No. 12-30366

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

KARL F. THOMPSON, JR.,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

AMENDED BRIEF OF THE UNITED STATES AS APPELLEE

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STATEMENT OF JURISDICTION

This appeal is taken from a district court's final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. On November 15, 2012, the district court sentenced the defendant. SER 19-22.[1] On November 19, 2012,

[1] "ER _" refers to the Appellant's Excerpts of Record by page number. "SER _" refers to the United States' Supplemental Excerpts of Record by page number. "R. __:__" refers, respectively, to the document recorded on the district court docket sheet and page number. "Trial Exh. __:__" refers, respectively, to the exhibit admitted at trial by number and page number. "Br._" refers to the original page number of appellant's opening brief and not the pagination set by this Court.

the district court entered final judgment (SER 23-28), and defendant filed a timely Notice of Appeal. ER 5-7. On November 28, 2012, defendant filed a timely Amended Notice of Appeal. ER 1-4. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether defendant was prejudiced under *Brady* v. *Maryland*, 373 U.S. 83 (1963), when the challenged impeachment evidence was cumulative of evidence available to defendant and, given the overwhelming evidence of guilt, defendant could not show a reasonable probability that the verdict would have been different.

2. Whether the district court abused its discretion in evidentiary rulings.

3. Whether the district court erred or abused its discretion in formulating jury instructions on willfulness.

4. Whether the district court abused its discretion in determining that the jury's verdict was not influenced by extraneous evidence.

STATEMENT OF THE CASE

On June 19, 2009, Karl F. Thompson, Jr. (Thompson or defendant) was charged in a two-count Indictment in the Eastern District of Washington with violating 18 U.S.C. 242 (violation of civil rights under law by use of excessive force) and 18 U.S.C. 1519 (false entry or statements in a recorded interview with the intent to impede, obstruct and influence an investigation within the jurisdiction

of the Federal Bureau of Investigation). ER 3235-3236. The Indictment is based on an incident that occurred on March 18, 2006, when defendant, then a Spokane Police Department patrol officer, struck his baton repeatedly and fired his taser at Otto Zehm during a police inquiry and subsequently lied about the circumstances of his assault to justify his use of force. ER 3168-3169, 3235-3236. In April 2010, the district court rejected defendant's motion (SER 29-32) to dismiss Count Two and held that the Indictment adequately alleged a violation of Section 1519 because a defendant, as here, who "reviews and signs a transcript of an interview he has given (which is what the Indictment alleges) arguably adopts the transcript as his personal account of the events described therein; thereby causing the transcript to become a record within the meaning of § 1519." SER 32.

A 14-day trial commenced on October 13, 2011. After the United States' case-in-chief, defendant moved for an acquittal and asserted that the United States failed to prove defendant acted willfully or used unreasonable force to support a conviction on Count One. SER 34-40. The district court denied defendant's motion. SER 41-42.

On November 2, 2011, the jury convicted defendant on both counts. SER 44-46. On November 16, 2011, defendant renewed his motion for judgment of acquittal (R. 784-785), and the United States opposed the motion. SER 47-66. At

a hearing on December 19, 2011, the district court orally denied the motion (SER 67, 78-80) and issued a written order the following day. SER 82.

On December 23, 2011, defendant filed a motion seeking a new trial. ER 546-582. The United States opposed the motion. SER 83-122. On January 5, 2012, the district court granted defendant an opportunity to amend his motion for a new trial to add a claim pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963). SER 123-127. Defendant asserted primarily that the United States withheld exculpatory information that warranted dismissal of the Indictment or a new trial. The United States argued that the challenged evidence was not exculpatory or suppressed, and even if deemed so, the statements were not prejudicial. See, *e.g.*, SER 128-163. On September 18, 2012, the district court issued two opinions denying defendant's motions for further relief. ER 8-64.

On November 15, 2012, the district court sentenced defendant to 51 months' imprisonment and three years of supervised release for each count to run concurrently, and a $200 fine. SER 1, 19-22. Judgment was entered November 19, 2012. SER 23-28. On November 19, 2012, defendant filed a timely Notice of Appeal. ER 5-7. On November 21, 2012, the district court issued findings to support the sentence. SER 167-172. On November 28, 2012, defendant filed an Amended Notice of Appeal. ER 1-4. On March 11, 2013, the district court issued an order denying restitution. R. 1194.

1. A "Suspicious Circumstances" Report And Citizen Witness Testimony Regarding Defendant's Initial Assault Of Otto Zehm[2]

In the evening of March 18, 2006, Otto Zehm[3] walked towards an ATM machine in Spokane, Washington, at the same time Ms. Alison Smith, then 18 years old, was in her car beginning a transaction at the ATM. ER 3203; SER 174-175. "Uncomfortable" due to Zehm's "close[ness]" to her car and the ATM, Ms. Smith did not complete her ATM transaction. ER 3203, 3211-3212. Ms. Smith and her passenger, Makenzie Murcar, called 911 to report their concern that Zehm may have gained access to Ms. Smith's bank account at the ATM. ER 3203-3204, 3211-3212; SER 175. The call was transferred to the Spokane Police Department's (SPD's) radio dispatch and the girls continued to speak to a dispatch officer as they followed Zehm, who left the ATM and went towards a nearby Zip Trip convenience store. ER 3203-3204, 3211-3212. The girls made inconsistent statements to the dispatch officer regarding whether Zehm did or could have accessed Ms. Smith's account. ER 3203-3204, 3211-3212. The dispatch officer classified this call as a "suspicious circumstances" event and dispatched SPD Patrol Officer Steve Braun to look for Zehm near the Zip Trip store on Division

[2] Evidence from various sources concerning the events of March 18, 2006, *e.g.*, citizen witnesses, police officers, and experts, are discussed separately to aid this Court's review of defendant's *Brady* claims.

[3] Zehm was an adult with a mental disability and mental illness, although the jury was not so informed. See R. 497, 630.

Street. ER 3179-3180, 3203.[4] SPD Patrol Officer Tim Moses was dispatched to provide back up on the call. ER 3203. Defendant, who was on break and heard the call, responded first to the store. ER 3177-3180.

Zehm had "casual[ly]" entered the Zip Trip and walked towards the southwest corner of the store to the display of Pepsi products. ER 1546; see ER 1539-1548, 1557. Zehm was a frequent customer at Zip Trip stores. ER 1425. On an almost-daily basis, up to at least six weeks prior to this assault, Zehm regularly purchased a two-liter, plastic bottle of Pepsi at a different, nearby Zip Trip store. ER 1425-1426.

Several customers inside and outside the Zip Trip store testified at trial to the following:

Defendant got out of his police car "very quickly," "ran" through the store's north entrance, and moved quickly and directly towards Zehm. ER 1928, 2004; see ER 1493, 1917; SER 176. Zehm did not appear to be aware of defendant's arrival or his movements. ER 1929. Defendant's hand was on his baton as he entered the store, and he pulled the baton out of its holder as he approached Zehm. ER 1918,

[4] The district court declined to admit testimony that Zehm did not engage in any unlawful conduct at the ATM. ER 965-966, 2209-2210, 2475-2490.

1928, 2005. Defendant did not stop moving forward until after he struck Zehm with his baton and Zehm fell to the ground. ER 1918, 1931, 2005; SER 181.[5]

Witnesses observed that defendant's first two "overhand" or "overhead" baton strikes hit Zehm in the head, shoulders, or upper body. ER 1343-1344, 1494; see ER 1363-1364, 1450, 1465, 1690, 1919, 2006, 2010, 2023; SER 177. Some witnesses in the store did not hear defendant say anything before he struck Zehm. ER 2005; SER 182-183; see ER 1494 (witness first heard defendant speak when Zehm was on the floor).[6] Nor did witnesses hear Zehm say anything to defendant before Zehm was struck with a baton. ER 1346-1347, 2007; SER 183-184.

When Zehm first saw defendant, he was holding a Pepsi bottle in front of himself in a non-threatening manner. ER 1495, 1508, 2023. Zehm appeared "surprised" before defendant's first baton strike (ER 1450, 1468), "very startled" after defendant's first strike, and moved backwards away from defendant. ER

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[5] Defendant was authorized to carry his straight, hardwood baton, which is approximately five inches longer than the SPD-standard issue batons, which are metal or made of a lighter wood. See ER 1888-1889, 1963-1964; Trial Exh. 113 (photos of defendant's and Officer Braun's batons; compare Braun DSC-0001 with Thompson DSC-0001); Trial Exh. 114 (photos of defendant's baton); see also R. 747:2338-2340.

[6] Two witnesses who were outside the store testified that defendant stopped "momentarily," for one or two seconds, before striking Zehm, and defendant may have spoken to Zehm. ER 1449-1450; see ER 24, 1463-1464.

2006; see ER 1468, 2024. When hit by defendant's baton, Zehm did not say anything but he "groan[ed] in a painful manner." ER 2007. Zehm fell to the floor after defendant's second baton strike. ER 1919.

2. Citizen Witness Testimony Regarding Defendant's Firing Of A Taser And The Continuing Assault Against Zehm

When on the floor on his back, Zehm held the Pepsi bottle in front of himself in a defensive posture, either in front of his face or near his chest, and pulled his knees to his chest into a "fetal position." ER 1512; see ER 1344, 1365, 1495, 1501, 1512, 1737; SER 183. Defendant told Zehm to "drop the pop" while Zehm was on his back on the floor. ER 1494; see ER 1715-1719 (witness does not clearly identify when defendant said "drop the pop"). While standing over Zehm, defendant also warned Zehm to "quit resisting, I have a Taser," yet Zehm was not "resisting," kicking, or punching defendant. ER 1366, 1371-1372; see ER 1747; SER 182. Defendant then fired two taser darts into Zehm's chest while Zehm was "cradl[ing]" the soda bottle. ER 1344; see ER 1366; SER 199-200.[7] In response to the taser, Zehm "flail[ed]" his arms and legs, and "grunt[ed] and moan[ed] in pain." SER 183-184; see ER 1514, 1693, 1748, 2011, 2025-2027, 2037; SER 189.

[7] An SPD-issued taser could be fired with two darts, which are electrically-charged needles with barbs at the end that can penetrate the skin, or it could be pressed directly against a person's body to fire electricity for a drive stun. See SER 193-198.

While still on the floor, Zehm was kicking his feet and "scooting on his back down the aisle" to try to get away from defendant. ER 1496; see ER 1345.

Zehm never stood up or got up off the floor after he was hit by the first two baton strikes and defendant's taser darts. ER 1346, 1500, 1694, 1922, 2037. Zehm never assumed a boxing position or punched, lunged or acted in an aggressive manner towards defendant; and he did not throw the soda bottle or use the bottle as a weapon or in an aggressive manner towards defendant. ER 1346, 1495, 1497, 1500, 1739, 1754, 1922, 2006, 2012-2014, 2032; SER 183, 187-188. Instead, Zehm "struggl[ed]" against the defendant to try and get away from being struck and he acted in a "defensive manner." ER 1755; see ER 1710, 1716.

In addition to the initial strikes, witnesses estimated that defendant struck Zehm with his baton seven to ten times when Zehm was on the floor (ER 1919, 2007, 2036) and some witnesses saw defendant's baton strikes hit Zehm on his head, shoulders, neck, and other parts of his body. ER 1690; SER 182.

3. The Arrival Of SPD Officer Braun And Other SPD Officers And The Continuing Confrontation

SPD Officer Braun arrived after the defendant. ER 1261. He walked casually past the store's south entrance to the west side entrance, and did not see defendant or Zehm through the windows. ER 1260-1263, 1294-1295. His baton was in its ring holder. ER 1294. When Braun entered the store, Zehm was in the middle aisle, on the floor, flailing his arms and legs, while defendant was bent over

or standing above Zehm. ER 1267-1269, 1295. Braun did not see Zehm kick, punch or make any contact with defendant. ER 1296, 1306. Zehm was holding a white piece of paper in one hand, which was later identified as his pay check. ER 1297-1298.

Zehm appeared "surprised" at Braun's presence. ER 1300-1301. At defendant's order, Braun, holding his baton in both hands, delivered three or four power jabs at Zehm's ribs while at the same time telling Zehm to stop resisting and fighting. ER 1270-1271, 3193. Zehm continued to thrash about and Braun gave Zehm two or three additional power jabs with his baton. ER 1272-1273. Also on defendant's order, Braun fired taser darts at Zehm and then applied two or three drive stuns into Zehm's neck while telling Zehm to stop resisting. ER 1274, 1276, 1278, 1304, 3194. Braun and defendant were unable to place handcuffs or other restraints on Zehm due to Zehm's continued struggle against the officers. ER 1277-1279, 1285. Braun did not believe the circumstances warranted lethal force against Zehm. ER 1301-1302.

Approximately nine more SPD officers arrived on the scene. When SPD Officer Erin Raleigh arrived, defendant was straddling Zehm's body while Zehm was lying on the floor. SER 207-208, 213. Officer Raleigh said Zehm did not assault or kick any officer, although Zehm did flail his legs and "active[ly] struggle" against the officers who eventually put him in handcuffs and leg

restraints. SER 217-218; see SER 211, 214, 220, 222-223. The officers put Zehm in a prone hog-tie restraint, with his feet and hands bound behind his back, where he remained for approximately 19 minutes. ER 2880, 3011, 3016.

In response to a call from one of the SPD officers, Spokane Fire Department paramedics arrived to remove the taser darts and check Zehm's vital signs. ER 3010-3011, 3013. An SPD officer, concerned that Zehm might spit at the officers, asked a paramedic for a mask. SER 240. A plastic non-rebreather mask that is designed for use with oxygen was placed over Zehm's nose and mouth, but no oxygen was administered. SER 240-241. The mask was in place for approximately three minutes before an officer noticed Zehm had stopped breathing.[8] SER 241, 312-313, 316-317, 328. Zehm's last words were, "I just wanted a Snickers." SER 211-212.

Resuscitation efforts at the scene were not successful and Zehm did not regain consciousness. SER 241, 328. After Zehm was transported to the hospital, medical staff was able to secure a pulse. SER 327; Trial Exh. 143:5 (Zehm's

[8] The defendant was charged with inflicting bodily injury but not death resulting from his actions. See ER 3235-3236. The jury was instructed that they were not to speculate regarding the cause of Zehm's death. ER 727; see R. 434. Thus, there was only brief testimony regarding Zehm's cardiac arrest and loss of consciousness at the scene. See SER 312-313, 316-317, 328, 489-490; see also SER 211-212. The jury was not told about the mask placed on Zehm's face or details regarding the paramedics' unsuccessful efforts to resuscitate Zehm at the scene.

hospital records). He remained unconscious and was declared brain dead two days later. SER 232, 340.

4. Defendant's On-Scene Statements And Other SPD Statements

At the Zip Trip store, defendant told SPD Officers Erin Raleigh and Tim Moses, and SPD Corporal Ty Johnson that Zehm lunged or came at him with the soda bottle and assaulted him, and that was why he responded with baton strikes. SER 208-209, 219, 420-423, 441-442. Defendant told Raleigh that Zehm punched him in the mouth, yet Raleigh saw no visible injury to defendant. SER 209. Defendant told Moses that his baton strikes hit Zehm on his head, neck, and upper torso. SER 433-434. Moses denied at trial that defendant said that Zehm had "lunged" at him with the Pepsi bottle, although he admitted that he had testified to that effect before the grand jury. SER 441-442.[9] Based on defendant's statements, Moses also informed emergency medical technicians Aaron Jaramillo and Michael Stussi that Zehm had been struck by up-down baton swings to his head, neck, and upper chest. SER 304, 308-311, 322-326, 433-434, 437-439.[10]

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[9] At trial, Johnson also denied that either he or defendant previously stated that Zehm "lunged" at the defendant, although Johnson admitted that he used that term in a prior statement. SER 421-423.

[10] Moses' trial testimony was internally inconsistent and inconsistent with his prior statements, and included assertions of improper conduct by U.S. counsel and the Agent. SER 429, 438, 443, 447-448, 451. On May 7, 2013, Moses pled guilty to a state charge of providing false information to federal officials and

(continued…)

SPD Officer Sandra McIntyre arrived at the Zip Trip after defendant's assault was over. SER 457. Zip Trip employee Angela Wiggins testified that McIntyre reviewed the store's security video that recorded portions of the assault, and when McIntyre reviewed the video with SPD Sergeant Joe Walker, McIntyre twice commented out loud, "Zehm did not lunge" at defendant. SER 472, 474-477; see also SER 461, 465.[11] Wiggins also testified that McIntyre counted out loud defendant's baton strikes in the center aisle up to "seven." SER 472A-474. McIntyre spoke with the defendant at the scene after viewing the video. SER 470. Before the grand jury, McIntyre conceded she "might have" told defendant that he had a problem with the "lunge" story because she did not see a lunge on the video. SER 463-464. At trial, McIntyre repeated she did not see Zehm lunge on the video. SER 462.

(…continued)
resigned from the SPD. See Thomas Clouse, *SPD's Moses Pleads Guilty to Lying to FBI*, The Spokesman-Review, May 7, 2013, http://www.spokesman.com/stories/2013/may/07/spds-moses-pleads-guilty-lying-fbi/.

[11] At trial, McIntyre denied that she commented out loud, while watching the video, that Zehm did not lunge at the defendant; denied that she shared that observation with defendant at the scene; and denied hearing the word "lunge" before then-Acting Chief Nicks' press briefing about the incident. See SER 462-464. McIntyre had a close, professional and personal relationship with defendant. SER 454-456. McIntyre and Johnson were two of many SPD officers who signed petitions supporting defendant's then-pending application to become police chief. See R. 1143-4:1-5.

An email sent the evening of the assault by SPD Public Information Officer Tom Lee to all SPD personnel stated that Zehm "immediately lunged toward the officer and began fighting." SER 490; see SER 485-487; Trial Exh. 61A. The email was "very consistent" with the briefing that then-Acting Chief Jim Nicks received on scene at the Zip Trip from other officers, including Walker and Moses. SER 491-493. Nicks also briefed reporters to the same effect. SER 492. Nicks testified at trial that in 2009 (three years after the incident), defendant came to him and stated words to the effect, "I would like to remind you that sometime *** after the event happened, I tried to correct you or I corrected you on the lunge issue." SER 496-497. Nicks testified that he had no recollection of any earlier conversation, and that he would have remembered it if it had happened. SER 497-498.

