

No. 21-2101

IN THE
United States Court of Appeals
FOR THE SEVENTH CIRCUIT

SUSAN DOXTATOR, ARLIE DOXTATOR, AND SARAH
WUNDERLICH, AS SPECIAL ADMINISTRATORS OF THE ESTATE OF
JONATHON TUBBY,

Plaintiffs-Appellants,

v.

ERIK O'BRIEN, ANDREW SMITH, TODD J. DELAIN, HEIDI MICHEL,
CITY OF GREEN BAY, BROWN COUNTY, JOSEPH P. MLEZIVA,
NATHAN K. WINISTERFER, THOMAS ZEIGLE, AND JOHN DOES 1-
5,

Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of
Wisconsin, No. 1:19-cv-00137
Hon. William C. Griesbach, District Judge

APPELLANTS' SEPARATE APPENDIX

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CIRCUIT RULE 30(D) CERTIFICATION

I hereby certify this separate appendix includes all materials required by Cir.R.
30(d).

Dated: November 3, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2021, I electronically filed Appellant's Separate Appendix with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: November 3, 2021

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Screenshots from DOXT_0000585

1. Prior to Tubby entering the frame, the rear bumper of the car is unobstructed



[continued on next page]

2. After Tubby enters the frame, the flesh of his right hand can be seen by the bumper



Screenshots of ECF 120-3 at 1:44:52—1:45:11



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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

- - - - -

SUSAN DOXTATOR, ARLIE DOXTATOR,
and SARAH WUNDERLICH, as Special
Administrators of the
Estate of Jonathon C. Tubby,

Plaintiffs,

vs. Case No. 1:19-cv-00137-WCG

ERIK O'BRIEN, ANDREW SMITH,
TODD J. DELAIN, HEIDI MICHEL,
CITY OF GREEN BAY, BROWN COUNTY,
JOSEPH P. MLEZIVA, NATHAN K. WINISTERFER,
THOMAS ZEIGLE, BRADLEY A. DERNBACH,
and JOHN DOES 1-5,

Defendants.

- - - - -

Deposition of ERIK O'BRIEN
Thursday, December 19, 2019
9:05 a.m. to 4:07 p.m.

Reported by Jennifer M. Steidtmann, RPR, CRR, CRC

<p style="text-align: right;">Page 6</p> <p>1 versus uh-huh, un-huh.</p> <p>2 Does that make sense?</p> <p>3 A I understand.</p> <p>4 Q You're not -- and you're not a captive in this room.</p> <p>5 If you need to take a break for any reason, just let</p> <p>6 me know, and I'll do my best to indulge you. The</p> <p>7 only thing that I would typically ask is if there's a</p> <p>8 question pending, like if I've asked you a question,</p> <p>9 that you just answer it, and then we can take a</p> <p>10 break.</p> <p>11 Sound fair to you?</p> <p>12 A I understand.</p> <p>13 Q You have a right to understand my questions. If for</p> <p>14 some reason you don't understand my question, ask</p> <p>15 that you just ask me to clarify. And if you don't</p> <p>16 ask me to clarify, I'm going to assume that you</p> <p>17 understood the question.</p> <p>18 Fair enough?</p> <p>19 A I understand.</p> <p>20 Q Is there anything about today in particular that</p> <p>21 would make it -- that would prevent you from</p> <p>22 testifying truthfully?</p> <p>23 A No.</p> <p>24 Q Anything about today that would prevent you from</p> <p>25 testifying accurately?</p>	<p style="text-align: right;">Page 8</p> <p>1 yesterday.</p> <p>2 Q And I don't -- were you ever -- like today you're</p> <p>3 sworn in under oath, right?</p> <p>4 A Correct.</p> <p>5 Q Were you sworn in under oath on October 25th when you</p> <p>6 gave this interview?</p> <p>7 A No.</p> <p>8 Q But notwithstanding that, you told the truth on the</p> <p>9 25th about everything that happened?</p> <p>10 A Correct.</p> <p>11 Q The contents of this Exhibit 6 is all truthful?</p> <p>12 A Correct.</p> <p>13 Q If you flip to the second page of the exhibit.</p> <p>14 A Second page excluding the cover page, page 2 of</p> <p>15 document?</p> <p>16 Q The second page of the exhibit, the one of that says</p> <p>17 page 1 at the bottom.</p> <p>18 A Okay.</p> <p>19 Q You go down about one, two, three, four paragraphs,</p> <p>20 it says, "Officer O'Brien was hired as a patrol</p> <p>21 officer with the GBPD in December 2012."</p> <p>22 Do you see that?</p> <p>23 A Yes.</p> <p>24 Q All right. Next sentence, if you skip a sentence, it</p> <p>25 says, "Officer O'Brien was in the U.S. Army."</p>
<p style="text-align: right;">Page 7</p> <p>1 A No.</p> <p>2 (Exhibit 6 marked for identification.)</p> <p>3 BY MR. TAHDOOAHNIPPAH:</p> <p>4 Q I'm going to hand you what's been marked as Exhibit</p> <p>5 No. 6.</p> <p>6 Do you recognize Exhibit No. 6?</p> <p>7 A Yes.</p> <p>8 Q All right. What is Exhibit 6?</p> <p>9 A It is the Wisconsin Department of Justice DCI</p> <p>10 interview of myself that took place on October 25,</p> <p>11 2018.</p> <p>12 Q And after this interview happened, a special agent</p> <p>13 with DCI wrote this document, correct?</p> <p>14 A That is correct.</p> <p>15 Q And you had a chance to review it and make</p> <p>16 corrections?</p> <p>17 A That is correct.</p> <p>18 Q And you reviewed it again today in preparation for</p> <p>19 your deposition?</p> <p>20 A This day I did not review it.</p> <p>21 Q But you reviewed it in preparation for your</p> <p>22 deposition today, right?</p> <p>23 A That is correct.</p> <p>24 Q And when did you review it in particular?</p> <p>25 A The last time that I reviewed this would have been</p>	<p style="text-align: right;">Page 9</p> <p>1 Do you see that?</p> <p>2 A Yes.</p> <p>3 Q Okay. Were you in the U.S. Army?</p> <p>4 A Yes.</p> <p>5 Q Okay. When did you join the Army?</p> <p>6 A Immediate recollection, I don't have an exact date in</p> <p>7 mind.</p> <p>8 Q Okay.</p> <p>9 A Do you have a document you would like to provide me</p> <p>10 to refresh my memory?</p> <p>11 Q I don't.</p> <p>12 Do you have any idea when you were in the</p> <p>13 Army, about how old you were, about what year it</p> <p>14 was, or is that just totally vacant from your</p> <p>15 recollection?</p> <p>16 A Without looking at the document, I would not want to</p> <p>17 answer that question because I don't know that I</p> <p>18 would answer it accurately.</p> <p>19 Q All right. When did you graduate from high school?</p> <p>20 A In 1993.</p> <p>21 Q All right. About how long after high school did you</p> <p>22 join the Army?</p> <p>23 A Over a decade.</p> <p>24 Q Okay. What did you do in that decade as far as work</p> <p>25 or education?</p>

<p style="text-align: right;">Page 10</p> <p>1 A A great number of things.</p> <p>2 Q All right. What was your first? Start right out of</p> <p>3 high school. What was your first step as far as</p> <p>4 career or education goes?</p> <p>5 A I had enrolled in Mesa Community College immediately</p> <p>6 after high school.</p> <p>7 Q Okay. Where is that?</p> <p>8 A In Mesa, Arizona.</p> <p>9 Q Okay. Did you graduate from Mesa?</p> <p>10 A I did not.</p> <p>11 Q What was your next career or education step?</p> <p>12 A I worked -- I do not want to provide you with an</p> <p>13 inaccurate answer as to which jobs I held during</p> <p>14 which time periods, and I do not have my resume in</p> <p>15 front of me.</p> <p>16 Q All right. Just give me a general sense about what</p> <p>17 types of industries you worked in, what types of jobs</p> <p>18 you held between 1993 and the time you joined the</p> <p>19 Army.</p> <p>20 A Okay. I worked in the automotive industry for a</p> <p>21 company. That was Sun Automotive Group in</p> <p>22 Scottsdale, Arizona. I worked at AT&T Communications</p> <p>23 as an account representative. I was a stay-at-home</p> <p>24 father from 1999 until I believe it was about -- I</p> <p>25 would say approximately five years.</p>	<p style="text-align: right;">Page 12</p> <p>1 A I don't know the exact definition for what that</p> <p>2 means.</p> <p>3 Q Okay. Why did you leave the Army?</p> <p>4 A So my discharge was for pre-existing medical</p> <p>5 conditions.</p> <p>6 Q Okay. What were those medical conditions?</p> <p>7 A I had depression.</p> <p>8 Q Okay. Anything else?</p> <p>9 A No.</p> <p>10 Q So after -- well, while you were in the Army,</p> <p>11 obviously you received firearms training?</p> <p>12 A Correct.</p> <p>13 Q Did you ever have any interest in law enforcement</p> <p>14 within the Army, like join the military police or</p> <p>15 anything like that?</p> <p>16 A No.</p> <p>17 Q Did you receive any training with respect to any sort</p> <p>18 of less-than-lethal implements, TASERs, bean bag</p> <p>19 guns, anything like that?</p> <p>20 A Through the Army?</p> <p>21 Q Yeah, through the Army.</p> <p>22 A No.</p> <p>23 Q All right. After the Army, what was -- what did you</p> <p>24 do?</p> <p>25 A I went to school.</p>
<p style="text-align: right;">Page 11</p> <p>1 Q All right. Anything else, just generally speaking?</p> <p>2 A I might have held miscellaneous employment in retail</p> <p>3 during that time period.</p> <p>4 Q All right. Other than Mesa Community College, did</p> <p>5 you attend any educational institutions before</p> <p>6 joining the Army?</p> <p>7 A No.</p> <p>8 Q All right. Did you join the Army after being a</p> <p>9 stay-at-home father, or did you have employment in</p> <p>10 between?</p> <p>11 A Correct.</p> <p>12 Q Okay. So you joined the Army maybe 2004 or so?</p> <p>13 A It was around that time period.</p> <p>14 Q And about how old were you at that time?</p> <p>15 A 29.</p> <p>16 Q All right. How long did you serve in the Army?</p> <p>17 A It was a brief period.</p> <p>18 Q Okay. When you say "brief", are we talking about</p> <p>19 more or less than a year?</p> <p>20 A Active duty time, less than one year.</p> <p>21 Q What rank did you attain?</p> <p>22 A I was a Private First Class.</p> <p>23 Q All right. Did you receive an honorable discharge?</p> <p>24 A I received a discharge without condition.</p> <p>25 Q Okay. What does that mean?</p>	<p style="text-align: right;">Page 13</p> <p>1 Q And is that at New Mexico State?</p> <p>2 A Let me clarify. I returned from the Army and</p> <p>3 continued my role as a stay-at-home parent and then</p> <p>4 enrolled in college.</p> <p>5 Q All right. About when did you start at -- in</p> <p>6 college?</p> <p>7 A I would say I initially enrolled in 2005 is my</p> <p>8 belief.</p> <p>9 Q All right. And you got a bachelor's degree in</p> <p>10 education from New Mexico State?</p> <p>11 A Bachelor's of science degree in elementary education,</p> <p>12 yes.</p> <p>13 Q Okay. Did you go to just New Mexico State, or did</p> <p>14 you move around to get that education degree?</p> <p>15 A The entire degree was through New Mexico State</p> <p>16 University.</p> <p>17 Q All right. Did you then become a teacher?</p> <p>18 A That is correct.</p> <p>19 Q Where did you teach at?</p> <p>20 A I taught at Heights Elementary School, H-E-I-G-H-T-S.</p> <p>21 Q Where is that?</p> <p>22 A In Alamogordo, New Mexico.</p> <p>23 Q All right. At some point in time, you started</p> <p>24 studying for your master's degree?</p> <p>25 A Correct.</p>

