

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

Susan Doxtator, Arlie Doxtator and
Sarah Wunderlich, as Special
Administrators of the Estate of
Jonathon C. Tubby,

Plaintiffs,

Case No. 19-CV-137

vs.

Erik O'Brien, Andrew Smith,
Todd J. Delain, Heidi Michel,
City of Green Bay, Brown County,
Joseph P. Mleziva, Nathan K.
Winistorfer, Thomas Zeigle,
and John Does 1-5,

Defendants.

**PLAINTIFFS' RESPONSE TO ERIK O'BRIEN, ANDREW SMITH AND
CITY OF GREEN BAY'S PROPOSED FINDINGS OF FACT IN SUPPORT OF
SUMMARY JUDGMENT**

In support of their motion for summary judgment, Defendants, Erik O'Brien, Andrew Smith and the City of Green Bay (collectively "the Green Bay Defendants") submitted the below-numbered proposed findings of fact. In the bolded text that follows each numbered paragraph, Plaintiffs provide a concise response to factual contention submitted by the Green Bay Defendants.

I. PLAINTIFFS' RESPONSE TO THE GREEN BAY DEFENDANTS' STATEMENT OF FACTS

1. At the time of his death on October 19, 2018, Jonathon Tubby was an adult resident of the City of Green Bay, Wisconsin. (Dkt. 83, ¶ 5)

Response: Not disputed.

2. Plaintiffs Sue Doxtator, Arlie Doxtator, and Sarah Wunderlich are adult residents of the State of Wisconsin and were appointed Special Administrators of Mr. Tubby's estate on

December 7, 2018 in the probate matter captioned In the Matter of the Estate of Jonathon C. Tubby, 2018-PR-000428, in Brown County Circuit Court. (Dkt. 83, ¶¶ 6-8)

Response: Not disputed.

City of Green Bay Defendants

3. Defendant City of Green Bay (“Green Bay”) is a municipal corporation located in Brown County with its principal office located at 100 North Jefferson Street, Green Bay, Wisconsin 54301. (Dkt. 83, ¶ 13)

Response: Not disputed.

4. Defendant Erik O’Brien is a City of Green Bay Police Officer, and was so employed on October 19, 2018. (Dkt. 83, ¶ 9; Baynard Decl. ¶ 2, Ex. A, O’Brien dep. p. 24)

Response: Disputed, O’Brien was an Officer on October 19, 2018, but was later promoted to the rank of Sergeant. 2d Tahdooahnippah Decl. Ex. 6 200:3-6.

5. Defendant Andrew Smith is the Chief of Police for the City of Green Bay Police Department and has been employed since February 1, 2016. (Dkt. 83, ¶ 10; Baynard Decl. ¶ 3, Ex. B, Smith dep. p. 7)

Response: Not disputed.

6. Defendant Brown County (“Brown County”) is a municipal corporation with its principal office located at 305 E. Walnut Street, Green Bay, Wisconsin 54301. (Dkt. 83, ¶ 14)

Response: Not disputed.

7. Brown County maintains jurisdiction over and operates the Brown County Sheriff’s Office and the Brown County jail. (Dkt. 83, ¶ 14)

Response: Plaintiffs agree that Brown County maintains jurisdiction over and operates the Brown County Sheriff’s Office. Plaintiffs agree that Brown County maintains jurisdiction over and operates the Brown County Jail. Plaintiffs dispute Paragraph 7 to

the extent it asserts that Green Bay Police Department (“GBPD”) policies or procedures do not apply to GBPD officers while they are within the Brown County Jail. ECF 121-27 (GBPD memorandum regarding county-owned property, specifying that BCSO takes calls at the jail but not that GBPD policies do not apply to GBPD officers at the jail); 2d Tahdooahnippah Decl. Ex. 15 at 14:12-20.

8. Defendant Todd J. Delain is the Sheriff of Brown County and was so employed on October 19, 2018. (Dkt. 83, ¶ 11)

Response: Plaintiffs dispute that Defendant Todd Delain was the Brown County Sheriff on October 19, 2018. Todd Delain was elected Brown County Sheriff on November 6, 2018, and took office shortly thereafter. See Shelby Le Duc, *Todd Delain Elected to Be Brown County’s Next Sheriff*, Green Bay Press-Gazette (Nov. 7, 2018).¹ Plaintiffs agree that Defendant Todd Delain is the current Brown County Sheriff.

9. Defendant Heidi Michel is the Jail Administrator for the Brown County Jail and was so employed on October 19, 2018. (Dkt. 83, ¶ 12)

Response: Not disputed.

10. Defendant Joseph P. Mleziva is a Brown County Sheriff’s Deputy and was so employed on October 19, 2018. (Dkt. 83, ¶ 15)

Response: Not disputed.

11. Defendant Nathan K. Winisterfer is a Brown County Sheriff’s Deputy and was so employed on October 19, 2018. (Dkt. 83, ¶ 15)

Response: Not disputed.

¹ <https://www.greenbaypressgazette.com/story/news/2018/11/07/brown-county-sheriff-clerk-courts-election-results/1819859002/>

12. Defendant Thomas Zeigle is a Patrol Lieutenant for the Brown County Sheriff's Office and was so employed on October 19, 2018. (Dkt. 83, ¶ 16)

Response: Not disputed.

Jurisdiction and Venue

13. This action arises under the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. The Court has jurisdiction over the Plaintiffs' federal claims pursuant to 28 U.S.C. §§ 1331 and 1343. The Court has supplemental jurisdiction over Plaintiffs' state law claims pursuant to 28 U.S.C. § 1367. (Dkt. 83, ¶ 2)

Response: Not disputed.

14. The Eastern District of Wisconsin is the proper federal venue for this action pursuant to 28 U.S.C. § 1391(b) because it is where all acts alleged in the Complaint occurred. (Dkt. 83, ¶ 4)

Response: Plaintiffs agree that Eastern District of Wisconsin is the proper federal venue for this action pursuant to 28 U.S.C. § 1391(b) because it is where all acts alleged in the Complaint occurred. Plaintiffs disagree with Paragraph 14 to the extent Defendants assert that the Green Bay Division of the Eastern District of Wisconsin is the proper venue for trial. See ECF 106.

Traffic Stop of Tubby's Vehicle: 7:42 p.m. - 8:22 p.m.

15. On Friday, October 19, 2018 at approximately 7:24 p.m., Green Bay Police Department ("GBPD") Officer Colton Wernecke and his field training officer, Officer Erik O'Brien, were on patrol in the City of Green Bay when Officer Wernecke observed a vehicle with an unregistered license plate drive through a red light. Officer Wernecke decided to initiate a traffic stop and activated his overhead lights and followed the vehicle. (Baynard Decl. ¶ 4, Ex. C,

Squad 42 exterior video at 46:20-46:21; Baynard Decl. ¶ 5, Ex. D, Wernecke dep. pp. 12, 22, 48-49, 118; Baynard Decl. ¶ 2, Ex. A, O'Brien dep. pp. 24, 27-30)

Response: Not relevant to the Green Bay Defendants' Motion for Summary Judgment, the reasons for the initial traffic stop of Jonathon Tubby ("Tubby") are not relevant to the claims and defenses in this action.

16. The vehicle did not stop and instead turned into the parking lot of the Hyatt Regency hotel. The vehicle continued to drive through the parking lot despite Officer Wernecke turning on the squad's overhead lights, shining a spotlight at the vehicle, and blipping the squad's siren. (Baynard Decl. ¶ 4, Ex. C, Squad 42 exterior video at 46:40-48:24)

Response: Not relevant to the Green Bay Defendants' Motion for Summary Judgment, the circumstances regarding the initial traffic stop of Tubby are not relevant to the claims and defenses in this action.

17. The occupants of the vehicle were later identified as Jonathon Tubby, who was driving, and his aunt, Theresa Rodriguez, who was in the passenger seat. (Baynard Decl. ¶ 5, Ex. D, Wernecke dep. p. 54; Baynard Decl. ¶ 6, Ex. E, Rodriguez dep. pp. 30, 36)

Response: Plaintiffs agree that Officers O'Brien and Wernecke identified Tubby as the person who was driving the vehicle Officers O'Brien and Wernecke pulled over during the October 19, 2018 traffic stop, the identity of the passenger of the vehicle is not relevant to the Green Bay Defendants' Motion for Summary Judgment.

18. Prior to encountering Officers O'Brien and Wernecke, Tubby had picked Rodriguez up from a friend's house and was driving her back to her home. Rodriguez noted that when she got into the car, Tubby appeared upset and had been in an argument with his girlfriend. (Baynard Decl ¶ 6, Ex. E, Rodriguez dep. pp. 18-21)

Response: Not relevant to the Green Bay Defendants' Motion for Summary Judgment. Where and why Tubby and his passenger were travelling is immaterial to the disposition of the Green Bay Defendants' motion. The Green Bay Defendants do not contend they had any knowledge on October 19, 2018 of any argument Tubby had with his girlfriend, and as such, it is irrelevant to the claims and defenses in this action. In any event, Plaintiffs dispute that Tubby appeared upset. Rodriguez testified she thought Tubby "was kind of upset a little bit, but he just kind of brushed it off." ECF 121-5, at 19:25—20:4.

19. Rodriguez noticed that the cops were following Tubby's vehicle and told Tubby to pull over. Tubby did not pull over and continued to drive through the parking lot while he attempted to call his girlfriend. Tubby drove around the parking lot for about a minute while he spoke to his girlfriend. (Baynard Decl. ¶ 4, Ex. C, Squad 42 exterior video at 47:28-48:24; Baynard Decl. ¶ 6, Ex. E, Rodriguez dep. pp. 26-30)

Response: Not relevant to the Green Bay Defendants' Motion for Summary Judgment, the circumstances regarding the initial traffic stop of Tubby are not relevant to the claims and defenses in this action. The Green Bay Defendants do not contend they had any knowledge on October 19, 2018 of any phone call Tubby had with his girlfriend, and as such, it is irrelevant to the claims and defenses in this action.

20. Officer O'Brien requested a second squad to provide cover for the officers and GBPD Officer Tyler Haack responded. GBPD Officer Haack and Officer O'Brien approached the passenger side of the vehicle while Officer Wernecke approached the driver's side. (Baynard Decl. 1 4, Ex. C, Squad 42 exterior video at 50:48-51:02; Baynard Decl. 1 2, Ex. A, O'Brien dep. p. 27; Haack Decl. 11 2-7)

Response: Not relevant to the Green Bay Defendants' Motion for Summary

Judgment, the circumstances regarding the initial traffic stop of Tubby are not relevant to the claims and defenses in this action.

21. GBPD Officer Haack observed marijuana in the vehicle and Tubby and Rodriguez were ordered to exit the vehicle. (Baynard Decl. ¶ 4, Ex. C, Squad 42 exterior video at 51:16-21; Baynard Decl. ¶ 5, Ex. D, Wernecke dep. p. 54; Baynard Decl. ¶ 2, Ex. A, O'Brien dep. p. 28; Baynard Decl. ¶ 6, Ex. E, Rodriguez dep. p. 39; Haack Decl. ¶¶ 9-10)

Response: Plaintiffs do not dispute that GBPD Officer Haack observed what he suspected to be marijuana in the vehicle, but the Green Bay Defendants have offered no proof that the substance actually was marijuana. The remainder of the Paragraph 21 is irrelevant to the Green Bay Defendants' Motion for Summary Judgment.

22. Officer Wernecke handcuffed Tubby behind his back and searched him while Officer O'Brien observed. Officer Wernecke did the same procedure on Tubby's left side. The search of Tubby was completed at about 7:34 p.m. (Baynard Decl. ¶ 4, Ex. C, Squad 42 exterior video at 52:35-56:53; Baynard Decl. ¶ 5, Ex. D, Wernecke dep. pp. 54-61; Baynard Decl. ¶ 2, Ex. A, O'Brien dep. p. 85)

Response: Plaintiffs agree that Officer Wernecke handcuffed Tubby behind his back and searched him while Officer O'Brien observed, and that the search of Tubby was completed at about 7:34 p.m. Plaintiffs do not understand the sentence "Officer Wernecke did the same procedure on Tubby's left side."

23. While Officer Wernecke searched Tubby, GBPD Officer Haack searched Rodriguez. (Baynard Decl. ¶ 4, Ex. C, Squad 42 exterior video at 51:53-52:43; Haack Decl. ¶11)

Response: Not relevant to the Green Bay Defendants' Motion for Summary Judgment, Ms. Rodriguez is not a plaintiff in this action and her search and arrest are not

relevant to the claims or defenses in this action.

24. Tubby was not truthful about his identity to the officers. (Baynard Decl. ¶ 6, Ex. E, Rodriguez dep. p. 39)

Response: Not relevant to the Green Bay Defendants' Motion for Summary Judgment, Tubby was killed by Defendant O'Brien and cannot be a witness in this action. Therefore, his character for truthfulness cannot be at issue. See Fed. R. Evid. 404, 608.

25. Rodriguez had also originally lied about her identity due to active arrest warrants, but ultimately identified herself and Tubby to GBPD Officer Haack. A warrant check determined that both Tubby and Rodriguez had active arrest warrants. (Baynard Decl. ¶ 7, Ex. F, Squad 42 interior video at 55:15; Haack Decl. ¶ 12)

Response: Plaintiffs do not dispute that Tubby had a warrant for a non-violent offense. ECF 83, ¶¶ 19, 21; ECF 86, ¶¶ 19, 21. The remainder of Paragraph 25 is not relevant to the Green Bay Defendants' Motion for Summary Judgment.

26. At some point, GBPD Officer Joe Merrill joined GBPD Officers O'Brien, Wernecke and Haack and a search of Tubby's vehicle was conducted. (Baynard Decl. ¶ 4, Ex. C, Squad 42 exterior video at 1:00:13-1:24:06)

Response: Not relevant to the Green Bay Defendants' Motion for Summary Judgment.

27. GBPD Officer Haack left the scene of the arrest approximately 10-15 minutes prior to Officers O'Brien and Wernecke because they were standing by with Tubby's vehicle waiting for a tow truck. GBPD Officer Haack transported Rodriguez to the Brown County Jail to be booked into the jail on possession of marijuana and obstructing charges, and for the active warrant. (Haack Decl. ¶¶ 13-14)

Response: Not relevant to the Green Bay Defendants' Motion for Summary Judgment.

28. At 7:35 p.m., Tubby was placed in the back of Officer Wernecke's squad car and seat belted in with his hands handcuffed behind his back. (Baynard Decl. ¶ 2, Ex. A, O'Brien Dep. p. 35; Baynard Decl. ¶ 7, Ex. F, Squad 42 interior video at 55:15-55:25)

Response: Not disputed.

29. At 7:40:36, while cuffed and secured by the seat belt in the back of the squad, Tubby can be seen on the interior squad camera moving his hands under his butt behind his bent legs as he remains seated. (Baynard Decl. ¶ 7, Ex. F, Squad 42 interior video at 1:00:50-1:01:37)

Response: Not disputed.

30. At 7:41:54, Tubby appears to be physically struggling. He gets one leg through his handcuffed arms and starts putting his right hand up under his shirt. Tubby keeps manipulating and moving his right hand up under shirt farther, up closer to his face. Tubby's body is turned away from the camera view. Tubby reaches with his hand down into his pants. (Baynard Decl. ¶ 7, Ex. F, Squad 42 interior video at 1:01:58-1:03:02)

Response: Plaintiffs do not dispute that Tubby maneuvered the handcuffs from behind his back to the front of his body. Plaintiffs do dispute the Green Bay Defendants' characterizations regarding Tubby's actions while in the back seat of the squad car. The video recording of Tubby's actions in the back seat of the squad car on October 19, 2018 speaks for itself, ECF 121-6 at 1:01:58—1:03:02, and it is the province of the jury to draw inferences and make characterizations based on the video.

31. At 7:43:43, Tubby gets the seatbelt off. (Baynard Decl. ¶ 7, Ex. F, Squad 42 interior video at 1:03:02-1:03:50)

Response: Not disputed.

32. At 7:43:49, Tubby gets his other leg out from under his handcuffed arms. At this time, both of Tubby's hands are in front of his body, still handcuffed together. Tubby's right hand is back up under his shirt. Tubby bends forward and keeps manipulating his hand up under his shirt. Tubby keeps moving, with both his hands up under his shirt, and his body bent forward. (Baynard Decl. ¶ 7, Ex. F, Squad 42 interior video at 1:03:50-1:03:59)

Response: Plaintiffs agree that Tubby maneuvered the handcuffs from underneath his right leg to the front of his body at about 7:43:49 and that Tubby's hands were still handcuffed together at that time. Plaintiffs agree that Tubby bent forward in the car after moving his handcuffs to the front of his body, and that Tubby's handcuffed hands were situated underneath his shirt. Plaintiffs disagree with the Green Bay Defendants' characterizations regarding Tubby's actions while in the back seat of the squad car. The video recording Tubby's actions in the back seat of the squad car on October 19, 2018 speaks for itself, ECF 121-6 at 1:03:50—1:03:59, and it is the province of the jury to draw inferences and make characterizations based on the video.

33. At 8:10:56, Officer Wernecke departed the scene of the arrest and began the transport of Tubby to the Brown County Jail to be booked on possession of marijuana and obstructing charges, as well as for the active warrant. (Baynard Decl. ¶ 4, Ex. C, Squad 42 exterior video at 1:32:59; Baynard Decl. ¶ 5, Ex. D, Wernecke dep. p. 54)

Response: Not disputed.