5. Defendant's Recorded Statement And Trial Testimony

a. Defendant's Recorded SPD Interview

On March 22, 2006, four days after the assault, SPD Detective Terry Ferguson arranged a recorded interview of defendant with his counsel and union representative present. ER 3168. On March 27, 2006, defendant reviewed and signed the transcript of his statement (ER 3168-3202), and also told Detective Ferguson that his baton strikes against Zehm were primarily horizontal and not vertical. ER 3202; SER 501-502, 505-506. Defendant's signature with the

notation "[r]eviewed by:" represented that the transcript set forth his truthful and accurate statement of the events of March 18, 2006. ER 3202. Defendant no longer asserted that Zehm lunged at him.

Instead, defendant now asserted that Zehm held the plastic soda bottle in a "loaded position" with his "muscles *** tensed back and he took a fixed position of aggression." ER 3182-3183, see ER 3185. Defendant also claimed that Zehm had direct eye contact with defendant and responded to defendant's two, alleged commands to drop the Pepsi bottle by saying, "Why?" and then, "No." ER 3185. Zehm's face "did not display any fear," and "did not display any confusion" (ER 3185); he appeared "deliberate[,] *** resolute, *** and noncompliant" (ER 3186), and he adopted "a very resolute stance," with one leg in front of the other. ER 3187; see ER 3189. Defendant asserted he quickly struck twice at Zehm's legs before Zehm fell to the floor to "preempt" what defendant claimed was an imminent attack by Zehm with the soda bottle. ER 3186-3188, 3199. The defendant also claimed that Zehm, while standing, started "boxing" defendant with "clenched fists" and hit defendant on his chest (ER 3188); the defendant struck back, but not at Zehm's head (ER 3188); Zehm swung "both his fists" at defendant while Zehm was lying on his back in the south aisle (ER 3189-3190); and after

being struck by the taser darts, Zehm stood again, and "box[ed defendant] with both fists, throwing punches." ER 3192.[12]

b. Defendant's Trial Testimony

At trial, defendant's testimony was consistent with his recorded statement; namely, that he ran into the store to contact Zehm for an investigation, he stopped and twice ordered Zehm to drop the soda bottle, which Zehm refused to do, and he then quickly struck Zehm on his legs with his baton to preempt any attack by Zehm with the soda bottle and to gain control. ER 1000-1002, 1027, 1076-1078. After the first strike, defendant also stated that he grabbed Zehm by the back of the coat collar, and swung his baton a second time at Zehm's thigh. ER 1118, 1123.

On cross-examination, defendant was unable to identify images from the store video that supported material portions of his recorded statement. In his statement (ER 3185), defendant asserted that Zehm looked at him as he was entering the store just before he grabbed the soda bottle, but he could not identify this on the video, and he later asserted that his recorded statement was incorrect. ER 1085-1087. Defendant could not identify video images of him stopping before he ordered Zehm to drop the soda bottle, and he modified his explanation to state that he ordered Zehm to drop the soda as he was coming around the corner and

[12] The United States asserted that these and other recorded statements were false, were refuted by eye witness testimony and other evidence, and were grounds to convict defendant of Count Two.

down the aisle (at 18:26:11). ER 1088-1089; Exh. 3, Cam. 1:59.[13] Defendant testified that Zehm's turning motion before his second baton strike was "hidden from view" on the video. ER 1102; see ER 3187; compare ER 3189 (defendant's recorded statement that he fell on Zehm, who swung his fists at defendant) with ER 1107-1108, 1111-1113 (defendant's trial testimony regarding video images of defendant standing and straddling Zehm without Zehm punching).

Finally, with respect to the timing of his initial baton strikes, defendant stated on cross-examination that Frame 71 (18:26:15) of the photographs developed from the Zip Trip's video camera depicted the delivery and impact of his first baton strike on Zehm. ER 886, 1091-1092; Trial Exh. 3, Cam. 1:71. He also agreed his baton was visible in Frames 74-75 (18:26:16), and after which, at Frame 76 (18:26:16), Zehm is on the floor facing defendant. ER 1097-1099; Trial Exh. 3, Cam. 1:74-76 and Cam. 4:14.

6. Video And Photographic Evidence

At trial, the jury saw videos of the confrontation between defendant and Zehm, and other officers and the aftermath. Trial Exh. 1-2, 5. In March 2006, the Zip Trip store had four mounted cameras that filmed all movements in the

[13] Trial Exhibit 3 is comprised of four separate discs, one for each camera within the store. See p. 18, *infra*. "Cam. _:_" refers to the Camera number and the photograph/JPEG frame number, respectively. Each frame includes a time-stamp recorded by the Zip Trip clock. See SER 517.

camera's range without audio. SER 510-511, 518. Each camera took approximately three or four pictures or frames per second in sequence, and therefore the images were approximately 1/16th of a second apart. SER 516; see ER 1534-1535. As each picture was taken, it was electronically stamped with a time. SER 517.

Zip Trip staff prepared two DVDs of the video of the assault and the aftermath (approximately 30 minutes) from the four cameras. SER 514-515, 519-520; Trial Exhs. 1-2. Grant Fredericks, an expert in videography analysis first retained by the SPD and City of Spokane, was later retained by the United States for this case in August 2007, after his contractual release from the City. ER 2675-2678, 2982; SER 532-535, 557-558, 562, 565-566. Fredericks developed for the United States several video clips and PowerPoint slides with individual photographs for each frame (jpeg images), which did not alter the original video images. See, *e.g.*, Trial Exhs. 3, 5; ER 2099-2103, 2107-2108.[14] The photographs

[14] Trial Exhibit 5 is the original video with an overlay of the SPD's radio dispatch of the call with the complainant Ms. Smith (ER 3211-3222), and excerpts from the Computer Aided Dispatch (CAD) transcript (ER 3203-3210). See ER 2099-2101. The time recorded on Trial Exhibit 5 was modified to synchronize, as best as possible, the dispatch clock at Atomic/Pacific Standard Time and the Zip Trip clock. While the district court explained (based on witness testimony) that one must add 2:03 minutes to the Pacific Standard Time identified to correlate with images identified by the Zip Trip clock (see ER 9, 2101-2102), some of the images correlate by adding 2:02. See ER 2864 (Fredericks' 2006 report: the Zip Trip clock is "approximately 2 minutes and three seconds fast (sic) from the actual time

(continued…)

may contain some "compression artifacts," which are distortions in the image due to the quality of the video that produce lines in the photograph that are not part of the original image. SER 624-625; ER 1216-1217, 1222-1223.

7. United States' Expert Analysis Of The Video Evidence Of Defendant's Assault

Dr. Richard Gill testified as an expert in the area of human factors engineering, which combines the disciplines of traditional engineering with human behavior and psychology. ER 1523; see ER 1521-1532 (professional background and expertise); R. 428. Dr. Gill also testified about photogrammetrics, which determines the distance and relationship between objects in a photo or other media. ER 1529-1530. Dr. Gill provided extensive analysis of Zehm's and defendant's approach, entrance, and initial movement in the store; defendant's initial baton strikes and Zehm's responses; and how the video images are inconsistent with defendant's recorded statement. ER 1536-1617.[15] Dr. Gill also identified the

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(…continued)
of day"); *e.g.*, ER 3000 (Fredericks' 2007 report: a photo is time-stamped 18:24:12:21 PST and 18:26:14 by the Zip Trip clock).

[15] Dr. Gill's assessment is based on his expertise, analysis of the Zip Trip videos and photographs, the defendant's statement, witnesses' statements, measurements at the store, and other materials. ER 1523, 1532-1537; SER 629-630; see also SER 633-645 (Dr. Gill's 2008 report).

During his testimony, Dr. Gill used eight PowerPoint presentations (Trial Exhibit 2559) for illustrative purposes. See, *e.g.*, ER 1537-1539, 1578-1581.
(continued…)

photographs from the Zip Trip video that depict, in whole or in part, defendant's 13 baton motions and his taser strike at Zehm, and his chart that reports this data. ER 1618-1637, 3106; Trial Exh. 2559/Disc 8. Dr. Gill's analysis is as follows:

Zehm approached and entered the Zip Trip store's north entrance at walking speed, and he walked directly and "casual[ly]" to the Pepsi display in the southwest corner of the store. ER 1545, 1652; see ER 1539-1548, 1557; Trial Exh. 3, Cam. 3:7-50. Nothing about Zehm's behavior attracted any attention from the store clerk or customers. ER 1575-1576. Given Zehm's position as he approached the store's door, he may have seen defendant, in a marked police car, enter the store's north parking lot. ER 1553-1555; Trial Exh. 3, Cam. 3:7-3l.

After entering the store, Zehm never turned back or looked over his shoulder before reaching the Pepsi display, and therefore he had no opportunity to see defendant stop and get out of his car, enter the store, or rapidly approach him. ER 1554-1561, 1585, 1677-1678; Trial Exh. 3, Cam. 3:13-42. After he picked up a two-liter plastic Pepsi bottle from the display, Zehm took a couple steps to his left before turning around. ER 1558; Trial Exh. 3, Cam. 1:52-59.

(…continued)
These PowerPoint presentations are collections of identical, duplicate images of the individual frames in Trial Exhibit 3 that show discreet stages of defendant and Zehm's movements before and during the assault, and Dr. Gill's summary assessment of defendant's and Zehm's movements. See, *e.g.*, Trial Exh. 2559/Discs 7 and 8. Thus, the joint citations in this section to images on Trial Exhibits 3 and 2559/Discs 7 and 8 can be seen on either respective exhibit.

Defendant opened his car door before the car stopped "very abruptly." ER 1548-1549; Trial Exh. 3, Cam. 3:38-44. Defendant moved at a "rapid pace" from his car and immediately removed his eye glasses. ER 1549-1550; see Trial Exh. 3, Cam. 3:55-64. Zehm was at the soda display when defendant entered the store. ER 1557, 1572; Trial Exh. 3, Cam. 1:50. As defendant entered the store and turned right, down the north aisle, defendant removed his baton from its holder with his left hand and transferred it to his right, dominant hand. ER 1562-1563, 1569-1571; Trial Exh. 3, Cam. 1:52-55, Cam. 2:83-89. Defendant's cognitive decision to remove the baton from its holder was made before he entered the store. ER 1563, 1569; see ER 1565. Defendant's speed was "significantly faster than a normal adult walking pace." ER 1550-1552; Trial Exh. 3, Cam. 1:49-68.

After Zehm picked up a Pepsi bottle from the display, he turned and first saw defendant at Frame 60 (18:26:12) (ER 1558-1559; Trial Exh. 3, Cam. 1:60), when defendant was approximately 10-12' away, rapidly approaching, with his baton raised. ER 1552, 1560-1561, 1583, 1611; Trial Exh. 3, Cam. 1:60-68. From the time that Zehm first saw defendant until he was struck twice by defendant with his baton, Zehm constantly moved backwards until he fell to the floor. ER 1577, 1582-1583; Trial Exh. 3, Cam. 1:60-72. Defendant, however, continued to move forward and did not stop or slow down as he closed the gap with Zehm and made his first baton strike at Zehm. ER 1552, 1583, 1586, 1611, 1615; Trial Exh. 3,

Cam. 1:60-69. Defendant's first baton strike at Zehm is captured on Frames 68-70 (18:26:14). ER 1601-1605, 1618-1619, 1634-1636; Trial Exh. 2559/Disc 8.[16]

Defendant's first strike was within approximately 2 1/4 seconds of Zehm turning and first seeing defendant. ER 1613-1615; Trial Exh. 3, Cam. 1:68-70 (18:26:14). In addition, while defendant began moving his arm to strike Zehm at 18:26:14 (Trial Exh. 3, Cam. 1:68), defendant *decided* to strike Zehm before he began moving his arm. ER 1612-1613.

After the first baton strike, Zehm continued to step backwards in the south aisle and held the Pepsi bottle in front of his head while defendant kept moving forward. ER 1577-1578, 1580-1583, 1606; Trial Exh. 3, Cam. 1:69-76, Cam. 4:11. Defendant's second, overhead baton strike at Zehm is captured in Frames 74-76 (18:26:16), within two seconds of his first baton strike. ER 1606-1608, 1619-1620; Trial Exh. 3, Cam. 1:74-76, Cam. 4:13-15; Trial Exh. 2559/Disc 8. Zehm is last visible standing at 18:26:15. ER 1578, 1607-1609; Trial Exh. 3, Cam. 1:72. After defendant's second baton strike, Zehm fell backward and landed on the floor near the east end of the south aisle at 18:26:16, which is four seconds after Zehm first saw defendant. ER 1581; Trial Exh. 3, Cam. 4:13-14.

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[16] Given the cameras' limited angles for images, the lack of clarity of the images, and the shelving in the store, it is not possible to identify where the defendant's baton strikes hit Zehm based solely on the video images.

Dr. Gill testified that, for Frame 69 (one of the images of defendant's first baton strike), defendant's hand is not clearly visible, the source of a bright spot on Frame 69 cannot be clearly identified, and he could not recall when he learned that a FBI analyst (Skaluba) also could not identify defendant's hand on Frame 69. ER 1634-1636, 1664-1669. However, Dr. Gill still concluded, based primarily on the images in the individual, surrounding frames on the video and Thompson's recorded statement, that defendant's first baton strike at Zehm is depicted in Frames 69-70, and that defendant struck Zehm twice with the baton before Zehm fell to the floor. ER 1603-1604, 1608-1610, 1636, 1665; Trial Exh. 3, Cam. 1:60-76. Given that defendant is too far from Zehm to strike him in Frames 60-68, the baton is rising in Frames 70-71, and the second baton strike that results in Zehm's fall to the floor is shown at Frames 74-76, Dr. Gill concluded that the first baton strike occurs at Frames 69-70. ER 1606, 1609-1610, 1613, 3106.[17]

Dr. Gill also testified that the video images refuted many of defendant's statements regarding his initial approach and Zehm's actions. For example, defendant asserted that Zehm looked at defendant before he selected the Pepsi

[17] Dr. Gill explained that even though images may not be entirely clear on the individual frames, one can make rational observations and conclusions based on the images. See ER 1635-1636, 1668. For example, photos that depict defendant exiting his police car do not show him right outside the car, but a viewer can conclude logically that defendant is right outside the car door when it is shut. See ER 1549, 1635-1636; Trial Exh. 3, Cam. 3:44-54.

bottle (ER 3185), but Zehm never looked back over his shoulder towards the north entrance after he entered the store. See p. 20, *supra*. Immediately after the assault and at the Zip Trip store, defendant stated that Zehm lunged at him (see p. 12, *supra*), and in his recorded statement four days after the assault, he said that Zehm stopped, adopted a resolute stance, threatened him with a soda bottle, and did not comply with his oral orders. See pp. 14-15, *supra*. Dr. Gill opined that from the point Zehm turned and saw defendant, Zehm did not stop, adopt a resolute stance, or lunge at the defendant; "at no time did Zehm move forward, at no time did Zehm stay stationery, he constantly moved backwards until the frame *** where he starts to go down." ER 1582-1583 (Zehm was "continually backing away from Thompson in each successive frame"). In addition, it was unlikely that the 2 1/4 second lapse between Zehm's first sighting of defendant and defendant's first baton strike was sufficient time for the conversation defendant alleged he had with Zehm and for defendant to decide to make his first baton strike. ER 1586-1589, 1614-1616; p. 15, *supra*.

In sum, Dr. Gill testified that Zehm first saw defendant at 18:26:12 (Frame 60), defendant's first baton strike occurred at 18:26:14 (Frames 68-70), and defendant's second baton strike occurred at 18:26:16 (Frames 74-76).

After Zehm fell to the floor at the east end of the south aisle, defendant fired two darts from his taser at close range into Zehm at 18:26:34 (16 seconds after

Zehm had fallen to the floor). ER 1590, 1631-1632, 1674; Trial Exh. 3, Cam. 1:133-145, Cam. 4:73-84; Trial Exh. 2559/Disc 8. Just as defendant is about to fire or is firing the taser, he rotated away from standing and straddling Zehm and moved towards the top of Zehm's head and upper torso. ER 1674-1676. Less than a second after the taser firing struck him, Zehm's foot rose and then immediately fell back to the floor. ER 1648-1649, 1675-1676; Trial Exh. 3, Cam. 4:83-85. At various points during defendant's assault in the south aisle, the video and photos show Zehm holding the Pepsi bottle with two hands above him while he is on the floor and defendant is standing above him. See, *e.g.*, ER 1589-1590 (discussing Trial Exh. 3, Cam. 4:11-82), 1596-1597; Trial Exh. 3, Cam. 4:11, 20-28.

For the rest of the assault, defendant remained standing; he never fell on top of Zehm, and Zehm never stood again. ER 1589-1592, 1595-1598, 1600-1601; Trial Exh. 3, Cam. 1:135-174, Cam. 4:12-99; Trial Exh. 2259/Disc 7. Less than a second after defendant's taser strike and during the next six seconds (18:26:37-26:43), defendant delivered four more baton strikes at Zehm (strikes 3-6). ER 1590, 1620-1623 (photo images identified), 1676, 3106; Trial Exh. 2559/Disc 8. During this time, Zehm, while still on the floor, crawled back to the west end of the south aisle while defendant continued to follow and stand above Zehm. ER 1590-1591, 1597, 1670; Trial Exh. 3, Cam. 4:82-93.

Defendant's assault continued as he and Zehm moved down the back aisle and up the center aisle with Zehm still on the floor and defendant standing above him. ER 1623; Trial Exh. 3, Cam. 1:308-312. In the center aisle, defendant delivered another seven baton strikes within eight seconds (strikes 7-13). ER 1623-1630 (photo images identified), 3106; Trial Exh. 2559/Disc 8.