<p style="text-align: right;">Page 26</p> <p>1 particular, are you saying that you don't remember 2 whether you observed him search the vehicle, or that 3 you did not observe him? 4 A I have no specific recollection of -- of observing 5 him that specific day search the vehicle. 6 Q So does that -- 7 A I do know it was a pattern -- I'm sorry. Go ahead. 8 Q So does that mean you don't remember? 9 A Correct. 10 Q All right. But you had observed him searching the 11 vehicle on several occasions? 12 A I have. 13 Q And you hadn't seen any sort of mistakes that he was 14 making? 15 A No. 16 Q And it was your job to observe what he was doing and 17 correct any mistakes? 18 A Correct. 19 Q And you on October 19, 2018, even if you didn't 20 observe everything that he was doing, you certainly 21 knew that he had searched the vehicle? 22 A Correct. 23 Q All right. Prior to the time that Jonathon Tubby is 24 arrested, had anyone been in the vehicle? 25 A Other than Colton and I?</p>	<p style="text-align: right;">Page 28</p> <p>1 made to arrest Mr. Tubby; is that right? 2 A Correct. 3 Q And who made that decision? 4 A I don't -- I do not believe there was an overt 5 declaration of who was making that decision. 6 Q Uh-huh. 7 A I believe all the officers on scene were aware that a 8 criminal offense was observed by officers and, 9 therefore, the parties would be taken into custody 10 under arrest. 11 Q And what was that criminal offense in particular? 12 A Marijuana was located inside of the vehicle or 13 observed inside of the vehicle. 14 Q All right. So you suspect that you observed 15 marijuana. 16 So at that point, there's just a collective 17 unspoken consensus that both of these people will be 18 arrested? 19 A The understanding that those people would be 20 arrested. 21 Q All right. Who took Mr. Tubby out of the vehicle? 22 A Officer Wernecke directed Mr. Tubby out of the 23 vehicle. 24 Q All right. Who handcuffed Mr. Tubby? 25 A Officer Wernecke.</p>
<p style="text-align: right;">Page 27</p> <p>1 Q Right. 2 A No. 3 Q All right. At some point you initiate a traffic stop 4 of someone that you later learned is named Jonathon 5 Tubby, right? 6 A Officer Wernecke initiated the traffic stop, but that 7 would be correct. 8 Q Did you exit the vehicle with Officer Wernecke? 9 A We exited the vehicle at a -- about the same time. 10 Q Okay. And Officer Wernecke went to the driver's 11 side? 12 A That is correct. 13 Q Okay. Did you follow him to the driver's side, or 14 did you position yourself somewhere else? 15 A My recollection is that I went to the passenger's 16 side of the vehicle. 17 Q All right. And at some point in time, Officer Haack 18 arrived? 19 A Correct. 20 Q Why was that? 21 A We had requested a cover officer, which is a common 22 practice for us on traffic stops where the vehicle 23 does not immediately come to a stop or soon after the 24 activation of lights come to a stop. 25 Q All right. At some point in time the decision is</p>	<p style="text-align: right;">Page 29</p> <p>1 Q And you assisted him in that? 2 A Yes. 3 Q All right. And how did you assist him? 4 A As Mr. Tubby -- excuse me. As Mr. Tubby exited the 5 vehicle, his left hand was up by the door frame of 6 the vehicle as he began his exit. I reached and 7 grabbed his left hand to help assist, put it behind 8 his back, so Officer Wernecke could then facilitate 9 handcuffing. 10 Q All right. The procedures of the Green Bay Police 11 Department for searches incident to arrest, you 12 search the person after they're handcuffed? 13 A That is how we train it, yes. 14 Q Okay. Do you train people to search directly after 15 they're handcuffed, or are they supposed to handcuff 16 them and then wait a few minutes and then search 17 them? 18 A The instruction would be to handcuff and then 19 properly position the individual for a search and 20 then conduct your search. 21 Q Okay. In this -- in the case of Mr. Tubby, how 22 shortly after the handcuffing did -- was he searched? 23 A I do not know. 24 Q You don't know or you don't remember? 25 A I -- I do not recall specific time frames.</p>

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1 BY MR. TAHDOOAHNIPPAH:
 2 Q Yeah. Sorry. And that's my fault because you
 3 testified you didn't know whether there was actually
 4 a formal transportation policy, right?
 5 A That is correct.
 6 Q You just said that as far as you know, you just know
 7 that they train to have the transporting officer
 8 conduct his own or her own search, right?
 9 A The transporting officer does perform a search of the
 10 person. If they are handed off to them from another
 11 officer, they reconfirm the search. If that's your
 12 question, the answer is yes.
 13 Q Okay. Knowing that, did you ever consider searching
 14 Mr. Tubby yourself?
 15 A No, I did not consider searching Mr. Tubby myself.
 16 Q And why not?
 17 A I had faith in Officer Wernecke's training to that
 18 point on the search that I observed him perform in my
 19 periphery, and it is not common practice for the
 20 field training officer to repeat everything that a
 21 trainee does. I believe that would be a poor
 22 educational practice.
 23 Q All right. After Mr. Tubby is searched, is he placed
 24 in the vehicle?
 25 A He is placed in Officer Wernecke's squad car, yes.

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1 Q All right. And at some point, you and Officer
 2 Wernecke transport him to the Brown County Jail?
 3 A Officer Wernecke operates the squad, and I am in the
 4 passenger seat, that is correct.
 5 Q Okay. While you were in the passenger seat, did you
 6 ever look back and observe what Mr. Tubby was doing?
 7 A I do recall looking back through the partition.
 8 Q Okay. Did you see him putting his handcuffs in front
 9 of his body?
 10 A I did not see that.
 11 Q When you were looking back, did you observe anything
 12 suspicious?
 13 A Nothing suspicious. Mr. Tubby was leaning forward in
 14 the back of the squad car. It appeared that he was
 15 resting the front of his head against the partition
 16 that separates the officers from the suspects in the
 17 back of the vehicle. And that's -- that's all I
 18 remember observing.
 19 And I recall asking Mr. Tubby if he was
 20 okay, and I did not receive a response, or I didn't
 21 hear his response.
 22 Q There's a camera in the -- that records the back of
 23 the squad car, right?
 24 A That is correct.
 25 Q Can you observe what's going on through, like, a

Page 36

1 screen in the -- in the front of the squad?
 2 A It is possible to change the camera view on the
 3 camera system to observe that.
 4 Q Okay. Did you do that on October 19th?
 5 A I do not believe we did.
 6 Q Okay. So you didn't observe anything through any
 7 sort of electronic means?
 8 A That night?
 9 Q As far as looking in the back of the squad car.
 10 A On that evening?
 11 Q Yeah.
 12 A No.
 13 Q You get to the Brown County Jail.
 14 What happens next?
 15 A Are you saying when we arrived on the property?
 16 Q Yeah.
 17 A Okay. So we arrive on the property. Officer
 18 Wernecke begins to pull around the driveway area
 19 towards the sally port entrance. He asks me if
 20 anyone else had sent a booking sheet over, which is a
 21 sheet that is sent over electronically from our squad
 22 cars. I informed him that I don't think anyone else
 23 did, so that was going to be his job to send that
 24 over.
 25 So he pulled over and stopped the squad

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1 outside of the sally port entrance driveway and
 2 performed the completion of the booking form, which
 3 is a series of questions that get asked, as well as
 4 name information and charge information that gets
 5 e-mailed over to the booking area at the Brown County
 6 Jail.
 7 Q All right. Officer Wernecke completed the booking
 8 form?
 9 A That is correct.
 10 Q Okay. What happens after he finishes?
 11 A He pulls up to the speaker box outside of the Brown
 12 County Jail, announces our presence, and the door to
 13 the sally port is opened for us to enter.
 14 Q All right. And then you pull into the sally port?
 15 A Officer Wernecke pulls into the sally port, parks in
 16 a parking spot on the right -- what would be our
 17 right-hand side immediately next to a blue transport
 18 van in the sally port.
 19 Q Okay. Did the sally port door close behind you?
 20 A It would have at some point. That is standard
 21 procedure. I don't know if it closed immediately
 22 behind us or what time frame it closed, but I do
 23 recall that it was closed.
 24 Q Do you know, is that something that is, like, an
 25 automated process, or is there someone that's pushing

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1 buttons somewhere to open and close it?

2 A I quite honestly have no idea the function of that

3 door.

4 Q All right. You pull in.

5 What happens next?

6 A So Officer Wernecke exits the driver's side of the

7 squad car and opens the trunk. I am still seated in

8 the front passenger seat of the squad car. I am

9 completing some notes for Officer Wernecke's daily

10 observation report in regards to the incident we were

11 just on.

12 A brief period of time passes while

13 Officer Wernecke's at the trunk of the squad where he

14 is removing all of his lethal items and nonlethal

15 items such as OC, TASER, baton, firearm, additional

16 rounds, magazines, and any knives or anything like

17 that from his person. That is standard procedure for

18 us to place those in the back of the squad car.

19 Shortly after Officer Wernecke goes to the

20 back of the squad, I exit my side of the squad, shut

21 the passenger door, come around to the back of the

22 squad where I also begin to remove all of my items:

23 baton, firearm.

24 Q All right. At this point in time when you are

25 removing your items to place in the trunk --

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1 A Uh-huh.

2 Q -- did you perceive any threat or danger from

3 Mr. Tubby?

4 A No.

5 Q And if you had perceived such a threat, would you

6 still have removed all your items?

7 A No.

8 Q All right. You didn't remove all of your items.

9 You kept a backup weapon in your pocket?

10 A For clarification, I was still in the process of

11 removing items from my person --

12 Q Okay.

13 A -- when there was movement in the squad and Officer

14 Wernecke caught my attention.

15 Q All right. So if that hadn't happened, you would

16 have taken your backup weapon out of your pocket and

17 put it in the trunk, also?

18 A Correct.

19 Q All right. So you didn't do that because you

20 observed something.

21 What did you observe?

22 A So as I was still removing my items from my person

23 and putting them in the back of the squad car or,

24 sorry, in the trunk of the squad car, Officer

25 Wernecke had moved over to the driver's side, had

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1 opened up the rear passenger door and had asked

2 Mr. Tubby to step out of the vehicle.

3 I don't know if he asked once or twice.

4 And, again, this is happening in my periphery. I'm

5 standing at the rear of the vehicle facing the opened

6 trunk. Officer Wernecke is to my left. So in my

7 peripheral vision, I see Officer Wernecke.

8 Officer Wernecke, again, had given an

9 instruction to step out of the vehicle. I did not

10 see anybody stepping out of the vehicle or moving --

11 I did not see Mr. Tubby stepping out of the vehicle

12 or moving to step out of the vehicle.

13 And I observed Officer Wernecke. It looks

14 like he appeared to bend down and reach into the

15 vehicle at which point I see some movement in the

16 squad through the rear windshield.

17 I -- it was just movement. That's all I

18 could describe it as. The vehicle shifts slightly,

19 and Officer Wernecke appears startled and retracts

20 slightly and looks toward me. He looks a little bit

21 confused.

22 Q All right. What did you do next?

23 A I wasn't sure what had taken place, so I took the two

24 and a half, three steps over to Officer Wernecke's

25 immediate right where Officer Wernecke was standing

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1 in the open door frame of the squad car. So I was

2 immediately to his right, and I begin to look down

3 into the squad car to see what's going on.

4 Q And what did you see?

5 A So from this perspective, I'm looking into the rear

6 open door of the squad car. My eyesight immediately

7 falls to the feet because it is the most readily

8 available area. As I begin to lower my point of

9 view, I can then see higher into the squad, if that

10 makes sense.

11 My point of view begins at Mr. Tubby's

12 feet and works -- works their way up towards his legs

13 and to his waistband area, at which point I noticed

14 that I do not see Mr. Tubby's hands behind his back,

15 which would be normally where I would see a subject's

16 hands. My eye -- my eye line of sight begins to --

17 continues to follow up along his shoulder line.

18 I also observe that Mr. Tubby's shoulders

19 are -- appear to be hunched forward, which again is

20 contrary to what I would normally observe. Someone

21 whose hands are handcuffed behind their back, their

22 shoulders tend to be pulled back.

23 At this time Officer Wernecke says to me,

24 asks a question or asks a question of me or in

25 general, Are his hands in front of him?

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1 At this point my eyesight is still
 2 climbing up Mr. Tubby. I observe Mr. Tubby is leaned
 3 back in a reclined position away from the open squad
 4 door, leaning back away from me. I observe what I
 5 believe to be the barrel of a gun protruding from
 6 Mr. Tubby's shirt underneath his clothing. It is
 7 pressed up creating tension in the clothing. It
 8 appears cylindrical in nature, and it is flat on top.
 9 It does not appear to me to be a finger or other
 10 instrument. It immediately appears to me to be the
 11 barrel of a gun.

12 Mr. Tubby says either "no" or "don't". I
 13 don't know which negative he used. And he looks me
 14 right in the eye, and says, "I'll do it".

15 Q All right. When you are looking towards his hands --
 16 A Uh-huh.
 17 Q -- do you see that he's still handcuffed?
 18 A I do not.
 19 Q Can you see either of his hands?
 20 A The hands themselves?
 21 Q Yeah.
 22 A I cannot see his hands.
 23 Q So is it both his hands are underneath his shirt?
 24 A That is my recollection.
 25 Q All right. And you said that you saw what you

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1 believed to be a barrel of a gun?
 2 A Correct.
 3 Q And you said specifically that you saw that it
 4 appeared to you to be cylindrical?
 5 A Correct.
 6 Q All right. The barrel of a gun is cylindrical?
 7 A They can be.
 8 Q Can be. The -- how big of a gun did this look like
 9 it was to you?
 10 A The pressure end -- I don't know if this is even a
 11 word -- tautness on his clothing. The barrel could
 12 be one, two, three inches long. I don't really know
 13 because I would be speculating at that.
 14 It was recognized -- to me it appeared to
 15 be the barrel of a gun. I would -- I would be
 16 speculating if I would say I knew exactly what frame
 17 that would be, what size frame gun that would be.
 18 Q Well, you believed you saw a gun, right?
 19 A That is correct.
 20 Q And, therefore, you must have had some sort of idea
 21 of what -- how big this gun was.
 22 How big did you think it was?
 23 A Big enough that I could identify it as a gun
 24 underneath his shirt.
 25 Q All right. You said you thought the barrel was maybe

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1 one to three inches long?
 2 A Again, based on the degree that the clothing was
 3 pulled out, pulled taut over whatever was under his
 4 shirt, the gun under his shirt, it would be hard for
 5 me to -- honest, it would be hard for me to estimate
 6 what -- I would be purely speculating at the size of
 7 the gun, because it could be -- depend on where the
 8 person's hands on are the gun.

9 Q Well, it's got to be bigger than at least three
 10 inches long, right?
 11 A That's your words. I -- I cannot say that.
 12 Q Well, so what kinds of guns have cylindrical barrels?
 13 A Revolvers tend to have cylindrical barrels.
 14 Q Okay. So did you think it was a revolver?
 15 A That is what I believed I saw.
 16 Q Okay. What is the size range of a typical revolver?
 17 A They vary very significantly. A Derringer, small
 18 snub-nose .38 --
 19 Q Well, you didn't think this was a snub-nose, did you?
 20 A I had no thought other than it was a gun.
 21 Q Well, you specifically said you thought it was a gun
 22 because you saw a barrel, right?
 23 A Correct.
 24 Q And that barrel would have been bigger than what's
 25 possible for a snub-nose?