34. The transport to the Brown County Jail took approximately twelve minutes. (Baynard Decl. ¶ 4, Ex. C, Squad 42 exterior video at 1:32:59-1:44:57)

Response: Not disputed.

35. Officer O'Brien reported that Tubby remained quiet during the transport to the County Jail. (Baynard Decl. ¶2, Ex. A, O'Brien dep. pp 34-36). The squad's rear-facing camera depicts Tubby in a hunched forward position with his hands in front of his body, underneath his shirt during the transport. (Baynard Decl. ¶ 7, Ex. F, Squad 42 interior video at 1:27:42-1:31:02)

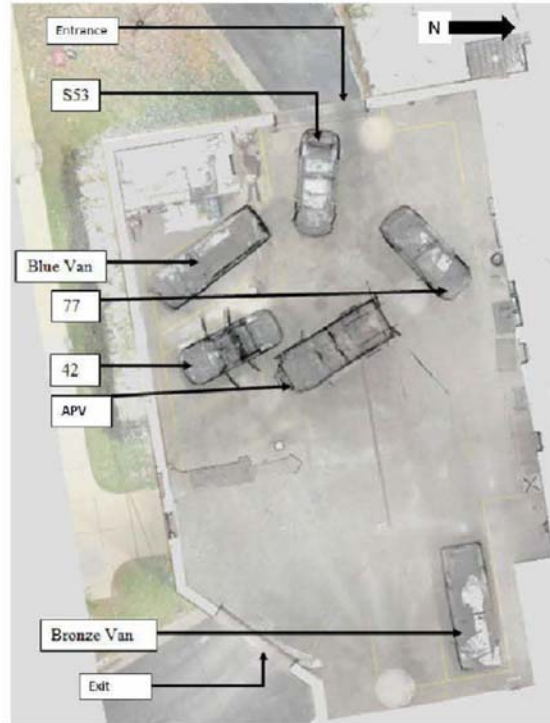
Response: Plaintiffs agree that O'Brien testified at his deposition that Tubby remained quiet during the transport to the Brown County Jail. Plaintiffs agree that the squad car's rear facing camera depicts Tubby leaning forward with his hands in front of his body during the transport and upon his arrival at the sally port. Plaintiffs dispute that his hands were underneath his shirt during the transport, which is a speculative factual contention not supported by the video recording. ECF 121-6 at 1:27:42—1:31:02.

Events at the Brown County Jail Sally Port: 8:22 p.m.-9:02 p.m.

36. At approximately 8:22 p.m. Officers Wernecke and O'Brien entered the sally port of the Brown County jail. Before the squad is parked, Officer O'Brien asked Tubby if he had anything on him. Tubby responded no. (Baynard Decl. ¶ 4, Ex. C, Squad 42 exterior video at 1:44:35; Baynard Decl. ¶ 7, Ex. F, Squad 42 interior video at 1:42:339-1:42:50)

Response: Not disputed.

37. The sally port is an enclosed area in the jail that provides the secure transition of inmates from the custody of police officers to the intake area of the jail. The sally port overhead door is controlled by the jail's master control. (Baynard Decl. ¶ 8, Ex. G, Marked as Exhibit 5 during the deposition of Charles Nelson; Dkt. 82, Third Amended Complaint ¶ 21; Baynard Decl. ¶ 9, Ex. H, Logan Rose dep. p. 15)



Response: Not disputed.

38. After parking the squad and turning off the engine, Officer O'Brien and Officer Wernecke exited the squad and placed their gear and weapons in the trunk pursuant to the jail's policy that officers are to not bring weapons into the jail. (Baynard Decl. ¶ 7, Ex. F, Squad 42 interior video at 1:43:59-1:44:35; Baynard Decl. ¶ 5, Ex. D, Wernecke dep. pp. 62-63)

Response: Not disputed.

39. When Officer Wernecke went to open the rear driver's side door of the squad to remove Tubby, he observed that Tubby's hands were not behind him and were instead in front and balled up under his shirt. Tubby had repositioned himself in the back seat so that his upper body was positioned away from the door. (Baynard Decl. ¶ 7, Ex. F, Squad 42 interior video at 1:44:51-1:45:22; Baynard Decl. ¶ 5, Ex. D, Wernecke dep. pp. 65-66)

Response: Plaintiffs agree that when Officer Wernecke went to open the rear driver's side door of the squad car to remove Tubby, he observed that Tubby's hands were not behind

him and were instead in front of his body and underneath his shirt. Plaintiffs dispute the Green Bay Defendants' claim that Tubby had repositioned himself in the back seat so that his upper body was positioned away from the door, that assertion is not supported by the video evidence. See ECF 121-6 at 1:44:51—1:45:22.

40. Officer Wernecke asked Tubby to get out of the squad car, but Tubby refused to exit, saying “No.” (Baynard Decl. ¶ 7, Ex. F, Squad 42 interior video at 1:44:44- 1:44:49; Baynard Decl. ¶ 5, Ex. D, Wernecke dep. p. 65)

Response: Plaintiffs dispute that Tubby communicated a refusal to exit the squad car or that he said “No” in the process of reacting to Officer Wernecke’s attempts to grab his ankle in the back seat of the squad car. At approximately 1:44:49 of the video recording of the interior of the squad car, Tubby mumbles an indeterminable statement. ECF 121-6.

41. Officer Wernecke told Tubby to “Step out,” but Tubby remained in the squad with his hands up under his shirt. Officer Wernecke again stated, “Stepping out?” and instructed “come on, bring your foot out,” as he reached into the back seat to attempt to guide Tubby out. Tubby flinched back further into the squad, still bent forward. (Baynard Decl. ¶ 7, Ex. F, Squad 42 interior video at 1:44:51-1:45:01; Baynard Decl. ¶ 5, Ex. D, Wernecke dep. p. 66)

Response: Plaintiffs agree that Officer Wernecke told Tubby to “Step out,” stated, “Stepping out?” and said “come on, bring your foot out.” Plaintiffs dispute that Officer Wernecke reached into the back seat to attempt to guide Tubby out. Rather, Officer Wernecke attempted to grab Tubby’s ankle in order to forcibly remove Tubby from the vehicle. ECF 121-6 at 1:44:51—1:45:10.

42. Officer O’Brien heard Officer Wernecke issue commands for Tubby to exit the vehicle, but Tubby had not exited. (Baynard Decl. ¶ 2, Ex. A, O’Brien dep. p. 40)

Response: Plaintiffs dispute that Officer O'Brien heard Officer Wernecke issue commands for Tubby to exit the vehicle. This factual contention is supported only by Officer O'Brien's self-serving deposition testimony, the veracity of which is called into questions by Officer O'Brien's history of dishonesty. *See* Mem. Opp'n to Green Bay Mot. S. J. at § II.C., pp. 12-15 (detailing O'Brien's changing story of events and history of dishonesty).

In particular, when O'Brien applied to become a police officer, his employment application specifically asked him to disclose "*ALL instances* in which you were convicted of a crime (misdemeanors or felonies), ordinance violations, traffic violations and the like. . . . Failure to include *all information* requested under this section may result in denial of employment. Use additional sheets if necessary." ECF 114-20 at DOXT00000723 (capitalization in original, italics added). At the time, O'Brien had been convicted of disorderly conduct after he had threatened a store clerk. ECF 114-5 at 211:7—212:20. Yet, O'Brien did not disclose this conviction—instead listing only three speeding tickets. ECF 114-20 at DOXT00000723.

The employment application also asked O'Brien to provide his "complete work history." ECF 114-20 at DOXT00000726 (emphasis in original). The application admonished him to "[b]e sure to clearly document your work history monthly, including periods of unemployment (ie, unemployed, in school, etc.) *Incomplete work histories will not be considered. Attach extra sheets if necessary.*" *Id.* (bolded lettering in original changed to italics). O'Brien was in the Army National Guard from 2004 to 2005 but was discharged due to depression. 2d Tahdooahnippah Decl. Ex. 28; ECF 114-5 at 9:3-4, 11:16—24; 2d Tahdooahnippah Decl. Ex. 6 at 217:24—219:3. Evidently fearful that his lack of an honorable discharge would harm his prospects, O'Brien omitted his military service. *Id.* at

216:20—217:9. Not only did he omit his military service, but he also affirmatively lied, stating that he had been “unemployed but was a full time stay at home parent to a [redacted] spouse” during the time he was in the military. ECF 114-20 at DOXT00000726. These omissions are not trivial or minimal. GBPD Lieutenant Nathan Allen testified that such omissions could be disqualifying, and that failing to disclose this information: “That’s bad.” 2d Tahdooahnippah Decl. Ex. 5 at 134:11-20, 136:5-19. Indeed, the GBPD Chief of Police agreed that the questions concerning Officer O’Brien’s dishonesty should be brought to the GBPD Internal Affairs supervisor. 2d Tahdooahnippah Decl. Ex. 15 at 100:16—101:2.

43. Officer O’Brien came around from the back of squad 42 and looked in the open door. Officer O’Brien immediately noticed that Tubby’s hands were no longer behind his back. Officer O’Brien observed that Tubby was bunched forward, which he found unusual. Officer O’Brien observed that Tubby was leaned back in a reclined position away from the open squad 42 door, leaning back away from the Officers. (Baynard Decl. ¶ 2, Ex. A, O’Brien dep. pp. 40-42)

Response: Plaintiffs dispute Defendants’ claims. These factual contentions are supported only by Officer O’Brien’s self-serving deposition testimony, the veracity of which is called into questions by Officer O’Brien’s history of dishonesty, as discussed above in response to Paragraph 42, which response is incorporated herein by reference. In addition, the video evidence shows that Tubby was not “leaned back in a reclined position away from the open” door. ECF 114-22 at 1:44:52—1:45:11.

44. At that time, Officer O’Brien observed what he believed to be the barrel of a gun protruding from Tubby's shirt underneath his clothing. It was pressed up creating tension in the clothing. It appeared cylindrical in nature, and it was flat on top. It immediately appeared to

Officer O'Brien to be the barrel of a gun. It did not appear to Officer O'Brien to be a finger or other instrument. (Baynard Decl. ¶ 2, Ex. A, O'Brien dep. pp. 42-43)

Response: Disputed. The video evidence does not show any “cylindrical object.”



ECF 114-22 at 1:44:52—1:45:11. Officer Wernecke was standing directly next to O'Brien at the time and testified that he did not see a gun or anything that would have led him to believe Tubby was armed. ECF 114-1 at 65:14—66:8, 69:5-8.

Moreover, had O'Brien seen a gun, under the training, policies, and practices of the Green Bay Police Department, O'Brien would have stated that he had seen a gun. ECF 114-17 at 101:7-13; 2d Tahdooahnippah Ex. 13 at 54:16-25. He did not do so—instead he merely stated that Tubby might have “something.” ECF 120-9 at 00:00—00:11. O'Brien also stated over the radio that he didn't believe “the whole Bearcat will do us any good,” underscoring the fact that he did not genuinely believe Tubby to be armed. ECF 120-9 at 2:32—2:42. In addition, an officer on the scene specifically testified that no one expressly told him that Tubby had a gun. 2d Tahdooahnippah Decl. Ex. 9 at 105:2-7 (“no one told me ‘I saw a

gun.’’). That “something” is not equivalent to a “gun” is further underscored by the fact that the officers reporting to the scene did not act as if they were responding to a call involving an armed subject. They brought multiple “ride-alongs” to the scene, permitted one to film the incident with a cell phone, and mulled about the sallyport with weapons holstered. ECF 114-17 at 101:24—102:6, 103:16-23; ECF 120-31; 2d Tahdooahnippah Decl. Ex. 35 at 0:00-6:30. The body language of the officers on the scene (many of whom had no weapons drawn and were merely mulling about) was also not consistent with a response to an armed subject. ECF 114-19 at ¶ 102.

Moreover, officers on the scene—such as Brown County SWAT Commander Thomas Zeigle—testified that the rear window of the squad car was broken precisely *because* officers did not know what Tubby had and wanted to obtain a visual. ECF 114-7, Ex. G at 126:13—127:18. Similarly, the medicolegal investigator was told the same thing—that the “possible contents” of Tubby’s hands had been obscured. ECF 114-12, Ex. L at 2.

In addition, the veracity of O’Brien testimony is questionable because he changed his story. Shortly after the shooting, O’Brien said he shot Tubby because he mistook the sound of the “bean bag shotgun” for the sound of a lethal handgun. ECF 114-13 at 10. *See also* ECF 112-1 at 3 (“supposedly there was a loud popping sound and an Officer reacted by firing.”). However, during the investigation by the Wisconsin Division of Criminal Investigation (“DCI”), several officers specifically noted that they could tell the difference between the sound of “bean bag shotgun” and sound of a real handgun. *E.g.*, ECF 114-27 at BC_JCT000725, 727, 748, 780, 834, 847, 896, 903–04. Several officers repeated this in depositions, ECF 114-8 at 102:6—103:2, ECF 114-6 at 109:8—110:5; ECF 114-1 at 39:19—40:10, and several officers even specifically testified that it would not be reasonable to

mistake the two sounds. ECF 114-14 at 40:17-21; ECF 114-15 at 31:9-14. Thereafter, the Brown County District Attorney published several photographs of Tubby in the rear of the squad car. ECF 114-16, Ex. Q at 11. None of the officers could see into the car at the time of these photographs because the windows were fogged and O'Brien had left the trunk of the squad car open (obscuring the view through the rear window). ECF 114-6, Ex. F at 21:8-15; ECF 114-4, Ex. D at 37:14-22, 56:10-17; ECF 114-5, Ex. E at 59:5-6, 93:6—94:19, 184:10—187:7. Officer O'Brien then *changed* his story after the DCI and District Attorneys made their reports public. He began claiming he saw the “barrel” of a gun under Tubby’s shirt when he and Wernecke opened the rear door of the squad, ECF 114-5 at 37:10-18, 39:19—42:11, and fired because he thought Tubby pointed the “barrel” at him, 2d Tahdooahnippah Decl. Ex. 6 at 134:18—135:9, or at other officers, *id.* at 143:20—144:6.

Plaintiffs vigorously dispute O'Brien’s credibility. Not only did O'Brien omit any mention of this important “fact” during the criminal investigation of him, and then change his story, but he also has a history of dishonesty, as discussed above in response to Paragraph 42, which response is incorporated herein by reference.

45. At 8:25:08, Officer O'Brien ordered, “Jonathon, bring your foot out,” but Tubby refused to do so. Tubby then stated, “I’ll fucking do it.” (Baynard Decl. ¶ 7, Ex. F, Squad 42 interior video at 1:45:05-1:45:21; Baynard Decl. ¶ 2, Ex. A, O'Brien dep. pp. 42, 60)

Response: Plaintiffs dispute that Tubby refused to bring his foot out. Plaintiffs agree that a Green Bay Police Officer stated: “Jonathan, bring your foot out” and Officer Wernecke then attempted to grab Tubby’s ankle. ECF 121-6 at 1:45:00. Tubby then stated “don’t” and then said “I’ll fucking do it,” *Id.* at 1:45:18-22. Officer Wernecke then immediately slammed the squad car door shut, preventing Tubby from indicating what he

meant by “don’t” and “I’ll do it.” A material question of fact exists as to what Tubby intended to communicate by these statements. Drawing all reasonable inferences in Plaintiffs’ favor, as required, the statement that he would “do it” means that Tubby was agreeing to cooperate without the need for force.

Furthermore, to the extent this Paragraph 45 is supported by Officer O’Brien’s self-serving deposition testimony, that testimony does not reliably establish Defendants’ factual contentions. Officer O’Brien’s testimony is not credible due to the changing nature of his story of events and history of dishonesty, as discussed in response to Paragraphs 42 and 44, which responses are incorporated herein by reference.

46. Officer O’Brien believed Tubby to be an armed and suicidal subject, and therefore posed a deadly threat. (Baynard Decl. ¶ 2, Ex. A, O’Brien dep. pp. 60-63)

Response: Disputed for all the reasons stated in response to Paragraphs 42, 44, and 45, which responses are incorporated herein by reference.

47. Officer O’Brien was trained that there are three criteria for assessing whether a suspect poses a deadly threat: weapon, intent, and delivery system. Intent can be inferred. (Baynard Decl. ¶ 2, Ex. A, O’Brien dep. pp. 60-63)

Response: Not relevant to the Green Bay Defendants’ Motion for Summary Judgment. Plaintiffs do not allege that O’Brien’s training on use of deadly force was constitutionally deficient.

48. Officer O’Brien slammed squad 42’s door with Tubby still inside and told Officer Wernecke, “I think he’s got a gun.” (Baynard Decl. ¶ 7, Ex. F, Squad 42 interior video at 1:45:22; Baynard Decl. ¶2, Ex. A, O’Brien dep. p. 58-60; Baynard Decl. ¶ 5, Ex. D, Wernecke dep. pp. 68-71)

Response: O'Brien's self-serving testimony that he saw a gun, or said he saw a gun, is an after-the-fact invention consistent with O'Brien's history of dishonesty, as discussed above in response to Paragraphs 42 and 44, which responses are incorporated herein by reference. The veracity of the other officers' testimony, such as Officer Wernecke, is also questionable due to the phenomenon known as the "blue wall of silence" where officers refuse to provide negative testimony that would harm another officer. Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. Pitt. L. Rev. 233, 234, 237–40 (1998); Olwyn Conway, *"How Can I Reconcile with You When Your Foot is On My Neck?": The Role of Justice in the Pursuit of Truth and Reconciliation*, 2018 Mich. St. L. Rev. 1349, 1373–75, 1374 n.114 (2018); Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 Pepp. L. Rev. 245, 253–54 (2017).