8. Defendant's Expert's Interpretation Of The Video

At trial, Michael Schott, defendant's witness, testified that he is trained in video analysis and advanced imaging techniques. ER 1205-1206. Schott reviewed the video without considering any other evidence regarding the assault. ER 1147-1148, 1164. He concluded that a high-definition image of Frame 69 (Schott's Frame 87) is not defendant's raised hand or his baton; the images are too large in proportion to his body to be his arm or his hand, and the dark line that Dr. Gill had described, at one point, as defendant's arm is asymmetrical to defendant's body. ER 1214, 1218-1222, 1233. Schott opined that these images are compression artifacts that result from creating images from the video. ER 1217, 1222-1223. Schott also stated that the light in Frame 69 is likely from a car's headlights shining through the store glass as the car is passing the store, and he said there are "very, very few" alternative explanations. ER 1157; see ER 1154. Based solely on the video, Schott did not see any of defendant's baton strikes until after he fired his taser at Zehm. ER 1165-1166. This assessment is contrary to defendant's own

statement. In addition, contrary to defendant's recorded statement, Schott testified that the video does not show Zehm ever punching at defendant (ER 1151), Zehm is holding the soda bottle in his hands just prior to being struck by defendant's taser (ER 1151-1152), and Zehm does not stand erect after he fell to the floor. ER 1152, 1170.

9. Zehm's Injuries

Dr. Sally Aiken, a Spokane County Medical Examiner, performed the autopsy on Zehm. SER 331, 338; see SER 331-338 (Dr. Aiken's medical training and experience). At trial, Dr. Aiken testified about Zehm's numerous injuries, including injuries that were consistent with baton strikes, injuries resulting from a taser, and bruises over most of his body from blunt force trauma.[18] See generally, SER 340-409. Dr. Aiken identified several injuries in addition to bruises that appeared as a parallel pattern of lines separated by 3/8" or 1/4." See, *e.g.*, SER 351, 358, 410A-411. The oval-shaped end of defendant's baton is consistent with the distance between the parallel wounds that were 3/8" apart. SER 351; see also

[18] Dr. Aiken identified several injuries caused by tasers on Zehm's lower chest (SER 359, 388; see SER 346, 387, 410); below his left shoulder and near his armpit and chest (SER 344, 373, 379-380; Trial Exh. 290); and on his left arm. SER 367; Trial Exh. 29l. Dr. Aiken also identified numerous, substantial bruises from blunt force trauma including: to Zehm's left eye (SER 354-355, 392-393), upper, left shoulder (SER 344, 358, 375; Trial Exh. 298), and left thigh. SER 369, 385; Trial Exh. 310.

Trial Exh. 114.[19] Dr. Aiken explained that pattern injuries of parallel lines separated by 3/8" or 1/4" above Zehm's right eyebrow and on his left shoulder and left and right thighs were consistent with baton strikes. SER 351, 358, 368-369, 391-392, 410A-414.

Dr. Aiken also identified at least two head injuries (subgaleal hematomas) that did not have corresponding visible signs of injury at the surface of Zehm's thick scalp: one injury was at the top of Zehm's head and a second injury was near his left ear. SER 396-400; Trial Exh. 346. Dr. Aiken testified that Zehm's two head injuries were caused by blunt force trauma and were consistent with baton strikes. SER 405-407. Dr. Aiken opined that it was "unlikely" that the injury at the top of Zehm's head was caused by a fall. SER 406. Moreover, there was no evidence, as defendant claimed, that Zehm's head injuries were the result of his hair being pulled out. SER 408-409; see ER 1008-1009. However, Dr. Aiken acknowledged that the injuries that were consistent with a baton strike could have been caused by other blunt force means. SER 406-407, 412-413, 417.

Dr. Harry Smith testified for the United States as an expert in radiology, engineering, and injury causation. SER 652; see SER 648-652 (educational

[19] Dr. Aiken explained that strikes with a long blunt instrument may cause a short or small injury depending on the degree of contact with the skin. See SER 363. When a long instrument strikes a person's head, the impact area will be comparatively small due to the curvature of the skull. See SER 363.

background and experience). He agreed with Dr. Aiken that a baton strike will not usually result in a laceration or a fractured skull. SER 416 (Dr. Aiken: "lacerations from baton injuries are quite unusual"), 666-669. Dr. Smith opined that three injuries to Zehm's head were caused by baton strikes. SER 656-658, 688-690; see SER 687 (three head injuries were caused by blunt trauma). He did not believe it was possible that these injuries could be caused by pushing Zehm's head to the floor with a person's knee (SER 658) or by someone pulling on Zehm's hair. SER 686-687. He also opined it was "not probable" that Zehm's injury to the side of his head was caused by falling to the floor. SER 691. Dr. Smith further testified that a bruise on a muscle in the back, right side of Zehm's neck was caused by a baton strike (SER 674, 688, 692-693), and not caused by the IV catheter inserted in Zehm's neck. SER 675-677.

10. United States' Experts' Opinions On Defendant's Use Of Force And Police Tactics

a. Expert Testimony On Use Of Force Principles

Mr. Robert Bragg, a 30-year veteran instructor at the Washington State Criminal Justice Training Commission, testified as a defensive tactics expert. ER 1940-1942, 1992; see ER 1942-1972 (Bragg's expertise in defensive training and equipment). Bragg explained the principles of baton use and an officer's authorized use of force as set forth in the SPD's baton training curriculum (Trial Exh. 158), which he authored in part. Based on defendant's training records, Mr.

Bragg agreed that defendant was "highly trained." ER 1977-1978; Trial Exh. 20 (defendant's training records include classes on defensive tactics, deadly force, and use of force); see also ER 1940-1941, 1981-1993.

Bragg testified that, in an investigatory stop, an officer is trained to begin with conversation. ER 1776. The officer should begin by identifying himself and stating the reason for his inquiry to establish his authority even if he is wearing a uniform. ER 1776, 1871-1872. An officer's threat assessment, and the level of force that may be used, includes considering whether the individual's behavior is aggressive, threatening, resistant, passive, or retreating. ER 1868-1870, 1879-1881. An officer is trained to attempt to de-escalate tension in a confrontation. ER 1772. Talking is one means to de-escalate tension; using force generally escalates tension. ER 1772.

If an officer determines force is necessary, the officer's goal is to disable an opponent with the least amount of injury, and the minimal number of baton strikes, so the initial strikes should be done with force to hurt the opponent. ER 1823-1824, 1984-1985.[20] An officer can strike a "primary target" area of a person's body (*e.g.*, arms, forearms, ribs, and shoulder) when an individual is actively

[20] Defendant sought permission to use his longer, hardwood baton because it provided him greater distance between himself and subjects, and the hardwood baton would not break during force engagements. See ER 1889-1890, 1983; SER 506; R. 747:2339-2441.

aggressive, but not when the individual is passive or retreating. ER 1879-1882; see Trial Exh. 158:2. Officers are trained that baton strikes to the head or neck area are deadly force and only authorized when there is an imminent threat of serious bodily harm or death. ER 1867, 1886, 1906, 1998-1999. Officers are also taught to avoid unintended lethal strikes by using a diagonal or sideways strike, which is more accurate to hit a targeted body area than an overhead strike. ER 1819, 1906-1907. While an officer can strike before he is hit if he perceives active aggression (ER 1882), an officer cannot create exigent circumstances to justify the use of force. ER 1771-1772, 1854.

b. Defendant's Use Of Force Violated His Training

Bragg testified that defendant's conduct towards Zehm was contrary to many aspects of his training. While there may have been exigency to warrant questioning Zehm, there were no signs of exigency to warrant defendant's use of force. ER 1783. Also, defendant used lethal force in his initial, overhand strikes against Zehm, and that force was not commensurate with Zehm's behavior. ER 1786-1788, 1793. Mr. Bragg further stated that even if defendant's initial baton strikes were characterized as intermediate force, his actions did not constitute a legitimate use of force since Zehm moved backwards and displayed no signs of

aggression towards defendant, which he described as eggressive resistance.[21] ER 1786-1788, 1792-1794. Moreover, the defendant's series of seven baton strikes did not serve a legitimate law enforcement purpose of controlling Zehm. ER 1798. Defendant's continued use of force was ineffective, at which point he should have stopped his action and evaluated alternative tactics. ER 1795-1796, 1821.

c. Defendant's Actions Did Not Comply With Proper Police Procedure

Mr. Joseph Callanan, an expert on police procedures, testified that, while it was appropriate to briefly detain Zehm, defendant's rapid entry into the Zip Trip, his immediate baton strikes at Zehm, and his continuing baton strikes at Zehm after Zehm was on the floor were contrary to appropriate police procedure and tactics. ER 793-796, 798-799, 845-846; see ER 775-780 (Callanan's training and experience). Callanan also opined that the CAD and dispatch reports did not support the conclusion that Zehm had committed a robbery.[22] ER 790, 846, 848.

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[21] The defendant's police procedures expert, SPD Officer Terry Preuninger, testified that defendant's initial baton strikes at Zehm were a legitimate use of force (see SER 698-700), yet his favorable opinions would change if defendant had lied about his justification for the use of force. See SER 696-697, 701; R. 432 (Order on qualification as expert). Officer Preuninger also signed the petition supporting defendant's then-pending application to become police chief. See SER 701; R. 1143-4.

[22] Defendant has asserted (Br. 11-12) that he believed he was responding to an "attempted theft or robbery." See ER 3178 (in his recorded statement,

(continued…)

Even assuming defendant was responding to a robbery and there was a risk of potential hostages at the store, defendant's immediate, solo approach with his baton was contrary to sound police procedure. ER 795-796, 800-801, 803-804. Callanan also compared defendant's rapid entry to the store and approach to Zehm with Officer Braun's more cautious, deliberative approach, which included looking in store windows and determining the best entrance to maintain safety. ER 793-794; p. 9, *supra*.

According to Callanan, Zehm did not pose an "actual threat" to defendant. ER 796. He considered the Pepsi bottle to be a "defensive shield more than it's an offensive weapon," or a possible "distraction." ER 803. Even if defendant believed an assault was possible, he had tactics other than force at his disposal to control the situation, including steps that would distance himself from Zehm. ER 823-824. Callanan stated that an officer cannot use preemptive force in the absence of a reasonable, logical basis to assume aggression by an individual. ER 806. In sum, defendant's baton strikes did not serve a legitimate law enforcement purpose, and even if his initial strikes were justified, there was no justification for further force after Zehm was on the floor and not posing a threat. ER 845-846.

(…continued)
defendant asserted that he may have been responding to a "premature robbery attempt").

11. The Jury Instructions On "Willfulness"

At the start of trial and before any witnesses testified, the district court instructed the jury generally on the trial proceedings, their role as jurors, and the elements of the two charges against defendant. R. 735:65-76. To convict defendant of violating Count One (18 U.S.C. 242), the district court instructed the jury that it must find, *inter alia*, that the "defendant acted willfully, that is to say, defendant acted with a bad purpose, intending to deprive Mr. Zehm of his right to be free from unreasonable force[.]" SER 703. Defendant's proposed instruction on willful conduct to be given to the jury at the close of the case mirrored, in part, the district court's preliminary instruction and stated that the jury must find defendant acted with a "bad purpose." SER 704-706.

Near the end of the trial, the district court provided counsel two different sets of jury instructions on willfulness. ER 2623-2624; SER 708, 712-713 (U.S. memorandum discussing procedural history) (one version of the instructions was not submitted to the ECF system). The court's second version stated, "'[w]illfully' means to act with knowledge that one's conduct is unlawful and with the intent to do something the law forbids, that is to say, with the bad purpose to disobey or to disregard the law. *** If you find the defendant acted through mistake, carelessness, or accident, then he did not act willfully." ER 2623-2624. The United States objected to both versions, including an objection to the statement that

it must prove defendant acted with a bad or evil purpose. ER 756-760; SER 709-719. Defendant argued that the court's proposed, second version of the instruction was an accurate statement of the law. ER 755-756.

The district court's final jury instructions on willfulness stated the following:

> "'[w]illfully" means that the defendant acted voluntarily and intentionally, with the intent not only to act with a bad or evil purpose, but specifically to act with the intent to deprive Otto Zehm of a right that is made definite by the Constitution.
>
> To find that the defendant acted willfully, you must find that the defendant not only had a generally bad or evil purpose, but also that the defendant had the specific intent to deprive Mr. Zehm of his Fourth Amendment right to be free from objectively unreasonable force. This does not mean that the government must show that the defendant acted with knowledge of the particular provisions of the Fourth Amendment to the Constitution, or that the defendant was even thinking about the Fourth Amendment when he acted.
>
> One may be said to act willfully if he acts in open defiance or in reckless disregard of a known and definite constitutional right, in this case, the right to be free from objectively unreasonable force. This specific intent to deprive another of a constitutional right need not be expressed; it may at times be reasonably inferred from the surrounding circumstances of the act. Thus, you may look at the defendant's words, experience, knowledge, acts and their results in order to decide the issue of willfulness.
>
> If you find that the defendant had the purpose – that is, the end at which his act was aimed – to deprive Mr. Zehm of his Fourth Amendment right to be free from objectively unreasonable force, then the defendant acted willfully. By contrast, if you find the defendant acted through mistake, carelessness, or accident, then he did not act willfully.

ER 2590; see ER 729-730.

On September 18, 2012, the district court rejected defendant's post-trial challenge to this jury instruction and held that the instruction was consistent with precedent. ER 60-62.

12. Post-Trial Proceedings Regarding The United States' Alleged Withholding Of Evidence

On December 16, 2011, approximately one month after the verdict, forensic video analyst and former law enforcement officer Grant Fredericks sent correspondence to the United States that asserted the United States' Rule 16 summary of his proposed testimony was inaccurate. ER 2845-2852; see ER 2668-2669, 2982, 3023-3024. Fredericks was identified as a potential witness but was not called at trial by either party. See p. 44, *infra*. On December 23, 2011, the United States provided Fredericks' letter to the district court and defendant. SER 720-723. Defendant moved to conduct discovery regarding Fredericks' allegations and to amend his pending motion for a new trial to assert a violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), which the district court granted. ER 521-522; SER 123-127.

The parties briefed this issue extensively. See, *e.g.*, ER 200-243 (Thompson reply), 435-464; SER 128-163 (R. 969, U.S. Mem.), 521-621 (R. 956, U.S. Proffer), 724-760 (R. 950, Agent Decl.), 761-774 (R. 1021, U.S. Mem.), 775-786 (R. 1029, U.S. Mem.), 843-865 (R. 1022, Agent Decl.); see also ER 3107-3115

(Fredericks' Privilege Log), 3116-3167 (Fredericks' Proffer). The district court rejected the *Brady* claim. ER 8-53.

a. Fredericks' Pre-Trial Reports And Statements And The United States' Production

In July 2006, Fredericks called the SPD to offer his professional services as a video analyst. SER 532-534 (U.S. Proffer). Fredericks prepared a report for the SPD in September 2006 (ER 2863-2990) that concluded defendant and Zehm were engaged in a confrontation for one minute, 13 seconds before the video depicted defendant "use[]" his baton, at which point defendant made "eight baton swings in just over six seconds." ER 2871, 2880; see ER 13.[23] Although this report was initially prepared for the SPD and paid for by the City Attorney's Risk Management Division, the United States also produced this report to defendant on or before August 3, 2009. ER 18; SER 268, 529, 532-536, 789-794; see p. 18, *supra*.

In March 2007, FBI Special Agent Lisa Jangaard and Assistant U.S. Attorney (AUSA) Timothy Durkin interviewed Fredericks. ER 3017; R. 950:4. During this interview, the Agent and AUSA reviewed Fredericks' 2006 report and

[23] Since the defendant's *Brady* claim is limited to his initial baton strikes, the United States has limited its discussion primarily to Fredericks' statements regarding defendant's rapid approach and initial baton strikes, rather than his other inculpatory statements regarding defendant's subsequent firing of taser darts and baton strikes. See ER 2870-2871, 3003-3008.

the Zip Trip video, and images that Fredericks enhanced with greater resolution through software on Fredericks' laptop computer. ER 13, 3018; R. 950:6. The Agent prepared a FBI 302 report summary (ER 3017-3021), which was produced to defendant on or about March 1, 2010. ER 20. The FBI 302 report summarizes, *inter alia*, Fredericks' comparison of his findings in his 2006 report to a more detailed assessment of the video during the interview. Fredericks could not identify frames in the video to confirm his 2006 statements that Zehm looked "north toward a police vehicle" before he entered the Zip Trip, or that Zehm was kicking with both feet at defendant while Zehm was on the floor. ER 3018. The FBI 302 report further stated, with respect to the video frames for 18:26:14 (including Frame 69), that:

> Fredericks initially advised that the image may be something other than a baton, such as a shadow or a video artifact [*i.e.*, compression artifact]. Upon further review of the frames however, Fredericks agreed that the images depicted in 18:26:14 and 18:26:15 were consistent with a baton strike(s) (sic) and agreed that [the defendant] appeared to be using his baton in a forward striking motion on at least two occasions prior to the images depicting Zehm on his back holding the Pepsi bottle.

ER 14 (quoting ER 3019). Fredericks acknowledged that he missed in his earlier report to SPD the images at 18:26:14 showing the baton in use. ER 3019.

Fredericks "cautioned" the Agent and counsel that enlarged photographs taken from the video images "may contain artifacts as the images may have been further compressed." ER 3019. In March 2007, Fredericks agreed to provide the

FBI high definition photographs from individual frames of the video for further review. ER 3019; SER 562, 731. The Agent and AUSA again interviewed Fredericks on August 3, 2007, to review high definition photographs and Fredericks offered to prepare a supplemental report.[24] ER 14.

Fredericks prepared a supplemental report dated September 13, 2007, which was produced to defendant on or about September 29, 2009. ER 19, 2991-3016 (report); SER 530. This report stated, *inter alia*, that upon entering the store, defendant removed his baton from his duty belt, immediately moved the baton "close to the officer's right shoulder" at 18:26:10 Zip Trip time (18:24:08:13 Pacific Standard Time (PST)), and moved the baton "in front of his body" as he turned the aisle at 18:26:11 (18:24:08:50 PST) and approached Zehm. ER 2998.[25] At 18:26:12 (18:24:09:30 PST), Zehm was facing defendant and, at 18:26:14 (18:24:11:34 PST), Zehm moved backward as defendant moved towards him. ER 2999.

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[24] The Agent met with Fredericks on several other occasions with or without an AUSA. Consistent with FBI protocol, the Agent did not prepare a Form 302 report of each meeting as they addressed the development of exhibits and not new opinions. SER 731-732; see ER 2848 (Fredericks stated that "the purpose of these meetings [dates previously identified] was to assist in the preparation of trial exhibits.").

[25] In his 2007 report, Fredericks added and used Pacific Standard Time (PST) rather than the Zip Trip clock to describe images although the original Zip Trip time stamp remains on the images themselves. See p. 18, n.14, *supra*.