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1 A You asked -- the question you asked me is: What
 2 range of sizes revolvers come in? That was the
 3 answer that I was providing you.
 4 Q All right.
 5 A There are a range of sizes.
 6 Q Right. And you didn't think it was a snub-nose, it
 7 was the next question I asked, right?
 8 MR. GUNTA: Objection to the form of the
 9 question.
 10 Go ahead and answer.
 11 THE WITNESS: I was at that moment not
 12 trying to identify what type of firearm it was
 13 underneath his shirt.
 14 BY MR. TAHDOOAHNIPPAH:
 15 Q But -- so you -- it couldn't have been a snub-nose
 16 based on what you observed?
 17 MR. GUNTA: Objection to the form of the
 18 question.
 19 Go ahead and answer.
 20 THE WITNESS: I can't say that.
 21 BY MR. TAHDOOAHNIPPAH:
 22 Q Well, are there any snub-nose revolvers that have
 23 cylindrical barrels that are one to three inches
 24 long?
 25 A Maybe one.

<p style="text-align: right;">Page 58</p> <p>1 BY MR. TAHDOOAHNIPPAH:</p> <p>2 Q After you see what you believe to be a gun, what</p> <p>3 happens next?</p> <p>4 A So my first reaction is to slam the door on the squad</p> <p>5 car. I immediately take my left arm in a waving</p> <p>6 motion, push back towards Colton, indicating for him</p> <p>7 to get back, and I say out loud, "I think he's got a</p> <p>8 gun." At which time I realize that I'm kind of out</p> <p>9 in no man's land in the middle of the sally port</p> <p>10 without cover or concealment.</p> <p>11 I wave my arm towards Colton to get behind</p> <p>12 me, and I immediately begin to move back and to my</p> <p>13 right around the back side of the trunk of the squad</p> <p>14 car.</p> <p>15 As I'm doing that, I'm continuing to wave</p> <p>16 for Colton to get behind me. As I'm passing behind</p> <p>17 the open trunk lid of the squad car, I observe that</p> <p>18 my duty weapon is laying on the -- in the trunk of</p> <p>19 the squad. I take a momentary pause to reach in,</p> <p>20 grab that duty weapon, and continue to retreat behind</p> <p>21 the blue transport van, continuing to wave Colton to</p> <p>22 get behind me.</p> <p>23 At that point, I do believe that I did</p> <p>24 verbalize to Colton to get behind me so that both of</p> <p>25 us were behind the blue transport van.</p>	<p style="text-align: right;">Page 60</p> <p>1 Go ahead and answer.</p> <p>2 THE WITNESS: We would not identify that</p> <p>3 as cover. It would be more concealment. A round</p> <p>4 could technically go through a trunk lid, but some</p> <p>5 protection is better than none.</p> <p>6 BY MR. TAHDOOAHNIPPAH:</p> <p>7 Q So it was a conscious decision to leave that open?</p> <p>8 A I believe it was, yes.</p> <p>9 Q Going back to just before when you grabbed your</p> <p>10 weapon and he was shouting, "I'll do it", did -- what</p> <p>11 meaning did you ascribe to those words at the time?</p> <p>12 A Well, he did not shout.</p> <p>13 Q Oh, he didn't shout. Okay. He just said, "I'll do</p> <p>14 it"?</p> <p>15 A He said, "I'll do it".</p> <p>16 Q What meaning did you give to that phrase at the time?</p> <p>17 A I believed Mr. Tubby was suicidal.</p> <p>18 Q All right. Had you received any training on how</p> <p>19 to -- on what to do if you're confronted with an</p> <p>20 armed suicidal person?</p> <p>21 A Yes, and I believe that's exactly what I did. I</p> <p>22 contained the problem, moved to a position of cover,</p> <p>23 slowed everything down to call for more resources.</p> <p>24 Q All right. So the policies, procedures, customs,</p> <p>25 training of Green Bay Police when you encounter an</p>
<p style="text-align: right;">Page 59</p> <p>1 Q When you noticed your duty weapon in the trunk --</p> <p>2 A Uh-huh.</p> <p>3 Q -- there were other weapons in the trunk, right?</p> <p>4 A That is correct.</p> <p>5 Q Okay. But you left the trunk open?</p> <p>6 A That is correct.</p> <p>7 Q Is there a reason why you didn't just reach down and</p> <p>8 shut your trunk after you got your weapon out?</p> <p>9 A Certainly.</p> <p>10 Q Why?</p> <p>11 A If Mr. Tubby had a gun -- my belief was Mr. Tubby had</p> <p>12 a gun. He was seated in the back seat of that squad</p> <p>13 car. Shutting that trunk would immediately expose me</p> <p>14 to the rear windshield of that vehicle. That rear</p> <p>15 trunk being up provided me a position of concealment</p> <p>16 and cover and did not allow for proper target</p> <p>17 acquisition from Mr. Tubby to me.</p> <p>18 Q So the trunk's made out of metal of some kind?</p> <p>19 A It is.</p> <p>20 Q So having it up against the rear window provides some</p> <p>21 cover?</p> <p>22 MR. GUNTA: Objection.</p> <p>23 THE WITNESS: Concealment. Sorry.</p> <p>24 MR. GUNTA: Objection to the form of the</p> <p>25 question.</p>	<p style="text-align: right;">Page 61</p> <p>1 armed suicidal subject: contain the person, slow</p> <p>2 things down, get additional resources?</p> <p>3 MR. GUNTA: I'm just going to object to</p> <p>4 the form of the question.</p> <p>5 You go ahead and answer, sir.</p> <p>6 THE WITNESS: Okay. So contain the</p> <p>7 problem; establish a perimeter; create time and</p> <p>8 distance, which is the slowing down piece; make the</p> <p>9 scene as safe as possible; and call for additional</p> <p>10 resources.</p> <p>11 BY MR. TAHDOOAHNIPPAH:</p> <p>12 Q Did he -- did you ever interpret "I'll do it" as a</p> <p>13 threat towards you, Officer Wernecke, or anyone else</p> <p>14 other than Mr. Tubby himself?</p> <p>15 A So the potential for threat exists when the person</p> <p>16 has a firearm in their hand. I, again, would</p> <p>17 reiterate that I believed Mr. Tubby was suicidal at</p> <p>18 that moment.</p> <p>19 Q So you never interpreted "I'll do it" to be meaning</p> <p>20 I'll shoot someone other than myself?</p> <p>21 A I would not say never. At that instant, my</p> <p>22 interpretation was that he was suicidal.</p> <p>23 Q Did Mr. Tubby ever make anything that you interpreted</p> <p>24 as a threat against a law enforcement officer?</p> <p>25 A Yes.</p>

<p style="text-align: right;">Page 90</p> <p>1 of the squad.</p> <p>2 Officer Salzmnn asks Officer Eric Allen</p> <p>3 over the radio if he should bring the entire BearCat</p> <p>4 to the scene. Hearing Officer Salzmnn repeat that</p> <p>5 request, him being a much more senior SWAT officer, I</p> <p>6 agree that his decision-making is probably the</p> <p>7 correct course of action, so I agree over the radio</p> <p>8 that the BearCat should respond.</p> <p>9 At this point, several minutes have passed</p> <p>10 by. Mr. Tubby has been continuing to move around in</p> <p>11 the back of the squad. I would imagine from that</p> <p>12 activity is what causes the windows in the squad car</p> <p>13 to begin to fog up, and we begin to lose a visual of</p> <p>14 Mr. Tubby in the back of the squad.</p> <p>15 So while we can see movement in the back</p> <p>16 of the squad, I can't see anything specifically</p> <p>17 taking place.</p> <p>18 Shortly thereafter, I believe Officer Eric</p> <p>19 Allen is the one who arrives on scene, and he is one</p> <p>20 of our assistant team leaders on the SWAT team. He</p> <p>21 asks me to ask Mr. Tubby to wipe the windows because</p> <p>22 we can no longer see into the -- we have -- no</p> <p>23 longer have a clear view into the back of the squad</p> <p>24 car. At that time, I do begin to give commands for</p> <p>25 Mr. Tubby to wipe the windows.</p>	<p style="text-align: right;">Page 92</p> <p>1 A As I'm progressing through the commands continuing to</p> <p>2 give them, there is a single act that takes place</p> <p>3 inside of the vehicle of a single swipe of the</p> <p>4 window, clears -- it looks like it clears a small</p> <p>5 patch. I assume that we're getting through and we're</p> <p>6 getting some compliance, so I continue to give the</p> <p>7 commands. However, no further acknowledgment or</p> <p>8 compliance appears to take place.</p> <p>9 Q So how many further commands did you give?</p> <p>10 A I am not sure how many more.</p> <p>11 Q More than 10 times?</p> <p>12 A I -- honestly, I do not recall.</p> <p>13 Q Okay. So you can't say more or less than 10?</p> <p>14 A I can't.</p> <p>15 Q Okay. From -- up until the point that Officer Allen</p> <p>16 arrives and you were behind the transport van, could</p> <p>17 you hear anything that Tubby was saying inside the</p> <p>18 squad car?</p> <p>19 A No.</p> <p>20 Q Okay. After -- after Officer Allen arrives up until</p> <p>21 the point that they break the rear window, can you</p> <p>22 hear anything that he's saying?</p> <p>23 A No.</p> <p>24 Q Okay. After they break the window, could you hear</p> <p>25 anything that he was saying?</p>
<p style="text-align: right;">Page 91</p> <p>1 Q And he complied with that?</p> <p>2 A So not initially. Several commands were given.</p> <p>3 Mr. Tubby did wipe the window in one sweeping</p> <p>4 movement is my recollection, and I continued to give</p> <p>5 that command to continue to wipe the windows, wipe</p> <p>6 the windows.</p> <p>7 That was the only time that I believed</p> <p>8 Mr. Tubby could hear me.</p> <p>9 Q So when -- before Officer Allen arrives and you're</p> <p>10 giving commands, you don't think he can hear you? Or</p> <p>11 you don't know?</p> <p>12 A I don't think he can hear me. I've -- we've given</p> <p>13 commands, and he's not complying quite -- it doesn't</p> <p>14 make sense to me why he's not showing his hands, so</p> <p>15 my assumption is that he can't hear versus being</p> <p>16 noncompliant.</p> <p>17 Q Then Officer Allen shows up. You ask him to wipe the</p> <p>18 windows, and he complies.</p> <p>19 So then you think he can hear you and is</p> <p>20 being compliant?</p> <p>21 A No, I did not say that.</p> <p>22 Q Okay. Well, what -- explain to me.</p> <p>23 A Sure. So I give the command several times with no</p> <p>24 response.</p> <p>25 Q Uh-huh.</p>	<p style="text-align: right;">Page 93</p> <p>1 A No.</p> <p>2 Q Did you hear anything that he said up until the time</p> <p>3 he was shot between the window's broken and the time</p> <p>4 you shot?</p> <p>5 A No.</p> <p>6 Q Okay. I wanted to make sure the -- I understand the</p> <p>7 time line and it's clear in the record. You said</p> <p>8 that the window was fogged up so you couldn't -- you</p> <p>9 couldn't see too much in the window at some point?</p> <p>10 A Correct.</p> <p>11 Q You could see some movement?</p> <p>12 A Correct.</p> <p>13 Q But beyond that, you couldn't see anything?</p> <p>14 A Correct.</p> <p>15 Q Okay. Do you know in relation to when he was shot</p> <p>16 how many minutes before he was shot that was?</p> <p>17 A I do not.</p> <p>18 Q Okay. With respect to when Officer Allen arrived,</p> <p>19 can you say that -- was that before or after Officer</p> <p>20 Allen arrived?</p> <p>21 A I don't understand the question.</p> <p>22 Q Yeah. So there's a point in time when the windows</p> <p>23 are too foggy to see anything specific, and I'm just</p> <p>24 trying to pinpoint when exactly that was. And we</p> <p>25 can't -- I assume you can't say that was at 9:01 p.m.</p>