49. Officer O'Brien asked Officer Wernecke what he was thinking and Officer Wernecke told Officer O'Brien that he thought he must have missed something in searching Tubby. (Baynard Decl. ¶ 5, Ex. D, Wernecke dep. p. 75)

Response: O'Brien's self-serving testimony that he saw a gun, or said he saw a gun, is an after-the-fact invention consistent with O'Brien's history of dishonesty, as discussed above in response to Paragraphs 42 and 44, which responses are incorporated herein by reference. The veracity of the other officers' testimony, such as Officer Wernecke, is also questionable due to the phenomenon known as the "blue wall of silence" where officers refuse to provide negative testimony that would harm another officer. Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. Pitt. L. Rev. 233, 234, 237–40 (1998); Olwyn Conway, *"How Can I Reconcile*

with You When Your Foot is On My Neck?”: The Role of Justice in the Pursuit of Truth and Reconciliation, 2018 Mich. St. L. Rev. 1349, 1373–75, 1374 n.114 (2018); Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 Pepp. L. Rev. 245, 253–54 (2017). And, also the culture of dishonesty at the Green Bay Police Department. *E.g.*, 2d Tahdooahnippah Decl. Ex. 14 at 17, Ex. 21 at 80-81, 85-86, 87.

50. Officer Wernecke ran to the booking window to alert jail staff that something was wrong. (Baynard Decl. ¶ 5, Ex. D, Wernecke dep. p. 71)

Response: Not disputed.

51. Officer O’Brien retrieved his handgun from the trunk of squad 42 and he and Officer Wernecke retreated behind the transport van parked next to squad 42. (Baynard Decl. ¶ 2, Ex. A, O’Brien dep. p. 58; Baynard Decl. ¶ 5, Ex. D, Wernecke dep. pp. 71-74)

Response: Not disputed.

52. Officer O’Brien radioed dispatch that Tubby had something in his hand and was refusing to exit squad 42, and requested back up because he believed Tubby had a firearm. (Baynard Decl. ¶ 2, Ex. A, O’Brien dep. p. 67)

Response: Disputed, O’Brien did not request back up because he believed Tubby had a firearm, Officer O’Brien radioed dispatch to say “it looked like” Tubby had “something” in his hands. ECF 114-28, Ex. CC at 00:00—00:11. He never said that Tubby had a gun, or a firearm, or a weapon of any sort. See generally *id.*

53. BCSO Jail Corporal Kevin Smith and BCSO Correctional Officer Charles Nelson were in the area near the sally port intake. Officer O’Brien told BCSO Cpl. Smith that he believed Tubby had a knife and/or a handgun. (Baynard Decl. ¶ 3, Ex. B, Smith dep. p. 51)

Response: Plaintiffs dispute this factual assertion, which is not supported by Exhibit B to the Baynard Declaration. ECF 121-2.

54. The windows of squad 42 began to fog up and the officers could not really see anything inside the squad car except some vague movement in the back seat. (Haack Decl. ¶ 23) The interior squad camera from that time demonstrates that at 8:26 p.m., Tubby was looking around the squad car, with a large bulge under his shirt. Tubby kept moving and manipulating his hands. (Baynard Decl. ¶ 7, Ex. F, Squad 42 interior video at 1:45:58-1:48:19)

Response: That the windows of squad 42 fogged up and officers could not see inside the squad car confirms that the remainder of the statements in Paragraph 54 are irrelevant. Officer did not have access to the interior squad camera at the time, and could not see inside the vehicle. Nothing that was going on inside the vehicle could have influenced officers' actions on the scene and cannot be relevant to the reasonableness of their actions in light of the information they possessed. Notwithstanding the lack of relevance of, Plaintiffs disagree with Defendants contention that Tubby had "a large bulge under his shirt" or that "Tubby kept moving and manipulating his hands"—the video speaks for itself, and it is the province of the jury to draw inferences and make characterizations based on the video.

55. At 8:28 p.m., officers yelled something to Tubby along the lines of, "Jonathan, put it down," and Tubby replied, "Fuck you. I'll do it." At this time, Tubby turned around and was sitting backwards in the seat facing towards the rear window. (Baynard Decl. ¶ 7, Ex. F, Squad 42 interior video at 1:48:19-1:48:26)

Response: Not relevant and inadmissible. The Green Bay Defendants cite no evidence that these statements were heard, and in fact officers testified that they could not hear anything Tubby was saying. 2d Tahdooahnippah Decl. Ex. 9 at 32:10-21; Ex. 6 at 88:17-

20. Unheard statements such as these are the proverbial tree falling in the forest, they cannot have influenced officers' actions on the scene and cannot be relevant to the reasonableness of their actions in light of the information they possessed. Therefore, they are irrelevant and inadmissible.

56. At 8:29 p.m., Tubby stated, "I'll fuckin' do it at the first fuckin' person to open this door," and then, "I'm not goin'." (Baynard Decl. ¶ 7, Ex. F, Squad 42 interior video at 1:49:14-1:49:25)

Response: Not relevant and inadmissible. The Green Bay Defendants cite no evidence that these statements were heard, and in fact officers testified that they could not hear anything Tubby was saying. 2d Tahdooahnippah Decl. Ex. 9 at 32:10-21; Ex. 6 at 88:17-

20. Unheard statements such as these are the proverbial tree falling in the forest, they cannot have influenced officers' actions on the scene and cannot be relevant to the reasonableness of their actions in light of the information they possessed. Therefore, they are irrelevant and inadmissible.

57. At approximately 8:30 p.m., GBPD Sergeant Denney drove into the entrance of the Brown County Jail sally port and parked just inside the entrance. Soon after, GBPD Officer Walvort respond to the scene and parked his squad directly outside the sally port entrance. (Baynard Decl. ¶ 10, Ex. I, Squad 53 video at 42:12)

Response: Not disputed.

58. At 8:31:22, Tubby stated, "Fuck you. I'll fuckin' do it." At 8:31:33, Tubby stated, "Fuck you." Tubby was moving in the back seat. At 8:31:45, Tubby stated, "Shut the fuck up." At 8:32:26, Tubby stated, "I can fuckin' hear you." At 8:35:09, Tubby stated, "...the fuck away from me." (Baynard Decl. ¶ 7, Ex. F, Squad 42 interior video at 1:51:32-1:55:20)

Response: Not relevant and inadmissible. The Green Bay Defendants cite no evidence that these statements were heard, and in fact officers testified that they could not hear anything Tubby was saying. 2d Tahdooahnippah Decl. Ex. 9 at 32:10-21; Ex. 6 at 88:17-20. Unheard statements such as these are the proverbial tree falling in the forest, they cannot have influenced officers' actions on the scene and cannot be relevant to the reasonableness of their actions in light of the information they possessed. Therefore, they are irrelevant and inadmissible.

59. At 8:42:49, Officer O'Brien instructed, "Jonathon, wipe the windows so they're clean." Officer O'Brien told Tubby to wipe the windows several times. At one point, Tubby did wipe the window down. This signaled to Officer O'Brien that Tubby could hear him, and he continued to give commands to Tubby to wipe the windows. (Baynard Decl. ¶ 7, Ex. F, Squad 42 interior video at 2:02:57-2:11:25; Baynard Decl. ¶ 2, Ex. A, O'Brien dep. pp. 89-91)

Response: Not disputed.

Additional BCSO and GBPD Law Enforcement Officials Respond to the Sally Port and BCSO Lt. Thomas Zeigle's Develops an Extraction Plan

60. While this back and forth was occurring between Tubby and the officers on scene, numerous law enforcement officers from GBPD and BCSO responded to the sally port. (Baynard Decl. ¶ 11, Ex. J, Jail exterior video beginning at 30:30)

Response: Not disputed.

61. BCSO Lt. Thomas Zeigle was notified that there was an incident occurring in the sally port of the jail involving an individual who was refusing to exit squad 42 and saying he had a gun. BCSO Lt. Zeigle responded to the jail and radioed BCSO Sgt. Jason Katers and requested that he respond to the sally port. (Baynard Decl. ¶ 12, Ex. K, Zeigle dep. pp. 14-19)

Response - Disputed. Radio dispatch recordings exist and never once does the

dispatcher state that Tubby has a gun. *See generally* ECF 120-9. Moreover, Lieutenant Zeigle's testified he was unaware of what Tubby had in the squad car, and that that lack of awareness informed his decision to break the rear window of the squad car to obtain a better visual, ECF 114-7 at 126:13—127:18. Other officers on the scene testified they were not told that Tubby had a gun. 2d Tahdooahnippah Decl. Ex. 9 at 105:2-7 ("no one told me 'I saw a gun.'"). In addition to the contradictions in the record, Lt. Zeigle's statement relays hearsay within hearsay (Tubby purportedly communicating to another person that he had a gun, who in turn relayed that purported statement to Lt. Zeigle). Such hearsay-within-hearsay is not competent to establish the truth of the matter asserted by Paragraph 61.

62. GBPD Lt. Nate Allen was a supervisor that night, and responded to the sally port in response to the radio traffic from Officer O'Brien that Tubby had his hands underneath his shirt pointed at his chin, and stating that "he would do it," or "I'll do it." (Baynard Decl. ¶ 13, Ex. L, N. Allen dep. pp. 16-19) Officer O'Brien had taken over the emergency radio traffic, which lead GBPD Lt. Allen to believe that Tubby had a weapon. (Baynard Decl. ¶ 13, Ex. L, N. Allen dep. pp. 29-30)

Response: Plaintiffs dispute that Officer O'Brien radioed other officers to say that Tubby stated "he would do it" or "I'll do it." First, recordings of radio traffic from that night exist, and do not capture Officer O'Brien relaying that Tubby stated "he would do it" or "I'll do it." *See generally* ECF 114-2 (Huerter Decl. Ex B). Second, Lt. Nate Allen did not testify that he observed Officer O'Brien claim over the radio that Tubby stated "he would do it" or "I'll do it." Rather, Lt. Nate Allen testified that he "believe[d]" either Officer O'Brien or Wernecke informed others over the radio that Tubby stated he would do it or "I'll do it." ECF 121-12, Ex. L at 16:3-8. Officer O'Brien later testified to his lack of personal

knowledge regarding the purported statements in Paragraph 62, saying that “[a]t some point, I was told that when they – Officer O’Brien and Wernecke went to take him out of the back of the squad car... he told the officers ‘I’ll do it.’” *Id.* 29:24—30:4. These speculative hearsay-within-hearsay statements, which omit mention of the actual declarant, are not competent evidence to establish the facts asserted in Paragraph 62.

Plaintiffs dispute that Officer O’Brien had taken over the emergency radio traffic, but agree that Officer O’Brien took part in communications that occurred over radio channel C designated for emergency traffic. *Id.* at 26-29. Plaintiff’s dispute that Lt. Nate Allen believed that Tubby had a weapon. Lt. Nate Allen did not testify that he believed Tubby had a weapon. Rather, Lt. Nate Allen testified that he inferred Tubby may have had a weapon but noted that GBPD “[doesn’t] always take emergency traffic for weapons calls.” *Id.* at 29:15-17. He also testified that no one told him that Tubby had a weapon in his hand. Instead, Lt. Nate Allen testified that someone told him that Tubby “had his hands or whatever appeared to be a weapon or a gun type weapon,” *Id.* at 29:24—30:2, but that he wasn’t sure whether Tubby actually had a gun, *Id.* at 46:6-9.

63. While en route to the sally port, GBPD Lt. Allen began developing a plan to extract Tubby from squad 42. GBPD Lt. Allen authorized the deployment of the BearCat armored vehicle to provide cover and requested additional pieces of equipment including the 40 millimeter munitions to fire wooden dowels, and a glass breaking implement. (Baynard Decl. ¶ 13, Ex. L, N. Allen dep. pp. 31-32)

Response: Not disputed.

64. Upon arriving in the sally port, GBPD Lt. Allen met with GBPD Sgt. Denney and GBPD Officer Eric Allen and called GBPD SWAT commander Lt. Gering to discuss options for removing Tubby from squad 42. (Baynard Decl. ¶ 13, Ex. L, N. Allen dep. pp. 44-56)

Response: Not disputed.

65. Lt. Allen's plan was to drive the BearCat within a few feet of the squad car, have a shield team with lethal cover open the rear door of the squad, and give Tubby commands to exit the vehicle. If Tubby did not exit the vehicle, they would send a K-9 to extract him. (Baynard Decl. ¶ 13, Ex. L, N. Allen dep. pp. 44-56)

Response: Not disputed.

66. GBPD Lt. Allen called BCSO Lt. Zeigle and informed him that there was a subject in the back of squad 42 with his hands and arms up in his shirt with an unknown possible weapon, threatening to harm himself. (Baynard Decl. ¶ 13, Ex. L, N. Allen dep. pp. 59-60; Baynard Decl. ¶ 12, Ex. K, Zeigle dep. p. 18)

Response: Plaintiffs dispute the veracity and credibility of the witnesses on this point, due to the phenomenon known as the "blue wall of silence" where officers refuse to provide negative testimony that would harm another officer. See G Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. Pitt. L. Rev. 233, 234, 237–40 (1998); Olwyn Conway, "How Can I Reconcile with You When Your Foot is On My Neck?": *The Role of Justice in the Pursuit of Truth and Reconciliation*, 2018 Mich. St. L. Rev. 1349, 1373–75, 1374 n.114 (2018); Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 Pepp. L. Rev. 245, 253–54 (2017).

67. BCSO Lt. Zeigle arrived on scene shortly after and GBPD Lt. Allen informed him of the extraction plan he and GBPD Lt. Gering and GBPD Officer E. Allen had developed. (Baynard Decl. ¶ 13, Ex. L, N. Allen dep. p. 61; Baynard Decl. ¶ 12, Ex. K, Zeigle dep. pp. 19-20)

Response: Not disputed.

68. BCSO Lt. Zeigle told GBPD Lt. Allen that he did not like their plan. BCSO Lt. Zeigle thought the GBPD plan could be a contingency plan, but was not the primary plan for extracting Tubby. (Baynard Decl. ¶ 12, Ex. K, Zeigle dep. p. 20, 46)

Response: Plaintiffs agree that Lt. Zeigle disapproved of the plan developed by Lieutenant Allen, and denied his recommendation.

69. BCSO Lt. Zeigle indicated that he was in charge of the Tubby response because it occurred at a County facility and thus, was under the jurisdictional control of the County. (Baynard Decl. ¶ 12, Ex. K, Zeigle dep. pp. 46-50; Baynard Decl. ¶ 13, Ex. L, N. Allen dep. pp. 61-62)

Response: Plaintiffs agree that Lt. Zeigle asserted Brown County had jurisdiction over the scene, because the GBPD squad car was located in the Brown County Jail, and that GBPD relented to Lt. Zeigle's assertion of jurisdiction.

70. BCSO Lt. Zeigle developed a different extraction plan. (Baynard Decl. ¶ 12, Ex. K, Zeigle dep. pp. 19-20, 46-49; Baynard Decl. ¶ 13, Ex. L, N. Allen dep. pp. 58, 61-62; Baynard Decl. ¶ 14, Ex. M, E. Allen dep. pp. 49-51)

Response: Plaintiffs agree that Lt. Zeigle developed a different plan. Plaintiffs dispute that Lt. Zeigle's plan constituted an "extraction" strategy, but instead sought to force Tubby out of the vehicle. ECF 120-15 at 51:15—53:6; ECF 121-11 at 52:22-23 (Zeigle explaining that plan was to spray OC onto Tubby's face to "see what type of reaction we could get").

71. BCSO Lt. Zeigle's plan was for officers to surround the squad car, break out the back window and to try to communicate with Tubby. The next step in the plan was to introduce OC spray into the rear window of the squad. It was BCSO Lt. Zeigle's goal to have Tubby exit the rear window and surrender after using the OC spray. (Baynard Decl. ¶ 12, Ex. K, Zeigle dep. pp. 19-20, 46-55)

Response: Not disputed that Zeigle's plan was to break the back window of the car and introduce OC spray. It is disputed that the plan involved communication with Tubby, when Tubby attempted to communicate with officers, he was ignored. ECF 120-3 at 2:29:05-2:30:00. It is also disputed that his plan was for Tubby to surrender. When Lieutenant Allen confronted Lieutenant Zeigle about what would happen after the rear window was broken, Lieutenant Zeigle had no response other than to state: "We need to see what we have." ECF 120-24 at 63:17—64:1.

72. GBPD Lt. Allen informed GBPD Officer Eric Allen of BCSO Lt. Zeigle's plan, and GBPD Officer Eric Allen followed orders. (Baynard Decl. ¶ 13, Ex. L, N. Allen dep. p. 67; Baynard Decl. ¶ 14, Ex. M, E. Allen dep. pp.48 -51)

Response: Plaintiffs dispute that Lt. Nate Allen informed Officer Eric Allen of Lt. Zeigle's plan to subdue Tubby. Lt. Nate Allen instructed Officer Eric Allen to "go along with Lieutenant Zeigle's plan." ECF 121-12 at 67:12-15. Lt. Nate Allen testified that he merely instructed Officer Eric Allen to perform the tasks of "break[ing] out a window, giv[ing] commands [to Tubby], and deploy[ing] OC if appropriate." *See Id.* at 70:9-11. Whether Lt. Nate Allen informed Officer Eric Allen of specifics of a plan to force Tubby from the vehicle is a disputed question of material fact.

73. In an attempt to respect the BCSO jurisdiction and wishes, GBPD Lt. Allen instructed GBPD Officer E. Allen to break out the window, give commands, and deploy OC if appropriate. (Baynard Decl. ¶ 13, Ex. L, N. Allen dep. pp. 66-71)

Response: Not disputed.