Fredericks stated in his 2007 report that defendant's baton was not visible in the image at 18:26:14 Zip Trip time (18:24:11:34 PST), yet defendant is lower in the next image, still at 18:26:14 (18:24:12:01 PST), than he was in the immediately preceding image (which is approximately 1/4 second earlier). ER 15, 2999-3000. (This movement corresponds with Fredericks' statement in March 2007 that defendant's actions are consistent with a baton strike.) Defendant's baton is visible "between the [defendant] and Zehm" at 18:26:15 (18:24:12:40 PST). ER 3000. One second later, at 18:26:16 (18:24:13:50 PST), Fredericks stated defendant and Zehm are not visible, but the baton was visible, "parallel to the floor above 'head-height.'" ER 3001. The baton also was visible on time stamp 18:26:17 (18:24:14:02 PST). ER 3001. Fredericks did not characterize the images at 18:26:14-16 as a "baton in motion," yet he uses that phrase and similar descriptions for baton motions after the taser strike.[26] ER 3002-3003.

On May 13, 2009, Fredericks testified before the grand jury and, *inter alia*, gave a more detailed description of video images at 18:26:14-16. See generally ER 3022-3073. A transcript of his testimony was produced to defendant on

[26] Fredericks' 2007 descriptions, including that the defendant removed his baton from his duty belt upon entering the store and moved the baton in a forward motion towards Zehm after firing the taser, are inconsistent with his 2006 report, which asserts that the video *did not* reflect the defendant's "use" of his baton for the first minute and 13 seconds of the confrontation. Compare ER 2880 with ER 2998, 3003.

October 2, 2009. SER 530. Fredericks stated that the video showed, at 18:26:12-13, Zehm backing away from defendant as defendant is moving forward. ER 3050-3051. Fredericks further explained that while defendant's arm was not visible, "[w]e can see his height," and defendant, at 18:26:13 and 18:26:14, is in a "*downward motion*, so he has changed height from one position to another position *** the officer has moved down." ER 3051 (emphasis added). Fredericks also testified that the images showed a "dark line" "to the front of [defendant's] head" that "goes away," and this image is "consistent with a baton." ER 3051. When asked whether "the movement that we're seeing here and as you have described, is that consistent with the movement of a forward overhand baton strike?" Fredericks said, "[i]t is." ER 3052.

Fredericks also described the images at 18:26:15-16 as showing a "line" that is "consistent again with the baton that we saw earlier." ER 3053. Fredericks stated that during 18:26:15-16, defendant held the baton in an overhand position, parallel to the floor, defendant's head moved lower in successive images, and Zehm fell to the floor at 18:26:16. ER 3052-3053, 3059-3060. The following exchange also occurred:

> Q: And we know from reviewing Camera Angle No.1 that the baton is caught *after the first baton strike*, and it's caught in an upward strike position with forward movement by [the defendant] at approximately 18:26:15, is that correct?

> A: Yes. There's a number of images that show the baton in the air at that time, yes.

ER 16-17 (quoting ER 3059) (emphasis added). Fredericks also testified to the grand jury that other movements, including images that show defendant's arm "up in the air" and "the next image his arm is down," are "consistent with a baton strike." ER 3055-3056.

On or about September 22, 2009, the United States gave defendant and Fredericks a summary of Fredericks' anticipated trial testimony pursuant to Federal Rule of Criminal Procedure 16. ER 18-19, 2733, 2770, 2853-2862; SER 583. The portion of the summary that defendant now challenges (ER 2855) stated:

> [i]mmediately after the Zip Trip security video shows Thompson appearing to strike Zehm with his baton for the first time, dispatch broadcasted that the complainant was not sure that Zehm had taken any of her money. This dispatch occurred before Thompson strikes Zehm a second time with another overhand, up and down, baton strike.

The summary further stated, "the Zip Trip Security video shows Thompson repeatedly moving his baton at a high rate of speed from above his head down toward Zehm consistent with the swinging of a baton." ER 2855.

In 2009, Fredericks testified on behalf of a New York City police officer charged with excessive force in *United States* v. *Simoes*, No. 08CR784 (S.D.N.Y.). On cross-examination, Fredericks denied the allegation that, in this case, he had changed his opinion in his 2007 report or that his 2006 report was incorrect. ER 17

(quoting ER 3229-3230). Fredericks responded that his first report was not incorrect and that the two reports were not inconsistent because the relevant video "did not show the baton striking [*e.g.*, impacting] the individual. Significantly different than whether he hit him." ER 17 (quoting ER 3230). The United States did not produce this brief testimony to defendant before trial. During a post-trial hearing, counsel for the United States admitted that the better course of conduct would have been production, even though this testimony was easily accessible to defendant, and counsel believed these statements were not exculpatory. ER 143-145, 147, 153-155.

Fredericks also prepared Trial Exhibits 3 and 5, see p. 18, *supra*, as well as Exhibit 12, which is 92 separate files of video clips in video and pdf format developed from Trial Exhibit 3 that includes a compilation Fredericks entitled, "Baton Motion 1-13" (Video 10 in Exhibit 12).[27] The United States produced to defendant Trial Exhibit 3 on July 31, 2009; versions of Trial Exhibit 5 in 2009, 2010, and 2011; and Exhibit 12 on October 13, 2011. SER 529-531. The United States also produced Fredericks' emails, PowerPoint photographs referred to as the "Pepsi video" (Exhibit 8), and other material. SER 529-532.

[27] "Exhibits" were not admitted at trial yet were produced to the defendant, and are distinguishable from a Trial Exhibit.

The United States and defendant designated Fredericks as a witness at trial. R. 364, 397:6, 634:4, 637, 641. Midtrial, the United States decided not to call Fredericks as a witness. ER 110-111; SER 799-803; p. 83, *infra*. Defendant also did not call Fredericks as a witness at trial.

b. Fredericks' Post-Trial Claims And The United States' Response

Although he received a copy of the Rule 16 summary in September 2009, Fredericks did not come forward until after the case was tried and the jury delivered a verdict. Approximately one month after defendant's conviction, Fredericks alleged the United States' Rule 16 summary did not identify fully and accurately his opinions. ER 2845-2849. Fredericks claimed that he informed United States counsel and the Agent during the August 2007 meeting that he did not believe a baton was visible "on the video *** between 18:26:11 *** and 18:26:15." ER 2847. Fredericks asserted that he told United States counsel and the Agent that the images they identified as defendant's baton were a "compression artifact (digital video error)," which is the result of high definition images created from low resolution video. ER 2847. Fredericks also asserted he addressed the problems of interpreting a video due to motion blur. ER 2847; see also ER 3107-3167 (Fredericks' 2012 submissions).

On March 2, 2012, Fredericks was interviewed and then deposed by defendant (ER 2670-2844; SER 606-617) and examined by the United States. ER

2744-2838. Fredericks repeated his claims that in 2007: he told United States counsel and the Agent that Frame 69 and photographs at 18:26:12-14 did not show defendant's arm, hand and baton, and that the dark line in the image was a compression artifact (ER 2684, 2693-2694); he explained the concept of motion blur (ER 2686-2687, 2704); he stated that an object will appear blurry when it is in motion faster than the camera taking the image, and that motion blur is evident later in the confrontation when defendant makes several baton swings (ER 2704); and he agreed with counsel that the images showing defendant's body position lowering at 18:26:14 were consistent with a baton motion, but claims that he also stated that these movements could be consistent with defendant crouching for a tackle or ducking. ER 2708-2710.

Fredericks also stated in his deposition that there is one image at 18:26:15 of a baton that is not blurry, which could mean that defendant is holding the baton still above his head, or it *could be* consistent with a baton motion, and that the image captured the baton at the high point before movement. ER 2686-2687, 2704-2705, 2716, 2737-2738. Fredericks agreed defendant is moving forward through the images immediately after 18:26:14, but Fredericks distinguished a forward body motion from a baton motion that is downward or swinging. ER 2793-2796; see also ER 2737-2738.

Post-trial, Fredericks distinguished the terms "baton strike," which he believes includes the impression of actual contact or impact, and "baton motion," which he considers is only a swing, without actual contact. ER 2724-2726, 2780, 2794-2795. He stated that the video "likely" showed a "baton strike" (with actual impact) later in the assault. ER 2779; see ER 2738, 2781-2782. However, he was comfortable stating that the video shows images that were consistent with a baton swinging motion and other motions. ER 2726. Ultimately, Fredericks stated: 1) his prior use of the term "baton strikes" should not be read to mean baton impact on Zehm; and 2) the United States' prior statements regarding "baton strikes" are correct as long as there is no implication of "baton impact." ER 2776-2778, 2794-2795. Fredericks further admitted that his statement in the 2006 report that defendant does not use his baton for the first minute, 13 seconds is "inaccurate" as long as one focuses only on baton motion, and not video images of baton motion with assumed impact on Zehm.[28] ER 2776-2778.

When asked during his post-trial deposition about his grand jury testimony, Fredericks confirmed his grand jury statement that defendant's motion at 18:26:14 was consistent with the movement of a "forward overhand baton strike." ER 2809. In his deposition, Fredericks claimed that he had only agreed with counsel

[28] This testimony contradicted his testimony in *Simoes* where he denied that his 2006 report was inaccurate.

previously to the phrase "consistent with a swinging motion," and not the remainder of what he considered to be counsel's description (*i.e.*, a baton strike connoting impact). ER 2809-2810. Fredericks, however, did not include any such limitation or qualification in his testimony to the grand jury. ER 3052.

The United States submitted to the district court extensive documentary evidence that Fredericks' post-trial statements included allegations that were false, incorrect, and inconsistent with his prior sworn testimony. See, *e.g.*, SER 557-575 (R. 956, discussion of inconsistent, pretrial statements), 575-584 (R. 956, discussion of inconsistent post-trial allegations), 724-760 (R. 950, Agent Decl.), 761-774 (R. 1021, U.S. Mem.), 775-786 (R. 1029, U.S. Mem.), 843-865 (R. 1022, Agent Decl.). The United States refuted many of Fredericks' allegations, including claims of inappropriate conduct (SER 740); identified false statements, including his description of his initial contacts with the SPD (SER 532-534); and refuted claims that he shared certain opinions with the United States in 2007, including that, at any time, Fredericks gave alternative explanations that defendant was "crouching" or "ducking."[29] See, *e.g.*, SER 143, 741. The United States also identified specific examples of how Fredericks' post-trial assertions were

[29] Defendant never claimed that he ducked or crouched when he engaged Zehm. Cf. ER 3186-3190.

inconsistent with his prior testimony, including testimony under oath. SER 618-621, 746-752.

The United States argued below that the challenged evidence was not exculpatory or suppressed, and even if deemed so, the statements were not prejudicial. See, *e.g.*, SER 138-162. For example, the United States argued (SER 138-146) that Fredericks' own distinction between baton "strikes" and "motion" is belied by Fredericks' own use of these terms interchangeably in his post-trial deposition. Fredericks described defendant's actions at 18:26:14-18:26:16 as:

- "consistent with many things, including a baton strike" (ER 2712);
- "consistent with a motion *** of an up and down baton strike" (ER 2724);
- "consistent with baton motion" (ER 2803);
- "the striking motion *** of the baton" (ER 2726); and
- "a striking motion or a motion of the baton" (ER 2781).

The United States also asserted that the challenged portion of the Rule 16 summary (see p. 42, *supra*) was addressing the timing of defendant's first baton strikes, although further acknowledged that this text could be interpreted differently. SER 140-141. The United States argued that, at best, Fredericks' post-trial claims rendered his opinions equivocal and therefore not exculpatory.[30] SER 145-146. The United States also argued that defendant had ample documentation from Fredericks that expressed his alternative views, including his 2006 report

[30] See *Scott* v. *Harris*, 550 U.S. 372, 380 (2007) (noting that video footage "blatantly contradicted" opposing party's version of the facts).

wherein he stated that there was no video evidence of baton strikes or motions during the first minute, 13 seconds of defendant's attack, and that this evidence was not suppressed from disclosure. SER 141-142, 146-148.

c. The District Court's Post-Trial Brady Ruling

On September 18, 2012, the district court rejected defendant's *Brady* argument. See generally ER 8-53. The court briefly summarized defendant's assault, the Zip Trip video recordings and JPEG images (frames), and defendant's statement. ER 8-12. The court discussed Fredericks' different reports and the United States' disclosures of his opinions (ER 12-20) and the evidence addressing both parties' versions of defendant's approach and initial baton strikes (ER 21-33). The court ruled that some of Fredericks' opinions regarding what is and is not visible on the Zip Trip video and alternative explanations for various images, including Frame 69, were exculpatory but unintentionally suppressed. ER 38-45, 52-53. The court found that the Agent's summary of the March 8, 2007, meeting (FBI 302 report) was "incomplete" due to an "innocent misunderstanding" of Fredericks' "nuanced" opinions. ER 35-36. Because it was incomplete, the court concluded it was "inaccurate," although the "United States did not intentionally mislead the defendant." ER 52.

The district court highlighted the FBI report's statement that Fredericks agreed that images at 18:26:14-15 (which includes Frame 69) are "consistent with

a baton strike" and that defendant was "using his baton in a forward striking motion" at least twice before Zehm fell to the floor. ER 3019. The court found that Fredericks expressed alternative interpretations of the video and Frame 69 during that meeting that were not included in the FBI 302 report (ER 43-45), including that the white spot and dark line in Frame 69 are not defendant's arm, hand and baton, and he did not see a baton in images at 18:26:12-18:26:14. ER 35, 43. The court also found that the FBI report does not discuss Fredericks' comments on motion blur. ER 31-32, 35. According to Fredericks, the baton that is visible in 18:26:15 is not blurred, and therefore not in motion. ER 31.

The district court stated that Fredericks' testimony in 2009 in the *Simoes* litigation put the United States "on notice *** that it had not fully understood" Fredericks' opinions. ER 38. The court explained Fredericks' "nuanced" views as follows: he "is willing to concede a number of the disputed images are consistent with a baton in motion. Nevertheless, in [Fredericks'] opinion, the fact an image is consistent with a moving baton does not mean the defendant was swinging the baton, much less striking Mr. Zehm. A reasonable person could fail to appreciate the distinction drawn by Mr. Fredericks." ER 36.

Assessing the potential prejudice, the district court found that Fredericks' undisclosed opinions "would have helped the defendant's attorneys illustrate the weaknesses of Dr. Gill's interpretation" that Frame 69 helped prove that

defendant's first baton strike occurred at 18:26:14 (ER 48) and added credence to defendant's version that he stopped and ordered Zehm to drop the soda bottle before his initial baton strike. ER 49-50; see ER 39-4l.[31]

The district court then balanced the "disadvantage" from the suppressed evidence against the trial evidence regarding defendant's approach and initial baton strikes at Zehm. ER 50-53. First, the district court found that defense witness Schott "mitigated" the disadvantage because Schott disagreed with Dr. Gill's interpretation of the video and Schott "was available to help the defendant's attorneys prepare their cross-examination of Dr. Gill. Beyond that, Mr. Schott testified." ER 50. Moreover, the district court concluded that defendant's potential use of Fredericks' opinions for cross-examination did not establish a reasonable probability of a different verdict in light of the "very strong" evidence

[31] The district court also noted Fredericks' opinions may have been utilized to cross-examine Bragg, whose expertise includes defensive tactics, but any impact was not clear since Bragg did not specify which frames he relied upon for his opinions. See ER 42-43. The district court also stated that the United States pretrial discussions with witness Michael Dahl about his opportunities to see the assault, as reflected in the video, led Dahl to testify that he heard Thompson say "drop the pop" after the first baton strike (rather than before the first strike, as Dahl recalled closer to the time of the incident). See ER 48-49. The defendant cross-examined Dahl regarding his pretrial interviews with the United States (which were disclosed in August 2009), yet the district court stated that the United States' pretrial interaction with Dahl "impaired the defendant's ability to challenge the United States' theory of the opening seconds." ER 49; see R. 42-2 (discovery discs 55 and 58).

of guilt. ER 51. The district court cited to the eye witness testimony that defendant's initial baton strikes were made "shortly after confronting Mr. Zehm *** in a manner that risked inflicting serious injury," the medical evidence, defendant's admissions, and experts who were "sharply critical of the decisions [defendant] made during the opening seconds of the confrontation and, indeed, of the decisions he made throughout his struggle with Mr. Zehm." ER 50-51. The district court concluded that, "consider[ing] the record as a whole, *** the likelihood of a different outcome is remote even assuming defendant discredited Dr. Gill's interpretation of the opening seconds of the confrontation." ER 51. The district court further concluded that the "verdicts are worthy of the public's confidence." ER 53.

13. Defendant's Post-Trial Requests To Interview Jurors

Two days after the verdict, defendant moved to interview jurors regarding allegations that they may have seen a tickertape news report during deliberations that stated Zehm had a mental disability, information the parties stipulated would be excluded. ER 599-607; see R. 630. Defendant also identified a newspaper article reporting that a juror said during deliberations that a friend told her Spokane had corrupt politics 20 years ago. ER 590-592, 594-595; R. 787.

On December 6, 2011, the district court issued an order (ER 583-598) denying defendant's request because, *inter alia*, "defendant has failed to

demonstrate reason to believe the jurors considered extraneous prejudicial information" (ER 591), and the jurors presumably followed the court's repeated instructions to ignore and avoid media reports. ER 588-592. The district court further stated that the Spokane comment was not "extraneous prejudicial information" because it reflected a person's "impressions" that were "a result of her experiences," "were formed years before the defendant's trial began and [did] not reflect knowledge about [the defendant's] confrontation with Mr. Zehm." ER 591.

In the spring of 2012, defendant again moved for an opportunity to interview jurors regarding new allegations, now by an alternate juror, that the jury discussed evidence and the merits of the case prior to the close of evidence. ER 59. On May 23, 2012, the district court conducted closed, in-chambers examinations of three jurors. ER 258-288. All three jurors denied that they prematurely deliberated the evidence or merits, or that they were aware of any misconduct by fellow jurors. ER 265, 272, 275-279, 282-285.