<p style="text-align: right;">Page 94</p> <p>1 or something, right?</p> <p>2 A Right.</p> <p>3 Q So I'm just trying to see if there's a benchmark we</p> <p>4 can use, and something that you testified about was</p> <p>5 the arrival of Officer Eric Allen.</p> <p>6 A Yep.</p> <p>7 Q So I am just saying, can we benchmark it with respect</p> <p>8 to that? Was it before or after Officer Eric Allen</p> <p>9 arrived?</p> <p>10 A So his arrival time might differ from when he</p> <p>11 conversed with me, so I -- I don't know.</p> <p>12 Q Okay.</p> <p>13 A I don't know if he arrived and was speaking with</p> <p>14 other people prior to him asking me to wipe the</p> <p>15 windows. I don't know.</p> <p>16 Q Okay. But it's -- when you talked to him -- when you</p> <p>17 were talking to Officer Allen, for sure at that point</p> <p>18 in time the windows were too foggy?</p> <p>19 A Correct.</p> <p>20 Q Okay. Then he wipes it off. Which window? Was he</p> <p>21 wiping the rear window? Or a passenger's side?</p> <p>22 Driver's side?</p> <p>23 A Sure. So it would be the passenger side rear door</p> <p>24 window.</p> <p>25 Q Okay. Does that help you see inside any better?</p>	<p style="text-align: right;">Page 96</p> <p>1 arrives.</p> <p>2 Did you ever talk to Wernecke about the</p> <p>3 search?</p> <p>4 A No.</p> <p>5 Q You never asked him, Hey, did you notice like a bulge</p> <p>6 in this guy's buttocks?</p> <p>7 A I was by myself.</p> <p>8 Q Okay. You couldn't get on the radio and ask him?</p> <p>9 A Sure. I could have used the radio. I did not.</p> <p>10 Q And you never asked him, Hey, you know -- hey, did</p> <p>11 you notice anything about how he was walking? Could</p> <p>12 he have had a gun in his shoe?</p> <p>13 A We did not converse any further that evening.</p> <p>14 Q Okay. Why not?</p> <p>15 A I was focused on my task at hand, which, to me, we</p> <p>16 were looking forward as how to progress through this</p> <p>17 situation and hopefully come to a peaceful resolution</p> <p>18 to this situation.</p> <p>19 Going back would be something that would</p> <p>20 be done after the situation was made safe.</p> <p>21 Q Well, it certainly was in the realm of possibility</p> <p>22 that he didn't actually have a gun, right?</p> <p>23 A Those are not my words.</p> <p>24 Q Well, you disagree? You think that there was a 100</p> <p>25 percent that he had a gun?</p>
<p style="text-align: right;">Page 95</p> <p>1 A No.</p> <p>2 Q Okay. So it's still foggy, and all you can really</p> <p>3 still see is him moving around?</p> <p>4 A Correct.</p> <p>5 Q All right. What happens next?</p> <p>6 A There's a lull for me. Officers have arrived on</p> <p>7 scene. We've established a perimeter around the</p> <p>8 vehicle. The BearCat is en route to the -- the</p> <p>9 scene.</p> <p>10 I am at this point taking up what we refer</p> <p>11 to as a forward observer position. I have probably a</p> <p>12 better angle moving back and forth along that</p> <p>13 transport van into the squad car to try to see</p> <p>14 anything because the trunk being up kind of obscures</p> <p>15 some of the view towards the back of the -- back of</p> <p>16 the squad.</p> <p>17 I try to relay information about if I'm</p> <p>18 able to see Tubby. I'm giving commands to the car</p> <p>19 to wipe the windows, continuing to do that.</p> <p>20 At the next -- the next big event is the</p> <p>21 BearCat arrival --</p> <p>22 Q All right.</p> <p>23 A -- at the sally port.</p> <p>24 Q Let's pause there, then. At this time, you kind of</p> <p>25 went into there's this lull before the BearCat</p>	<p style="text-align: right;">Page 97</p> <p>1 A My perception at that time was that he had a gun.</p> <p>2 Q And you were 100 percent confident about that?</p> <p>3 A That was my perception at that -- at that time, yes.</p> <p>4 Q So you don't think there was even a slight</p> <p>5 possibility that he didn't have a gun and it was just</p> <p>6 his hands or a facsimile under his shirt?</p> <p>7 A My perception was that he had a gun.</p> <p>8 Q And there wasn't even a slight possibility that that</p> <p>9 was wrong?</p> <p>10 A My perception was that he had a gun.</p> <p>11 Q But was there a slight possibility that he didn't?</p> <p>12 A Again, I will reiterate, my perception was that he</p> <p>13 had a gun.</p> <p>14 Q Yeah. And I will ask my question again.</p> <p>15 Is there a slight possibility that he did</p> <p>16 not have a gun?</p> <p>17 MR. GUNTA: Objection to the form of the</p> <p>18 question.</p> <p>19 Go ahead.</p> <p>20 THE WITNESS: And my answer remains the</p> <p>21 same. My perception at that time was that Mr. Tubby</p> <p>22 was in possession of a gun.</p> <p>23 BY MR. TAHDOOAHNIPPAH:</p> <p>24 Q Okay. You're not answering my question, so -- and I</p> <p>25 don't want to just keep asking it for seven hours.</p>

<p style="text-align: right;">Page 98</p> <p>1 So are you refusing to answer the question</p> <p>2 of whether there was a possibility, however slight,</p> <p>3 that he did not have a gun?</p> <p>4 A In hindsight?</p> <p>5 Q At the time.</p> <p>6 A I don't recall having that thought.</p> <p>7 Q And if someone -- you don't think it's important if</p> <p>8 someone is potentially armed to try to determine if</p> <p>9 they are, in fact, armed?</p> <p>10 MR. GUNTA: Objection to the form of the</p> <p>11 question.</p> <p>12 Go ahead and answer.</p> <p>13 THE WITNESS: Given the dynamics of the</p> <p>14 situation, I don't know how that would be 100</p> <p>15 percent answered. Even if I wanted to go down that</p> <p>16 road, I don't know how that would have been</p> <p>17 resolved.</p> <p>18 BY MR. TAHDOOAHNIPPAH:</p> <p>19 Q Well, you could have asked Officer Wernecke whether</p> <p>20 there was anything -- you know, any bulges or</p> <p>21 anything he saw at the time of the search, right?</p> <p>22 A Could I have asked him that? Sure.</p> <p>23 Q But you didn't?</p> <p>24 A I did not ask him that.</p> <p>25 Q Do you know if anyone else asked him to do that --</p>	<p style="text-align: right;">Page 100</p> <p>1 Q So now you have the sally port with two wide-open</p> <p>2 garage doors?</p> <p>3 A Correct.</p> <p>4 Q All right. I believe you testified earlier that the</p> <p>5 Green Bay Police Department policies, when you have a</p> <p>6 suicidal subject, is to have containment?</p> <p>7 A Correct.</p> <p>8 Q So wasn't having two wide-open garage doors the</p> <p>9 opposite of containment?</p> <p>10 A At that particular moment, Mr. Tubby was contained</p> <p>11 inside of a squad car.</p> <p>12 Q Because he was locked in?</p> <p>13 A Yes.</p> <p>14 Q But certainly didn't help containment to have two</p> <p>15 wide-open garage doors?</p> <p>16 A I could not disagree with that assessment.</p> <p>17 Q But it wasn't your call whether those were open or</p> <p>18 shut?</p> <p>19 A It was not.</p> <p>20 Q Whose call was that?</p> <p>21 A I do not know.</p> <p>22 Q All right. Do you know if that was with Green Bay or</p> <p>23 with Brown County?</p> <p>24 A I was not privy to any of that.</p> <p>25 Q All right. The BearCat comes in. It maneuvers into</p>
<p style="text-align: right;">Page 99</p> <p>1 asked him about that?</p> <p>2 A I do not.</p> <p>3 Q If you had talked to him and he had said, Yeah, I</p> <p>4 searched the guy; I was really confident in the</p> <p>5 search; I didn't notice anything weird about his</p> <p>6 shoes; I didn't see anything unusual about his</p> <p>7 buttocks, would you then have thought maybe he</p> <p>8 doesn't have a gun?</p> <p>9 MR. GUNTA: Objection to the form of the</p> <p>10 question.</p> <p>11 Go ahead and answer.</p> <p>12 THE WITNESS: I would be speculating on</p> <p>13 what my thought would have been based on the</p> <p>14 hypothetical answer from Officer Wernecke.</p> <p>15 BY MR. TAHDOOAHNIPPAH:</p> <p>16 Q So can you answer the question?</p> <p>17 A No, I can't answer that.</p> <p>18 Q All right. When the BearCat arrives, it backs in</p> <p>19 through the exit garage door of the sally port?</p> <p>20 A It enters. I don't remember if it backed in or not,</p> <p>21 but it entered through the exit.</p> <p>22 Q Okay. And does that exit garage door then shut?</p> <p>23 A I don't think so.</p> <p>24 Q So that door remains open?</p> <p>25 A My recollection is that it did not close.</p>	<p style="text-align: right;">Page 101</p> <p>1 position alongside Officer Wernecke's squad car.</p> <p>2 What happens next?</p> <p>3 A So at this particular time when the BearCat comes</p> <p>4 into position, I -- as it's moving into position, I</p> <p>5 am still positioned behind the blue transport van,</p> <p>6 which creates a problem for me, tactically speaking.</p> <p>7 There's a crossfire issue between me and</p> <p>8 the BearCat, and also the BearCat is now going to</p> <p>9 assume the forward observer position. It has a</p> <p>10 better vantage than I would, and it's an armored</p> <p>11 vehicle.</p> <p>12 So I extract myself from the sally port.</p> <p>13 I follow my line of cover behind the transport van,</p> <p>14 move along that cinder block wall that initially</p> <p>15 Officer Wernecke was behind, and then I move out of</p> <p>16 the sally port. In reference to Exhibit 6, just</p> <p>17 outside the sally port door. At the top of the page</p> <p>18 immediately to the left of the open garage door is</p> <p>19 where I positioned myself. On that exhibit that is</p> <p>20 provided from DCI, there is a circle and an X</p> <p>21 indicated as to what my position was.</p> <p>22 Q And so your position specifically was the X?</p> <p>23 A So it's -- this is not the best copy. My position</p> <p>24 would be where that farthest left mark begins.</p> <p>25 Q All right. Since it's not that great of a copy, why</p>

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1 A Yes, because the dynamics of this situation, I was
 2 concerned about their safety. The trunk lid itself
 3 was not something that stuck out in my mind as a
 4 concern at that moment.
 5 Q All right. You look in. The trunk has been shut.
 6 What happens next?
 7 A So I remember Officer Allen coming up out of the
 8 turret of the BearCat alongside the squad car. He
 9 has a 40 millimeter -- excuse me -- 40 millimeter
 10 less lethal gun and deploys wooden dowel rounds at
 11 the back window of the squad car.
 12 Q All right. At that moment, did you know anything
 13 about this plan to shoot wooden dowel rounds through
 14 the rear window of the squad car?
 15 A No.
 16 Q No one had shared with you, like, this is what's
 17 going on?
 18 A No.
 19 Q Do you know -- did you know then who was in charge of
 20 making that decision?
 21 A No.
 22 Q Do you know now who was in charge of making that
 23 decision?
 24 A I am aware.
 25 Q Who was that?

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1 A My understanding, it was Lieutenant Zeigle from Brown
 2 County.
 3 Q All right. So the window is broken, the rear window?
 4 A Yes.
 5 Q And now Mr. Tubby's no longer contained in the car?
 6 A So initially when the window was broken, the window
 7 did not fall.
 8 Q Okay.
 9 A The window shatters and is punctured. The glass does
 10 not fall immediately away from the back of the squad.
 11 I can only see the trunk of Squad 42 where Mr. Tubby
 12 is and a small portion of the rear window based on my
 13 angle past the blue van -- sorry -- from the exited
 14 sally port past the blue van to the squad.
 15 Q Okay. Could you see him himself?
 16 A I could not see Mr. Tubby.
 17 Q Okay.
 18 A I do see the BearCat porthole open up and a glass
 19 break pole brought out from inside the BearCat. I do
 20 remember radio transmission saying the -- asking if
 21 the rest of the window could be broken, at which time
 22 the metal pole was used to drop the rest of the
 23 window. It's banged on until all the glass falls
 24 away.
 25 Q So at that point, you understood there's no more rear

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1 window?
 2 A That is correct.
 3 Q So now an escape route out of the car has been
 4 created?
 5 A Correct.
 6 Q So now the goal of containment is being frustrated?
 7 A Yes.
 8 Q All right. So were you -- would agree that that
 9 seems like it's contrary to the standard policies for
 10 dealing with a suicidal person?
 11 A Yes.
 12 Q Okay. Did you disagree with that decision being
 13 made?
 14 A At the time, I found it unusual. It did not -- so as
 15 I was standing outside of the sally port, I am a new
 16 squad officer.
 17 Q Okay.
 18 A Relatively new. The people that are inside the sally
 19 port are much more experienced than I am. Part of
 20 the reason I came around and peeked into the sally
 21 port is I wanted to observe how this situation was
 22 going to be resolved.
 23 I had formulated thoughts in my head, what
 24 would I do, how do we think this would progress. And
 25 when the back window was dropped, that was not a

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1 thought that I -- I did not think that's the plan
 2 that was going to take place, so I was a little
 3 perplexed by that decision.
 4 Q Of your own personal thoughts, I mean, did you think
 5 that just waiting it out to see if, you know, he
 6 would eventually surrender, was that -- seem like a
 7 good idea to you?
 8 A I communicated this over the radio and to Sergeant
 9 Denney. I knew at some point we were going to have
 10 to get Mr. Tubby out of the car.
 11 Q Because he's locked in?
 12 A He's locked in. He can't exit of his own volition at
 13 this point. I felt that it would require some
 14 compliance from Mr. Tubby in order to do that safely.
 15 Q In other words, just wait to see more compliance from
 16 him before you approached the vehicle?
 17 A My hope was that the hands would come up to the
 18 window. He'd place his hands on the window and then
 19 an approach would be made, and he'd be taken out of
 20 the squad.
 21 Q Yeah. What other kind of -- you referenced some
 22 plans kind of in your head.
 23 A Sure.
 24 Q What were you thinking specifically?
 25 A When I was them --

28 (Pages 106 - 109)

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1 A That is correct.

2 Q Could they see anything that was inside the sally
3 port?

4 A I am not certain what they could and could not see.

5 Q Okay. The ones that were behind you and to your
6 left, do you know any of their names?

7 A I don't.

8 Q Do you know approximately how many were there?

9 A I don't.

10 Q Okay. There was some officers, I believe, that were
11 around the rear of Sergeant Denney's squad car?

12 A Correct.

13 Q Okay. Do you know how many officers were there?

14 A My recollection is that there were two or three
15 officers in that immediate vicinity directly behind
16 Officer Denney's squad car and towards the rear
17 driver's side quarter panel of that squad car.

18 Q Okay. And was Sergeant Denney one of them?

19 A That is what I recall, yes.

20 Q Okay. Do you recall who any of the other ones were?

21 A I don't. I know they were Green Bay Police officers.
22 I know who was there. But at that moment, at that
23 time, I don't recall which ones were standing in that
24 area.

25 Q Of the officers behind you, those were Brown County

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1 officers?

2 A That is my recollection, yes.

3 Q Okay. How far behind you was the closest one?

4 A I don't recall exact distances. I could see them as
5 they moved in my periphery. I was moving my head, so
6 I picked them up in my peripheral vision.

7 Q Uh-huh.

8 A They were close enough for me to see and acknowledge
9 that they were wearing uniforms and were police
10 officers or deputies.