74. BCSO Lt. Zeigle observed the implementation of his plan from outside the sally port. (Baynard Decl. ¶ 12, Ex. K, Zeigle dep. p. 53)

Response: Not disputed.

Execution of Lt. Zeigle's Extraction Plan: 9:02 p.m. - 9:10 p.m.

75. At approximately, 9:02 p.m., GBPD Officer Joseph Merrill drove the BearCat armored vehicle into the sally port. BCSO Sgt. Katers was in the front passenger seat. GBPD Officers Allen, Lynch, Christensen, Salzmänn and K9 Pyro were also inside as the BearCat took position next to the driver's side of squad 42. (Baynard Decl. ¶ 10, Ex. I, Squad 53 video at 1:14:35-1:15:22; Baynard Decl. ¶ 15, Ex. N, Salzmänn dep. pp. 44-45, 49; Baynard Decl. ¶ 14, Ex. M, E. Allen dep. pp. 54, 57-58)

Response: Not disputed.

76. GBPD Officers Lynch and Christenson got out of the BearCat with a shield and handguns and approached the back of squad 42 to close the trunk in order to secure the weapons in the trunk. (Baynard Decl. ¶ 10, Ex. I, Squad 53 video at 1:16:12-1:16:28; Baynard Decl. ¶ 15, Ex. N, Salzmänn dep. p. 50; Baynard Decl. ¶ 14, Ex. M, E. Allen dep. p. 59)

Response: Not disputed, in addition, the body language of Lynch and Christensen indicates that they did not believe they were facing an armed threat from Tubby. ECF 114-2 at 34:39—35:00; ECF 114-29 ¶ 102(e).

77. While the BearCat was getting into position Tubby can be seen and heard on squad 42's interior camera. At 9:04 p.m., Tubby still had his hand under his shirt and then put an object

in his mouth and stated what sounds like, “I’ll fuckin’ do it.” At 9:05 p.m., Tubby faced the back window and a short time later stated, “I’ll fuckin’ do it.” (Baynard Decl. ¶ 7, Ex. F, Squad 42 interior video at 2:24:37-2:26:12)

Response: Not relevant and inadmissible. The Green Bay Defendants cite no evidence that these statements were heard or that officers could see inside the squad car at this time, and in fact officers testified that they could not hear anything Tubby was saying and could not see into the vehicle due to fogged windows. 2d Tahdooahnippah Decl. Ex. 9 at 32:10-21; Ex. 6 at 88:17-20; ECF 114-6, Ex. F at 21:8-15; ECF 114-4, Ex. D at 37:14-22, 56:10-17; ECF 114-5, Ex. E at 59:5-6, 93:6—94:19, 184:10—187:7. Unheard statements and unseen actions such as these are the proverbial tree falling in the forest, they cannot have influenced officers’ actions on the scene and cannot be relevant to the reasonableness of their actions in light of the information they possessed. Therefore, they are irrelevant and inadmissible.

Moreover, Plaintiffs dispute that Tubby put an object in his mouth, *see* ECF 121-6 at 2:24:37-2:26:12, Tubby did not have any objects with him that could have been put into his mouth, except for a ring and a coin, which were on his finger and in his back pocket, respectively, ECF 112-1 at PDF pgs. 13, 14, ECF 114-22 at 2:21:35, and which cannot have reasonably been stuck into his mouth at that time as discussed at length in Plaintiffs Motion to Exclude Expert Opinions of John Peters, ECF 109 at 13-15, which is incorporated herein by reference.

78. At approximately 9:06 p.m., GBPD Officer Allen opened the turret on top of the BearCat and directed a spotlight into the back of the squad car. Officer Allen then shot a 44 millimeter wooden dowel into the lower passenger corner of the rear window of the squad,

breaking a portion of the rear window. (Baynard Decl. ¶ 10, Ex. I, Squad 53 video at 1:17:44-1:18:36; Baynard Decl. ¶ 7, Ex. F, Squad 42 interior video at 2:26:50; Baynard Decl. ¶ 14, Ex. M, E. Allen dep. pp. 69-70)

Response: Not disputed.

79. Tubby moved away from the breaking glass, and said, “Fuck you.” He then appeared to bring the object up to his eye level and point it out the back window for a moment. (Baynard Decl. ¶ 7, Ex. F, Squad 42 interior video at 2:26:54)

Response: Plaintiffs dispute that Tubby simply moved away from the breaking glass. In actuality, Tubby leapt back and took cover inside the squad car from the shattered glass that had been propelled into the squad car from the blast of the wooden dowel. ECF 121-6 at 2:26:24—2:27:40. Whatever was said by Tubby at this time is irrelevant and inadmissible, it was not heard by any officer given the low volume of Tubby’s speech and the echoes of the blast from the window reverberating throughout the sally port. *Id.* at 2:26:50-56.

Plaintiffs further dispute that Tubby brought an object up to his eye level and pointed it out the back window. As the video recording of that moment clearly shows, Tubby did not bring an object up to his eye level, but instead raised his hand and shirt in order to protect himself from the breaking glass. *Id.* at 2:26:45-50.



80. At 9:07:01, GBPD Officer Allen stated, “Jonathon, put your hands up where I can see them.” At 9:07:11, GBPD Officer Allen stated, “Jonathon, put your hands up.” Tubby is heard making moaning type sounds. Tubby did not put his hands up. (Baynard Decl. ¶ 7, Ex. F, Squad 42 interior video at 2:27:10-2:27:27)

Response: Plaintiffs agree that officers on the scene instructed Jonathan to put his hands up at around 9:07 and that Jonathan Tubby tucked himself into the corner of the squad car, away from the locations of the blasts of the wooden pellets, and began to cry. Tubby exclaimed “Ok!”, ECF 121-6 at 2:28:27-29, and audibly cried loudly enough for officers on the scene to hear him through the now open window, *Id.* at 2:28:40-2:29:16. He then twice repeated: “what are you guys going to me?” *Id.* at 2:29:02-07. He then stated “I’m sorry,” *Id.* at 2:29:19-22, and then, directing his voice towards the open window, repeatedly stated: “Help me!” *Id.* at 2:29:41—2:31:00.

81. At 9:07:29, GBPD Officer Allen fired a second wooden dowel round at the squad, breaking out a bigger portion of the back window. GBPD Officer Allen retreated back into the BearCat. (Baynard Decl. ¶ 10, Ex. I, Squad 53 video at 1:19:19; Baynard Decl. ¶ 7, Ex. F, Squad 42 interior video at 2:27:34; Baynard Decl. ¶ 14, Ex. M, E. Allen dep. p. 71)

Response: Plaintiffs agree that Officer Allen fired a second wooden dowel at the window, spraying additional glass shards into the car towards Tubby's face and body.

82. At 9:08 p.m., BCSO Sgt. Katers used a rake tool to clear the remaining glass from the rear window of squad 42. (Baynard Decl. ¶ 10, Ex. I, Squad 53 video at 1:20:03; Baynard Decl. ¶ 7, Ex. F, Squad 42 interior video at 2:28:18-2:28:28; Baynard Decl. ¶ 16, Ex. O, Katers dep. p. 28; Baynard Decl. ¶ 14, Ex. M, E. Allen dep. p. 71)

Response: Not disputed.

83. After breaking out the rear window, GBPD Officer Allen was able to see into the back seat of squad 42. GBPD Officer Allen saw that Tubby was facing back toward the rear window with his hands concealed under his shirt holding something up under his chin. (Baynard Decl. ¶ 14, Ex. M, E. Allen dep. pp. 71-74)

Response: Plaintiffs agree that Officer Eric Allen obtained partial visibility into the back seat of the squad car after the broken glass had been cleared out from the squad car.

Plaintiffs dispute Defendants' characterization of Tubby's position in the back seat of the squad car after Officer Allen shattered the rear window. As captured by the squad car recording, Tubby was crouched into a protective position in the corner of the back seat cabin closest to the rear side of the driver's seat. ECF 121-6 at 2:26:45—2:30:20.

Plaintiffs dispute that Officer Allen saw Tubby's hands concealed under his shirt holding something up under his chin. Tubby's hands remained near his side for throughout

the period of time that followed the destruction of the squad car's rear window, *see* ECF 121-6 at 2:26:45—2:30:20. Immediately prior to propelling a stream of OC spray into Tubby's face, Tubby's left hand is clearly visible to Officer Allen. Officer Allen even states: "I can see that one is clear, let me see *your other hand*, Jonathan." ECF 121-6 at 2:30:53.



84. GBPD Officer Allen gave Tubby commands to show his hands. Tubby did not comply. (Baynard Decl. ¶ 14, Ex. M, E. Allen dep. pp. 71-74)

Response: Plaintiffs agree that officers on the scene directed Tubby to show his hands. ECF 121-6 at 2:29:15—2:31:03. Plaintiffs dispute that Tubby refused to comply with the officers' direction. Tubby, disoriented by the dowel shots fired into the back of the window, repeated multiple times, "What is happening? What is happening?" before being sprayed with a three-second blast of OC spray. ECF 121-6 at 2:30:53 to 2:31:06. Tubby was unable to understand the officers' directions; he did not refuse to comply.

85. At 9:08 p.m., GBPD Officer Allen stated, “Put your hands up Jonathon,” and Tubby can be heard making moaning and crying noises. Tubby did not comply and did not show officers his hands. (Baynard Decl. ¶ 7, Ex. F, Squad 42 interior video at 2:28:57; Baynard Decl. ¶ 14, Ex. M, E. Allen dep. pp. 71-74)

Response: Plaintiffs agree that officers on the scene directed Tubby to show his hands. ECF 121-6 at 2:29:15—2:31:03. Plaintiffs dispute that Tubby refused to comply with the officers’ directions. Tubby was disoriented, in a fearful state, and could not understand what the officers wanted him to do. ECF 121-6 at 2:29:05 to 2:31:06 (Tubby: “What is happening? What is happening?” “I’m scared” “help me!”). Absent the ability to comply, Tubby actions are not a refusal to comply.

86. GBPD Officer Allen used the loud speaker and stated, “Jonathon, put your hands up.” Tubby did not comply and did not show officers his hands. Tubby stated, “What are you guys doing to me?” (Baynard Decl. ¶ 7, Ex. F, Squad 42 interior video at 2:29:02-2:29:07)

Response - Plaintiffs agree that officers on the scene directed Tubby to show his hands. ECF 121-6 at 2:29:15—2:31:03. Plaintiffs agree Tubby stated: “What are you guys doing to me?” before wailing “I’m sorry!” ECF 121-6 at 2:29:02—2:29:30. Plaintiffs dispute Tubby refused to comply with the officers’ directions. Tubby was disoriented, in his fearful state, and could not understand what the officers wanted him to do. Absent the ability to comply, Tubby actions are not a refusal to comply. ECF 121-6 at 2:30:53—2:31:06 (Tubby: “What is happening? What is happening?”).

87. At 9:09 p.m., GBPD Officer Allen stated, “Jonathon, put your hands up, bud, so I can see them. Come on, Jonathon.” Seconds later, GBPD Officer Allen stated, “Jonathon, we

don't want to hurt you. Put your hands up, bud. Come on, Jonathon.” (Baynard Decl. ¶ 7, Ex. F, Squad 42 interior video at 2:29:17-2:29:43)

Response: Not disputed.

88. At some point, GBPD Officer Allen could see Tubby's left hand outside of his shirt, but Tubby had not complied with repeated orders to show both his hands in order to demonstrate that both his hands were free of a weapon. (Baynard Decl. ¶ 14, Ex. M, E. Allen dep. pp. 78-85; see also Haack decl. ¶¶ 25-27)

Response: Plaintiffs agree that Officer Allen could see Tubby's left hand outside of his shirt. Plaintiffs dispute Tubby refused to comply with the officers' directions. Tubby was disoriented, in a fearful state, and could not understand what the officers wanted him to do. Absent the ability to comply, Tubby actions are not a refusal to comply. ECF 121-6 at 2:30:53—2:31:06 (Tubby: “What is happening? What is happening?”).

89. At 9:10 p.m., Tubby looked out the back window and GBPD Officer Allen stated, “Jonathan, put your hands up for me, bud.” Seconds later, GBPD Officer Allen stated, “Put your hands up for me, Jonathon. I can see that one is clear. Let me see your other hand. Let me see your other hand, bud.” Tubby did not comply and did not show both of his hands. (Baynard Decl. ¶ 7, Ex. F, Squad 42 interior video at 2:30:30-2:31:00)

Response: Plaintiffs agree that officers on the scene directed Tubby to show his hands. ECF 121-6 at 2:29:15—2:31:03. Plaintiffs dispute Tubby refused to comply with the officers' directions. Tubby was disoriented, moaning and crying in his fearful state, and could not understand what the officers wanted him to do. Absent the ability to comply, Tubby actions are not a refusal to comply. ECF 121-6 at 2:30:53—2:31:06 (Tubby: “What is happening? What is happening?”).

90. GBPD Officer Allen was handed a larger canister of OC spray because he did not believe the small pepper spray on duty belt would effectively reach Tubby in the back of squad 42. (Baynard Decl. ¶ 14, Ex. M, E. Allen dep. pp. 72, 74-75)

Response: Plaintiffs dispute Officer Allen used a large canister OC spray because he did not believe his duty-belt pepper spray would reach Tubby—a contention solely supported by Officer Allen’s self-serving testimony, not corroborated by other evidence in the record, and therefore subject to cross-examination at trial.

91. At 9:10:51 p.m., GBPD Officer Allen deployed oleoresin capsicum (OC) spray into the back window of the squad. Tubby held his shirt up to deflect the spray. Tubby still did not show both of his hands as instructed. Tubby yelled, “Fuck you, fuck you, fuck you,” and started bouncing up and down in the seat. (Baynard Decl. ¶ 7, Ex. F, Squad 42 interior video at 2:31:01-2:31:06; Baynard Decl. ¶ 10, Ex. I, Squad 53 video at 1:22:45-1:22:49; Baynard Decl. ¶ 14, Ex. M, E. Allen dep. p. 100)

Response: Plaintiffs agree that Officer Allen fired a stream of OC spray into Tubby’s face at around 9:10 p.m., ECF 121-6 at 2:31:00-24, creating a “torture chamber” that caused Tubby to scream and move about the squad car cabin. ECF 121-12 at 46:14-18. Plaintiffs dispute Defendants’ characterization of what Tubby yelled at that time. The words that he screamed are not discernable from the noise generated by Tubby’s intense reaction to the pain from the OC spray burning his eyes and skin. Plaintiffs further dispute that OC spray was deflected; rather, the spray hit Tubby directly in the face, as evidence by his strong reaction of pain, ECF 120-13 at 39:15—41:18; ECF 120-3 at 2:31:00—2:31:04, and later his blind stumbling about the sallyport, ECF 114-8 at 83:10—85:22, 86:20—88:10.

Tubby Erupts From the Rear Window and Rushes Towards the Sally Port Door

92. Tubby exited the rear window and got onto his knees on the trunk of squad 42. Tubby then got up onto his feet and stood on the trunk of squad 42, facing out towards officers, with his left hand cradled under his right hand, which was up under his shirt. (Baynard Decl. ¶ 10, Ex. I, Squad 53 video at 1:22:56-1:23:04; Baynard Decl. ¶ 17, Ex. P, Denney dep. pp. 146-148)



Response: Plaintiffs dispute Defendants’ characterization of Tubby’s escape from the suffocating environment of the squad car, which is captured in the recording filed at ECF 121-9 at 1:22:56—123:04. To flee the “torture chamber” created by the OC spray, ECF 121-12 at 46:14-18, Tubby, without any other means to surrender or end the torture, fled the vehicle through the broken rear window, Tahdooahnippah 2d Decl., Ex. 2 at 52:16—53:17. To do so, he dove through the opening in the shattered glass that had been cleared, stood up, was shot by a bean bag round in the abdomen, slipped and fell on the glass scattered across the rear hood of the car, and rolled off the car. ECF 121-9 at 1:22:56—123:04; ECF 121-16 at 146:4—148:7. Then, blinded by the OC spray (and again without any instructions on how to surrender or receive aid) Tubby fell to the ground, got up, stumbled, and ran into a parked van. ECF 114-8 at 83:10—85:22, 86:20—88:10. Plaintiffs dispute Defendants’ characterization of Tubby’s left hand “cradl[ing]” his right hand. The video speaks for itself, and it is the province of the jury to draw inferences and make characterizations based on the video.

93. As Tubby quickly jumped out of the rear squad window, GBPD Sgt. Denney assessed Tubby's hands to see if they were both visible and free of a weapon. Tubby's hands were not visible and GBPD Sgt. Denney discharged one round from a beanbag gun, which hit Tubby in the lower abdomen. (Baynard Decl. ¶ 17, Ex. P, Denney dep. pp.144-148; Baynard Decl. ¶ 10, Ex. I, Squad 53 video at 1:23:04-1:23:07)

Response: Plaintiffs dispute that Tubby's hands were not visible. The video evidence shows Tubby's empty left hand was visible to officers when the rear window was broken. ECF 120-3 at 2:30:49-56. Plaintiffs do not dispute that Tubby was hit by a beanbag in the lower abdomen.

94. The beanbag round caused Tubby to fall off squad 42, but did not stop him. (Baynard Decl. ¶ 17, Ex. P, Denney dep. pp. 148)

Response: Plaintiffs agree the beanbag round fired into Tubby's abdomen caused him to fall off the squad car. Plaintiffs dispute the Green Bay Defendants' suggestion that Tubby was not "stop[ped]," without any instructions on how to surrender or receive the help he had requested, Tubby stumbled through the sally port and into a parked van. ECF 114-8 at 83:10—85:22, 86:20—88:10.