In response to further exploratory questions, the three jurors stated that a fellow juror commented that, 20 years earlier, the City of Spokane's politics were "kind of corrupted." ER 264-265; see ER 276, 284. Juror One stated that during deliberations, one of the jurors said a friend lived in Spokane 20 years earlier and said it had a corrupt government back then. ER 264. Juror One stated this

comment was made as the jury was discussing "whether [the defendant] was the victim of something bigger or if he was acting in isolation." ER 265. Juror Two recalled that a fellow juror stated she used to live in Spokane and that the police department was corrupt. ER 276. Juror Three said that a fellow juror made a "passing remark" that either she or someone else lived in Spokane "years ago" and she described Spokane as having a "historically corrupt government," or words to that effect. ER 284.[32] Juror Three stated the other jurors did not discuss or comment on the Spokane remark. ER 284 ("[T]hat was the end of it. It wasn't like and then we talked about it for two hours. It was a comment that was made *** – it was never, it was never – that wasn't deliberated. It was a comment from personal knowledge.").

Defendant again moved for a new trial based on alleged juror misconduct. ER 244-254. On September 18, 2012, the district court denied defendant's motion. ER 59-60. The district court found that the juror "interviews did not produce evidence indicating that jurors made up their minds prior to deliberations or that, during deliberations, they considered extraneous prejudicial information. Ruling:

[32] Juror Two said the Spokane comment did not affect her deliberations. See ER 276. When asked if he thought this comment affected the deliberations, Juror Three responded, "absolutely not. I would say, again, unequivocally, it was a passing remark. ***[I]t did not affect deliberations at all." ER 284.

The verdicts were not tainted by premature discussions among the jurors or by the jurors' consideration of extraneous prejudicial information." ER 59-60.

SUMMARY OF ARGUMENT

1. Defendant has not shown that the district court erred in concluding there was no violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963). He has not demonstrated that, if he had been provided Fredericks' withheld opinions, there was a "reasonable probability" that the verdict would have been different. *United States* v. *Bagley*, 473 U.S. 667, 683 (1985) (citation omitted). Defendant's own witness, Michael Schott, testified to the same opinions as Fredericks, and defendant had Schott's opinions to aid him in cross-examination of the United States' witnesses. Because the withheld impeachment testimony was cumulative and the witnesses' testimony would not have been significantly altered, the defendant cannot show that he was prejudiced under *Brady*. Moreover, as the district court concluded, even if Dr. Gill's testimony had been rejected, there remained overwhelming evidence from various other sources, including eye witnesses, the video, defendant's statements, medical testimony, and experts, proving defendant willfully used excessive force in one or both of his first two baton strikes.

2. The district court did not abuse its discretion in admitting evidence under Federal Rule of Evidence 403 of Zehm's patronage of Zip Trip stores, his final

statement before losing consciousness, and his possession of his pay check during the assault. The court found that the evidence had significant probative value to refute defendant's version of the facts prior to and during his use of force and to establish elements of the charged offenses. The district court reasonably concluded that the probative value outweighed any possible prejudice from evidence unknown to defendant at the time of the incident. *Boyd* v. *City & Cnty. of S.F.*, 576 F.3d 938, 943 (9th Cir. 2009) (evidence not known to officer may be more probative than prejudicial when it addresses disputed facts regarding an officer's use of force).

3. The jury was properly instructed that in order to find that defendant acted willfully, a required element to convict under 18 U.S.C. 242, the jury must conclude that defendant had the specific intent to violate Zehm's right to be free from unreasonable force, which can be proven by showing that defendant acted in knowing disregard, open defiance, or reckless disregard of that right. *Screws* v. *United States*, 325 U.S. 91, 105 (1945); *United States* v. *Reese*, 2 F.3d 870, 883 (9th Cir. 1993). There is no requirement that the government prove specific intent and some additional evil motive. The primary elements of the instruction are consistent and nearly identical to instructions approved by the Supreme Court, this Court, and other circuits. See, *e.g.*, *Reese*, 2 F.3d at 885. Moreover, the district court's instructions go beyond what is legally required and call for proof of evil

purpose. Defendant has not and cannot show how the instruction is confusing. The district court did not abuse its discretion in formulating this instruction.

4. Defendant's challenge to the jury's verdict on Count Two, the false statement charge, based on a juror's single comment that a friend said Spokane's government was corrupt 20 years ago, is without merit. Defendant's challenge is "trivial" because the juror's statement is an "off-the-cuff" comment that does not constitute extrinsic evidence. *Grotemeyer* v. *Hickman*, 393 F.3d 871, 878 (9th Cir. 2004); *Price* v. *Kramer*, 200 F.3d 1237, 1255 (9th Cir. 2000). The statement also is comparable to a juror's expression of personal experience or bias that is not prohibited extrinsic evidence. Even if considered extrinsic, the statement is not prejudicial due to its generality, the historic reference, and its lack of a rational and direct relationship to the jury's determination that defendant made a false statement(s) during his 2006 recorded interview; the jurors did not discuss it; the jurors were advised to only consider trial evidence; and overwhelming evidence supports the jury's verdict. Accordingly, the United States has met its burden of showing that there is not a "reasonable probability" that the statement could have affected the verdict. *United States* v. *Montes*, 628 F.3d 1183, 1187 (9th Cir.) (citation omitted), cert. denied, 131 S. Ct. 2171, and 131 S. Ct. 2468 (2011).

ARGUMENT

I

DEFENDANT HAS NOT ESTABLISHED A VIOLATION UNDER *BRADY* v. *MARYLAND*, 373 U.S. 83 (1963)

A. Standard Of Review

This Court reviews de novo a district court's denial of a motion for a new trial based on an alleged violation of *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). *United States* v. *Collins*, 551 F.3d 914, 923 (9th Cir. 2009); *United States* v. *Howell*, 231 F.3d 615, 624 (9th Cir. 2000). Factual findings underlying a *Brady* analysis, including a finding that government representatives did not act intentionally or with bad faith, are reviewed for clear error. *United States* v. *Chapman*, 524 F.3d 1073, 1084 (9th Cir. 2008). The "usual" remedy upon proof of a *Brady* violation, in the absence of willful actions or bad faith, is a new trial. *United States* v. *Kohring*, 637 F.3d 895, 912-913 (9th Cir. 2011).

B. Overview Of Brady Principles

A defendant must prove three elements to establish a violation of *Brady*, 373 U.S. at 87: the evidence must be favorable to the accused because it is exculpatory or impeaching, the evidence must have been suppressed (either intentionally or inadvertently), and the withholding of such evidence must result in prejudice. Evidence may be deemed prejudicial or material; the terms are used interchangeably. *Benn* v. *Lambert*, 283 F.3d 1040, 1053 n.9 (9th Cir. 2002).

Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States* v. *Bagley*, 473 U.S. 667, 682 (1985). Undisclosed impeachment evidence that is cumulative of evidence known by defendant and available at trial is not material, while undisclosed evidence that is different in kind and concerns a witness critical to determining defendant's guilt is material. *United States* v. *Wilkes*, 662 F.3d 524, 535 (9th Cir. 2011), cert. denied, 132 S. Ct. 2119 (2012); *Kohring*, 637 F.3d at 908-909.

There is a "reasonable probability" of a different result when the absence of the evidence, considered in the context of the entire case, "undermines confidence in the outcome of the trial." *Kyles* v. *Whitley*, 514 U.S. 419, 434 (1995) (quoting *Bagley*, 473 U.S. at 678). Thus, the court must "undertake a careful, balanced evaluation of the nature and strength of [the withheld evidence] and the evidence each side presented at trial." *United States* v. *Jernigan*, 492 F.3d 1050, 1054 (9th Cir. 2007) (en banc) (citation omitted); *Benn*, 283 F.3d at 1053 ("[T]he withheld evidence must be analyzed 'in the context of the entire record.'") (citation omitted). A court must consider whether and to what extent the withheld evidence challenges testimony of a significant or peripheral witness or challenges the weight of other evidence that supports the conviction. *Strickler* v. *Greene*, 527 U.S. 263, 289-295 (1999) (withheld impeachment evidence was not material; it did not

undermine other evidence, including physical evidence, of defendant's role in the crimes); *Wilkes*, 662 F.3d at 536; *Smith* v. *Almada*, 640 F.3d 931, 939-940 (9th Cir. 2011) (withheld impeachment evidence did not undermine evidence of defendant's motive or physical evidence linking him to charged offense).

C. Defendant's Materiality Claim Under Brady Is Without Merit

Defendant asserts (Br. 50-66) three reasons why the district court's assessment of materiality is flawed: 1) the court erred in concluding that the jury agreed that all of defendant's baton strikes were bases for his conviction; 2) it did not consider all of the means by which defendant would have used the suppressed evidence; and 3) it did not infer materiality based on the United States' actions that, according to defendant, were committed in bad faith. None of defendant's arguments has merit. The district court appropriately assessed defendant's claimed theoretical use of suppressed evidence in light of defendant's approach and initial baton strikes. Defendant's theoretical cross-examination is cumulative of what he did or could have done, and therefore is not material. Even if not considered cumulative, he cannot show that any theoretical impeachment creates a reasonable probability that the verdict would be different given the other overwhelming evidence of guilt. Finally, the district court correctly concluded that the United States' actions were not intentional or committed in bad faith.

1. The District Court's Materiality Assessment Was Appropriately Based On The Evidence Regarding Defendant's Approach And First Two Baton Strikes

Defendant asserts (Br. 50-56) that the district court's materiality assessment was erroneous due to the general verdict and the court's assumption that the jury found defendant committed each alleged act of unreasonable force. Defendant misconstrues the court's opinion.

The district court acknowledged that because there was a general verdict, it is unknown which acts or statements formed the basis of the convictions. ER 46. The court also observed that the jury *could have* found defendant guilty based on any of the acts or false statements alleged by the government. ER 46. Given that the act or statement the jury relied upon is unknown, every act or statement has to be treated as the one the jury relied upon. The court then stated that it would focus on the first two strikes because defendant's *Brady* claim relates only to those strikes. ER 46. The district court's actual *analysis* of prejudice began as follows: "[a]t this juncture, *only the first two strikes are at issue*." ER 46 (emphasis added). Clearly, the challenged evidence has no bearing on the weight of the evidence for defendant's latter 11 baton strikes and taser firing.[33] *United States* v. *Olsen*, 704 F.3d 1172, 1185 (9th Cir. 2013) (withheld evidence challenging credibility of

[33] Defendant has not challenged the sufficiency of the evidence for his convictions under 18 U.S.C. 242 (based on the other baton strikes or taser firing) or 18 U.S.C. 1519.

arresting officer had no impact on proof of defendant's intent to use chemical as a weapon); *Benn*, 283 F.3d at 1053.

The district court balanced defendant's theoretical use and impact of suppressed evidence against the collective evidence regarding defendant's approach and initial baton strikes. ER 46-52. The court referred to defendant's potential cross-examination of Dr. Gill on Frame 69 and witness testimony describing defendant's initial strikes. ER 39-40. Significantly, the court did *not* address Dr. Gill's assessment, the video, or witness testimony regarding defendant's 11 other baton strikes and taser firing, or Officer Braun's testimony regarding defendant's orders to inflict baton strikes, fire taser darts, and apply drive stuns to conclude Fredericks' evidence was not material. ER 47-53. Rather, the court appropriately assessed how the withheld evidence affects the weight of the evidence that could have been the basis for conviction (*i.e.*, the first two strikes). *Kohring*, 637 F.3d at 903-913.

In addition, defendant's assertion (Br. 52-56) that the general verdict is grounds to find materiality under *Brady* is without merit and his reliance on *Kohring* is misplaced. In *Kohring*, 637 F.3d at 902-903, this Court rejected the government's claim that previously undisclosed records did not refute some evidence that supported the general verdicts, and therefore were not *relevant*. This Court explained that the bases for a general verdict on three charges was unknown,

and withheld evidence regarding some of the alleged wrongful conduct that could have been the basis for the verdicts was therefore relevant. *Ibid.* The Court proceeded to conduct a detailed analysis of each category of withheld evidence under *Brady*. *Id.* at 903-912. This Court did not hold that withheld evidence regarding actions that may be the basis of a general verdict is automatically deemed material. In fact, this Court found that some of the relevant, withheld evidence in *Kohring* was not material. *Id.* at 908, 910. Thus, defendant's assertion (Br. 54-55) that *Kohring* supports his claim that Fredericks' evidence is material should be rejected.

2. Defendant's Theoretical Uses Of Impeachment Evidence Are Cumulative Of Cross-Examination Defendant Did Or Could Have Done At Trial

Defendant's claim (Br. 56-64) that the district court erred in its assessment of materiality because it did not account fully for how he would have used Fredericks' opinions is without merit. Defendant's proffered cross-examination of any witness would not be substantively different than what defendant did or could have done at trial, and therefore he cannot show the evidence is material.

As noted, undisclosed impeachment evidence that is cumulative of evidence known and available is not material, yet undisclosed evidence that is different in kind and concerns a significant witness is material. *Wilkes*, 662 F.3d at 535-536 (documents of proffer sessions with cooperating witness were cumulative and

therefore not material when witness' cooperation and immunity were known to the jury); *Kohring*, 637 F.3d at 903-904, 908-909 (undisclosed evidence regarding a significant witness' faulty memory was cumulative when defendant had cross-examined the witness' poor memory, yet undisclosed evidence of the witness's pending sexual misconduct charges with a minor was a different means to impeach that witness' credibility and therefore not cumulative and material). The materiality assessment of impeachment evidence considers actual and potential cross-examination with available evidence. *Moreno-Morales* v. *United States*, 334 F.3d 140, 147-148 (1st Cir. 2003) (court's ruling on the lack of prejudice did not depend on whether defendant cross-examined the witness on known inconsistent statements or, as to one witness, "chose not to utilize" contrary statements). In addition, this Court should examine not only how defendant theoretically may have used the challenged evidence, but also how the government would have likely responded. *Collins*, 551 F.3d at 924-925 (withheld recording of threat to an informant, when fact of the threat was known and addressed in cross-examination, was cumulative and would have "little value" in theoretical use); *United States* v. *Gale*, 326 F.3d 228, 229 (D.C. Cir. 2003) (no materiality found where government represented that witness who could be impeached by withheld evidence would not be called in retrial).

a. Theoretical Impeachment Of Dr. Gill Would Be Cumulative Or Insubstantial

At trial, defendant cross-examined Dr. Gill about various images on the video (*e.g.*, ER 1644-1647), including his interpretation of Frame 69. ER 1665, 1667-1669. While defendant highlighted Dr. Gill's inability to identify defendant's hand or baton in Frame 69, Dr. Gill testified that Frame 69 and other images supported his conclusion that defendant's first baton strike occurred at 18:26:14. ER 1667-1669. Dr. Gill could not recall when he learned an FBI analysis could not conclusively determine the position of defendant's hand in Frame 69. ER 1667. Dr. Gill also stated that a baton strike is visible in Frames 74-75 (which Schott asserts is defendant's first strike). ER 1659-1663.[34]

Defendant had Schott's analysis, which was contrary to Dr. Gill's and consistent with Fredericks' purported views on this point. ER 50; SER 154-155 (U.S. chart highlighting similarities between Schott and Fredericks' post-trial opinions). Schott stated that the image in Frame 69 (same as Schott's Frame 87) is not defendant's raised arm or his baton, and Frame 69 includes compression artifacts. ER 1214, 1217, 1219-1223, 1233. Schott also testified that the light in that Frame is likely from a car's headlights shining through the store glass as it passes, and there are "very, very few" alternative explanations. ER 1157; see ER

[34] On cross-examination, the defendant stated that his first baton strike was delivered at Frame 71. See ER 886, 1091-1092.

1154. As the district court recognized, Schott's analysis "mitigated" the disadvantage of the suppressed evidence and "covered many of the points Mr. Fredericks would have made concerning" Frame 69. ER 50; see ER 1154, 1157. Given that defendant had the same type of evidence available to him for cross-examination, his theoretical use of Fredericks' opinions would be cumulative, and therefore not material. *Wilkes*, 662 F.3d at 535-537 (proffer statements are cumulative when witness is cross-examined on immunity and cooperation with government, and a witness' payment of $l million fine is cumulative of testimony the witness "made a great deal of money from his crimes"); *Kohring*, 637 F.3d at 908 (similar evidence of faulty memory is not material when witness was cross-examined on topic). Since defendant had the opportunity at trial, but chose not to use Schott's testimony to directly challenge Dr. Gill's conclusions, he cannot claim now that he was prejudiced. *Moreno-Morales*, 334 F.3d at 148 (suppressed witness statements that were similar to other statements available to defendant were not material, whether or not defendant used the available evidence).

Defendant asserts (Br. 56-58) that he would have used Fredericks' opinions to more expansively cross-examine Dr. Gill regarding reliance on Fredericks' data, the purpose of Dr. Gill's baton-taser chart, and Dr. Gill's interpretation of the Zip Trip video. Based on the record, this examination would have had minimal

benefit. *Collins*, 551 F.3d at 924 (assessing effectiveness of potential cross-examination based on existing testimony); *Gale*, 326 F.3d at 229.

First, defendant repeatedly mischaracterizes Dr. Gill's expertise, the purpose of his testimony, and how his expertise, analysis, and opinions differ from Fredericks'. Br. 22-23, 31-32, 57, 65. Fredericks has no expertise in human factors engineering, biomechanics or defensive tactics, and he deferred to the government's experts. ER 2773, 3067; SER 574-575. In contrast, Dr. Gill has expertise in human factors engineering (the combined disciplines of human physiology, psychology, and engineering) and photogrammetrics (an analysis of the distance or relation between objects in photographs or other media). ER 1523, 1565-1567. Dr. Gill addressed, *inter alia*, the neurological and physical response time to stimuli (ER 1565-1568) and his analysis of defendant's assault based on the video, defendant's and witnesses' statements, and medical evidence. See pp. 19-26, *supra*. There is no basis to assert that these two witnesses' *opinions* were based on the same analysis.

Dr. Gill *considered* materials from various sources, including the video and enhanced images prepared by Fredericks and Fredericks' reports. See p. 19, n.15, *supra*. However, Dr. Gill *did not* rely on Fredericks' analysis or opinions, but rather only the enhanced images and videos that Fredericks prepared. SER 629-630; see ER 1532-1534. Defendant's repeated assertion (Br. 22-23, 57, 65) that

the United States hired Dr. Gill to provide alternative testimony when it purportedly was displeased with Fredericks' opinions is not only inaccurate, but completely ignores their different expertise and analyses, and inappropriately maligns government counsel and representatives.