11 Q Were they close enough that you could have just
12 reached behind and touched them?

13 A I don't think any of them ever -- the ones that we
14 were referring to that were behind and to my left --

15 Q Uh-huh.

16 A -- I don't recall that any of them got that close to
17 me that they could touch me or I could touch them.

18 Q About how many steps away do you think it would have
19 been before you could touch them?

20 A Many.

21 Q Like three, four steps?

22 A Probably further than that.

23 Q Okay. Five, six steps?

24 A I'm honestly -- I'm guessing.

25 Q Okay.

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1 A If I were to give you an estimate, 10, 12 feet.

2 Q Okay. And the ones that were to your right, how --
3 how many feet would you estimate they were away from
4 you?

5 A The situation was fluid, and people were constantly
6 in motion and moving. People got as close as three
7 feet to my right, I would estimate. And people were
8 extended down the length of the wall.

9 Q All right. When you're looking, you -- you said you
10 could see the spray, but you couldn't actually see
11 the spray, the OC spray hit Jonathon Tubby?

12 A From my position, I observed it deployed from the
13 canister towards the vehicle. But I did not see it
14 enter the vehicle.

15 Q Okay. What did you see, or what happened next?

16 A Shortly after the OC was deployed towards the back of
17 the vehicle, I heard a noise, sounded like a
18 commotion.

19 And then I observed Mr. Tubby erupting
20 from the back seat of the vehicle towards the trunk.
21 It was a quick movement from the back seat to the
22 trunk lid. He appeared to be scrambling.

23 As he's coming up out of the trunk lid, I
24 can see his left hand. And at that point, I realized
25 that I am not in a good position, and I retreat back

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1 behind just -- it's a small body movement, just to
2 change my angle behind that wall so that I was no
3 longer exposed to Mr. Tubby as he came out onto that
4 trunk.

5 Q Okay. So you -- in your line of sight, you actually
6 saw him standing on the trunk --

7 A No.

8 Q Okay.

9 A I saw him as he was coming up out of the back of
10 the -- of the squad car --

11 Q Okay.

12 A -- and making his way to the trunk.

13 Q Okay.

14 A I never actually saw him stand on the trunk because
15 as he was coming up out of the trunk is when I
16 changed my relative position and took a different
17 angle of cover behind the wall.

18 Q Okay. So you saw him moving up out of the rear
19 window, but you never actually saw him feet planted,
20 standing on the trunk?

21 A That is correct.

22 Q Okay. As he was coming up out of the vehicle, you
23 said you could see his hands?

24 A I could see his left hand.

25 Q You could see his bare left hand?

<p style="text-align: right;">Page 130</p> <p>1 A Yes.</p> <p>2 Q Okay. Could you see his right hand?</p> <p>3 A No.</p> <p>4 Q Okay. Where was his right hand?</p> <p>5 A Concealed under the shirt and behind his left hand.</p> <p>6 Q Okay. Did you see that he was wearing handcuffs at</p> <p>7 that time?</p> <p>8 A I did not.</p> <p>9 Q Okay. Did you see a gun in his hand?</p> <p>10 A I did not.</p> <p>11 Q Did you believe that you saw anything that looked</p> <p>12 like a gun in his hand at that point?</p> <p>13 A At that point, no, I did not see anything that</p> <p>14 resembled a gun in his hand.</p> <p>15 Q Okay. And you -- you retreated because you were</p> <p>16 fearful for your own safety to some extent?</p> <p>17 A Correct.</p> <p>18 Q Because now you have someone that you believe is</p> <p>19 armed that is coming out of the vehicle?</p> <p>20 A Yes.</p> <p>21 Q You didn't just shoot him right then and there,</p> <p>22 right?</p> <p>23 A No.</p> <p>24 Q Do you think you should have shot him right then and</p> <p>25 there?</p>	<p style="text-align: right;">Page 132</p> <p>1 know if there were other considerations they had as</p> <p>2 far as proximity of people. I just don't know the</p> <p>3 answer to that.</p> <p>4 Q So if you had been standing three steps to your left,</p> <p>5 would you have shot him?</p> <p>6 MR. GUNTA: Objection. Vague as to time.</p> <p>7 Go ahead. Answer.</p> <p>8 THE WITNESS: Sure. So, again, I fall</p> <p>9 back on our training, which indicates that the --</p> <p>10 the requirement is a weapon, intent, and delivery</p> <p>11 system.</p> <p>12 I believe Mr. Tubby was in possession of a</p> <p>13 weapon. I believe he had the delivery system. I</p> <p>14 did not see at that point as he's erupting from the</p> <p>15 back of the squad car any explicit intent or even</p> <p>16 implied intent at that particular moment.</p> <p>17 BY MR. TAHDOOAHNIPPAH:</p> <p>18 Q All right. So you retreat behind the wall,</p> <p>19 What happens next?</p> <p>20 A Again, I hear -- this happens in an extremely rapid</p> <p>21 and dynamic unfolding situation. I hear another</p> <p>22 commotion. I don't know what the sound was. It drew</p> <p>23 my attention back to the sally port area.</p> <p>24 So, again, with not moving my feet</p> <p>25 necessarily but just changing my relative position</p>
<p style="text-align: right;">Page 131</p> <p>1 A No.</p> <p>2 Q Do you think deadly force would have been justified</p> <p>3 at that moment?</p> <p>4 A So, again, I would go back to what the officer's</p> <p>5 perception is at that time. I had the ability to</p> <p>6 move to cover.</p> <p>7 Q Uh-huh.</p> <p>8 A Other officers were engaged with the suspect. I did</p> <p>9 not have the best vantage point. Immediately behind</p> <p>10 Mr. Tubby exiting the squad car is our armored</p> <p>11 vehicle, the BearCat.</p> <p>12 But the last recollection I have is</p> <p>13 Officer Allen is still in the turret of the BearCat.</p> <p>14 So due to all of those circumstances, I did not fire</p> <p>15 my weapon. I could retreat to a position of cover.</p> <p>16 Q All right. If there was some other officers like the</p> <p>17 ones that were to your left that weren't as close to</p> <p>18 cover, do you think that they would have been</p> <p>19 justified if they had shot him right then and there?</p> <p>20 A That boils down to the individual officers'</p> <p>21 perceptions of the situation at that time. I don't</p> <p>22 know what they saw. I don't know what they were</p> <p>23 thinking. I don't know what the extent of, you know,</p> <p>24 their training would be at that point and how</p> <p>25 comfortable they would be taking that shot. I don't</p>	<p style="text-align: right;">Page 133</p> <p>1 and angle on that corner of the sally port, I lean</p> <p>2 back out to take a view into the sally port. And</p> <p>3 that's when I see Jonathon is up and rushing in my</p> <p>4 direction.</p> <p>5 Q Okay. His body posture at that point in time, was</p> <p>6 he -- he was running?</p> <p>7 A He was running.</p> <p>8 Q Okay. And he had his hands in front of him still?</p> <p>9 A That is correct.</p> <p>10 Q And you could still see -- could you still see his</p> <p>11 left hand?</p> <p>12 A I could see his left hand, and I could see his right</p> <p>13 hand underneath his shirt or appeared to be concealed</p> <p>14 under his shirt.</p> <p>15 Q Could you see the handcuffs on his wrists?</p> <p>16 A I did not see the handcuffs on his wrists.</p> <p>17 Q Did you see a gun?</p> <p>18 A I did not see a gun.</p> <p>19 Q Was he running upright? Or was he kind of falling</p> <p>20 down?</p> <p>21 A So when I observed him running towards me, he was in</p> <p>22 an upright position, but he appeared to be leaning</p> <p>23 forward.</p> <p>24 Q All right. At that point in time, what happened?</p> <p>25 A I saw Mr. Tubby rushing in my direction. And I again</p>

<p style="text-align: right;">Page 134</p> <p>1 moved my body to conceal myself behind the corner of</p> <p>2 the sally port entrance. Simultaneously, as that</p> <p>3 took place, Mr. Tubby comes into my view between --</p> <p>4 Q Between?</p> <p>5 A -- between myself and Sergeant Denney's squad car.</p> <p>6 Q Okay. So when you see him running towards you,</p> <p>7 you -- you don't fire yet?</p> <p>8 A Correct.</p> <p>9 Q All right. Is that still because you felt that the</p> <p>10 intent element was missing? Or was there another</p> <p>11 reason why you didn't fire?</p> <p>12 A I was purely reacting to the stimulus in front of me.</p> <p>13 There was a person rushing at me, and I think a</p> <p>14 normal human stimulus is to retreat.</p> <p>15 Q Okay. But you didn't -- but do you think that you</p> <p>16 could have lawfully fired at him at that point?</p> <p>17 A Yes.</p> <p>18 Q That deadly force was justified because he was</p> <p>19 rushing towards you?</p> <p>20 A Yes, and I believed him to be armed.</p> <p>21 Q Okay. And so you interpreted his running in your</p> <p>22 direction as fulfilling that intent element you just</p> <p>23 talked about a moment ago?</p> <p>24 A His hands were in a position that presented the</p> <p>25 threat of great bodily harm or death.</p>	<p style="text-align: right;">Page 136</p> <p>1 Q Okay. So you said the gun was pointed in your</p> <p>2 direction?</p> <p>3 A It was pointed in front of him.</p> <p>4 Q In front of him?</p> <p>5 A Yes. And I was in front of him.</p> <p>6 Q Did you see a barrel sticking out of his shirt?</p> <p>7 A Not at that moment, I did not.</p> <p>8 Q So you just felt that because his hands were in front</p> <p>9 of him, the gun that you believed he had must be</p> <p>10 pointing in front of him also?</p> <p>11 A Correct.</p> <p>12 Q If he's leaning forward, didn't you think maybe he's</p> <p>13 about to fall on his face?</p> <p>14 A At that moment, that's not what I thought.</p> <p>15 Q Why not?</p> <p>16 A That's not what occurred to me at that time.</p> <p>17 Q Isn't it -- wouldn't it be strange for someone to be</p> <p>18 leaning forward to a significant degree and then at</p> <p>19 the same time fire a gun?</p> <p>20 MR. GUNTA: Objection to the form of the</p> <p>21 question.</p> <p>22 Go ahead and answer.</p> <p>23 THE WITNESS: So as I'm observing you,</p> <p>24 you're leaning forward a little bit more than my</p> <p>25 recollection of Mr. Tubby's leaning forward.</p>
<p style="text-align: right;">Page 135</p> <p>1 Q Okay. What do you mean by his hands were in a</p> <p>2 position that presented a threat of great bodily harm</p> <p>3 or death?</p> <p>4 A Mr. Tubby in possession of a firearm. His hands are</p> <p>5 up in front of him. He is leaning forward, postured</p> <p>6 forward. And if I'm standing immediately in front of</p> <p>7 him, whether the gun is directly pointed at me or in</p> <p>8 my general vicinity, that is enough of a threat that</p> <p>9 would warrant deadly force.</p> <p>10 Q So if someone points a gun at you as a police</p> <p>11 officer, then you can use deadly force?</p> <p>12 MR. GUNTA: Objection to the form of the</p> <p>13 question. Vague.</p> <p>14 THE WITNESS: Again, that -- there are a</p> <p>15 number of factors there that come into play. That's</p> <p>16 a very simplistic, boiled-down version of a</p> <p>17 scenario.</p> <p>18 If someone were to point a firearm at me</p> <p>19 as a law enforcement officer and I were able to</p> <p>20 articulate that that is a weapon, the intent is</p> <p>21 there and the delivery system is there, and I</p> <p>22 believe that they are exhibiting behavior that could</p> <p>23 cause death, great bodily harm to me or another</p> <p>24 person or persons, then, yes.</p> <p>25 BY MR. TAHDOOAHNIPPAH:</p>	<p style="text-align: right;">Page 137</p> <p>1 BY MR. TAHDOOAHNIPPAH:</p> <p>2 Q Okay. So the angle that he was leaning forward, it</p> <p>3 wasn't an extreme angle?</p> <p>4 A It was not an extreme angle.</p> <p>5 Q It wasn't like a 45-degree angle to the ground?</p> <p>6 A At the moment I saw him rushing towards me?</p> <p>7 Q Right.</p> <p>8 A No.</p> <p>9 Q And in addition to the fact that you thought he was</p> <p>10 armed and had a gun in front of him, part of the</p> <p>11 reason you think that deadly force was justified was</p> <p>12 that he was coming specifically in your direction?</p> <p>13 A Correct.</p> <p>14 Q Weren't you just standing in an open door?</p> <p>15 A Correct.</p> <p>16 Q How -- why did you interpret his behavior as being</p> <p>17 threatening rather than just trying to escape through</p> <p>18 an open door?</p> <p>19 A That was my perception at the time.</p> <p>20 Q Uh-huh.</p> <p>21 A My response at the time was also to change position.</p> <p>22 The totality of the circumstances, I think kind of</p> <p>23 lead to all of this. Mr. Tubby was aware law</p> <p>24 enforcement was there attempting to take him into</p> <p>25 custody under a lawful arrest. He was not</p>