95. After falling off the squad Tubby quickly got back on his feet and began to charge towards the open sally port door where Officer O'Brien and other officers were located. (Baynard Decl. ¶ 17, Ex. P, Denney dep. p. 148; see also Haack decl. ¶¶ 28-29)

Response: Plaintiffs dispute that Tubby began to charge towards the sally port door. Blinded by the OC spray (and again without any instructions on how to surrender or receive aid) Tubby fell to the ground, got up, stumbled, and ran into a parked van. ECF 114-8 at 83:10—85:22, 86:20—88:10.

96. Almost simultaneously, GBPD Officer Salzmänn was informed that Tubby was exiting the squad and was instructed by GBPD Officer Allen to deploy police canine Pyro. (Baynard Decl. ¶ 15, Ex. N, Salzmänn dep. p. 82; Baynard Decl. ¶ 14, Ex. M, E. Allen dep. pp. 100-101)

Response: Plaintiffs agree that Officer Salzmänn deployed the police canine Pyro to detain Tubby, but dispute that this occurred “almost simultaneously” with Tubby charging toward the door because Tubby did not charge as discussed in response to Paragraph 95. ECF 114-8 at 98:15—99:24.

97. GBPD Officer Salzmänn opened the back doors of the BearCat and canine Pyro, who was on a 15-foot lead, immediately jumped out and rounded the corner of the BearCat. As GBPD Officer Salzmänn rounded the corner of the BearCat behind Pyro, he saw Tubby stumbling backwards towards squad 42 with his hands concealed under his shirt. Tubby then started to run towards the blue transport van and towards the entrance of the sally port. (Baynard Decl. ¶ 15, Ex. N, Salzmänn dep. pp. 82-85)

Response: Disputed. Tubby’s did not conceal his hands under his shirt. His left hand was visible. ECF 120-3 at 2:30:49-56; see also ECF 120-6 at 128:15-24. When Tubby was engaged from behind by a police canine, GBPD Sergeant Thomas Denney positioned near the rear of his squad car and fired a “bean bag shotgun” at Tubby. ECF 114-8 at 98:15—99:24; ECF 114-4 at 148:13—149:13. The bean bag hit Tubby, and he fell to the ground—alive—with his head landing near the rear bumper of Denney’s squad car. See ECF 114-9 at 46:12—49:10 (testifying that Tubby fell to ground after being shot by officer with rifle near the rear of squad car); ECF 114-1 at 101:19—104:6 (Tubby alive when he fell to ground); ECF 114-10 at 0:09-0:10; see also ECF 114-11. The video evidence shows that as

Tubby fell to the ground, his arms extended away from his body and his empty right hand was revealed. ECF 114-10 at 0:09, ECF 120-7. Tubby's body (still alive) was then pulled backwards, ECF 114-10 at 0:09-0:10, by the police canine.

98. As Tubby ran around the transport van towards the sally port entrance, Pyro engaged Tubby in the buttock area. As Pyro engaged Tubby in the buttock area, GBPD Officer Salzmann pulled back on Pyro's lead to pull Tubby back and stop him from advancing towards the officers near the sally port entrance. (Baynard Decl. ¶ 15, Ex. N, Salzmann dep. pp. 98-100)

Response: Plaintiffs agree that the K9 Pyro engaged Tubby in the buttocks and secured him to stop him from advancing.

99. GBPD Sgt. Denney fired a second less lethal beanbag round at Tubby. (Baynard Decl. ¶ 17, Ex. P, Denney dep. p. 149; Baynard Decl. ¶ 15, Ex. N, Salzmann dep. p. 100)

Response: Plaintiffs agree that Sgt. Denney fired a second beanbag round at Tubby.

Officer O'Brien Perspective in the Moments Before the Shooting

100. Shortly after the OC was deployed into the back of the vehicle, Officer O'Brien heard a noise, and then saw Tubby "erupting" from the backseat of squad 42. (Baynard Decl. ¶ 2, Ex. A, O'Brien dep. pp. 129-130)

Response: These factual contentions are supported only by Officer O'Brien's self-serving deposition testimony, the veracity of which is called into questions by Officer O'Brien's changing story and history of dishonesty, as discussed above in response to Paragraphs 42 and 44, which responses are incorporated herein by reference.

101. As Tubby came out onto the trunk, Officer O'Brien could see Tubby's left hand, but could not see Tubby's right hand because it was concealed under his shirt behind his left hand. Officer O'Brien realized his position was not safe and retreated back to his position of cover. (Baynard Decl. ¶ 2, Ex. A, O'Brien dep. pp. 129-130)

Response: These factual contentions are supported only by Officer O'Brien's self-serving deposition testimony, the veracity of which is called into questions by Officer O'Brien's changing story and history of dishonesty, as discussed above in response to Paragraphs 42 and 44, which responses are incorporated herein by reference.

102. Officer O'Brien peeked back around the corner of the door jamb and saw Tubby in an upright position, leaning slightly forward as he rushed toward the sally port entrance door where Officer O'Brien and the other officers were located. (Baynard Decl. ¶ 2, Ex. A, O'Brien dep. pp. 133-134)

Response: These factual contentions are supported only by Officer O'Brien's self-serving deposition testimony, the veracity of which is called into questions by Officer O'Brien's changing story and history of dishonesty, as discussed above in response to Paragraphs 42 and 44, which responses are incorporated herein by reference.

103. Tubby's right hand was still concealed under his shirt and he rushed toward the sally port door. (Baynard Decl. ¶ 2, Ex. A, O'Brien dep. p. 133; Baynard Decl. ¶ 18, Ex. Q, Mleziva dep. pp. 36-37; Baynard Decl. ¶ 19, Ex. R, Winisterfer dep. pp. 48-50; Baynard Decl. ¶ 20, Ex. S, Dernbach dep. pp. 77-81; Haack decl. ¶ 29)

Response: Disputed, as discussed above in response to Paragraph 93, which response is incorporated herein by reference, Tubby's right hand became visible to officers. Moreover, the veracity of O'Brien's self-serving testimony is disputed given O'Brien's changing story and history of dishonesty, as discussed above in response to Paragraphs 42 and 44, which responses are incorporated herein by reference. The veracity of the other officers' testimony, such as Officer Wernecke, is also questionable due to the phenomenon known as the "blue wall of silence" where officers refuse to provide negative testimony that would harm another

officer. See Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. Pitt. L. Rev. 233, 234, 237–40 (1998); Olwyn Conway, *“How Can I Reconcile with You When Your Foot is On My Neck?”: The Role of Justice in the Pursuit of Truth and Reconciliation*, 2018 Mich. St. L. Rev. 1349, 1373–75, 1374 n.114 (2018); Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 Pepp. L. Rev. 245, 253–54 (2017). And, also the culture of dishonesty at the Green Bay Police Department. *E.g.*, 2d Tahdooahnippah Decl. Ex. 14 at 17, Ex. 21 at 80-81, 85-86, 87.

104. Officer O’Brien retreated back to his position of cover, and, simultaneously Tubby came back into Officer O’Brien’s line of sight from that position of cover. (Baynard Decl. ¶ 2, Ex. A, O’Brien dep. pp. 133-134, 138-139)

Response: These factual contentions are supported only by Officer O’Brien’s self-serving deposition testimony, the veracity of which is called into questions by Officer O’Brien’s changing story and history of dishonesty, as discussed above in response to Paragraphs 42 and 44, which responses are incorporated herein by reference.

105. Tubby’s hands were in front of his body as he rushed towards the sally port door and toward the officers located in the area of the sally port door. This concerned Officer O’Brien, because he believed Tubby was armed and would shoot through his clothing at him or other officers. (Baynard Decl. ¶ 2, Ex. A, O’Brien dep. p. 152)

Response: Disputed, as discussed above in response to Paragraph 93, which response is incorporated herein by reference, Tubby’s right hand became visible to officers. Moreover, the veracity of O’Brien’s self-serving testimony is disputed given O’Brien’s changing story and history of dishonesty, as discussed above in response to Paragraphs 42

and 44, which responses are incorporated herein by reference.

Moreover, at the time of the shooting, O'Brien could not have reasonably believed that Tubby "would shoot through his clothing at him or other officers," Tubby was face down on the ground and under the control of a police canine. ECF 114-9 at 46:12—49:10 (testifying that Tubby fell to ground after being shot by officer with rifle near the rear of squad car); ECF 114-1 at 101:19—104:6 (Tubby alive when he fell to ground); ECF 114-10 at 0:09-0:10; ECF 114-11. That Tubby was face down on the ground at the time of the shooting is corroborated by physical evidence. Tubby was shot through the back of his head, neck, and torso. 2d Tahdooahnippah Decl. Ex. 7. All of these shots were in a *downward* direction. ECF 112-1 at 15–17. In addition, Tubby had *pre-mortem* injuries to his chin consistent with falling face-first to the ground. ECF 114-12 at 81:19—82:9.

106. As Tubby was running with his hands concealed under his clothing, Officer O'Brien heard a "pop" sound and believed Tubby shot the gun he was concealing under his clothing. (Baynard Decl. ¶ 2, Ex. A, O'Brien dep. pp. 144-145)

Response: Disputed, as discussed above in response to Paragraphs 44, 93, and 105, which responses are incorporated herein by reference, O'Brien did not believe that Tubby was armed initially (O'Brien only that he saw "something," not a gun), Tubby's right hand became visible as he fell to the ground anyway, and, regardless of whether O'Brien thought he saw a gun, Tubby was in no position to cause harm he was laying facedown on the ground under the control of a police canine at the time that he was shot. Moreover, this Paragraph 106 relies entirely on O'Brien's own testimony for support, but the veracity of O'Brien's self-serving testimony is disputed given O'Brien's changing story and history of dishonesty, as discussed above in response to Paragraphs 42 and 44, which responses are incorporated

herein by reference.

Most significantly, whether or not O'Brien subjectively "believed Tubby shot the gun he was concealing" is irrelevant. The inquiry in this case is an objective one. The "inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, *without* regard to their underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 397 (1989) (emphasis added). Likewise, in order to prevent qualified immunity from being a "license to lawless conduct," qualified immunity is defined "essentially in objective terms." *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). Hearing a "pop" and shooting a blinded, subdued arrestee is not a reasonable course of conduct, particularly where the "pop" sounds nothing like a handgun. During the criminal investigation of O'Brien, many officers stated they could tell the difference between the sound of the "bean bag shot gun" (the source of the "pop") and the sound of a real handgun, and even described the differences (such as the "bean bag shotgun" being quieter). ECF 114-27 at BC_JCT000725, 727, 748, 780, 834, 847, 896, 903–04. Officers, including Officer O'Brien's own trainee, also testified that the two sounds are different—some going as far as to specifically say that it is *not* reasonable to mistake the two sounds. ECF 114-8 at 102:6—103:2, ECF 114-6 at 109:8—110:5; ECF 114-1 at 39:19—40:10; ECF 114-14 at 40:17-21; ECF 114-15 at 31:9-14.

107. Officer O'Brien observed Tubby's body was descending in a downward direction and his right hand was still concealed. (Baynard Decl. ¶ 2, Ex. A, O'Brien dep. pp. 144-145)

Response: Disputed, as discussed above in response to Paragraph 105, Tubby fell down *before* he was shot. ECF 114-9 at 46:12—49:10 (testifying that Tubby fell to ground after being shot by officer with rifle near the rear of squad car); ECF 114-1 at 101:19—104:6

(Tubby alive when he fell to ground); ECF 114-10 at 0:09-0:10; ECF 114-11. That Tubby was face down on the ground at the time of the shooting is corroborated by physical evidence. Tubby was shot through the back of his head, neck, and torso. 2d Tahdooahnippah Decl. Ex. 7. All of these shots were in a *downward* direction. ECF 112-1 at 15–17. In addition, Tubby had *pre-mortem* injuries to his chin consistent with falling face-first to the ground. ECF 114-12 at 81:19—82:9. Moreover, this Paragraph 107 relies entirely on O’Brien’s own testimony for support but the veracity of O’Brien’s self-serving testimony is disputed given O’Brien’s changing story and history of dishonesty, as discussed above in response to Paragraphs 42 and 44, which responses are incorporated herein by reference.

108. Tubby’s body was twisting to the left and he was looking across his body to the left and toward the officers that were located behind GBPD Sgt. Denney’s squad car. Officer O’Brien saw Tubby looking at those officers while his hands were still concealed and pointed right at the officers. Officer O’Brien perceived Tubby to be moving in a target acquisition manner, meaning that he was moving in a manner to acquire a target to shot. (Baynard Decl. ¶ 2, Ex. A, O’Brien dep. pp. 145)

Response: Disputed, as discussed above in response to Paragraphs 44, 93, and 105, which responses are incorporated herein by reference, O’Brien did not believe that Tubby was armed initially (O’Brien only that he saw “something,” not a gun), Tubby’s right hand became visible as he fell to the ground anyway, and, regardless of whether O’Brien thought he saw a gun, Tubby was in no position to cause harm he was laying facedown on the ground under the control of a police canine at the time that he was shot. Moreover, this Paragraph 108 relies entirely on O’Brien’s own testimony for support but the veracity of O’Brien’s self-serving testimony is disputed given O’Brien’s changing story and history of dishonesty, as

discussed above in response to Paragraphs 42 and 44, which responses are incorporated herein by reference.

109. The time between Tubby exiting the rear-window of squad 42 and Officer O'Brien shot was approximately 10 seconds. (Baynard Decl. ¶ 10, Ex. I, Squad 53 video at 1:23:02-1:23:17; Baynard Decl. ¶ 7, Ex. F, Squad 42 interior video at 2:31:16-2:31:26)

Response: Not disputed.

Officer O'Brien Believed Tubby was Armed

110. O'Brien believed that Tubby was in possession of a firearm at all times that he was present on the scene. Officer O'Brien never thought that Tubby was just pretending to be armed. Officer O'Brien is trained to err on the side of caution. (Baynard Decl. ¶ 2, Ex. A, O'Brien dep. pp. 67-69, 97)

Response: Disputed, as discussed above in response to Paragraphs 44, 93, 105, and 106, which responses are incorporated herein by reference, O'Brien did not believe that Tubby was armed: he observed the search of Tubby and did not claim Tubby was armed on his radio transmissions and to other officers, among other things; Tubby's right hand became visible as he fell to the ground anyway; regardless of whether O'Brien thought he saw a gun, Tubby was in no position to cause harm he was laying facedown on the ground under the control of a police canine at the time that he was shot; and, O'Brien subjective beliefs are irrelevant anyway—no objective officer would have thought Tubby was armed, another officer was directly beside O'Brien at the moment O'Brien claims he saw the "barrel" of a gun and the other officer saw nothing resembling a gun, which is supported by the video evidence of that moment.

Moreover, this Paragraph 110 relies entirely on O'Brien's own testimony for support but the veracity of O'Brien's self-serving testimony is disputed given O'Brien's changing

story and history of dishonesty, as discussed above in response to Paragraphs 42 and 44, which responses are incorporated herein by reference.

111. Because he feared for his safety and the safety of the other officers, Officer O'Brien believed he had no other force options available to him, and discharged his firearm at Tubby, and Tubby fell to the ground. (Baynard Decl. ¶ 2, Ex. A, O'Brien dep. p. 152)

Response: Disputed, as discussed above in response to Paragraphs 44, 93, 105, and 106, which responses are incorporated herein by reference, O'Brien did not believe that Tubby was armed: he observed the search of Tubby and did not claim Tubby was armed on his radio transmissions and to other officers, among other things; Tubby's right hand became visible as he fell to the ground anyway; regardless of whether O'Brien thought he saw a gun, Tubby was in no position to cause harm he was laying facedown on the ground under the control of a police canine at the time that he was shot; and, O'Brien subjective beliefs are irrelevant anyway—no objective officer would have thought Tubby was armed, another officer was directly beside O'Brien at the moment O'Brien claims he saw the “barrel” of a gun and the other officer saw nothing resembling a gun, which is supported by the video evidence of that moment, and no reasonable officer would have mistaken the “pop” of a “bean bag shotgun” for the sound of a real gun.

Moreover, this Paragraph 111 relies entirely on O'Brien's own testimony for support but the veracity of O'Brien's self-serving testimony is disputed given O'Brien's changing story and history of dishonesty, as discussed above in response to Paragraphs 42 and 44, which responses are incorporated herein by reference.

112. Officer O'Brien believed that Tubby posed an imminent threat at the moment he fired at Tubby. (Baynard Decl. ¶ 2, Ex. A, O'Brien dep. p. 143)

Response: Disputed, as discussed above in response to Paragraphs 44, 93, 105, and 106, which responses are incorporated herein by reference, O’Brien did not believe that Tubby was armed: he observed the search of Tubby and did not claim Tubby was armed on his radio transmissions and to other officers, among other things; Tubby’s right hand became visible as he fell to the ground anyway; regardless of whether O’Brien thought he saw a gun, Tubby was in no position to cause harm he was laying facedown on the ground under the control of a police canine at the time that he was shot; and, O’Brien subjective beliefs are irrelevant anyway—no objective officer would have thought Tubby was armed, another officer was directly beside O’Brien at the moment O’Brien claims he saw the “barrel” of a gun and the other officer saw nothing resembling a gun, which is supported by the video evidence of that moment, and no reasonable officer would have mistaken the “pop” of a “bean bag shotgun” for the sound of a real gun.

