. Thompson's immediate baton strikes to the  
23 retreating, non-assaultive Zehm did not serve a legitimate law enforcement purpose  
24 (i.e., *Terry stop* detention of a non-threatening suspect) and no reasonable officer  
25 would have perceived Zehm's response to Officer Thompson's presence as  
26 assaultive. I have not reached this assessment lightly and in fact have peer  
27

1 reviewed my analysis, assessment and conclusions with Chief Anne Kirkpatrick.

2 RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of August 2011.

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4   
5 JAMES E. NICKS  
6 Assistant Chief of Police  
7 Spokane Police Department  
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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  
Eastern District of Washington  
Post Office Box 1494  
Spokane, WA 99210-1494  
Telephone: (509) 353-2767  
Tim.Durkin@USDOJ.gov

**JAMES E. NICKS**  
**SPOKANE POLICE DEPARTMENT**  
**1100 W. MALLON**  
**SPOKANE, WA 99260**

EXPERIENCE

32-years criminal justice experience and currently serving as the Assistant Chief of Police for the Spokane Police Department.

**Spokane Police Assistant Chief from February 2007 to Present**

Chief Operating Officer and second in command of the police department. Responsible for all departmental operations, budget, strategic planning, policy, training and personnel. Member of the City Labor Negotiations Executive Committee. Member of the Spokane Regional Emergency Communication System Committee. Oversight of 400-employees and \$49 million budget.

**Interim Chief of Police from January 2006 to September 2006**

Served as the Chief of Police during the recruiting and selection process for a permanent chief.

**Spokane Police Deputy Chief of the Uniform Bureau from January 2001 to January 2006 and September 2006 to February 2007.**

Command Level responsibility for the Patrol Division, the Traffic Division, the K-9 Unit, the Dispatch Center, the Neighborhood Resource Officer Unit and Critical Incident Teams. Served as the police administration representative on the City Labor Negotiation Committee. Span of control in this assignment was up to 220-employees.

**Spokane Police Department Patrol Captain from March 2000 to January 2001**

Provided command level oversight of the Patrol Division; to include the Traffic Division, K-9 Unit and Neighborhood Resource Officers Unit. Span of Control was approximately 180-employees.

**Spokane Police Department Operational Management Services Lieutenant from January 1998 to March 2000**

Duties involved the supervisory oversight of the Police Dispatch Center, the Evidence and Property Facility, and the police fleet.

**Spokane Police Department Patrol Lieutenant from May 1994 to January 1998**

Shift Commander for two years on the evening shift and two years on the night shift. Span of control was up to 60-officers.

**Spokane Police Operational Management Services Sergeant, April 1990 to May 1994**

Duties involved the coordination of community special events, contracting of off-duty employment of police officers and oversight of the police fleet. Provided general supervisory oversight of crime analysis and the case screening function.

**Spokane Police Department Patrol Sergeant from March 1988 to April 1990**

First level field supervisor for 12-officers on the evening shift

**Spokane Police Property Crime Detective from January 1988 to March 1988**

Primarily a training and familiarization assignment in the property crime unit due to my short tenure in this position.

**Spokane Police Department Patrol Officer from April 1982 to January 1988**

Assigned to the evening and the night shift. Served as a Field Training Officer during the last two years in this assignment.

**Ephrata Washington Police Department from March 1980 to April 1982**

Served as a patrol officer during my tenure with the Ephrata Police Department and attended the Washington State Criminal Justice Training Academy in Spokane.

**Yakima County Sheriff Office from August 1979 to March 1980**

Served as a Corrections Officer and was assigned to the intake/booking area, inmate housing units and prisoner transports.

**CERTIFICATION AND EDUCATION**

**Senior Management Institute for Police**

**Session #49 (2011)**

The Senior Management Institute for Police (SMIP) provides senior police executives intensive training in the latest management concepts and practices used in business and government. SMIP is designed for police executives who will ultimately lead police agencies. SMIP is a Police Executive Research Forum program and is held at Boston University.

**U.S. Department of Justice Secret Security Clearance (May 2011-2021)**

Security clearance for handling and safeguarding classified information.

**Certified Labor Relations Professional (2010)**

National Public Employer Labor Relations Association

**FBI Law Enforcement Executive Development Seminar**

**Session #64 (2010)**

The Law Enforcement Executive Development Seminar (LEEDS) is an international executive leadership training program conducted by the FBI Academy.

**Executive Management Program, Northwestern University Center for Public Safety**

**Session #25 (2004)**

The EMP is a law enforcement executive training program focusing on current law enforcement topics.

**School of Police Staff and Command, Northwestern University Center for Public Safety**

**Session #176 (2002)**

The SPSC is a wide-ranging and comprehensive law enforcement training program. Instruction includes such diverse topics as ethics, traffic management, media relations, human resources, labor relations, budget and current topics in law enforcement.

**Executive Career Level Certification, Washington State Criminal Justice Training Commission (2000)**

Certification is attained through the completion of specified supervisory and management courses of study through the Washington State Criminal Justice Commission and other law enforcement or academic training courses.

**Northwest Law Enforcement Executive Command College (1998)**

Law enforcement executive training program sponsored in partnership with the Washington State Criminal Justice Training Commission, the Federal Bureau of Investigation and the Washington Association of Sheriff and Police Chiefs.

**Bachelor of Science in Criminal Justice – Columbia Southern University**

Culmination of full time and subsequent part time course of study. Studies were conducted through Washington State University (1976-1977, 1978-1979), Central Washington University (1977), Big Bend Community College (1980), Spokane Community College (1980), Spokane Falls Community College (1983), City University (1994-1998), and Columbia Southern University (1999-2000).

SPECIAL ASSIGNMENTS

**Tactical Team Commander (1994 to 2000)**

Developed a regional civil disturbance training program for law enforcement agencies in response to riots at Washington State University. The program continues to be taught annually by the Spokane Police Department. Over a thousand officers from Montana, Idaho, Oregon, Washington, the military, and other local, state, and federal agencies have attended.

**Chemical Agent Response Team Commander (1995 to 1997)**

Implemented a specialty team for the delivery of chemical agents during critical incidents for the Spokane Police Department.

**Tactical Team Assistant Commander (1991 to 1994)**

Restructured the Tactical Team and redefined the mission of the team. The team mission is to provide crowd control capability and first responder expertise for the Spokane Police Department.

**Field Training Officer (1986 to 1988)**

Trained new officers as they transitioned from the academy training program to street level law enforcement duties.

**Washington State Criminal Justice Training Commission Instructor (1985 to 1989)**

Basic Law Enforcement Academy. Instructed academy recruits on the investigation auto theft and Evidence Law.

AWARDS

- **Executive Leadership Award** – Northwestern University, Center for Public Safety.
- **Tactical Team Leadership Award** – First departmental recipient of this annual award.
- **Innovative Strategies Award** – Washington State Traffic Safety Commission.
- **Spokane Police Reserve Officers** – Recognized by the volunteer officers for support and assistance of the program.

PROFESSIONAL and COMMUNITY ASSOCIATIONS

- Leadership Spokane Alumni Association. Class of 2011
- Washington Public Employer Labor Relations Association
- National Public Employer Labor Relations Association
- International Association of Chiefs of Police
- Toastmasters International
- St. Francis Xavier-St. Patrick Church Youth Group Coordinator Assistant