<p style="text-align: right;">Page 142</p> <p>1 be commonly referred to as a fight-or-flight</p> <p>2 response. Blood is drawn away from what could be</p> <p>3 considered unessential parts of the body. Things</p> <p>4 like auditory exclusion take place, so your hearing</p> <p>5 things doesn't necessarily become as important for</p> <p>6 your survival. Memory can be impacted in the way</p> <p>7 it's sequentially put together. Basically, your body</p> <p>8 is just in survival mode.</p> <p>9 Q All right. I want you to turn -- flip the last page</p> <p>10 of that Exhibit 6 over. Flip it over so you have</p> <p>11 like a white sheet of paper in front of you. I want</p> <p>12 you to grab a pen if there's one around you. If not,</p> <p>13 I'll give you one.</p> <p>14 All right. I want you to just draw a</p> <p>15 square that represents you standing -- standing up.</p> <p>16 A You're asking me to draw a square that would</p> <p>17 represent me and my position?</p> <p>18 Q Yeah. Just draw a square, I guess, first of all.</p> <p>19 And then I'll tell you that I want that, you know, to</p> <p>20 represent your position.</p> <p>21 MR. GUNTA: Here. Use this one. That's</p> <p>22 better. You don't have to put pressure on it.</p> <p>23 BY MR. TAHD00AHNIPPAH:</p> <p>24 Q All right. Now I want you to draw a rectangle that</p> <p>25 represents Jonathon Tubby's position relative to you</p>	<p style="text-align: right;">Page 144</p> <p>1 hand, right hand was still concealed underneath his</p> <p>2 shirt. It still appeared to be pushing out against</p> <p>3 the shirt and appeared that the gun was pointed in</p> <p>4 the direction of the other officers who were, my</p> <p>5 recollection, were behind Sergeant Denney's squad</p> <p>6 car.</p> <p>7 Q Okay. Can you draw where -- where would -- Sergeant</p> <p>8 Denney's squad car would be?</p> <p>9 A Sure.</p> <p>10 Q All right. And so can you just draw, like, a circle</p> <p>11 where you thought the officers that were in danger</p> <p>12 were?</p> <p>13 A (Witness complies.)</p> <p>14 Q All right. So you thought that they specifically</p> <p>15 were in danger because that's the direction that you</p> <p>16 saw his hands going towards?</p> <p>17 A Correct.</p> <p>18 Q Let's talk about all of the factors that you felt</p> <p>19 posed a threat to them at that particular moment.</p> <p>20 Was the fact that he was descending</p> <p>21 downward, did that -- in your estimation, did that</p> <p>22 heighten or diminish the risk that he posed?</p> <p>23 A It does not change it from my perspective at that</p> <p>24 moment.</p> <p>25 Q Okay. Was the fact that he was kind of twisting?</p>
<p style="text-align: right;">Page 143</p> <p>1 as he's descending downward.</p> <p>2 A (Witness complies.)</p> <p>3 Q All right. Now draw an arrow that says which way was</p> <p>4 his head facing.</p> <p>5 So his head is facing forward?</p> <p>6 A I'm sorry. I thought you were asking for which way</p> <p>7 is relative -- his head is positioned relative on his</p> <p>8 body. This is his head. This is his feet.</p> <p>9 Q Which way was he looking? Draw another arrow.</p> <p>10 A Again, I have two flash images of recollection.</p> <p>11 Q Okay.</p> <p>12 A One is Jonathon's head is facing up, looking this</p> <p>13 way.</p> <p>14 Q Okay.</p> <p>15 A I have another where Jonathon's head is faced away</p> <p>16 from me, facing down.</p> <p>17 Q Okay. So that's the twisting? Is his head going</p> <p>18 from facing up that way to facing down that way?</p> <p>19 A Yes.</p> <p>20 Q Okay. And at this -- at the moment you fired your</p> <p>21 weapon, you believe he posed an imminent threat to</p> <p>22 someone?</p> <p>23 A Yes.</p> <p>24 Q And was that to you or to someone else?</p> <p>25 A When I observed him, his hands were still -- his</p>	<p style="text-align: right;">Page 145</p> <p>1 A Yes.</p> <p>2 Q Okay.</p> <p>3 A My perception was that he was moving in a target</p> <p>4 acquisition manner. He was moving, acquiring a</p> <p>5 target for the -- for shooting.</p> <p>6 Now, as Mr. Tubby comes into view and he's</p> <p>7 descending in front of me, I hear simultaneously a</p> <p>8 pop --</p> <p>9 Q Uh-huh.</p> <p>10 A -- which is also one of the factors that I use in</p> <p>11 assessing the situation that determined my use of</p> <p>12 deadly force.</p> <p>13 Q And you thought that that pop was a -- him firing a</p> <p>14 gun?</p> <p>15 A That was my perception at the time.</p> <p>16 Q All right. If you had never heard that pop, do you</p> <p>17 think you still would have fired?</p> <p>18 A I do, but I think it was a contributing factor.</p> <p>19 Q So the mere fact that he's that close to these</p> <p>20 officers, and he's twisting, and you think he has a</p> <p>21 gun, that's -- you would have fired?</p> <p>22 A Yes.</p> <p>23 Q But you -- at the same time you heard this -- you</p> <p>24 heard a pop?</p> <p>25 A Yes.</p>

<p style="text-align: right;">Page 146</p> <p>1 Q All right. From the time you first -- he first came 2 into your view until the time that you fired, how 3 much time elapsed? 4 A Fractions of a second. 5 Q All right. I want you to go back to the front page 6 of the last page of that Exhibit 6, which is the 7 diagram we've been discussing. 8 Can you draw a rectangle as to where 9 Mr. Tubby was when you shot him? 10 MR. GUNTA: I'm sorry. I was looking at 11 something. Could you -- okay. 12 BY MR. TAHDOOAHNIPPAH: 13 Q All right. Do you know where in particular on 14 Mr. Tubby's body that you shot him? 15 A No. To clarify, I am now aware. At the time, I was 16 not aware. 17 Q I mean, you didn't see -- or you don't remember 18 seeing the bullets hit him? 19 A I have no recollection of that. 20 Q Okay. But you now know? 21 A I do. 22 Q How do you know that? 23 A From the DCI report. 24 Q Did you look at pictures of him shot or just the 25 narrative that they had?</p>	<p style="text-align: right;">Page 148</p> <p>1 Q As you're moving from right to left, is that 2 movement, is that something that you're trained to 3 do? 4 A The specific direction of right to left? 5 Q Or just shooting while you're kind of strafing in 6 that way? 7 A I wouldn't call it strafing. 8 Q Okay. Well, how would you describe it? 9 A We are taught to get off the X is the terminology we 10 train under. It means that a stationary target is 11 more easily hit. The potential that Mr. Tubby could 12 engage the other officers on scene could also 13 possibly transfer to me. So in my training, yes, I 14 am taught to move and fire. 15 MR. TAHDOOAHNIPPAH: All right. Let's 16 take a quick break. 17 MR. GUNTA: Sure. 18 (Break taken from 1:32 p.m. to 1:40 p.m.) 19 BY MR. TAHDOOAHNIPPAH: 20 Q All right. Officer O'Brien, when you shot Mr. Tubby, 21 Sergeant Denney and a few other officers were in 22 pretty close proximity? 23 A That is my recollection. 24 Q You weren't worried about any cross fire hitting them 25 or anything?</p>
<p style="text-align: right;">Page 147</p> <p>1 A Pictures. 2 Q Okay. So you know he had a couple bullet entry 3 points on his left shoulder? I think was it three? 4 A Correct. 5 Q And then he had a bullet entry and exit kind of on 6 the nape of his neck? 7 A Yes. 8 Q And then he had an entry point at the top, kind of 9 right side of his -- of his skull? 10 A That description, I don't know. 11 Q Okay. 12 A I do know that there was an entry wound in the skull. 13 Q How do you account for those kind of trajectories 14 with the positions that you drew on the back page a 15 moment ago? 16 MR. GUNTA: I'm going to object to the 17 form of the question. 18 But you go ahead and answer, if you can. 19 THE WITNESS: I am not a trajectory 20 expert. I can tell you that I was body in motion 21 from right to left and backwards as I was firing. I 22 have no recollection of the individual shots that 23 were fired. I remember shooting. I remember 24 stopping shooting. 25 BY MR. TAHDOOAHNIPPAH:</p>	<p style="text-align: right;">Page 149</p> <p>1 A So when I am observing Tubby, Mr. Tubby, I have what 2 would be termed tunnel vision, and the scope of my 3 vision becomes completely compressed to 4 Mr. Tubby's -- essentially the top portion of his 5 chest and up. And my backdrop at that point is the 6 back end of the squad car. I see nothing but this at 7 that point. So, no, I do not see any cross fire 8 issues. 9 Q You're not concerned about -- it's just not a factor 10 that you considered? 11 MR. GUNTA: Objection. Asked and 12 answered. 13 But go ahead and answer it. 14 THE WITNESS: Are you asking at that 15 moment? 16 BY MR. TAHDOOAHNIPPAH: 17 Q Yeah, at that moment. 18 A It would be a consideration. I did not observe 19 anything that -- I did not observe anything at that 20 moment that appeared to be a cross fire issue. 21 Q If someone was coming at you running towards you with 22 a gun about to kill you and there was potential for 23 cross fire, would you still take the shot to save 24 your own life? 25 MR. GUNTA: Objection to the form of the</p>

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1 any way, if that's what you're asking.

2 Q Right.

3 A Yeah.

4 Q Okay. And this is what you think is reasonable to

5 assume is the back of his head?

6 A I do not know which portion of his body or head that

7 would be.

8 Q Well, it's not -- it's not his -- you can't see his

9 face?

10 A I cannot see his face.

11 Q It looks like it's hair?

12 MR. GUNTA: Excuse me.

13 THE WITNESS: It could be. I don't know

14 what it is.

15 BY MR. TAHDOOAHNIPPAH:

16 Q You don't know what it is because you don't remember

17 this transpiring?

18 A Well, that's not from my perspective or my angle.

19 And this is -- it's all that we have, but it is a

20 blurry image.

21 Q So do you remember this transpiring?

22 A Do I remember the shooting transpiring?

23 Q Him falling to the ground as depicted in this photo?

24 A I remember him being on the ground. And like I had

25 mentioned before, what appeared to be levitating away

Page 183

1 from me. He was in a descended position.

2 Q But you don't remember this specifically?

3 MR. GUNTA: Are you referring to the same

4 exhibit?

5 MR. TAHDOOAHNIPPAH: Uh-huh.

6 MR. GUNTA: Okay.

7 MR. TAHDOOAHNIPPAH: Exhibit 4. This is

8 Exhibit 4, right?

9 MR. GUNTA: Yes, sir.

10 THE WITNESS: So, again, my perspective

11 would be different because I don't even appear in

12 this frame. So do I remember Mr. Tubby going to the

13 ground? Yes.

14 BY MR. TAHDOOAHNIPPAH:

15 Q Uh-huh. So where would you be with respect to this

16 specific frame?

17 A My assumption would be right outside of the frame --

18 Q To the --

19 A -- to the right.

20 Q To the right.

21 And, again, you can't say whether this is

22 before or after the shooting?

23 A I cannot.

24 MR. TAHDOOAHNIPPAH: All right. Let's get

25 these organized. We're going to move onto another

Page 184

1 exhibit.

2 BY MR. TAHDOOAHNIPPAH:

3 Q All right. And before we move on, in preparing for

4 your deposition, did you do anything before Tuesday?

5 A In preparation for the deposition, I did not.

6 Q All right. You have been handed what has been marked

7 as Exhibit No. 2.

8 Have you ever read this before?

9 A I do not believe I have seen this before.

10 Q All right. I want you to turn to the twelfth page,

11 which has the number 11 at the bottom in the center.

12 And it also has what we call a Bates number that ends

13 in 1112.

14 MR. GUNTA: That's what he's going to be

15 referring to.

16 THE WITNESS: Okay.

17 BY MR. TAHDOOAHNIPPAH:

18 Q All right. There's a figure B and a figure C.

19 Do you see that?

20 A Yes.

21 Q All right. It says figure B camera footage from

22 squad number 42, 9:02:29 p.m.

23 Do you see that?

24 A Yes.

25 Q So this is about 10 minutes before Mr. Tubby was

Page 185

1 shot?

2 A My recollection is that the shooting was recorded at

3 9:11 p.m., so that's --

4 Q About nine minutes before?

5 A Sure.

6 Q Were you looking into the squad car nine minutes

7 before he was shot?

8 A I do not know.

9 Q We were just talking about the video that was Exhibit

10 3. And you had mentioned that sometimes the -- you

11 can't say what happened because it was a different

12 angle.

13 Do you remember that?

14 A Yes.

15 Q Were you looking at the squad car through the front

16 window at this angle at 9:02 p.m.?

17 A No.

18 Q Did you ever look at the squad car through this angle

19 that night?

20 A During the incident?

21 Q During the incident.

22 A No.

23 Q So it's fair to say that you never saw this image

24 that's depicted in figure B?

25 A That night?

Page 186

1 Q Yeah.
 2 A No.
 3 Q And the same thing is true for figure C?
 4 A I did not see that image, correct.
 5 Q Okay. Turn the page. There's a figure D.
 6 Did you ever see that image on that night?
 7 A That night?
 8 Q Yeah.
 9 A No.
 10 Q Okay. Turn to the next page is figure E. This one
 11 is from 9:04:31 p.m.
 12 Do you see that?
 13 A Yes.
 14 Q And you weren't looking into the squad at 9:04 p.m.,
 15 were you?
 16 A No.
 17 Q And you certainly weren't looking at it from that
 18 angle?
 19 A No.
 20 Q And you never saw this image on that night?
 21 A No.
 22 Q All right. If you turn the page, there's a figure F.
 23 And, again, this is from 9:04 p.m.
 24 Do you see that?
 25 A Yes.

Page 187

1 Q Again. You weren't looking into the squad at that
 2 time, right?
 3 A No.
 4 Q And certainly not from this angle?
 5 A Correct.
 6 Q You never saw this image?
 7 A No.
 8 Q All right. Figure G on the next page.
 9 This is when the window was broken, right?
 10 A Correct.
 11 Q And I think you testified before that window was
 12 broken, you couldn't see Mr. Tubby?
 13 A Correct.
 14 Q All right. Figure H. You testified that you saw him
 15 coming out, emerging from the vehicle.
 16 Did you see figure H as it was happening?
 17 A No.
 18 Q All right. Figure I. It's on the next page. I
 19 think you testified before you never saw him actually
 20 standing on the trunk.
 21 So I take it to mean you never saw the
 22 image in figure I, or you did not see it that night?
 23 A That night, correct.
 24 Q All right. Let's go back to the figure B.
 25 MR. GUNTA: 1112.