Moreover, this Paragraph 112 relies entirely on O’Brien’s own testimony for support but the veracity of O’Brien’s self-serving testimony is disputed given O’Brien’s changing story and history of dishonesty, as discussed above in response to Paragraphs 42 and 44, which responses are incorporated herein by reference.

113. Officer O’Brien believed that Tubby was armed at the moment he fired at Tubby. (Baynard Decl. ¶ 2, Ex. A, O’Brien dep. pp. 143-144)

Response: Disputed, as discussed above in response to Paragraphs 44, 93, 105, and 106, which responses are incorporated herein by reference, O’Brien did not believe that Tubby was armed: he observed the search of Tubby and did not claim Tubby was armed on his radio transmissions and to other officers, among other things; Tubby’s right hand became visible as he fell to the ground anyway; regardless of whether O’Brien thought he

saw a gun, Tubby was in no position to cause harm he was laying facedown on the ground under the control of a police canine at the time that he was shot; and, O'Brien subjective beliefs are irrelevant anyway—no objective officer would have thought Tubby was armed, another officer was directly beside O'Brien at the moment O'Brien claims he saw the “barrel” of a gun and the other officer saw nothing resembling a gun, which is supported by the video evidence of that moment, and no reasonable officer would have mistaken the “pop” of a “bean bag shotgun” for the sound of a real gun.

Moreover, this Paragraph 113 relies entirely on O'Brien's own testimony for support but the veracity of O'Brien's self-serving testimony is disputed given O'Brien's changing story and history of dishonesty, as discussed above in response to Paragraphs 42 and 44, which responses are incorporated herein by reference.

114. Officer O'Brien fired at Tubby because he perceived him as posing a deadly threat to himself, the other officers in the sally port and the general public if he were to successfully escape. (Baynard Decl. ¶ 2, Ex. A, O'Brien dep. pp. 143-144)

Response: Disputed, as discussed above in response to Paragraphs 44, 93, 105, and 106, which responses are incorporated herein by reference, O'Brien did not believe that Tubby was armed: he observed the search of Tubby and did not claim Tubby was armed on his radio transmissions and to other officers, among other things; Tubby's right hand became visible as he fell to the ground anyway; regardless of whether O'Brien thought he saw a gun, Tubby was in no position to cause harm he was laying facedown on the ground under the control of a police canine at the time that he was shot; and, O'Brien subjective beliefs are irrelevant anyway—no objective officer would have thought Tubby was armed, another officer was directly beside O'Brien at the moment O'Brien claims he saw the

“barrel” of a gun and the other officer saw nothing resembling a gun, which is supported by the video evidence of that moment, and no reasonable officer would have mistaken the “pop” of a “bean bag shotgun” for the sound of a real gun.

Moreover, this Paragraph 114 relies entirely on O’Brien’s own testimony for support but the veracity of O’Brien’s self-serving testimony is disputed given O’Brien’s changing story and history of dishonesty, as discussed above in response to Paragraphs 42 and 44, which responses are incorporated herein by reference.

In addition, the Green Bay Defendants cannot argue that O’Brien perceived a threat to the public because they did not identify this argument in their responses to Plaintiffs’ contention interrogatories, and also because Tubby had not committed any violent felonies. 2d Tahdooahnippah Decl. Ex. 31.

115. GBPD Sgt. Denney believed that at the moment Officer O’Brien discharged his firearm, Tubby presented an imminent threat of death or great bodily harm to himself and to all the officers in the area of the sally port. (Baynard Decl. ¶ 17, Ex. P, Denney dep. pp. 161-163)

Response: Disputed, Denney was never told that Tubby was armed. 2d Tahdooahnippah Decl. Ex. 9 at 105:2-7 (“no one told me ‘I saw a gun.’”). In addition, for the reasons discussed above in response to Paragraphs 44, 93, 105, and 106, which responses are incorporated herein by reference, officers, including Denney, could not have reasonably believed Tubby to be armed, saw that Tubby had been subdued, and therefore could not have thought himself to be in imminent danger. Any testimony that he would he perceived himself or other to be in imminent danger is merely an example of the “blue wall of silence,” false testimony to support another officer. See Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. Pitt. L. Rev.

233, 234, 237–40 (1998); Olwyn Conway, *“How Can I Reconcile with You When Your Foot is On My Neck?”: The Role of Justice in the Pursuit of Truth and Reconciliation*, 2018 Mich. St. L. Rev. 1349, 1373–75, 1374 n.114 (2018); Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 Pepp. L. Rev. 245, 253–54 (2017).

116. GBPD Officer Salzmann testified that there was an imminent danger of death or serious bodily harm to the officers standing by the sally port door at the point that Tubby was running towards the sally port door. This was based on the totality of the circumstances indicating that Tubby was armed. (Baynard Decl. ¶ 15, Ex. N, Salzmann dep. pp. 89-90, 93)

Response: Disputed. Officer Salzmann is not a credible witness—he believes civilians are his “enemies” and gets a commemorative tattoo every time that he kills one. 2d Tahdooahnippah Decl. Ex. 19 at 170:6-9, 176:3—177:25, 181:17—182:1. Moreover, Salzmann was present in the sallyport and did not use deadly force, ECF 114-27 at BC_JCT000891, an objective fact indicating that he did not perceive himself or others to be in imminent danger. Any testimony that he believed himself or others to be in imminent danger is merely an example of the “blue wall of silence,” false testimony to support another officer. See Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. Pitt. L. Rev. 233, 234, 237–40 (1998); Olwyn Conway, *“How Can I Reconcile with You When Your Foot is On My Neck?”: The Role of Justice in the Pursuit of Truth and Reconciliation*, 2018 Mich. St. L. Rev. 1349, 1373–75, 1374 n.114 (2018); Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 Pepp. L. Rev. 245, 253–54 (2017).

117. Tubby never did anything to demonstrate that he was not armed. Tubby's behavior and mannerisms when he exited the rear window of squad 42 demonstrated that he was concealing a weapon under his shirt and was running at officers. (Baynard Decl. ¶ 15, Ex. N, Salzmann dep. pp. 89-90, 93)

Response: Disputed, Tubby was not “running at officers,” but instead was stumbling around blinded by OC spray. ECF 114-8 at 83:10—85:22, 86:20—88:10. As discussed above in response to Paragraphs 44, 93, 105, and 106, which responses are incorporated herein by reference, no reasonable officer would have believed Tubby to be armed: Tubby was searched, the arresting officer was “confident” in that search, O’Brien not claim Tubby was armed on his radio transmissions or to other officers; Tubby’s right hand became visible as he fell to the ground; Tubby was in no position to cause harm he was laying facedown on the ground under the control of a police canine at the time that he was shot; the video evidence at the moment O’Brien claims he saw the “barrel” of a gun shows nothing of the sort, and no reasonable officer would have mistaken the “pop” of a “bean bag shotgun” for the sound of a real gun.

Moreover, this Paragraph 117 relies on the testimony of Officer Salzmann. As discussed above in Paragraph 116, Salzmann—an officer who gets tattoos every time he kills a civilian, is not a credible witness.

118. BCSO Deputy Joseph Mleziva perceived himself to be in imminent danger of death or seriously bodily harm at the time that Officer O’Brien fired his gun at Tubby. This was due to Tubby aggressively exiting the squad while believed to be possessing a weapon. (Baynard Decl. ¶ 18, Ex. Q, Mleziva Dep. 36-37)

Response: Disputed, Mleziva specifically testified that he *never* perceived Tubby to be armed

with a gun or pointing a gun at officers. 2d Tahdooahnippah Decl. Ex. 37 at 37:5-16. In addition, for the reasons discussed above in response to Paragraphs 44, 93, 105, and 106, which responses are incorporated herein by reference, officers, including Mleziva, could not have reasonably believe Tubby to be armed, saw that Tubby had been subdued, and therefore could not have thought himself to be in imminent danger. Moreover, Mleziva was actually in the sallyport at the time and did not use deadly force, ECF 114-27 at BC_JCT000891, an objective fact indicating that none he did not perceive himself or others to be in imminent danger. Any testimony that he perceived himself to be in imminent is merely an example of the “blue wall of silence,” false testimony to support another officer. *See* Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. Pitt. L. Rev. 233, 234, 237–40 (1998); Olwyn Conway, *“How Can I Reconcile with You When Your Foot is On My Neck?”: The Role of Justice in the Pursuit of Truth and Reconciliation*, 2018 Mich. St. L. Rev. 1349, 1373–75, 1374 n.114 (2018); Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 Pepp. L. Rev. 245, 253–54 (2017).

119. BCSO Deputy Nathan Winisterfer perceived himself to be in imminent danger of death or serious bodily harm in the moment before Officer O’Brien stepped in front of him and fired his weapon. This was due to his knowledge that Tubby presented to have a firearm concealed under his shirt, Tubby was running directly at him, and because none of the force applied to that point was successful in stopping Tubby. (Baynard Decl. ¶ 19, Ex. R, Winisterfer dep. pp. 48-50) **Response: Disputed,** Winisterfer specifically testified that he did not see a gun. ECF 120-32 at 46:21-23. In addition, for the reasons discussed above in response to Paragraphs 44, 93, 105, and 106, which responses are incorporated herein by reference, Winisterfer could not

reasonably believe Tubby to be armed, saw that Tubby had been subdued, and therefore could not have believed himself to be in imminent danger. Moreover, Winisterfer did not use deadly force, ECF 114-27 at BC_JCT000891, although he was armed with a gun in the sallyport, 2d Tahdooahnippah Decl. Ex. 36 at Tr. 55:20—56:15, an objective fact indicating that he did not perceive himself or others to be in imminent danger. Any testimony that he perceived himself to be in imminent danger is merely an example of the “blue wall of silence,” false testimony to support another officer. *See* Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. Pitt. L. Rev. 233, 234, 237–40 (1998); Olwyn Conway, “*How Can I Reconcile with You When Your Foot is On My Neck?*”: *The Role of Justice in the Pursuit of Truth and Reconciliation*, 2018 Mich. St. L. Rev. 1349, 1373–75, 1374 n.114 (2018); Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 Pepp. L. Rev. 245, 253–54 (2017).

120. BCSO Deputy Winisterfer feared that Tubby posed a safety threat to the general public because he was the last line of defense as exterior scene security, and if Tubby got past him then other individuals or citizens in the community could also be in danger. He feared that other law enforcement officers in the area were also in imminent danger of death or serious bodily harm. (Baynard Decl. ¶ 19, Ex. R, Winisterfer dep. pp. 49-51)

Response: Disputed, Winisterfer specifically testified that he did not see a gun. ECF 120-32 at 46:21-23. In addition, for the reasons discussed above in response to Paragraphs 44, 93, 105, and 106, which responses are incorporated herein by reference, Winisterfer could not reasonably believe Tubby to be armed, saw that Tubby was subdued, and therefore could not have thought that individuals or citizens in the community could be in danger. Moreover,

Winisterfer did not use deadly force, ECF 114-27 at BC_JCT000891, although he was armed with a gun in the sallyport, 2d Tahdooahnippah Decl. Ex. 36 at 55:20—56:15, an objective fact indicating that he did not perceive himself or others to be in imminent danger. Any testimony that he perceived a threat to the public is merely an example of the “blue wall of silence,” false testimony to support another officer. *See* Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. Pitt. L. Rev. 233, 234, 237–40 (1998); Olwyn Conway, *“How Can I Reconcile with You When Your Foot is On My Neck?”: The Role of Justice in the Pursuit of Truth and Reconciliation*, 2018 Mich. St. L. Rev. 1349, 1373–75, 1374 n.114 (2018); Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 Pepp. L. Rev. 245, 253–54 (2017).

121. BCSO Deputy Bradley Dernbach perceived himself to be in imminent danger of death or serious bodily harm at the time that Officer O’Brien fired his weapon. This was based on Tubby running toward Deputy Dernbach, who believed that Tubby possessed a gun. (Baynard Decl. ¶ 20, Ex. S, Dernbach dep. pp. 77-81)

Response: Disputed, Dernbach specifically testified that he did not believe Tubby was charging toward any officer (much less himself). 2d Tahdooahnippah Decl. Ex. 25 at 86:8-10. In addition, for the reasons discussed above in response to Paragraphs 44, 93, 105, and 106, which responses are incorporated herein by reference, Dernbach could not reasonably believe Tubby to be armed, saw that Tubby was subdued, and therefore could not have thought that he was in imminent danger. Moreover, Dernbach did not use deadly force, ECF 114-27 at BC_JCT000891, an objective fact indicating that he did not perceive himself or others to be in imminent danger. Any testimony that he would perceived himself to be in

imminent danger is merely an example of the “blue wall of silence,” false testimony to support another officer. *See* Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. Pitt. L. Rev. 233, 234, 237–40 (1998); Olwyn Conway, “How Can I Reconcile with You When Your Foot is On My Neck?": *The Role of Justice in the Pursuit of Truth and Reconciliation*, 2018 Mich. St. L. Rev. 1349, 1373–75, 1374 n.114 (2018); Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 Pepp. L. Rev. 245, 253–54 (2017).

122. BCSO Deputy Dernbach testified that would have shot Tubby if Officer O’Brien had not shot first. (Baynard Decl. ¶ 20, Ex. S, Dernbach dep. pp. 77-78)

Response: Not relevant and disputed. Dernbach did not use deadly force, ECF 114-27 at BC_JCT000891, an objective fact indicating that he did not perceive himself or others to be in imminent danger. Any testimony that he would have used deadly force is merely an example of the “blue wall of silence,” false testimony to support another officer. *See* Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. Pitt. L. Rev. 233, 234, 237–40 (1998); Olwyn Conway, “How Can I Reconcile with You When Your Foot is On My Neck?": *The Role of Justice in the Pursuit of Truth and Reconciliation*, 2018 Mich. St. L. Rev. 1349, 1373–75, 1374 n.114 (2018); Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 Pepp. L. Rev. 245, 253–54 (2017).

123. GBPD Sgt. Denney, GBPD Officer Merrill and GBPD Officer Christensen approached Tubby with a shield. Tubby still posed a threat even as he lay motionless on the ground

because his hand was concealed under his shirt and he was believed to still be armed. (Baynard Decl. ¶17, Ex. P, Denney dep. pp. 153-155)

Response: Plaintiffs dispute that Tubby still posed a threat, for the reasons discussed above in response to Paragraphs 44, 93, 105, and 106, which responses are incorporated herein by reference, the officer could have not reasonably believe Tubby to be armed, and saw that Tubby had been subdued. In addition, Tubby had been shot five times in the back of the head and back. ECF 112-1 at 15–17; 2d Tahdooahnippah Decl. Ex. 7.

124. GBPD Sgt. Denney, GBPD Officer Merrill and GBPD Officer Christensen used the shield to pin Tubby's hands to his chest so they could pull Tubby's hands down. (Baynard Decl. ¶ 17, Ex. P, Denney dep. pp. 153-155; Baynard Decl. ¶ 10, Ex. I, Squad 53 Video at 9:12:59 - 9:13:39)

Response: Not disputed.

125. It was not until this time that officers determined that Tubby did not have a gun. (Baynard Decl. ¶ 17, Ex. P, Denney dep. pp. 153-155)

Response: Disputed, for the reasons discussed above in response to Paragraphs 44, 93, and 105, which responses are incorporated herein by reference, the officers could have not reasonably believe Tubby to be armed at any time during the night of October 19, 2018.

126. After making sure Tubby was no longer a threat and was not armed, the officers conducted a pat down search. The jail nurse arrived and started performing CPR while GBPD Sgt. Denney and GBPD Officer Christensen took turns doing chest compressions until the rescue team responded. (Baynard Decl. ¶ 17, Ex. P, Denney dep. pp. 155-157)

Response: Not relevant to the Green Bay Defendants' Motion for Summary Judgment.

Investigation into the Tubby Shooting Incident

127. As is required in officer-involved shootings, investigators from Wisconsin Department of Justice Division of Criminal Investigation (DCI) arrived to the sally port within hours of the shooting to conduct an investigation. (Baynard Decl. ¶ 21, Ex. T, Brown County DA Report and Conclusions, p. 1)

Response: Not disputed.

128. The Dane County Medical Examiners Office took custody of Tubby's body from the sally port, and on October 20, 2018, Chief Medical Examiner Dr. Vincent Tranchida conducted Tubby's autopsy. (Baynard Decl. ¶ 22, Ex. U, Vincent Tranchida dep. pp. 13-20)

Response: Not disputed.

129. The toxicology screening of Tubby's femoral blood and urine indicated positive for the presence of Methamphetamine, THC, Methadone, Nicotine, Cotinine, Amphetamine, Alprazolam, Fentanyl, Norfentanyl, Morphine, Codeine, and Hydromorphone. (Baynard Decl. ¶ 22, Ex. U, Vincent Tranchida dep. pp. 42-47; 49-50; Baynard Decl. ¶ 23, Ex. V, Medical Examiner's Report pp. 5, 9-10.)

Response: Disputed, and inadmissible. Defendants have not disclosed the toxicologist that performed the analysis as an expert witness in this case, nor any other toxicologist that would be competent to testify as to the reliability of the methodology used for the toxicology or the laboratory conditions of the analysis. Admitting this evidence and allowing Defendants to offer the toxicology findings for the truth of the matter asserted would be fundamentally unfair to Plaintiffs, depriving them of the ability to know or test the reliability of the methodology used and the reliability of the application of the methodology.