Defendant's similar assertion (Br. 31-32, 62-63) that the United States acted in bad faith and knowingly created a misleading or inaccurate chart of baton motions given Fredericks' purportedly contrary views also is without merit. Defendant claims (Br. 58) that Dr. Gill used the "Baton/Taser Motion Reference Grid" (ER 3106) to identify when defendant delivered baton strikes and fired his taser, which is contrary to Fredericks' asserted purpose in developing "a PowerPoint presentation," which was to identify a baton motion or position, but not a baton strike. First, Dr. Gill determined the content of the chart, which identifies frames with corresponding times for each of defendant's baton strikes and the firing of taser darts. ER 1618, 1632-1633, 3106.[35]

[35] The district court found that this chart was prepared by Agent Jangaard. ER 22; see ER 150. It is more accurate to state that Dr. Gill determined the content and Agent Jangaard assisted in typing the exhibit. Dr. Gill testified at trial that he prepared a summary chart; the Baton/Taser Motion Reference Grid. See ER 1618, 1632-1633, 3106. This detail supports, but is not essential to, the central argument that Dr. Gill's assessment of the video and frames is based on different expertise and is independent of Fredericks' preparation of or views of the same data.

Similarly, Dr. Gill determined the content of his PowerPoint presentations and used individual frames that were prepared by Fredericks (just as all individual frames in Trial Exhibit 3 and video images on Exhibit 12 were prepared by Fredericks). See, *e.g.*, Trial Exhibit 2559/Disc 8; ER 1618-1633 (trial testimony on Disc 8); pp. 19-20, *supra*.[36] The fact that Fredericks disagrees with Dr. Gill's assessment continues to ignore how Dr. Gill's expertise differs from Fredericks' training, unjustifiably projects a nefarious or improper motive by the United States when none exists, and is of no consequence to defendant's theoretical cross-examination. Dr. Gill's use of some of the same enhanced images that Fredericks characterized as "baton motions," copied from the original videos, does not nullify Dr. Gill's independent, expert assessment of those images. In addition, Dr. Gill's interchangeable use of the terms "baton motion," which is part of the title on the challenged chart (ER 3106), and "baton strike," which Dr. Gill used at times when he testified at trial describing defendant's actions (see, *e.g.*, ER 1590, 1601, 1624), further belies defendant's allegations of nefarious purpose. Dr. Gill's testimony focused on defendant's motions and did not identify where the baton struck Zehm

[36] Fredericks first prepared video clips (Video 10, Exhibit 12, entitled "baton motions") and subsequently PowerPoint slides to correspond to Dr. Gill's anticipated trial testimony. See generally ER 150. It is not clear if defendant is arguing that Dr. Gill's Baton/Taser Motion Grid was based on PowerPoint images prepared by Fredericks or based on Fredericks' video compilation of 13 "baton motions." See Br. 31-32, 58.

since the impact location on Zehm's body is not clearly visible. See, *e.g.*, ER 1577-1581, 1590, 1601, 1624. However, there is no evidence that defendant's baton motions did not hit, and therefore the motions did impact Zehm.

In addition, defendant's and Fredericks' effort to distinguish a chart of "baton motions" vs. "baton strikes" is a distinction without a difference. Prior to Fredericks' and then defendant's post-trial claims, there was no difference in meaning. Fredericks used these phrases interchangeably in his post-trial deposition. See p. 48, *supra*. Even if a distinction is accepted now, it is insignificant. Defendant claimed his first two rapid baton strikes hit Zehm's legs, p. 15, *supra*, and he has never asserted that a baton motion did not strike Zehm. The eye witnesses testified that defendant's initial baton strikes hit Zehm in the head, shoulder, or neck area. See p. 7, *supra*. While the witnesses did not see where all subsequent baton motions struck Zehm, no one testified that defendant's initial baton motions did not hit Zehm. Moreover, medical experts testified that injuries to Zehm's face, head, and back were caused by baton strikes. See pp. 27-29, *supra*. Thus, there is ample, independent evidence of impact from defendant's baton motions, and therefore whether his actions are characterized as baton "motions" or "strikes" is of no consequence.

Even if the jury discounted Dr. Gill's testimony about what is or is not visible on Frame 69 itself, the jury could reasonably conclude that the first baton

strike occurred between Frames 68 and 71. That evidence includes that: a) defendant delivered two baton strikes before Zehm fell (as defendant admitted); b) the two men first face each other at Frame 60 (18:26:12); c) they are too far apart in Frames 61-68 for defendant's baton to reach Zehm; d) a (second) baton strike is visible at Frames 71-74 (18:26:16); and e) Zehm falls to the floor at Frame 74 (18:26:16). See p. 23, *supra*. And, even if the jury did not accept *any* of Dr. Gill's analysis, the jury had ample grounds to rely on the citizen witnesses and other testimony that defendant willfully struck Zehm twice with his baton before Zehm fell to the floor. See pp. 74-78, *infra*. Accordingly, defendant has not shown how his additional, theoretical cross-examination of Dr. Gill is material. *Wilkes*, 662 F.3d at 535-537; *Collins*, 551 F.3d at 924-925; see also *Gale*, 326 F.3d at 229.

b. Defendant's Theoretical Cross-Examination Of Other Experts And Lay Witnesses Would Be Cumulative Or Insubstantial

Defendant's claim (Br. 59-60) that he was prejudiced by an inability to use the withheld evidence to cross-examine Bragg and Callanan is without merit. Defendant failed to take the opportunity to cross-examine these experts with similar evidence. Any theoretical cross-examination does not create a reasonable probability the verdict would be different; therefore, there is no prejudice. *Collins*, 551 F.3d at 924-925; *Gale*, 326 F.3d at 229.

Defendant asserts (Br. 59) he "would have cross-examined Bragg about his lack of expertise in image analysis, and pointed out the difficulties in interpreting

the security video as a lay person" to undermine opinions on defendant's use of force. Defendant does not identify why Fredericks' opinions are necessary for such cross-examination. Further, defendant cross-examined Bragg extensively, with more than 22 questions, to highlight that Bragg is not a police officer, and therefore has not made an investigatory stop. ER 1799-1802, 1821. Defendant did not need a police expert's analysis to cross-examine Bragg about his lack of experience as a law enforcement officer. Similarly, defendant could have cross-examined Bragg or Callanan on their lack of expertise in video analysis without any expert video analysis, even though he had such expertise (Schott) at his disposal. Given what defendant did or could have addressed on cross-examination, he has not shown that Fredericks' opinions are material to his theoretical examination of Bragg or Callanan. *Collins*, 551 F.3d at 924-925; *Moreno-Morales*, 334 F.3d at 141.

Moreover, defendant would not have gained a substantive advantage if he cross-examined these experts regarding their purported reliance on Fredericks' opinions. Bragg testified that his opinions on defendant's use of force (*e.g.*, ER 1786-1787) were based on the video, enhanced images, witness statements, the autopsy, and implicitly, his educational background in kinesiology and his 30 years of experience as an instructor of Washington state law enforcement officers on defensive tactics and lawful use of force. ER 1768-1769, 1786, 1940-1943.

Callanan testified that he reviewed witnesses' and defendant's statements, video and photographs, the autopsy, and expert reports. ER 784. While these experts reviewed and considered the images created by Fredericks, they did not rely on Fredericks' analyses to form their own opinions. SER 804-806 (Callanan Decl.), 809-811 (Bragg Decl.). Accordingly, defendant cannot show that theoretical use of the withheld evidence to further cross-examine these experts would be material. *Wilkes*, 662 F.3d at 535-537; *Collins*, 551 F.3d at 924-925 ("impeachment value would have been little").

Defendant also claims (Br. 60) that lay eye witnesses would have been "more thoroughly cross-examined" and "further impeach[ed]" about how their recollection of the assault differed from the video if Fredericks' opinions had been produced. Again, defendant provides no explanation why Fredericks' assessment of the video is necessary to cross-examine eye witnesses regarding their recollections. In fact, defendant did highlight in cross-examination inconsistencies between certain witnesses' recollection and the video images. For example, Mr. Balam testified at trial, based on his recollection, that defendant "clap[ped]" Zehm on the shoulder and Zehm turned around before defendant struck Zehm with his baton. ER 1493-1494. On cross-examination, Balam acknowledged that the video showed Zehm facing defendant before defendant ever touched him. ER 1503. While Mr. Likarish testified about his recollection of defendant's initial strikes at

Zehm (see ER 1343), on cross-examination, defendant's counsel showed Likarish the video and highlighted that Likarish appeared to be facing the cash register and not the defendant and Zehm during the first strikes. ER 1357-1361. Defendant also used the video to contradict Ms. Dougherty's testimony and recollection as to which aisle defendant went down to reach Zehm. ER 1936-1937. Defendant's claim that he would have used Fredericks' opinions to "more thoroughly" cross-examine witnesses on their discrepancies reflects how this theoretical cross-examination is cumulative of what was available and therefore not material. *Wilkes*, 662 F.3d at 535-537; *Collins*, 551 F.3d at 924-925; *Kohring*, 637 F.3d at 908.

3. Given Overwhelming Evidence Of Guilt, Defendant Cannot Show Theoretical Cross-Examination Creates A Reasonable Probability The Verdict Would Be Different

Even if defendant's theoretical impeachment is not considered cumulative, defendant's assessment is flawed. He has not and cannot show how his theoretical uses of the evidence, when balanced against the entire record of his approach and initial baton strikes, establish a "reasonable probability" that the verdict would be different. *Kyles*, 514 U.S. at 434; *United States* v. *Ross*, 372 F.3d 1097, 1107-1108 (9th Cir. 2004) ("The materiality of omitted evidence is assessed in the light of other evidence, not merely in terms of its probative value standing alone."). Here, there is overwhelming evidence from various sources to support the verdict that

defendant willfully used excessive force in both of his first two baton strikes at Zehm in violation of 18 U.S.C. 242.

Defendant was responding to a call categorized by SPD as "suspicious circumstances." See p. 5, *supra*. Several customers described defendant's hasty approach to the store's entrance from his car; his deployment of his baton upon entry; his continuous, rapid movements directly towards Zehm; his failure to stop and identify himself; and his failure to engage in any discussion or oral commands before rapidly delivering two "overhand" baton strikes at Zehm's head, shoulders, or upper body. See pp. 6-7, *supra*. When Zehm first alerted to defendant's approach, Zehm was holding a plastic Pepsi bottle in his hands in a nonthreatening manner. See p. 7, *supra*. Zehm appeared "surprised" and "very startled" by the defendant's initial actions and continuously moved backwards until he fell to the floor. *Ibid*.

After the assault, defendant told Officer Moses he used overhand baton strikes that hit Zehm in the head, shoulder, and neck. See p. 12, *supra*. Defendant also told fellow officers that he struck Zehm with his baton because Zehm lunged or assaulted him. *Ibid*.

Four days after the incident, after being told that his lunge description was not supported by the video, defendant modified his story. See pp. 14-16, *supra*. Defendant then claimed that he stopped and twice ordered Zehm to drop the soda

bottle; that Zehm understood, defied his commands, stood still, and held the soda bottle in a threatening, "loaded position"; and defendant struck Zehm to "preempt" Zehm's defiant and aggressive presence. See p. 15, *supra*. During cross-examination, defendant could not identify video images that showed he stopped to give commands, or supported other material aspects of his recorded statement or trial testimony. See pp. 16-17, *supra*; see also SER 87-89.

Medical evidence and expert testimony further establish that defendant inflicted lethal baton strikes that served no legitimate law enforcement purpose. The injuries immediately above Zehm's right eyebrow included parallel track marks that are 3/8" apart and consistent with defendant's baton. See pp. 27-29, *supra*. Zehm also had three subgaleal head injuries. See pp. 28-29, *supra*. One expert, Dr. Smith, opined that these head injuries were caused by a baton strike and another expert, Dr. Aiken, testified that two subgaleal head injuries were consistent with a baton strike. *Ibid*. Bragg testified extensively about appropriate law enforcement approaches to a suspect and how defendant's actions violated defendant's training on lawful force. See pp. 29-32, *supra*. Most important, defendant's use of force was contrary to his training since it was not commensurate with Zehm's behavior. ER 1791. Whether described as lethal or intermediate, defendant's immediate use of force was not justified since Zehm was not aggressive, and in fact showed "eggressive resistance" by moving backwards. See

pp. 31-32, *supra*. Similarly, Callanan opined that defendant's initial baton strikes were unnecessary and improper based on proper police procedures since Zehm did not present an "actual threat." See pp. 32-33, *supra*. It is well established that where the subject does not objectively present a threat to the officer or others, any amount of force is constitutionally unreasonable. *Gravelet-Blondin* v. *Shelton*, 728 F.3d 1086, 1096 (9th Cir. 2013) (as early as 2001, a plaintiff had a "right to be free from non-trivial force in response to his total lack of resistance" to law enforcement); *Fontana* v. *Haskin*, 262 F.3d 871, 880 (9th Cir. 2001); *Nelson* v. *City of Davis*, 685 F.3d 867, 881 (9th Cir. 2012). Thus, defendant's initial use of force did not serve a legitimate law enforcement purpose. *Id.* at 880-884; ER 1797-1798. Moreover, an individual who is the attacker cannot legally make a claim of self-defense as a justification for an assault. *Glenn* v. *Washington Cnty.*, 673 F.3d 864, 878-879 (9th Cir. 2011).

Consistent with the district court's conclusion, comparing defendant's theoretical use of the subject evidence against the "sheer weight" of the evidence of defendant's guilt, defendant has not shown a reasonable probability that the verdict would be different.[37] ER 50; *Kyles*, 514 U.S. at 434; *Olsen*, 704 F.3d at

[37] The district court's 51-month sentence for Count One reflects its assessment of, *inter alia*, the evidence supporting that conviction and its confidence in the verdict. See p. 4, *supra*; SER 2-14.

1185. To be sure, the United States presented Dr. Gill's testimony for a reason. However, as the district court recognized, Dr. Gill was only "one part" of an extensive and "very strong" case establishing defendant's guilt based on the first two baton strikes. ER 51. The United States presented overwhelming evidence supporting its position that defendant's first two baton strikes violated 18 U.S.C. 242 because: a) defendant struck at Zehm's head or neck, which is lethal force; and b) a reasonable officer in defendant's position would not conclude, based on, *inter alia*, Zehm's retreat and lack of aggression, that any force was warranted. ER 620-645, 713-716; SER 813-842 (closing argument); pp. 30-33, *supra*. Thus, even if Dr. Gill's assessment was discredited entirely (which the United States does not believe would occur, even if cross-examined further), defendant has not raised a sufficient challenge to the other, independent evidence supporting the verdict. *Olsen*, 704 F.3d at 1185; *Smith* v. *Almada*, 640 F.3d 931, 939-940 (9th Cir. 2011) (withheld impeachment evidence did not undermine evidence of defendant's motive or physical evidence linking him to charged offense). Accordingly, the convictions should be affirmed.[38]

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[38] No extended argument is needed to reject defendant's remaining *Brady* claims (Br. 62-64) that he was prejudiced by the United States' reference in closing argument to Dr. Gill's baton motion/taser chart, and that his "trial themes" would have been different. Defendant's challenge to the closing argument (Br. 62-63) essentially repeats his challenge to the baton motion chart. See pp. 66-70, *supra*. Defendant's assertion (Br. 83) that his "trial themes" would have been different

(continued…)

4. United States' Representatives Did Not Act Deliberately Or In Bad Faith

Defendant points to (Br. 64-67) several acts that he characterizes as a concerted, deliberate pattern of withholding evidence required to be produced under *Brady*, and asserts this Court should infer materiality based on this conduct. Defendant's claims have no merit. Despite defendant's wild allegations of misconduct, the district court found that government counsel and the Agent assigned to this case did not intentionally violate *Brady* or act in bad faith. ER 52. Defendant has not shown that those findings are clearly erroneous. *United States* v. *Chapman*, 524 F.3d 1073, 1084 (9th Cir. 2008) (findings of fact for dismissal of indictment under court's supervisory powers for *Brady* violations are reviewed under clearly erroneous standard). Moreover, the United States is not aware of any opinion where this Court held that intentional conduct or bad faith is a factor in determining materiality under *Brady*.

While defendant never specifically argues that alleged intentional conduct warrants dismissal of the Indictment (Br. 64-67), he nonetheless makes a

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(…continued)
ignores that any "case theory" could not deviate from defendant's detailed statement that he rapidly used baton strikes to purportedly "preempt" Zehm's alleged imminent attack. See pp. 15-16, *supra*. Nor can defendant alter the testimony of eye witnesses, on-scene police officers, medical experts, and defensive tactics experts that proved defendant unlawfully used lethal force – two overhand baton strikes at Zehm's head or shoulders – which defendant admits was prohibited. See ER 3186, 3199-3200; pp. 6-8, 12-13, 27-33, *supra*.

conclusory statement for this alternative relief in his conclusion (Br. 84). Since defendant failed to substantively address this claim in his opening brief, his argument has been abandoned or waived. *Ghahremani* v. *Gonzales*, 498 F.3d 993, 997-998 (9th Cir. 2007) ("Issues raised in a brief that are not supported by argument are deemed abandoned.") (citation omitted). Even if considered, defendant cannot show that the district court abused its discretion in denying relief. Cf. *Kohring*, 637 F.3d at 912-913 (no dismissal of an indictment based on *Brady* warranted since counsel did not "act[] flagrantly, willfully, and in bad faith"; new trial was warranted based on nondisclosure of material evidence) (citation omitted).

Defendant alleges (Br. 65) that the same conduct reviewed and rejected by the district court was nonetheless "affirmative steps to hide" exculpatory material. Defendant alleges that: in March and August 2007, government counsel and the Agent failed to identify Fredericks' opinions that purportedly challenged the government's theory; the Rule 16 summary and FBI 302 report were "intentionally" misleading; and government counsel acted unprofessionally towards Fredericks. As noted, Agent Jangaard controverted, on behalf of herself and government counsel, post-conviction claims that Fredericks expressed certain opinions during March and August 2007 meetings and that counsel acted inappropriately or tried to unduly influence Fredericks. See generally SER 724-

760, 843-865; pp. 47-48, *supra*.[39] The United States explained that the challenged text of the Rule 16 summary focused on the timing of defendant's initial strikes vis-a-vis the dispatch record, which raised doubts Zehm committed any crime. SER 140-141, 850-851. The United States acknowledged that, in hindsight, this text was capable of more than one interpretation, and was not as precise as it should have been. SER 141.