Page 188

1 BY MR. TAHDOOAHNIPPAH:
 2 Q Do you recall this morning you testified that when
 3 you looked in the door, you saw a cylindrical object?
 4 Is this what it looked like, figure B?
 5 Does that depict what you're referring to?
 6 A So to jump ahead, figure C would be a better
 7 representation of what I observed.
 8 Q All right. So figure B is not -- is not an accurate
 9 representation of what you observed?
 10 A It was not most similar to what I observed.
 11 Q All right. You said figure C of all these pictures
 12 it's the most similar?
 13 A Correct.
 14 Q All right. So figure D is not that similar to what
 15 you observed?
 16 A No. It was more like figure C.
 17 Q All right. And figure E, that's not similar to what
 18 you observed?
 19 A Correct.
 20 Q All right. Figure F is not similar to what you
 21 observed?
 22 A Correct.
 23 Q Figure G is not similar to what you observed?
 24 A Correct.
 25 Q All right. So let's go back to figure C because you

Page 189

1 said this was the most similar?
 2 A Yes.
 3 Q How similar is it to what you did observe?
 4 A So the reason I would say it's most similar is
 5 because it does have the most accurate representation
 6 to me of the lighting that I observed in the back of
 7 the squad car, as well as the contour of the shirt
 8 and appears to be definition of a cylindrical object
 9 inside of that shirt.
 10 The relative position is not what I saw.
 11 In my DCI statement, it's accurate in that I saw the
 12 object underneath his shirt pointed towards the
 13 bottom of his chin is my perception, perspective from
 14 that position of the squad car.
 15 Q So forgetting the other figures in this -- in this
 16 report, figure C, is it quite similar, sort of
 17 similar, or not all that similar to what you observed
 18 when you thought you saw a cylindrical -- flat
 19 cylindrical object?
 20 MR. GUNTA: Just hold on a second.
 21 Objection to the form of the question.
 22 Go ahead and answer his question, please.
 23 THE WITNESS: So it looks similar.
 24 BY MR. TAHDOOAHNIPPAH:
 25 Q Okay. Not anything more than similar? Certainly not

Page 210

1 A Correct.

2 Q Okay. Was this all instances in which you were

3 convicted of a crime?

4 MR. GUNTA: Objection to the form of the

5 question.

6 THE WITNESS: So I was never convicted of

7 a crime. That's the answer to the question.

8 BY MR. TAHDOOAHNIPPAH:

9 Q You've never been convicted of any crime, period?

10 A Of a crime, that is correct.

11 Q Okay.

12 A Now, the -- go ahead.

13 Q So you've never been convicted of something that

14 would be a felony?

15 A Correct.

16 Q You've never been convicted of anything that would be

17 a misdemeanor?

18 A Correct.

19 Q But you have been convicted of petty misdemeanors?

20 A Ordinance violations and traffic violations.

21 Q All right. So speeding is what, a traffic violation?

22 A Correct.

23 Q So you listed your three speeding tickets, right?

24 A I listed speeding tickets, yes.

25 Q All right. Did you have any other additional

Page 211

1 speeding tickets at this time, January 2012?

2 A I believe I did.

3 Q Okay. Why didn't you list those?

4 A I don't know if it was because the number of boxes

5 that were provided. If I didn't recall them. I

6 don't know.

7 Q All right. Did you have any other ordinance

8 violations that weren't traffic, like petty

9 misdemeanors, ordinance violations or the like that

10 were not traffic-related?

11 A There was a disorderly conduct ticket that does

12 not -- is not included on that -- in that box.

13 Q All right. That was disorderly conduct, you said?

14 A Correct.

15 Q And that is not a misdemeanor?

16 A It was an ordinance violation.

17 Q Is disorderly conduct a misdemeanor?

18 A It can be, yes.

19 Q But it wasn't in your case?

20 A That is correct.

21 Q Was it charged as a misdemeanor?

22 A No.

23 Q It was charged as an ordinance violation?

24 A Yes.

25 Q Why didn't you list disorderly conduct in this box?

Page 212

1 A I don't know.

2 Q So this box is not 100 percent accurate?

3 A This box is incomplete.

4 Q What was the date that you were convicted of

5 disorderly conduct?

6 A I pled no contest to a disorderly conduct citation.

7 I believe that would have been in 1996.

8 Q All right. What happened that led you to be cited

9 for disorderly conduct?

10 A Sure. So my fiancée at the time and I had gone to a

11 furniture store to pick up some furniture items that

12 were ordered. The items were not ready when the

13 staff had informed her that she could pick the items

14 up. She became upset. She was yelling at them.

15 They, in turn, began yelling at her, at which point I

16 stepped between the two, and I told the male store

17 worker that he had to back up or I would make him

18 back up, something along those lines.

19 Mesa Police Department was contacted, and

20 they issued me a disorderly conduct citation.

21 Q So this is in Mesa, Arizona?

22 A That is correct.

23 Q All right. So you threatened the store clerk?

24 A That's not how I would put it.

25 Q Okay. How would you put it?

Page 213

1 A I was separating the two. And I was giving him fair

2 warning to not advance any further and to stop his

3 behavior.

4 Q So if he didn't back up but did advance further --

5 A I don't know. That's speculation. I don't want to

6 speculate as to how that could have otherwise

7 unfolded.

8 Q Okay. It was a physical -- but you would have

9 used --

10 A It was a verbal altercation.

11 Q You would have used physical force? That was the

12 threat was to use physical force?

13 A That's not how I would put it, no.

14 Q You told him you'd make him back up?

15 A Yes.

16 Q And that's not a threat to use physical force?

17 A I'm sure it could be interpreted as one.

18 Q But you didn't intend it as one?

19 A It was intended to get him to stop and back up.

20 Q By threatening physical force?

21 A Well, I was physically in between he and my fiancée

22 at the time.

23 Q So you think it was self -- or defense of others?

24 A That's the way I interpreted it, yes.

25 Q All right. But you didn't -- you didn't fight the

<p style="text-align: right;">Page 214</p> <p>1 ticket and assert a defense of others defense?</p> <p>2 A That is correct, I did not.</p> <p>3 Q You just took the citation?</p> <p>4 A Correct.</p> <p>5 Q And so by defending others, you were trying to</p> <p>6 threaten physical force in defense of others?</p> <p>7 A I was asserting that I would not allow the situation</p> <p>8 to continue.</p> <p>9 Q Implying that you would use force against this guy?</p> <p>10 A If necessary, maybe, yeah.</p> <p>11 Q And you didn't disclose that on your application?</p> <p>12 A On this box, no, I did not. During the application</p> <p>13 process I did.</p> <p>14 Q How?</p> <p>15 A Through conversation with the professional standards</p> <p>16 division.</p> <p>17 Q All right. When did they talk to you about this?</p> <p>18 A I don't know. During that process. I don't know.</p> <p>19 Q All right. Regardless, it's not -- it's not anywhere</p> <p>20 in this application, right?</p> <p>21 A It's not in this box. I don't know if there's</p> <p>22 another place elsewhere.</p> <p>23 Q Go ahead and read this and let me know if it's</p> <p>24 anywhere in here.</p> <p>25 A No, it does not appear.</p>	<p style="text-align: right;">Page 216</p> <p>1 Alamogordo public schools?</p> <p>2 A Correct.</p> <p>3 Q And then above, you have accounted for that gap in</p> <p>4 employment from February 2011 to September 2011 by</p> <p>5 saying you were relocating, and you were at the law</p> <p>6 enforcement academy?</p> <p>7 A Correct.</p> <p>8 Q All right. If we flip the page, it says that from</p> <p>9 January 2007 to August 2009, you were teaching,</p> <p>10 tech/tutor?</p> <p>11 A Correct.</p> <p>12 Q The next one, it looks for a summer, you were a youth</p> <p>13 group leader?</p> <p>14 A Correct.</p> <p>15 Q All right. And then the next one is -- goes from</p> <p>16 October '95 to October of 2000, right?</p> <p>17 A Correct.</p> <p>18 Q And that's customer service team leader?</p> <p>19 A Correct.</p> <p>20 Q So that's a gap in the resume between October of 2000</p> <p>21 up until August of 2009, right, or up until January</p> <p>22 of 2007 -- excuse me -- right?</p> <p>23 A Correct.</p> <p>24 Q And if you flip back a page, you account for that by</p> <p>25 saying October 2000 to January 2007 unemployed but</p>
<p style="text-align: right;">Page 215</p> <p>1 Q All right. Let's go to the employment history</p> <p>2 section of this. I don't have a page number for you.</p> <p>3 I didn't get this Bates stamped. Sorry. But you'll</p> <p>4 know you're there because there's a handwritten</p> <p>5 portion.</p> <p>6 And on the top, that says 02-11 through</p> <p>7 09-11 due to relocation and law enforcement academy</p> <p>8 attendance?</p> <p>9 A Correct.</p> <p>10 Q Are you there?</p> <p>11 A Yes.</p> <p>12 Q All right. It says in the box in printed text,</p> <p>13 "Please provide below your complete work history for</p> <p>14 the last 10 years or more, if applicable."</p> <p>15 Do you see that?</p> <p>16 A Yes.</p> <p>17 Q All right. It says that from September 2011 to the</p> <p>18 time that you filled out this application, you worked</p> <p>19 as a building supervisor/security for the YMCA of the</p> <p>20 Fox Cities?</p> <p>21 A Correct.</p> <p>22 Q And then from January -- the next entry begins -- and</p> <p>23 it says January '10 to February 2011; is that right?</p> <p>24 A Yes.</p> <p>25 Q And you were -- that says classroom teacher,</p>	<p style="text-align: right;">Page 217</p> <p>1 was a full-time stay-at-home parent to a military</p> <p>2 spouse, correct?</p> <p>3 A Correct.</p> <p>4 Q So you don't say that you, yourself, list your Army</p> <p>5 experience on this application?</p> <p>6 A Correct.</p> <p>7 Q So, again, this is an incomplete work history?</p> <p>8 A It is missing my military service, that is correct,</p> <p>9 or my time in the military.</p> <p>10 Q All right. And you said you got a discharge without</p> <p>11 condition?</p> <p>12 A The terminology, I don't know 100 percent, but it is</p> <p>13 an unconditional discharge without condition.</p> <p>14 Q Okay. So that means that you were discharged not due</p> <p>15 to a disability, or due to a medical issue that</p> <p>16 didn't rise to the level of disability?</p> <p>17 A Are you asking do I receive disability services from</p> <p>18 the VA?</p> <p>19 Q I am just asking -- I just don't know the levels of</p> <p>20 discharge. I am just trying to figure it out.</p> <p>21 A I don't either. I am not 100 percent sure on that.</p> <p>22 Q Well, do you receive disability?</p> <p>23 A I do not.</p> <p>24 Q All right. The process of getting discharged, was</p> <p>25 that something that you initiated or someone else</p>

Page 218

1 initiated?

2 A I don't recall how the process began. I went and

3 expressed concerns.

4 Q To whom?

5 A To the platoon leader, who expressed concerns to

6 staff about I wanted to talk to a counselor.

7 Q Okay.

8 A And I went and spoke with the counselor. And I don't

9 recall requesting to be discharged from the military.

10 Q Okay. So did that counselor make a recommendation

11 that you be discharged?

12 A I don't -- I don't know, to be honest with you.

13 Q Do you know who -- do you know who at all recommended

14 that you be discharged?

15 A I don't.

16 Q You wanted -- you said you wanted to talk to a

17 counselor?

18 A Yes.

19 Q Why was that?

20 A I was experiencing depression.

21 Q Okay. What -- did you have any specific suicidal

22 ideations?

23 A No.

24 Q Homicidal ideations?

25 A No.

Page 219

1 Q Just kind of general depression?

2 A To the point I was having difficulty functioning,

3 yes.

4 Q Was there any sort of incident that occurred in the

5 military that caused you to vocalize that?

6 A No. It was a cumulative effect.

7 (Exhibit 12 marked for identification.)

8 BY MR. TAHDOOAHNIPPAH:

9 Q All right. You've been handed Exhibit 12. Turn to

10 the third page. There's a letterhead that says

11 "Psychological Consultants of Green Bay, Brown

12 County."

13 Do you see that?

14 A Yes.

15 Q Do you recall meeting with a psychologist and doing a

16 psychological assessment?

17 A I do.

18 Q And this was a part of your application to become a

19 police officer with Green Bay?

20 A Correct.

21 Q All right. I want you to flip to the next page.

22 There's a heading that says "Test results/emotional

23 stability/suitability for law enforcement

24 employment."

25 Do you see that?

Page 220

1 A Yes.

2 Q And have you -- have you ever seen this before, this

3 assessment?

4 A I do not recall if I've seen this before or not.

5 Q All right. If you go to that heading I just pointed

6 you to and then go down to the second paragraph, it

7 says, "On the personality assessment inventory, PAI

8 law enforcement corrections and public safety

9 selection reports Erik obtained a valid profile."

10 Do you see that?

11 A Yes.

12 Q It says, "However, he obtained a high," which is

13 italicized, "risk for receiving a poorly suited

14 rating by a psychologist with expertise in law

15 enforcement, corrections, and public safety

16 screening."

17 Do you see that?

18 A I do.

19 Q Did you know that you had obtained a high risk for

20 receiving a poorly suited rating by a psychologist

21 with expertise in law enforcement, corrections, and

22 public safety screening?

23 A No.

24 Q Is this the first time you're learning about that?

25 A Yes.

Page 221

1 Q The next sentence says, "Erik's high score is due to

2 the fact that he endorsed many antisocial behavior

3 items which really had to do with behaviors in high

4 school."