Moreover, the presence of metabolites of tobacco (nicotine and cotinine) is irrelevant. ECF 120-30 at 53:11-16; ECF 120-25 at 212:6-16. Similarly, the presence of Amphetamine,

Alprazolam, Fentanyl, Norfentanyl, Morphine, Codeine, and Hydromorphone (all of which are prescription) in Tubby’s urine is irrelevant—urine tests show past consumption, not current intoxication at the time he died. ECF 120-30 at 50:4—51:10. What substances Tubby consumed in the past is irrelevant to why O’Brien shot and killed him on the night of October 19, 2018.

Finally, methadone and methamphetamine are available by prescription or can have false positive triggered by over the counter medicine, ECF 120-30 at 107:2-10; ECF 120-25 at 210:25—211:8, 212:21-25; <https://www.rxlist.com/desoxyn-drug.htm>; ECF 120-33 at 190:11-24, and the Green Bay Defendants have done nothing to analyze whether the positive test result was due to prescription or over the counter medicine use. ECF 120-25 at 210:25—211:8, 212:21-25.

130. Dr. Tranchida concluded that Tubby’s cause of death was “gunshot wounds of head, neck and torso and manner of death was “homicide (shot by police while resisting custody).” (Baynard Decl. ¶ 22, Ex. U, Vincent Tranchida dep. pp. 56-57; Baynard Decl. ¶ 23, Ex. V, Medical Examiner’s Report p. 10)

Response: Plaintiffs agree that the medical examiner concluded that Tubby’s cause of death was gunshot wounds of head, neck and torso and manner of death was homicide, but dispute that Tranchida has foundation to conclude that Tubby was “resisting custody.”

131. Dr. Tranchida noted an “acute intoxication due to the combined effects of methamphetamine and methadone.” Dr. Tranchida also noted signs of acute marijuana use and recent ingestion of Alprazolam, Fentanyl, morphine, codeine, and hydrocodone/hydromorphone. (Baynard Decl. ¶ 23, Ex. U, Tranchida dep. pp. 60-63; Baynard Decl. ¶ 23, Ex. V, Medical Examiner’s Report pp. 9-10)

Response: Disputed, as discussed above in response to Paragraph 129, which response is incorporated herein by reference, Tranchida has no foundation to testify regarding the toxicology report. He did not perform the analysis, and the toxicologist was never disclosed as an expert witness, depriving Plaintiffs of any discovery related to the toxicology. Moreover, “recent ingestion” is irrelevant, and the Green Bay Defendants have not offered any proof that the “acute intoxication” cited was not the result of prescription medicine use.

132. The WI DCI concluded its investigation on November 16, 2018 and turned its investigative file over to the Brown County District Attorney David Lasee to determine if any criminal charges would be filed against Officer O’Brien. (Baynard Decl. ¶ 21, Ex. T, Brown County DA Report, p. 1)

Response: Not relevant to the Green Bay Defendants’ Motion for Summary Judgment, or any of the claims or defenses.

133. The Brown County District Attorney investigated the shooting and concluded in part that Officer O’Brien did not commit any criminal wrongdoing and was justified in using deadly force when he shot Tubby. (Baynard Decl. ¶ 21, Ex. T, Brown County DA Report, p. 27)

Response: Not relevant to the Green Bay Defendants’ Motion for Summary Judgment, or any of the claims or defenses.

Plaintiffs Policy and Practice Claims

GBPD Officer Training

134. All Wisconsin certified sworn police officers, including all Green Bay Police Officers, are trained on the Wisconsin DAAT Manual. (Baynard Decl. ¶ 24, Ex. W, Knetzger dep. p. 38)

Response: Not disputed.

135. At that time of the October 19, 2018 Tubby incident, the Green Bay Police Department had a policy and trained its officers on constitutional uses of force. (Baynard Decl. ¶ 25, Ex. X, Warych dep. pp. 105-120; Baynard Decl. ¶ 26, Ex. Y, Use of Force Procedures from the Green Bay Police Department Policy Manual; Baynard Decl. ¶ 27, Ex. Z, Green Bay Police Department Policy No. 300 - Use of Force; Baynard Decl. ¶ 24, Ex. W, Knetzger dep. pp. 43-44)

Response: Disputed, Green Bay does not train officers on how to handle a missed firearm during a search. ECF 117 at 17—20.

136. At that time of the October 19, 2018 Tubby incident, the Green Bay Police Department Policy 303.4 trained officers that the use of deadly force is justified in the following circumstances:

- (a) An officer may use deadly force to protect him/herself or others from what he/she reasonably believes would be an imminent threat of death or serious bodily injury.
- (b) An officer may use deadly force to stop a fleeing subject when the officer has probable cause to believe that the person has committed, or intends to commit, a felony involving the infliction or threatened infliction of serious bodily injury or death, and the officer reasonably believes that there is an imminent risk of serious bodily injury or death to any other person if the subject is not immediately apprehended. Under such circumstances, a verbal warning should precede the use of deadly force, where feasible.

Imminent does not mean immediate or Instantaneous. An imminent danger may exist even if the suspect is not at that very moment pointing a weapon at someone. For example, an imminent danger may exist if an officer reasonably believes any of the following:

- 1. The person has a weapon or is attempting to access one and it is reasonable to believe the person intends to use it against the officer or another.
- 2. The person is capable of causing serious bodily injury or death without a weapon and it is reasonable to believe the person intends to do so.

With a subject presenting an imminent threat of great bodily harm or death to the officer or others and other intervention options being exhausted or clearly ineffective, the Green Bay Police Department directs its officers to stop the subject's actions by using deadly force.

(Baynard Decl. ¶ 27, Ex. Z, Green Bay Police Department Policy No. 300, Section 300.4)

Response: Not relevant to the Green Bay Defendants' Motion for Summary Judgment. Plaintiffs do not allege that Green Bay's training on use of deadly force was constitutionally deficient.

137. At the time of the October 19, 2018 Tubby incident, the Green Bay Police Department had a policy and trained its officers on scenarios involving barricaded subjects. (Baynard Decl. ¶ 24, Ex. W, Knetzger dep. p. 28; Baynard Decl. ¶ 25, Ex. X, Warych dep. pp. 76-79; Baynard Decl. ¶ 28, Ex. AA, Green Bay Police Department Policy No. 409 - Hostage and Barricade Incidents)

Response: Disputed, Green Bay does not train officers on how to handle a missed firearm during a search. ECF 117 at 17—20.

138. At the time of the October 19, 2018 Tubby incident, the Green Bay Police Department trained its officers on scenarios involving armed individuals in confined spaces and tactics related to isolating the potential threat, setting up perimeters and in order to minimize harm to everybody involved within the area. (Baynard Decl. ¶ 24, Ex. W, Knetzger dep. pp. 25-28)

Response: Disputed, Green Bay does not train officers on how to handle a missed firearm during a search. ECF 117 at 17—20.

139. At the time of the October 19, 2018 Tubby incident, the Brown County Sheriff's Department had jurisdictional control over the sally port of the Brown County Jail. (Baynard Decl. ¶ 3, Ex. B, Smith dep. p. 14; Baynard Decl. ¶ 29, Ex. BB, Green Bay Police Department Operation Division Memorandum regarding County owned property; Baynard Decl. ¶ 30, Ex. CC, Green Bay Police Department Memorandum; Baynard Decl. ¶ 12, Ex. K, Zeigle Deposition p. 172)

Response: Plaintiffs agree that the Brown County Sheriff's Department asserted

jurisdictional control over the sally port of the Brown County Jail on October 19, 2018, and that GBPD assented to that jurisdictional control. Plaintiffs disagree with Paragraph 139 the extent it asserts that GBPD policies or procedures do not apply to GBPD officers while they are within the Brown County Jail. ECF 121-27 (GBPD memorandum regarding county-owned property, specifying that BCSO takes calls at the jail but not that GBPD policies do not apply to GBPD officers at the jail); 2d Tahdooahnippah Decl. Ex. 15 at 14:12-20.

GBPD Use of Force Complaints

September 6, 2010

140. The Green Bay Police Department received a use of force complaint regarding a September 6, 2010 incident involving Officer Brad Strouf. (Baynard Decl. ¶ 3, Ex. B, Smith dep. p. 17)

Response: Not disputed.

141. The September 6, 2010 incident was investigated by the Green Bay Police Department Professional Standards Division and former Chief of police James Arts issued Officer Strouf a 10-day unpaid suspension. (Baynard Decl. ¶ 3, Ex. B, Smith dep. pp. 21-25)

Response: Not disputed that a ten-day suspension was imposed, Plaintiffs dispute that this was adequate discipline, particularly because Strouf was found to have been dishonest. ECF 114-29 ¶ 3-4.

April 19, 2014

142. The Green Bay Police Department received a use of force complaint regarding an April 2014 incident involving Officer Derek Wicklund. (Baynard Decl. ¶ 3, Ex. B, Smith dep. pp. 67-69)

Response: Not disputed.

143. The April 2014 incident was investigated internally by the Green Bay Police Department and externally by the State of Wisconsin Department of Criminal Investigations. The investigations concluded that Officer Wicklund's use of force was not excessive or improper. (Baynard Decl. ¶ 3, Ex. B, Smith dep. pp. 68-69)

Response: Plaintiffs do not dispute that the investigations concluded the use of force was excessive, but dispute the merits of whether the force was excessive. As is shown in the video evidence, Officer Wicklund charged an unarmed man who was backing away, threw him to the ground, and began punching him in the face and head. Ex. 20; Ex. 15 67:10-17. To conceal Wicklund's excessive use of force, a fellow officer attempted to prevent a witness from recording the incident. Ex. 20 at 0:23.

February 26, 2017

144. The Green Bay Police Department internal affairs department investigated the matter a use of force complaint relating to a February 26, 2017 incident, which involved a high-risk traffic stop initiated by former Green Bay Police Officer Michael Rahn. (Baynard Decl. ¶ 3, Ex. B, Smith dep. p. 31- 33; Baynard Decl. ¶ 31, Ex. D, Internal Investigation - Use of Force Administration Investigation Case No. 17I-000005)

Response: Not disputed.

145. As a result of the investigation, two Green Bay Police Officers who were on scene during the high-risk stop and one Patrol Lieutenant were also disciplined relating the February 26, 2017 incident. (Baynard Decl. ¶ 3, Ex. B, Smith dep. pp. 36)

Response: Not disputed that minimal discipline was imposed, Plaintiffs dispute that this was adequate discipline, particularly because Strouf was found to have been dishonest. ECF 114-29 ¶ 3-4.

146. Michael Rahn, the former Green Bay Police officer who initiated the high risk traffic stop, resigned during the investigation. (Baynard Decl. ¶ 3, Ex. B, Smith dep. pp. 31- 32, 36) November 5, 2017

Response: Not disputed.

147. Chief Smith was made aware of a use of force complaint that occurred December of 2017 that involved Officer Alex Carlson. The complaint was investigated and it was determined that Officer Carlson acted reasonably in detaining a highly intoxicated subject and using a minor level of force. (Baynard Decl. ¶ 3, Ex. B, Smith dep. pp. 73-75)

Response: Not disputed.

January 15, 2018

148. Chief Smith was made aware of a use of force complaint relating to a January 15, 2018 incident involving Captain Florence, Lieutenant Belanger, and Lieutenant Brester. The Green Bay Police Department's internal affairs department investigated the matter. (Baynard Decl. ¶ 3, Ex. B, Smith dep. pp. 55-63, Baynard Decl. ¶ 32, Ex. EE, Internal Investigation - Public Recording of Law Enforcement Investigation Case No. 18-000001)

Response: Not disputed.

149. As a result of the investigation, Lieutenant Belanger received a letter of reprimand, Lieutenant Brester received a 1-day unpaid suspension, and Captain Florence received an oral warning. (Baynard Decl. ¶ 3, Ex. B, Smith dep. pp. 58-62, ; Baynard Decl. ¶ 33, Ex. FF, Belanger Discipline Letter and Brester Discipline Letter, pp. 55-59, 59-63, 63-68)

Response - Not disputed that minimal discipline was imposed, Plaintiffs dispute that this was adequate discipline, particularly given the blatant unconstitutional conduct, see 2d Tahdooahnippah Decl. Ex 26.

II. PLAINTIFFS' STATEMENT OF FACTS REQUIRING DENIAL OF SUMMARY JUDGMENT

The Green Bay Police Department Has a Widespread Practice of Excessive, and Often Deadly, Force Enabled by a Culture of Dishonesty.

1. Green Bay officers use force hundreds of times each year, and the proportion of police encounters that result in the use of force is going up. ECF 114-21 at 122.

2. On September 6, 2010, GBPD Officer Brad Strouf used excessive force against Anthony Basler, who was then unarmed and subdued, when Strouf punched Basler in the head with a closed fist and also punched him in the testicles. Tahdooahnippah 2d Decl., Ex. 14 at 1, 17.

3. In response to a citizen complaint against Officer Strouf for excessive use of force, Officer Strouf lied to omit any mention of striking Basler in the head or testicles, Tahdooahnippah 2d Decl., Ex. 14 at 1, 17, received only a ten-day suspension and is still employed by the GBPD today. *Id.* at 25; Tahdooahnippah 2d Decl., Ex. 15 at 29:17-19.

4. On April 21, 2007, GBPD officers shot Ben Sonnenberg, who was unarmed, in the back and killed him after GBPD stopped him in a traffic stop and Sonnenberg ran out of the car after first refusing commands to exit the vehicle. Tahdooahnippah 2d Decl., Ex. 16 at 2–3.

5. Officers claimed they mistook the sound of a cellphone clicking shut as the sound of a gunshot to justify their use of deadly force against an unarmed suspect, and the officers that killed Sonnenberg faced no discipline. Tahdooahnippah 2d Decl., Ex. 17 at 48:9-18; Ex. 16 at 2.

6. In another deadly shooting in 2011, GBPD officers responded to a call of a suicidal man (David Spencer), ended up killing the man, and then claimed that he committed “suicide by cop” by pointing a gun at them. 2d Tahdooahnippah Decl. Ex. 18 at 2–4.

7. To commemorate Officer Salzmann’s involvement in the killings of Sonnenberg and Spencer, Officer Salzmann tattooed himself with two eagle feathers with red dots representing

the killing of an “enemy,” with one feather representing Sonnenberg and the other representing Spencer. 2d Tahdooahnippah Decl. Ex. 19 at 170:6-9, 176:3—177:25, 181:17—182:1, 182:18-22

8. When Plaintiffs raised the issue in this litigation, Green Bay first denied the significance of the tattoos, *see* ECF 75 at 5 (calling suggestion that tattoos celebrated shooting civilians “absurd[.]” and “baseless”), and then simply asked Salzmänn to simply cover the tattoos, 2d Tahdooahnippah Decl. Ex. 19 at 180:5-17 (apparently so that no one else would see them and realize a GBPD officer celebrated his use of deadly force).

9. In April 2014, Officer Derek Wicklund responded to profanity directed towards him by a citizen, Josh Wentzal, by charged at Wentzal, throwing him to the ground, and punching him in the face and head. *See generally* 2d Tahdooahnippah Decl. Ex. 15 at 69:9-15; 2d Tahdooahnippah Decl. Ex. 20; 2d Tahdooahnippah Decl. Ex. 15 67:10-17.

10. To conceal Wicklund’s excessive use of force, a fellow officer attempted to prevent a witness from recording the incident, 2d Tahdooahnippah Decl. Ex. 20 at 0:23, and GBPD never disciplined Wicklund who continues to serve as a Green Bay Police Officer today. 2d Tahdooahnippah Decl. Ex. 15 at 68:18—69:19.

11. In February of 2017, two GBPD police officers Tasered and tackled Carl McDuffie, the passenger of a vehicle detained during a traffic stop, after he extended his middle finger to police. 2d Tahdooahnippah Decl. Ex. 21 at 11. *Id.*

12. These officers then wrote false police reports to justify their use of excessive force, in which one officer falsely claimed that McDuffie told the officers to “shoot him,” and falsely claimed that McDuffie refused to exit the vehicle and exhibited pre-attack posture. *Id.* at 80–81.

13. A different officer also wrote a report that falsely “made it seem like McDuffie was uncooperative and some sort of extreme danger to the officers,” *id.* at 85–86, and another officer attempted to corroborate the false story that McDuffie asked officers to “shoot him.” *Id.* at 87.

14. After the investigation concluded the officers used excessive force and made false reports, GBPD only gave the officers five-day suspensions as discipline, 2d Tahdooahnippah Decl. Exs. 22-24, and several of those officers continue to be employed by the GBPD today. 2d Tahdooahnippah Decl. Ex. 15 at 52:12-14, 54:3-5.

15. In 2018, GBPD officers accosted Scott Kosbab while he was conducting a First Amendment audit of the Department, 2d Tahdooahnippah Decl. Ex. 27 at 5, by grabbing Kosbab’s sleeve and throwing him to the ground. 2d Tahdooahnippah Decl. Ex. 26 at 11:37—12:15; 2d Tahdooahnippah Decl. Ex. 27 at 64. To justify this excessive use of force, the Lieutenant claimed he saw Kosbab move towards police property, but this claim was not corroborated by the video evidence. *Id.* at 64–65.

16. GBPD investigated Kosbab’s claim of excessive force and gave the officer that threw the man to the ground a *de minimis* a one day suspension and “exonerated” the officer that assisted the Lieutenant in carrying out the excessive force. *See id.* at 60.

17. Officer O’Brien was never disciplined for his shooting and killing of Tubby but was instead promoted from Officer to Sergeant after the shooting. 2d Tahdooahnippah Decl. Ex. 6 200:3-6.

18. GBPD’s Rule 30(b)(6) deponent testified that it was permissible under the Department’s policies to use deadly force against someone with their arms pinned and unmovable. 2d Tahdooahnippah Decl. Ex. 1 at 117:6-15.