The district court found the United States' failure to disclose some of Fredericks' opinions, which the court described as "nuanced," was unintentional. ER 52. The court ruled that Fredericks' nuances resulted in United States' representatives having an "innocent misunderstanding" of those opinions. ER 35-36. Implicit in the court's finding of no intentional conduct is the rejection of, *inter alia*, defendant's claim (Br. 65) that the "government attempted to influence Fredericks to change" his opinions or otherwise engaged in unprofessional conduct. See, *e.g.*, *United States* v. *Stinson*, 647 F.3d 1196, 1209-1210 (9th Cir. 2011) (threats to secure witnesses' cooperation, including threat of the death penalty or solitary confinement, do not warrant dismissal of indictment), cert. denied, 132 S. Ct. 1768 (2012).

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[39] Defendant's assertion (Br. 65 n.25) that AUSA Durkin has not personally refuted defendant's or Fredericks' post-trial allegations is irrelevant and ignores the fact that the United States responded on behalf of the case agent *and* trial counsel. See, *e.g.*, SER 128-163, 775-786.

At a post-trial hearing, the United States acknowledged that it did not produce a transcript of Fredericks' brief testimony in another, unrelated case (*Simoes*). Counsel explained that he did not believe this evidence was exculpatory, although counsel recognized that the better course would have been production. ER 143-145. The United States also informed the court that this information was readily accessible through due diligence (*i.e.*, search on Google). ER 143, 145, 155. In its opinion, the court found that Fredericks' brief *Simoes* testimony "put the United States on notice *** that it had not fully understood him." ER 38. The district court made no determination regarding the nature or nondisclosure of the *Simoes* testimony as part of its *Brady* analysis. There is no basis to conclude that counsel's nondisclosure of Fredericks' *Simoes* testimony was anything other than an inadvertent oversight. See ER 143-155. Even if this Court determines that counsel's initial assessment of the *Simoes* testimony was mistaken or flawed, that determination does not establish intentional bad faith and/or prejudicial conduct.

Defendant's redundant argument (Br. 65) that Dr. Gill was hired to provide testimony that Fredericks would not has been addressed and rejected, and also does not reflect intentional misconduct. See pp. 66-70, *supra*.

Defendant also asserts (Br. 66) that the United States' purported pattern of intentional conduct continued when the United States "cleverly avoided calling Fredericks," admitted certain evidence through other witnesses, and avoided

defendant's cross-examination of Fredericks. The trial team collectively decided during trial that it would not call Fredericks for three primary reasons: 1) his evidence was admitted through other witnesses; 2) his testimony could put the presentment of other experts' testimony at risk of being excluded based on limits on witnesses and potential overlapping testimony; and 3) Fredericks was vulnerable to cross-examination based on his conflicted 2006 and 2007 reports, and subsequent statements. ER 110-113; SER 799-803. A tactical decision such as this is not grounds to find an intentional or flagrant effort to violate *Brady*, or prejudice to defendant.

Trial counsel, the U.S. Attorney's Office of the Eastern District of Washington, and the Civil Rights Division are very mindful of their obligations as representatives of the United States and do not take allegations of suppressed, exculpatory evidence lightly, even where the ultimate conclusion is no prejudice occurred. The arguments herein do not deviate from the United States' duty to "serve truth and justice first" and stay "well within the rules." *United States* v. *Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993).

In fact, the history of this case shows that United States counsel conscientiously approached their obligations under *Brady*. The United States diligently disclosed early and expansive discovery to defendant, including almost 23,000 pages of material and another 96 gigabytes of electronic data. ER 144;

SER 529-532 (chart of disclosures regarding Fredericks' material); see, *e.g.*, R. 42, 54-55, 65, 82, 140-141, 143, 147, 204, 478, 577. When the United States believed close questions existed regarding *Brady* disclosures, it sought determinations from the district court. ER 151. In sum, neither oversight nor nominal errors, whether individual or combined, are a basis to find flagrant conduct, or prejudice to defendant under *Brady*. *United States* v. *Jacobs*, 855 F.2d 652, 655 (9th Cir. 1988) (per curiam) (absent flagrant and prejudicial prosecutoria1 conduct, dismissal of an indictment is an abuse of discretion). Therefore, defendant's conclusory dismissal request must be denied. ER 51-53; *Olsen*, 704 F.3d at 1185-1187; cf. *Chapman*, 524 F.3d at 1084-1085.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE THAT REFUTED DEFENDANT'S VERSION OF THE FACTS

A. Standard Of Review

This Court reviews a district court's evidentiary rulings for abuse of discretion. *Boyd* v. *City & Cnty. of S.F.*, 576 F.3d 938, 943 (9th Cir. 2009). "As long as it appears from the record as a whole that the trial judge adequately weighed the probative value and prejudicial effect of proffered evidence before its admission, we conclude that the demands of Rule 403 have been met." *Id.* at 948 (citation omitted). This Court will reverse a district court's evidentiary ruling only

when it is "firmly convinced that the reviewed decision lies beyond the pale of reasonable justification under the circumstances." *Id.* at 943 (quoting *Harman* v. *Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000)). Moreover, the moving party must show that the error is "prejudicial [] and that the verdict was 'more probably than not' affected as a result." *Ibid.* (citation omitted). Denial of a motion for a new trial is reviewed for abuse of discretion. *United States* v. *Hinkson*, 585 F.3d 1247, 1261-1263 (9th Cir. 2009).

B. District Court's Pretrial Ruling, Trial Rulings, And Post-Trial Order

On June 18, 2010, the district court ruled that the government could not present evidence that Zehm did not commit any crime at the ATM. ER 2475-2490. The court held that evidence of Zehm's innocent actions at the ATM, namely the ATM video, testimony that Zehm did not take any money from complainant's account, bank records, and the contents of his pockets, which included a bank deposit envelope, while relevant, was inadmissible under Rule 403 in the United States' case-in-chief. See ER 2485-2487, 2490. The court concluded this evidence placed "undue emphasis" on Zehm's thought processes rather than his observable behavior, and therefore this evidence was considered prejudicial because it could interfere with the jury's assessment of the reasonableness of defendant's actions in light of the information known to him at the time. ER 2485-2487.

The United States challenged the district court's ruling on interlocutory appeal and this Court affirmed, holding that while the district court's assessment "gives us pause," it did not rise to the level of an abuse of discretion, particularly since the evidence was deemed relevant under *Boyd*, the district court "conscientiously weighed the probative value against the prejudicial effect," the ruling was "preliminary," and the district court expressed a willingness to reconsider the issue at trial. See ER 2306-2308.

During trial, the district court continued to bar evidence of Zehm's innocent actions at the ATM. ER 965-966, 2209-2210. At the same time, the court admitted evidence relevant to Zehm's actions at the Zip Trip and ruled that this evidence was distinguishable from Zehm's "innocence" actions at the ATM. ER 1297, 1443-1444; SER 867-868. The court permitted testimony by Zeth Mayfield, a Zip Trip employee, that Zehm regularly (daily or almost daily) purchased two-liter bottles of Pepsi and candy at a Zip Trip store located near the store where Zehm was assaulted. ER 1424-1428. Due to his transfer to another location, Mayfield last saw Zehm approximately two months before the incident. ER 1424-1428. Officer Raleigh testified that Zehm's final words after the assault were, "I just wanted a Snickers bar." ER 1383-1384. Officer Braun testified that, during the assault, Zehm held his pay check in his hand. ER 1297-1298.

Both at trial and in his motion for a new trial, defendant argued that this evidence should not have been admitted because its prejudicial effect outweighed its probative value. Defendant argued evidence not known to him at the time of the assault was prejudicial and would permit the jury to consider Zehm's state of mind rather than what defendant knew at the time he acted. ER 1480-1482, 1487-1489.

In denying defendant's post-trial motion, the court stated that its rulings, both pretrial and at trial, "attempted to balance two competing interests[:] *** defendant's interest in having the jury determine whether his actions were objectively reasonable in light of the facts confronting him *** [and] the United States' interest in testing the accuracy of [defendant's] account of what occurred[.]" ER 57-58. The court stated that the United States sought admission of this evidence to provide the jury "innocent reasons for [Zehm] being in the store" and to "rebut the suggestion Mr. Zehm had gone inside the store *** to hide from the police." ER 58. The court ruled that by admitting this evidence, defendant was not "deprived" of his right to have the jury assess whether his actions were objectively reasonable and this evidence "did not distract the jury from its task." ER 58.

C. The District Court Did Not Abuse Its Discretion By Admitting Evidence Refuting Defendant's Version Of Facts

Under *Graham* v. *Connor*, 490 U.S. 386, 396 (1989), when a law enforcement officer is charged with excessive force, a jury must evaluate the reasonableness of an officer's use of force "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." This Court also has held that, under the *Graham* analysis, when "what the officer perceived just prior to the use of force is in dispute, evidence that may support one version of events over another is relevant and admissible." *Boyd*, 576 F.3d at 944 (citing *Graham*, 490 U.S. at 399 n.12). This "relevant and admissible" evidence includes evidence that is not known by an officer at the time of the incident, and is more probative than prejudicial under Rule 403. *Id.* at 944-945, 947-949.

Rule 403 is a rule of inclusion rather than exclusion. *United States* v. *Hankey*, 203 F.3d 1160, 1172 (9th Cir. 2000). A court may only exclude relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice" or other specific considerations. Fed. R. Evid. 403. The application of Rule 403 to exclude evidence "must be cautious and sparing. Its major function is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." *Hankey*, 203 F.3d at 1172 (citation omitted).

The district court's analysis is sound and consistent with *Graham*, *Boyd*, and Rule 403. Had Zehm been alive, he would have testified to his actions and statements at the store, including why he was there, when he first saw defendant, his reactions during the assault, and his own comments. The admission of alternative evidence that addressed his shopping habits, an item in his hand, and his final comment before losing consciousness were reasoned judgments. Mayfield's testimony addressed Zehm's customary shopping habits that were close in time to the incident and for the exact item (two-liter Pepsi) that defendant described as a "weapon," and refuted any purported, nefarious purpose for Zehm entering the store. ER 1424-1428, 3185-3186. Testimony that Zehm was holding his pay check during the assault was not admitted to address Zehm's conduct at the ATM, but to clarify Braun's testimony that Zehm had clenched fists. ER 1295-1296. Similarly, Zehm's final comment was probative to establish that he remained confused as to why he was the subject of the officers' contact and use of force, and was used to rebut defendant's characterization of Zehm as aggressive and defiant as soon as Zehm faced defendant, and that Zehm strategically selected the soda bottle as a weapon. ER 1383-1384, 1479, 3185-3186.

All of this evidence was admissible notwithstanding defendant's lack of knowledge, and was more probative than prejudicial since it addressed disputed characterizations of Zehm's actions at the time defendant used force. *Boyd*, 576

F.3d at 943, 948. The district court fully and more than "adequately weighed" the competing factors of probative value and potential unfair prejudice under Rule 403, while considering *Graham* and *Boyd*. *Boyd*, 576 F.3d at 948 (citation omitted); *United States* v. *Pineda-Doval*, 614 F.3d 1019, 1035 (9th Cir. 2010) (district court's decision permitting jury view of "crushed" vehicle in which ten victims died to help jury "understand the events" in issue reflected "adequate[] weigh[ing]" under Rule 403) (citing *Boyd*, 576 F.3d at 948).

Defendant asserts (Br. 72) that the probative value of "Zehm's innocence" was "slight" because it "was not offered to prove an element of either offense" and does not support the claim that an innocent person is less likely to resist an officer. Defendant's assertion is wrong and misleading for at least three reasons. First, defendant's characterization of the challenged evidence as innocence evidence is inconsistent with how that phrase is used by the district court. The district court referred to Zehm's conduct at the ATM as innocence evidence (see, *e.g.*, ER 2210, 2484-2485) and distinguished that from Zehm's conduct at the Zip Trip. ER 752-753, 1443-1444. Second, the probative value is not "slight" because the evidence rebuts defendant's false description of Zehm's demeanor and actions, which defendant claimed justified his rapid, initial baton strikes. *Boyd*, 576 F.3d at 944-945; see also pp. 15-16, *supra*. Third, this evidence is essential to address an element of both charges; to determine whether defendant's description of Zehm's

behavior was accurate, which goes to whether his force was unreasonable (an element of 18 U.S.C. 242) and whether his descriptions of Zehm as the defiant aggressor were false (an element of 18 U.S.C. 1519).[40] Similarly, defendant's claim (Br. 73 n.28) that he never asserted Zehm was not innocent and therefore this evidence was irrelevant ignores his claim that his baton strikes were reasonable because of Zehm's aggressive behavior, and the challenged evidence was offered to rebut that false claim.

Defendant's claim (Br. 73-75) that the district court did not give sufficient weight to the possible prejudice from the jury's potential consideration under *Graham* of facts that he did not know is without merit. In each instance when either party moved to admit evidence or challenge a ruling, the district court was mindful of *Boyd*, the balance under Rule 403, and consistently distinguished evidence of Zehm's conduct at the store from his actions at the ATM. ER 965-966

[40] Defendant's cited cases (Br. 72-73) are inapposite; they involve the admission of highly prejudicial evidence not relevant to any element of charged offenses. In *United States* v. *Ellis*, 147 F.3d 1131, 1135 (9th Cir. 1998), this Court held that "The Anarchist Cookbook" was not relevant because the defendant's intent with explosives was not an element of the possession charge. In *United States* v. *Arambula-Ruiz*, 987 F.2d 599, 604-605 (9th Cir. 1999), defendant's prior arrests "lacked probative value" as they did not establish an element of charged offenses, but their admission was harmless. In *United States* v. *Hitt*, 981 F.2d 422, 423-425 (9th Cir. 1992), the district court abused its discretion in admitting a photograph of multiple weapons having "exceedingly small" probative value on whether one weapon was dirty or defective; the photograph was inflammatory and incorrectly implied that defendant owned the weapons.

(noting the differences in the "subject matter" of actions at the two locations), 1443, 2209-2210; SER 867 (concern of creating a "trial within a trial"). The district court's distinction reflects deliberate and reasonable balancing, and not an abuse of discretion.

Finally, even if the jury made inferences of Zehm's state of mind (ER 1440, 1479, 1482-1483 (U.S. argument that evidence addressed state of mind)), that possibility is insufficient to establish unfair prejudice. *Boyd*, 576 F.3d at 948 ("Proof that evidence was prejudicial to one party is insufficient to establish that the prejudice was unfair, or that the trial court abused its discretion."). The jury was instructed that it must evaluate defendant's conduct "from the perspective of an objective officer on the scene, rather than from the 20/20 vision of hindsight" and to assess whether his actions were "objectively reasonable in light of the facts and circumstances that were confronting him." ER 729. This Court presumes that jurors will follow their instructions. *United States* v. *Padilla*, 639 F.3d 892, 897 (9th Cir.), cert. denied, 132 S. Ct. 254 (2011). Thus, defendant's challenge to the evidentiary rulings should be rejected. *Boyd*, 576 F.3d at 948.

III

THE JURY INSTRUCTION ON "WILLFULNESS" WAS ACCURATE AND NOT MISLEADING

A. Standard Of Review

A challenge that a jury instruction misstated the law is reviewed de novo. *United States* v. *Perdomo-Espana*, 522 F.3d 983, 986 (9th Cir. 2008); *United States* v. *Reese*, 2 F.3d 870, 883 (9th Cir. 1993). Alleged errors in the formulation of a jury instruction are reviewed for an abuse of discretion. *United States* v. *Keyser*, 704 F.3d 631, 642 (9th Cir. 2012) (citing *Reese*, 2 F.3d at 883); *Reese*, 2 F.3d at 883 (an abuse of discretion in the formulation of instructions occurs "where the jury instructions taken as a whole are misleading or inadequate to guide the jury's deliberations").

B. The "Willfulness" Instruction Was Accurate And Not Misleading

Defendant argues (Br. 76) that the district court's instruction was too detailed, "overly *** confusing," and erroneous because it did not require the jury to find that defendant had a "bad or evil intent" when he used force against Zehm. In fact, the jury instruction was not confusing and the principle elements are consistent with the Supreme Court and this Court's precedent.

"Willfulness" is an element of a violation of 18 U.S.C. 242. *Screws* v. *United States*, 325 U.S. 91, 105 (1945) (opinion of Douglas, J.). In *Screws*, *id.* at 103-105, the Supreme Court rejected a challenge that the predecessor of Section

242 was void for vagueness. The Court explained that, "the presence of a bad purpose or evil intent alone may not be sufficient. *** [A] requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law saves the Act from any charge of unconstitutionality on the grounds of vagueness." *Id.* at 103. The Court explained that specific intent can be established by showing that defendant "is aware that what he does is precisely that which the statute forbids *** or [he] act[s] in open defiance or in reckless disregard of a constitutional requirement that has been made specific and definite." *Id.* at 104-105.[41]

In *Reese*, this Court reviewed a challenged jury instruction on willfulness. 2 F.3d at 880-887. This Court cited *Screws*' explanation that willfulness includes an act committed "in open defiance or *reckless disregard* of a constitutional requirement that has been made specific and definite," and that willfulness may be proven even though defendant need not have been thinking in "constitutional terms." *Id.* at 881 (citing *Screws*, 325 U.S. at 105-106). This Court further explained that a defendant's "intentionally wrongful conduct, because it contravenes a right definitely established in law, evidences a reckless disregard for

[41] While *Screws* was a plurality opinion, subsequent decisions have treated its analysis that Section 242 requires proof of specific intent as binding. See *Anderson* v. *United States*, 417 U.S. 211, 223 (1974); *United States* v. *Guest*, 383 U.S. 745, 753-754 (1966); *United States* v. *Williams*, 341 U.S. 70, 81-82 (1951).

that right; such *reckless disregard, in turn, is the legal equivalent of willfulness*." *Ibid*. (emphasis added).