Jonathon Tubby Was Shot While Unarmed, Handcuffed, Facedown, and Subdued by A Police Canine.

19. Tubby was arrested on the night of October 19, 2018 for non-violent offenses. ECF 83, ¶¶ 19, 21; ECF 86, ¶¶ 19, 21; ECF 114-1 at 54:13—56:4; ECF 120-1 at 54:7-9.

20. Officer Erik O'Brien knew that Tubby was unarmed, because he personally observed Officer Colton Wernecke thoroughly search Tubby at the time of his arrest, ECF 114-1 at 54:13—56:4; 2d Tahdooahnippah Decl. Ex. 10 at 48:21—49:3, 54:23-25.

21. Specifically, Officer Wernecke searched Tubby incident to the arrest, found no weapons, was “confident” in the search, and Officer O'Brien personally observed that Tubby did not have a weapon, as confirmed by the search. 2d Tahdooahnippah Decl. Ex. 10 at 48:21—49:3, 54:23-25, 131:24—132:2.

22. Officer O'Brien also knew Tubby could not access any weapons after he was placed in Officer Wernecke's squad car—as Wernecke's field training officer, O'Brien was responsible for ensuring Wernecke searched the squad prior to leaving the police station, *id.* at 50:19—51:8, 51:23—52:11, and no one else had been in the rear of the squad car that day, *id.* at 53:15-23.

23. After Officers Wernecke and O'Brien took Tubby to the sallyport of the Brown County Jail, Officer Wernecke asked Tubby to step out of the vehicle, Tubby refused, Officer Wernecke then attempting to pull Tubby's foot out of the car, after which Tubby said: “I'll fucking do it.” ECF 120-3 at 1:44:50-1:45:21.

24. Officers Wernecke and O'Brien did not ask Tubby what he meant when he said “I'll fucking do it.” *Id.*

25. Shortly after Tubby stated “I'll fucking do it,” Officer O'Brien shut the door and radioed police dispatch to tell them that “it look[ed] like” Tubby had “something,” ECF 114-28 at 00:00—00:11, but did not claim he had seen Tubby with a gun. *See* 2d Tahdooahnippah Decl. Ex. 9 at 105:2-7 (“no one told me ‘I saw a gun.’”).

26. GBPD officers are trained to specifically say “gun” (not “something”) if they think they see a gun when responding to an incident. ECF 114-17 at 101:7-13; 2d Tahdooahnippah Decl. Ex. 13 at 54:16-25.

27. Officer O’Brien did not see the barrel of a gun when the rear door of the squad car was opened, prior to him shutting it. Video footage of this exact moment exists, and it shows Tubby crouched over with his hands under his shirt.



ECF 114-22 at 1:44:52—1:45:11. Officer Wernecke, who was immediately adjacent to O’Brien at the time the squad car door was opened, testified that he saw Tubby with his hands under his shirt and did not see a gun, much less the barrel of a gun. ECF 114-1 at 65:14—66:8, 69:5-8.

28. Officers on the scene did not interpret O’Brien’s claim to have seen “something” to mean that Tubby had a gun, because they did not follow GBPD policies and procedures for responding to an incident involving an armed suspect. Specifically, (1) officers brought “ride-alongs” to the sallyport (bringing a “ride-along” would be prohibited in responding to the scene of

an armed subject), and one of whom even recorded the scene with a cell phone (also inconsistent with a fear of being shot by an armed subject); (2) Officer Wernecke specifically stated he was “confident” in his search that uncovered no weapons on Tubby’s person; and (3) the officers mulling about the sallyport while the events unfolded had their weapons holstered, evincing body language starkly inconsistent with there being a deadly threat feet away. ECF 114-4 at 10:25—11:18, 160:2-23, 179:14—181:1; ECF 114-17 at 101:24—102:6, 103:16-23; ECF 114-27 at BC JCT000778-780; 2d Tahdooahnippah Decl. Ex. 35 at 0:00-6:30.

29. Dozens of officers from both GBPD and Brown County Sheriff’s Office arrived at the scene heavily armed, bringing with them a beanbag shotgun, a large canister of OC spray, four canines, and an armored vehicle (the “Bearcat”), among other things. ECF 120-27 16:24—20:8; 29:2-12; ECF 120-15 at 74:23—75:13, 76:2-15; ECF 120-13 at 34:42.

30. The officers on scene broke the rear window of the squad car, and could clearly see Tubby’s empty *left* hand. ECF 120-3 at 2:30:49-56; *see also* 2d Tahdooahnippah Decl. Ex. 6 at 128:15-24.

31. Tubby then began pleading for help, saying: “help me!,” “what are you doing to me?,” “I’m scared.” ECF 120-3 at 2:29:05—2:30:00.

32. Rather than asking Tubby what was wrong (for instance, it may have been that his hands were stuck in his shirt due to the handcuffs), a GBPD officer propelled a stream of OC spray into his face using a device typically used for crowd control, ECF 120-13 at 41:03—41:18; ECF 120-3 at 2:31:00—2:31:04; ECF 120-17 ¶ 75.

33. GBPD officers provided no warning to Tubby that they would spray him in the face with OC spray, and did not explain to him how to properly surrender so he could receive the help he was requesting. ECF 120-3 at 2:31:00—2:31:04.

34. The OC spray in the vehicle created a “torture chamber” effect, 2d Tahdooahnippah Decl. Ex. 5 at 46:14-18, and Tubby, without any other means to surrender or end the torture, was forced to flee the OC spray-ridden vehicle through the broken rear window, 2d Tahdooahnippah Decl. Ex. 2 at 52:16—53:17.

35. As a Green Bay officer acknowledged, forcing a purportedly armed person outside of a secured car into an open area is dangerous. *See* Ex. 2d Tahdooahnippah Decl. 10 at 117:1-4; *see also* 2d Tahdooahnippah Decl. Ex. 9 141:19-24. To do so is “just a really bad plan.” 2d Tahdooahnippah Decl. Ex. 5 at 123:19.

36. If officers on the scene believed Tubby to be armed, forcing him from the car and allowing him to stumble around the sallyport was extremely indifferent to his safety as it would be highly foreseeable that a perimeter officer would shoot him—particularly since perimeter officers were *not told* that he would be forced from the vehicle. ECF 120-15 at 66:4-25; ECF 120-4 at 106:12-18; ECF 120-8 at 68:2-22.

37. Blinded by the OC spray and without any instructions on how to surrender or receive aid, Tubby fell to the ground, got up, stumbled, and ran into a parked van. ECF 114-8 at 83:10—85:22, 86:20—88:10.

38. Tubby was then engaged from behind by a police canine, *Id.* at 98:15—99:24, and shortly thereafter, GBPD Sergeant Thomas Denney positioned himself near the rear of his squad car and fired a “bean bag shotgun” at Tubby. ECF 114-4 at 148:13—149:13.

39. The bean bag hit Tubby, and he fell to the ground, alive, with his head landing near the rear bumper of Sgt. Denney’s squad car. *See* ECF 114-9 at 46:12—49:10 (testifying that Tubby fell to ground after being shot by officer with rifle near the rear of squad car); ECF 114-1 at 101:19—104:6 (Tubby alive when he fell to ground); ECF 114-10 at 0:09-0:10; ECF 114-11.

40. The video evidence shows that as Tubby fell to the ground, his arms extended away from his body, displaying his empty right hand. ECF 114-10 at 0:09, ECF 120-7.

41. Tubby's body (still alive) was then pulled backwards, ECF 114-10 at 0:09-0:10, by the police canine. After both of Tubby's hands had been revealed to be empty, and after a police canine secured control of Tubby's body while he had fallen to the ground, Officer O'Brien opened fire—shooting Tubby five times. ECF 112-1 at 15–17; 2d Tahdooahnippah Decl. Ex. 7.

42. Prior to the time that Officer O'Brien shot Tubby, Tubby had been subdued by the GBPD, brought to the ground by a police canine and beanbag. The video evidence, ECF 114-10 at 0:09-0:10 (recording Tubby, still alive, being pulled backwards by the police canine), Officer Wernecke's testimony about the video, ECF 114-1 at 101:19—104:6, and autopsy results all show that Tubby hit the ground *before* the fatal shots were fired, ECF 112-1 at ECF page 3.

43. At the time Officer O'Brien shot Tubby, Tubby was unarmed. ECF 114-16 at 18 (“Tubby did not have a weapon”); ECF 112-1 at ECF page 4 (noting the possessions on Tubby's person at the time of his death).

44. At the time Officer O'Brien shot Tubby, Tubby was handcuffed. ECF 112-1 at ECF page 12 (autopsy report detailing Tubby's were “handcuffed... and double locked”).

45. At the time Officer O'Brien shot Tubby, Tubby was facedown. 2d Tahdooahnippah Decl. Ex. 7 (showing the location of the shots in the back of Tubby's head, neck, and torso); ECF 112-1 at 15–17 (establishing that all of the shots that penetrated Tubby's body were in a downward direction); ECF 114-12 at 81:19—82:9 (noting that Tubby had *pre-mortem* injuries to his chin consistent with falling face-first to the ground).

46. At the time Officer O'Brien shot Tubby, Tubby was under control of a police canine. ECF 114-8 at 98:15—100:23; ECF 114-10 at 0:09—0:10 (recording Tubby, still alive, being pulled backwards by the police canine).

47. At the time Officer O'Brien shot Tubby, Tubby was blinded by OC spray. ECF 114-22 at 2:30:50—2:31:35; ECF 121-6 at 1:22:30—1:23:10, ECF 114-8 at 83:10—85:22, 86:20—88:10.

48. At the time Officer O'Brien shot Tubby, Tubby was outnumbered twenty-to-one by police. ECF 114-27 at BC JCT000675 to BC JCT000678.

49. Tubby did not die instantly, but instead, suffered as he lay dying on the concrete floor of the sallyport. Ex. 8 at 79:22—80:1.

50. Green Bay's Rule 30(b)(6) deponent testified it is clearly established that deadly force cannot be used against a person under control of law enforcement. 2d Tahdooahnippah Decl. Ex. 13 at 37:9-25.

51. Despite the presence of dozens of officers on the scene, including several standing directly next to O'Brien, no other officer fired his or her weapon. ECF 114-27 at BC_JCT000891.

52. The physical evidence corroborates that Tubby was face down on the ground at the time he was shot; Tubby was shot through the back of his head, neck, and torso, Ex. 7, all of these shots were in a *downward* direction, ECF 112-1 at 15–17, Tubby had *pre-mortem* injuries to his chin consistent with falling face-first to the ground, ECF 114-12 at 81:19—82:9.

53. Officer O'Brien was the only officer that fired, ECF 114-27 at BC_JCT000891, and none of the other officers on scene (of which there were dozens) felt any subjective threat.

54. The Tubby incident lasted approximately forty minutes, and officers had hours more they could have used to negotiate with Tubby prior to forcing him from the vehicle. ECF 120-8 at 75:24—76:25.

55. As a Green Bay officer acknowledged, common sense dictates that you should not force an armed person outside of a secured car into an open area. *See* 2d Tahdooahnippah Decl. Ex. 10 at 117:1-4; *see also* 2d Tahdooahnippah Decl. Ex. 9 141:19-24. To do so is “just a really bad plan.” 2d Tahdooahnippah Decl. Ex. 5 at 123:19.

To Avoid Liability for the Shooting, Officer O’Brien Changes His Story And Falsely Claims to Have Seen A Gun.

56. Shortly after the shooting, O’Brien said he shot Tubby because he mistook the sound of the “bean bag shotgun” for the sound of a lethal handgun. ECF 114-13 at 10. *See also* ECF 112-1 at 3 (“supposedly there was a loud popping sound and an Officer reacted by firing.”).

57. The night of the shooting, and several days later, the *sole reason* given by Officer O’Brien for the shooting was mistaking the sound of the “bean bag shotgun” for a real gun. ECF 114-13 at 10; ECF 112-1 at 3.

58. The sound of the discharge of a “bean bag shotgun” is different from the sound of a lethal firearm. Several officers confirmed the distinct differences in sound between shots fired by a “bean bag shotgun” and a real handgun in their depositions. ECF 114-8 at 102:6—103:2, ECF 114-6 at 109:8-110:5; ECF 114-1 at 39:19—40:10.

59. Multiple officers, including Officer O’Brien’s own trainee, testified that the two sounds are different, and a number of officers stated it is not reasonable to mistake the two sounds. ECF 114-8 at 102:6—103:2, ECF 114-6 at 109:8-110:5; ECF 114-1 at 39:19—40:10; ECF 114-14 at 40:17-21; ECF 114-15 at 31:9-14.

60. During the investigation by the Wisconsin Division of Criminal Investigation (“DCI”), several officers noted they could tell the difference between the sound of “bean bag shotgun” and sound of a real handgun. *E.g.*, ECF 114-27 at BC_JCT000725, 727, 748, 780, 834, 847, 896, 903–04.

61. After the DCI made their report public, Officer O’Brien then changed his story and instead claimed that he saw the “barrel” of a gun under Tubby’s shirt when he and Wernecke opened the rear door of the squad, ECF 114-5 at 37:10-18, 39:19—42:11, and fired because he thought Tubby pointed the “barrel” at him, 2d Tahdooahnippah Decl. Ex. 6 at 134:18—135:9, or at other officers, *id.* at 143:20—144:6.

62. Officer Wernecke, who was standing directly beside O’Brien at that exact moment, testified that he never saw a barrel shape or anything else that would have led him to believe Tubby to be armed. ECF 114-1 at 65:17—66:8, 69:5-8.

63. Officer O’Brien’s potential to reasonably believe Tubby was armed was negated by his observation of Tubby’s empty hands prior to firing the fatal shots. The video evidence shows Tubby’s empty left hand was visible to officers when the rear window of the squad was broken. ECF 120-3 at 2:30:49-56. Video evidence also shows—as a Green Bay officer agreed—a hand extending above Tubby’s head as he fell to the ground. ECF 120-8 at 184:18—185:10. This hand is empty, and given the perspective of the video, Tubby is facing away from the camera, the hand must be his right hand. ECF 114-10 at 0:09, ECF 120-7.

64. O’Brien has a history of dishonesty. When O’Brien applied to become a police officer, his employment application specifically asked him to disclose “*ALL instances* in which you were convicted of a crime (misdemeanors or felonies), ordinance violations, traffic violations and the like. . . . Failure to include *all information* requested under this section may result in denial

of employment. Use additional sheets if necessary.” ECF 114-20 at DOXT00000723 (capitalization in original, italics added). At the time, O’Brien had been convicted of disorderly conduct after he had threatened a store clerk, ECF 114-5 at 211:7—212:20, but did not disclose this conviction—instead listing only three speeding tickets. ECF 114-20 at DOXT00000723.

65. Officer O’Brien’s employment application also instructed him to provide his “complete work history.” ECF 114-20 at DOXT00000726 (emphasis in original), and admonished him to “[b]e sure to clearly document your work history monthly, including periods of unemployment (ie, unemployed, in school, etc.) **Incomplete work histories will not be considered.** Attach extra sheets if necessary.” *Id.* (bolded lettering contained in original).

66. Officer O’Brien omitted from his application that he was in the Army National Guard from 2004 to 2005 but was discharged due to depression, Ex. 28; ECF 114-5 at 9:3-4, 11:16—24; Ex. 6 at 217:24—219:3, because he was fearful that his lack of an honorable discharge would harm his prospects. *Id.* at 216:20—217:9.

67. Not only did Officer O’Brien omit his military service, he also affirmatively lied, stating that he had been “unemployed but was a full time stay at home parent to a [redacted] spouse” during the time he was in the military. ECF 114-20 at DOXT00000726.

68. GBPD Lieutenant Nathan Allen testified that such omissions could be disqualifying, and stated “[t]hat’s bad” that Officer O’Brien omitted and deliberately concealed important employment and criminal history from his application. Ex. 5 at 134:11-20, 136:5-19.

69. GBPD Chief of Police agreed that the questions concerning Officer O’Brien’s dishonesty should be brought to the GBPD Internal Affairs supervisor. Ex. 15 at 100:16—101:2.

Green Bay Spoliates Evidence in This Case.

70. Plaintiffs commenced this action on January 24, 2019, ECF 1, and a duty to

preserve evidence unquestionably arose on that date for the Green Bay Defendants.

71. Green Bay never issued a litigation hold. Ex. 29 at 13:7-15.

72. On February 25, 2019, GBPD destroyed O'Brien's cell phone, as well as those cell phones formerly belonging to other patrol officers on scene, and replaced them with new cell phones. Ex. 30; ECF 104-3 ¶¶ 9-11.

73. The destroyed phones were capable of taking videos, photos, and sending text messages, and during the relevant timeframe, O'Brien (and other officers) used those phones to send photos and messages. ECF 104-2; 104-3 ¶ 6.

Dated: December 2, 2020.

By /s/ Forrest Tahdooahnippah
Forrest Tahdooahnippah (MN Bar 0391459)
forrest@dorsey.com
Skip Durocher (WI Bar 1018814)
durocher.skip@dorsey.com
Jack Huerter (WI Bar 1098170)
huerter.jack@dorsey.com

DORSEY & WHITNEY LLP
Suite 1500, 50 South Sixth Street
Minneapolis, MN 55402-1498 Telephone:
(612) 340-2600
Facsimile: (612) 340-2868

David R. Armstrong (WI Bar 1070205)
david.armstrong4@gmail.com
8975 Westchester Dr. Manassas,
VA 20112

Attorneys for Plaintiffs