The challenged portions of the "willfulness" instruction approved in *Reese* stated:

> *an act is done willfully if it is done voluntarily and intentionally and with a specific intent to do something the law forbids, that is, with the intent to violate a specific protected right*. ***
>
> *[T]he requisite specific intent is the intent to use more force than is necessary under the circumstances.* ***
>
> [I]t is not necessary for you to find that the defendants were thinking in constitutional *or legal terms* at the time of the incidents, *because a reckless disregard for a person's constitutional rights is evidence of specific intent to deprive that person of those rights.*

2 F.3d at 885 (emphasis in original and added); *United States* v. *Koon*, 34 F.3d 1416, 1449-1450 (9th Cir. 1994) (affirming instruction that stated the jury may find specific intent "even if you find that [the defendant] had no real familiarity with *** the particular constitutional right involved, provided that you find that the defendant intended to accomplish that which the Constitution forbids") (citing *Reese*, 2 F.3d at 881), rev'd on other grounds, 518 U.S. 81 (1996); *United States* v. *Gwaltney*, 790 F.2d 1378, 1386-1387 (9th Cir. 1986) (affirming Section 242 instruction stating "it is not necessary for the government to prove the defendant was thinking in constitutional terms at the time of the incident, for a reckless

disregard for a person's constitutional rights is evidence of specific intent to deprive that person of those rights").

Here, jury instruction No. 12 similarly stated, in part:

> [t]o find that the defendant acted willfully, you must find that the defendant not only had a generally bad or evil purpose, but also that the defendant had the specific intent to deprive Mr. Zehm of his Fourth Amendment right to be free from objectively unreasonable force. This does not mean that the government must show that the defendant acted with knowledge of the particular provisions of the Fourth Amendment to the Constitution, or that the defendant was even thinking about the Fourth Amendment when he acted.
>
> One may be said to act willfully if he acts in open defiance or in reckless disregard of a known and definite constitutional right – in this case, the right to be free from objectively unreasonable force.

ER 2590; see p. 35, *supra*. Thus, the essential elements set forth in *Screws*, *Reese* and other circuit precedent are present; namely, the jury must find defendant acted with specific intent to violate the protected right to be free from objectively unreasonable force; willfulness can be established by defendant's open defiance or reckless disregard of Zehm's right; and defendant need not have been thinking in constitutional terms at the time he used unreasonable force. *Screws*, 325 U.S. at 104-105; *Reese*, 2 F.3d at 881-882; *Gwaltney*, 790 F.2d at 1386.

Defendant argues (Br. 77-78) that the district court's instruction was erroneous because it did not require the jury to find evil or bad motive in addition to willfulness. Defendant's claim (Br. 78-79) that *Screws* and *Reese* require that the government establish some bad or evil purpose *and* "reckless disregard" of

Zehm's constitutional rights is erroneous. *Screws*, 325 U.S. at 102-106; *Reese*, 2 F.3d at 881-882. The language in *Screws* establishes that Section 242 is not a general intent statute, but instead requires a showing of specific intent. 325 U.S. at 102-106. The Supreme Court made clear that while the term "willful" in a criminal statute "generally means an act done with a bad purpose," "bad purpose or evil intent" "may not be sufficient" to establish a violation of 18 U.S.C. 242. *Id.* at 101, 103. A defendant's specific intent (*i.e.*, a knowing disregard, open defiance, or reckless disregard of an established right) is a more demanding standard than general intent. *Id.* at 102-106. It is not an additional element of proof. *Ibid.*[42]; see *Anderson* v. *United States*, 417 U.S. 211, 223-227 (1974) (18 U.S.C. 241 requires proof of specific intent to violate a federal right (citing *Screws*); defendants' actual motive or goal was "irrelevant" to establishing specific intent to injure others' voting rights; which intent was established by defendants' instructions to cast false ballots); *United States* v. *Johnstone*, 107 F.3d 200, 210 (3d Cir. 1997) (upholding

[42] The Court stated that a defendant "violates the statute not merely because he has a bad purpose but because he acts in defiance of announced rules of law." *Screws*, 325 U.S. at 104. The Court rejected the challenged jury instruction because it did not make clear to the jury that "it was not sufficient that petitioner [] had a generally bad purpose," but that the jury must find a specific intent. *Id.* at 107. In the context of the *Screws* opinion, it is clear that a defendant's specific intent is a more demanding standard that is a substitute for general intent shown by a defendant's bad or evil motive, and that interpretation is supported by this Court's analysis in *Reese*. See *Screws*, 325 U.S. at 102-107; *Reese*, 2 F.3d at 881-882.

willfulness instruction stating "[n]or does it matter that a defendant may have also been motivated by hatred, anger or revenge, or some other emotion, provided that the specific intent which I have described to you [intent to do something the law forbids] is present").

This Court has repeatedly upheld instructions that state a jury may find the defendant acted willfully if it finds he acted in knowing violation, open defiance, or reckless disregard of an established right, without any reference to bad or evil motive. *Koon*, 34 F.3d at 1449-1450; *Reese*, 2 F.3d at 881-882, 885; *Gwaltney*, 790 F.2d at 1386-1387. Other circuits similarly define willfulness under Section 242 without reference to bad or evil motive. *United States* v. *House*, 684 F.3d 1173, 1199 (11th Cir. 2012), cert. denied, 133 S. Ct. 1633 (2013); *United States* v. *Mohr*, 318 F.3d 613, 618-619 (4th Cir. 2003); *Johnstone*, 107 F.3d at 208-209; but see *United States* v. *Aguilar*, 242 F. App'x 239, 244 (5th Cir. 2007).

To the extent that *Screws* actually requires evidence of bad motive (and the United States believes it does not), the district court's instructions include that requirement. Indeed, defendant ignores the plain text of the instruction, which states that the government must prove both a bad or evil purpose and specific intent to deprive Zehm's right to be free from unreasonable force. ER 2590. The instruction begins:

> "[w]illfully" means that the defendant acted voluntarily and intentionally, with the intent *not only* to act with a bad or evil purpose,

> *but* specifically to act with the intent to deprive Otto Zehm of a right that is made definite by the Constitution.
>
> To find that the defendant acted willfully, you must find that the defendant *not only* had a generally bad or evil purpose, *but also that* the defendant had the specific intent to deprive Mr. Zehm of his Fourth Amendment right to be free from objectively unreasonable force.

Ibid. (emphasis added). By its terms, the instruction identifies both "bad or evil purpose" and "specific intent" as requisite elements.

Finally, defendant claims (Br. 76, 79) the instruction was confusing, yet does not show how the detailed instruction misled the jury. The instructions clearly set forth the standard of unlawful conduct, identified the evidence that may be considered (the "surrounding circumstances," including "defendant's words, experience, knowledge, acts and their results"), and gave examples of conduct that refuted or did not establish willfulness ("mistake, carelessness, or accident"). See *Reese*, 2 F.3d at 881-882; ER 2590. In sum, whether reviewed de novo or for abuse of discretion, defendant's jury instruction challenges should be denied. *Reese*, 2 F.3d at 881-882, 885.

IV

THE JURY WAS NOT EXPOSED TO EXTRANEOUS EVIDENCE, AND EVEN IF IT WAS, THE CHALLENGED STATEMENT DOES NOT CREATE A REASONABLE PROBABILITY OF INFLUENCING THE JURY'S VERDICT ON COUNT TWO

A. Standard Of Review

This Court reviews a district court's denial of a motion for a new trial based on the jury's exposure to extrinsic evidence for abuse of discretion. *United States* v. *Montes*, 628 F.3d 1183, 1187 (9th Cir.), cert. denied, 131 S. Ct. 2171, and 131 S. Ct. 2468 (2011). This type of claim can also allege a violation of the Confrontation Clause, which is reviewed de novo, with this Court's review "an independent one, [in which it will] consider the entire record in determining whether the [government] has met its burden of demonstrating that extrinsic evidence did not contribute to the verdict." *United States* v. *Saya*, 247 F.3d 929, 937 (9th Cir.) (citation omitted), amended on other grounds, 2001 WL 476942 (9th Cir. 2001). This Court also gives "substantial weight" to the district court's "conclusion about the effect of the alleged misconduct." *Ibid.* (citation omitted).

B. A Juror's Isolated Comment Regarding Spokane 20 Years Ago Is Not Extraneous Evidence

Defendant's claim (Br. 79-84) that a juror's single comment during deliberations that Spokane had dirty or corrupt politics 20 years ago is extraneous,

prejudicial evidence that unduly influenced the jury's verdict on Count Two, 18 U.S.C. 1519, is without merit.

This Court has held that a juror's extemporaneous, "off-the-cuff" comment does not fall within the scope of extraneous information that may not be considered during a jury's deliberations. *Price* v. *Kramer*, 200 F.3d 1237, 1255 (9th Cir. 2000); see *Grotemeyer* v. *Hickman*, 393 F.3d 871, 878 (9th Cir. 2004). In *Grotemeyer*, *id.* at 878-880, this Court held that a challenge to a juror's comments, based on her medical training, that the defendant was mentally ill was "trivial" and that he would receive mental health treatment if sentenced did not constitute prohibited extraneous evidence. Similarly, a juror's comment that a defendant's handwriting "looks like the writing of a deviate sociopath" is an "off-the-cuff statement [that] does not even resemble the type of 'extraneous information' this court proscribes." *Price*, 200 F.3d at 1255 (citation omitted). Further, jurors are expected to rely upon and share their personal experiences when evaluating the evidence, and such comments are not considered extraneous evidence. *United States* v. *Budziak*, 697 F.3d 1105, 1111 (9th Cir. 2012) (jurors' knowledge and discussion of computer programs to explain evidence on defendant's computer are "personal life experiences" and not extraneous evidence), cert. denied, 133 S. Ct. 1621 (2013); *Grotemeyer*, 393 F.3d at 879 ("juror's past personal experiences may be an appropriate part of the jury deliberations") (citation omitted); *Price*, 200 F.3d

at 1255 (two jurors sharing prior experiences with police during deliberations of police misconduct charge is not extraneous evidence); see also *Morgan* v. *Woessner*, 997 F.2d 1244, 1261 (9th Cir. 1993) ("[t]he type of after-acquired information that potentially taints a jury verdict should be carefully distinguished from the general knowledge, opinions, feelings and bias that every juror carries into the jury room") (alteration in original; citation omitted).

Here, a juror stated that she had a friend who lived in Spokane 20 years ago and said that Spokane had a corrupt government back then. ER 264-265, 276, 284; pp. 53-54, *supra*. This single comment describing someone's opinion of Spokane 20 years ago is comparable to other "off-the-cuff" or "trivial" juror comments that do not constitute extrinsic evidence. *Grotemeyer*, 393 F.3d at 878; *Price*, 200 F.3d at 1255. If a juror's specific prior experience with police does not constitute extraneous evidence, there is no basis to find that a juror sharing a third party's general comment about a city's past reputation constitutes extraneous information. *Ibid.* In denying defendant's first post-trial claim of juror misconduct, the district court held, consistent with this Court's precedent, that the challenged comment reflected an individual's "impressions" that were a "result of her experiences." ER 591; see *Price*, 200 F.3d at 1255. After defendant raised this challenge a second time and the court interviewed three deliberating jurors, the court again concluded that the jury deliberations were not tainted by any "extraneous prejudicial

information." ER 59-60; see pp. 53-54, *supra*. Whether reviewed for an abuse of discretion or de novo, the court's conclusion that the juror's isolated reference to Spokane's past corrupt reputation does not constitute extraneous evidence is correct, and defendant's challenge should be denied. *Grotemeyer*, 393 F.3d at 878-880; *Price*, 200 F.3d at 1255-1256.

C. Even If A Juror's Comment Is Considered Extrinsic Evidence, A New Trial Is Not Warranted

Even if the challenged statement about Spokane's reputation 20 years ago is considered extrinsic evidence, there is no "reasonable possibility" it affected the verdict because the comment is not prejudicial, is not logically and directly related to defendant's conviction for a false entry in his official statement, and there is substantial evidence of guilt. *Montes*, 628 F.3d at 1187, 1189-1191 (citation omitted). This Court has identified numerous factors to consider in determining the impact of jury exposure to extrinsic evidence:

> (1) whether the [information] was actually received, and if so, how; (2) the length of time it was available to the jury; (3) the extent to which the jurors discussed and considered it; (4) whether the [evidence] was introduced before a verdict was reached, and if so at what point in the deliberations; and (5) any other matters which may bear on the issue of the reasonable possibility of whether the material affected the verdict.

Saya, 247 F.3d at 937 (quoting *Dickson* v. *Sullivan*, 849 F.2d 403, 406 (9th Cir. 1988)). This Court also considers whether there is a "direct and rational connection" between the extraneous evidence and the charges, and the strength of

the evidence of guilt. See *Montes*, 628 F.3d at 1190 ("When finding reversible prejudice, we have described 'a direct and rational connection between the extrinsic material and a prejudicial jury conclusion, as distinguished from a connection that arises only by irrational reasoning.'") (citation omitted); *Saya*, 247 F.3d at 938; *Price*, 200 F.3d at 1255-1256. While no factor is determinative, the inflammatory nature of the extraneous information, or lack thereof, receives "great weight" in the calculus of whether a new trial is warranted. *Montes*, 628 F.3d at 1189 (citation omitted).

For example, in *Montes*, the absence of prejudicial information in a newspaper article mentioned by one juror "tilt[ed] the scales" against a new trial; there also was no "direct and rational connection" between the article entitled, "Next President Might Be Gentler [O]n Pot Clubs" and defendant's crime of marijuana manufacturing and distribution, and the case evidence was "overwhelming." 628 F.3d at 1186, 1189-1190 (citation omitted); see *United States* v. *Bagnariol*, 665 F.2d 877, 888-889 (9th Cir. 1981). In *Saya*, 247 F.3d at 938-939, this Court denied a new trial when the jury considered an unrelated incident involving the defendant where another person was killed because, *inter alia*, the incident was unrelated to the charged offenses, the jurors had a "brief" and "isolated" discussion of the incident, and there was "strong" evidence of defendant's guilt. In contrast, this Court has held that extraneous information

about a defendant's prior conviction for a crime that is similar to the charged offense is prejudicial and not harmless, and therefore a new trial is warranted. *Dickson*, 849 F.2d at 407-408; *United States* v. *Keating*, 147 F.3d 895, 903 (9th Cir. 1998).

The only factors that are helpful to defendant (assuming the statement is extraneous evidence, which the United States does not concede), are that the statement was made to other jurors during deliberations, before a verdict. See ER 264-265, 274, 284; pp. 53-54, *supra*. However, the jurors did not further discuss the comment after it was made. ER 284.[43]

The remaining and most significant factors weigh against defendant: the statement is not prejudicial, is not directly and rationally related to his conviction, the jury was instructed to base its decision on the evidence at trial (ER 733), and there is strong evidence of defendant's guilt. See *Montes*, 628 F.3d at 1189-1191;

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[43] The district court asked two jurors what impact the Spokane comment had on deliberations; both jurors stated none. See ER 276-277, 284; p. 54, n.32, *supra*. Under Federal Rule of Evidence 606, a juror may testify to whether he was exposed to extraneous prejudicial information, but may not testify to "the effect of [any information]*** on that juror's *** vote." However, in *United States* v. *Mills*, 280 F.3d 915, 922 (9th Cir. 2002), this Court held that jurors' comments on the impact of extraneous information can be considered, but are not controlling. This Court need not decide whether this testimony is barred since it has no bearing on the district court's finding that the comment was not extraneous evidence. Moreover, under the extraneous evidence analysis, this Court should conclude no new trial is warranted regardless of whether it considers the jurors' testimony on the statement's benign impact.

Saya, 247 F.3d at 938-939. Defendant asserts (Br. 82) that because three jurors remembered the Spokane comment, the recollection in and of itself establishes its "significant and prejudicial nature." As discussed above, the general nature and referenced age of the comment support the absence of any prejudicial nature. See pp. 100-103, *supra.*

Defendant also asserts (Br. 80-81) that the Spokane comment is directly related to the jury's conviction under Count Two because "as framed by the prosecution, at issue in this case was whether *** Officer Thompson *and other Spokane police officers* engaged in a cover up of the underlying facts involving *** [the] initial confrontation with Zehm" (emphasis added). Defendant argues (Br. 82) that if the jurors believe Spokane has a history of corrupt politics, "a cover-up is consistent practice." First, defendant ignores that only he is named in the Indictment; this is not a conspiracy charge against defendant and other officers. ER 3236; see also ER 725-727, 733 (instructions to the jury that all evidence should be considered to evaluate defendant's potential guilt for the charged offenses). Second, the cover-up allegation presumably refers to the United States' examination of other officers regarding defendant's on-scene claim that Zehm "lunged" at him, and officers' efforts at trial to distance themselves from or refute their earlier testimony that was harmful to defendant. See pp. 12-13, *supra*. The United States examined these witnesses to establish defendant's changing

justifications for his baton strikes, which is further evidence of his false, recorded statements. The United States' theme was not one of a "cover up" as defendant alleges (Br. 81), but of defendant's repeated, false statements in his 2006 interview. See, *e.g.*, SER 588-591. In addition, as the district court found, the challenged statement concerned "impressions" "formed years before the defendant's trial began and they do not reflect knowledge about his confrontation with Mr. Zehm." ER 591. As in *Montes*, "there is simply no rational connection between the extraneous information and the jury's obligation to determine" defendant's guilt for Count Two. 628 F.3d at 1190; *Saya*, 247 F.3d at 938.

Finally, the challenged statement is *de minimis* in comparison to the overwhelming evidence that Zehm was not a threat and that defendant gave multiple, false statements regarding *inter alia*, Zehm's purportedly intentional, assaultive behavior, defendant's actions before the assault, and their respective actions throughout the assault. See pp. 6-16, *supra*. Accordingly, this Court should deny defendant's juror misconduct challenge. *Montes*, 628 F.3d at 1189-1191; *Saya*, 247 F.3d at 938-939.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, this case is related to an interlocutory appeal in which the United States challenged a pretrial evidentiary ruling, and this Court affirmed in an unpublished opinion issued March 24, 2011. *United States* v. *Karl Thompson, Jr.*, No. 10-30167, 423 F. App'x 758 (9th Cir. 2011); see also pp. 85-86, *supra*; ER 2306-2308.

CERTIFICATE OF COMPLIANCE

This amended brief is submitted pursuant to this Court's Order of December 2, 2013, which partially granted the United States' Motion For Leave To File An Oversize Brief pursuant to Circuit Rule 32-2, and instructed the United States to submit a brief that does not exceed 26,000 words. This brief is 25,989 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable.

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Dated: January 2, 2014

CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2014, by filing the foregoing Amended Brief Of The United States As Appellee with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, I caused to be served a true and correct copy of the foregoing brief. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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