5 Do you see that?

6 A Yes.

7 Q Okay. What antisocial behaviors were you endorsing

8 in high school?

9 A I do not know.

10 Q You have -- you have no idea what this is talking

11 about?

12 A No.

13 Q Okay. Did you talk to the psychologist about your

14 high school experience?

15 A I don't recall. I'm sure I did, but I don't recall.

16 Q Okay. Is there anything about your high school

17 experience that you believe was antisocial?

18 A Not that I recall.

19 Q Okay. Did you get into a lot of fights in high

20 school?

21 A There was some physical altercations in high school.

22 Q Okay. With whom? Other students?

23 A Yes.

24 Q Any authority figures?

25 A There was an incident with a teacher.

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF WISCONSIN
3 -----

4 SUSAN DOXTATOR, ARLIE
5 DOXTATOR, and SARAH
6 WUNDERLICH, as special
7 administrators of the Estate
8 of Jonathon C. Tubby,
9 Plaintiffs,

10 -vs-

Case No. 1:19-cv-137-WCG

11 ERIK O'BRIEN, ANDREW SMITH,
12 TODD J. DELAIN, HEIDI
13 MICHEL, CITY OF GREEN BAY,
14 BROWN COUNTY, JOSEPH P.
15 MLEZIVA, NATHAN K.
16 WINISTERFER, THOMAS ZEIGLE,
17 BRADLEY A. DERNBACH, and
18 JOHN DOES 1-5,
19

20 Defendants.
21 -----
22

23 Examination of COLTON WERNECKE, taken at
24 the instance of the Plaintiffs, under and pursuant to
25 the applicable Rules of Civil Procedure, before
 SAMANTHA J. SHALLUE, a Registered Professional
 Reporter and Notary Public in and for the State of
 Wisconsin, at the Green Bay City Hall, 100 North
 Jefferson Street, Green Bay, Wisconsin, on
 December 18, 2019, commencing at 8:45 a.m. and
 concluding at 12:10 p.m.

<p style="text-align: right;">Page 38</p> <p>1 blurred vision, watering eyes, a feeling that</p> <p>2 you can't breathe. Is that all accurate?</p> <p>3 A It is.</p> <p>4 Q Anything else that you experienced when you</p> <p>5 were exposed to OC spray?</p> <p>6 A I can't recall if there's anything else.</p> <p>7 Q And it's not a pleasant experience, is it?</p> <p>8 A It is not.</p> <p>9 Q And when you say "pain," I mean, it's an</p> <p>10 extreme pain?</p> <p>11 A Yes.</p> <p>12 Q And when you say you "can't breathe," you mean</p> <p>13 you feel like you're suffocating?</p> <p>14 A You can breathe; it just feels like you can't.</p> <p>15 Q Okay. So you're not actually going to</p> <p>16 suffocate, but it feels like you are</p> <p>17 suffocating?</p> <p>18 A Correct.</p> <p>19 Q And you also, it says, received training on</p> <p>20 beanbag shotguns; is that right?</p> <p>21 A Correct.</p> <p>22 Q Okay. What is a beanbag shotgun?</p> <p>23 A A beanbag shotgun is -- itself is a normal</p> <p>24 shotgun. Ours are just colored with orange --</p> <p>25 an orange stock and an orange handpiece. They</p>	<p style="text-align: right;">Page 40</p> <p>1 Q Very similar, you said?</p> <p>2 A Yes.</p> <p>3 Q But can you, as a trained police officer,</p> <p>4 distinguish between those sounds?</p> <p>5 MR. GUNTA: Objection to the form of</p> <p>6 the question.</p> <p>7 THE WITNESS: I believe I could.</p> <p>8 BY MR. TAHDOOAHNIPPAH:</p> <p>9 Q And is that a result of your training?</p> <p>10 A Yes.</p> <p>11 Q You don't have, like, some sort of superhuman</p> <p>12 hearing capability?</p> <p>13 A No.</p> <p>14 Q But it's because you've been specifically</p> <p>15 trained on different firearms that you're able</p> <p>16 to distinguish between them?</p> <p>17 A Correct.</p> <p>18 Q And you could probably distinguish between</p> <p>19 different calibers of ammunition even?</p> <p>20 MR. GUNTA: Just hold on a second.</p> <p>21 I'm just going to object to the form of the</p> <p>22 question as being vague, but subject to the</p> <p>23 objection, go ahead and answer.</p> <p>24 THE WITNESS: As per different</p> <p>25 calibers, I don't think I could do that.</p>
<p style="text-align: right;">Page 39</p> <p>1 fire beanbag rounds.</p> <p>2 Q All right. And what are beanbag rounds</p> <p>3 themselves?</p> <p>4 A It's a normal shotgun round; it's just inside</p> <p>5 of it is a wadded-up beanbag.</p> <p>6 Q All right. Are there different sizes of</p> <p>7 beanbags that you can get?</p> <p>8 A I don't know.</p> <p>9 Q The orange color of the shotgun is so that you</p> <p>10 know that it's for beanbags?</p> <p>11 A Correct.</p> <p>12 Q Could you just put a normal shotgun round in</p> <p>13 there and fire it?</p> <p>14 A You could.</p> <p>15 Q How do you make sure that it doesn't get mixed</p> <p>16 up?</p> <p>17 A We don't have regular shotgun rounds available</p> <p>18 to us.</p> <p>19 Q All right. Is the sound of a shotgun firing a</p> <p>20 beanbag round distinct from firing real, live</p> <p>21 ammunition?</p> <p>22 MR. GUNTA: Objection to the form of</p> <p>23 the question. Go ahead and answer if you can.</p> <p>24 THE WITNESS: They're very similar.</p> <p>25 BY MR. TAHDOOAHNIPPAH:</p>	<p style="text-align: right;">Page 41</p> <p>1 BY MR. TAHDOOAHNIPPAH:</p> <p>2 Q Do you think you could distinguish between</p> <p>3 different types of firearms: pistols, rifles,</p> <p>4 shotguns?</p> <p>5 MR. GUNTA: Same objection. Go ahead</p> <p>6 and answer.</p> <p>7 THE WITNESS: I could differentiate</p> <p>8 between a pistol, rifle, and shotgun. I</p> <p>9 couldn't tell you different calibers or gauges.</p> <p>10 BY MR. TAHDOOAHNIPPAH:</p> <p>11 Q Did you receive any training on beanbag guns --</p> <p>12 beanbag shotguns at NWTC?</p> <p>13 A At NWTC we were shown text about them, but we</p> <p>14 never manipulated any there.</p> <p>15 Q Did you do any sort of firearm training at</p> <p>16 NWTC?</p> <p>17 A We did.</p> <p>18 Q What proportion of the overall curriculum is</p> <p>19 firearm training?</p> <p>20 A Are you asking about the time of it or --</p> <p>21 Q Hm-hm.</p> <p>22 A I don't know exactly how much time we spent on</p> <p>23 it.</p> <p>24 Q How many classes are there on it?</p> <p>25 A I don't know.</p>

Page 46

1 A Yes.

2 Q Is that something that you also went back over

3 at the class you went to in the last year?

4 A Yes.

5 Q All right. The Exhibit 1 we've been

6 discussing, if you go back to that and you go

7 back to that third paragraph, it says that

8 "Officer Wernecke stated that he had been an

9 intern with the GBPD for two years so he was

10 allowed to go on some extra calls that most

11 recruits wouldn't go to until Step 2, including

12 some weapons calls." Do you see that?

13 A I do.

14 Q And is that accurate; you were, in fact,

15 allowed to go on some calls other -- that most

16 recruits wouldn't go on until Step 2?

17 A Correct.

18 Q And who -- who made the decision to allow you

19 to do that?

20 A It would have been my trainer, Officer O'Brien.

21 Q Okay. Did he need to get approval for that

22 from someone above him, or did he just have

23 discretion to make that call?

24 A It would be discretionary on him.

25 Q On Officer O'Brien?

Page 47

1 A Correct. On the trainer, yep.

2 Q So at Step 1, what are the types of calls that

3 most recruits are permitted to go on?

4 MR. GUNTA: We're talking about the

5 FTO training now?

6 MR. TAHDOOAHNIPPAH: Yes.

7 MR. GUNTA: Okay.

8 THE WITNESS: On Step 1 you're doing

9 a lot of geography of the city. You're going

10 to things such as 911 hang-ups, civil disputes.

11 BY MR. TAHDOOAHNIPPAH:

12 Q All right. So what were the -- anything else?

13 A Not that I can think of. Just various calls of

14 that nature.

15 Q What were the extra calls that you were

16 permitted to go on? Weapons calls is one

17 mentioned here, right?

18 A Correct.

19 Q Anything else that you were extra allowed to go

20 on?

21 A Not that I can think of.

22 Q All right. On October 19th -- we're here

23 because on October 19th, 2018, there was an

24 incident involving a man named Jonathon Tubby,

25 right?

Page 48

1 A Correct.

2 Q And that started out as just a traffic stop?

3 A It did.

4 Q Was there anything about that call that you

5 were permitted to do because of your

6 internship? In other words, was there anything

7 about that incident that you would have been

8 pulled out of if you had just been a normal

9 Step 1 recruit without having this internship?

10 A No. I have a question. May I use the

11 bathroom?

12 Q Yeah. Let's take a break.

13 (Brief recess taken.)

14 BY MR. TAHDOOAHNIPPAH:

15 Q Officer Wernecke, when did you graduate from

16 NWTC specifically?

17 A I don't know the day. It would have been

18 spring of 2018.

19 Q So May of 2018, approximately?

20 A Approximately.

21 Q All right. Let's talk about October 19th,

22 2018. At that time, you were in the first step

23 of your five-step field training officer

24 program; is that right?

25 A Correct.

Page 49

1 Q And your field training officer was Officer

2 O'Brien?

3 A Correct.

4 Q Okay. What are the duties and responsibilities

5 of a field training officer as it concerns the

6 trainee?

7 A I don't know. You would have to ask the field

8 training officer.

9 Q Okay. Well, what did you understand his role

10 was as a field training officer?

11 A To guide me on calls and help me when I needed

12 it.

13 Q Okay. And he's supposed to be supervising you?

14 A Correct.

15 Q He's supposed to be observing what you're

16 doing?

17 A Correct.

18 Q Making sure you're doing things correctly?

19 A Correct.

20 Q Correcting you when you make mistakes?

21 A Correct.

22 Q And at this time, October 19th, 2018, you were

23 about five months out of graduation from NWTC?

24 A Approximately.

25 Q And you were a few weeks out of passing the

Page 50

1 five-week mini academy?

2 A Correct.

3 Q So all the training and education you had was

4 pretty fresh in your mind still?

5 A Correct.

6 Q You started -- it says here, if you go to the

7 bottom, the second-to-last paragraph of the

8 page we've been looking at, that you started

9 that afternoon at about 2:15 p.m.?

10 A Correct.

11 Q If you turn to the next page and go down to

12 about the third or fourth paragraph, it talks

13 about attending roll call at 2:15 p.m.?

14 A I see it, yes.

15 Q All right. After that it says that you had to

16 "make your squad ready for patrol." Do you see

17 that?

18 A I do.

19 Q And to do that, you searched the back seat of

20 the squad car?

21 A I did.

22 Q When you search the vehicle, you're searching

23 for contraband?

24 A Correct, contraband or weapons. There

25 shouldn't be anything in the back seat.

Page 51

1 Q But someone that was arrested by the previous

2 user of that squad car that was in the back

3 seat might have ditched something into the

4 back?

5 A It's not outside the realm of possibilities.

6 Q So you searched to make sure that that didn't

7 happen?

8 A Correct.

9 Q And your search followed department procedures?

10 A I don't know if it's a procedure, but we're

11 explained to check the back seat, under the

12 seats to make sure there's nothing in the car.

13 Q And are you explained how to -- like, an order

14 of how to check it and where to look?

15 A I don't recall if there's an order.

16 Q Did they explain a procedure for checking the

17 back seat of the car at all?

18 A I don't know if they expressed a procedure per

19 se; they just informed us to check the back

20 seat and make sure there's nothing in there.

21 Q All right. And that's what you did?

22 A Correct.

23 Q And there was no weapons inside?

24 A There was not.

25 Q And you did follow the instructions to the best

Page 52

1 of your ability?

2 A Yes.

3 Q Did Officer O'Brien observe you searching the

4 squad car?

5 A I don't recall if he did.

6 Q All right. But as your field training officer,

7 part of his job would be to observe you

8 searching the squad car?

9 MR. GUNTA: Objection to the form of

10 the question. Go ahead and answer if you can.

11 THE WITNESS: It would be.

12 BY MR. TAHDOOAHNIPPAH:

13 Q Did he typically -- this is -- this is --

14 strike all that.

15 Searching the squad car, that's

16 something that you personally do every time

17 that you're going to go out on patrol?

18 A I do it every time I pick out a squad car.

19 Q And did Officer O'Brien generally observe you

20 searching the squad car?

21 A I don't recall.

22 Q So how long were you his trainee?

23 A I was his trainee approximately a week and a

24 half.

25 Q All right. How many times in that week and a

Page 53

1 half, approximately, did you go out on patrol?

2 A I don't know the number of days. As our

3 rotation is five on, three off, I don't know

4 the exact amount of days I would have been on

5 patrol with him.

6 Q But more than five?

7 A It would have been more than five, yes.

8 Q And you don't recall of that more than five

9 times on patrol whether or not he ever observed

10 you searching the vehicle?

11 A Yeah, I don't recall.

12 Q All right. At some point you stop a vehicle

13 that's driven by Jonathon Tubby, right?

14 A I did.

15 Q Between the time you searched the back seat and

16 the time you made the stop of Mr. Tubby's

17 vehicle, had anyone else been in the back seat

18 of that squad?

19 A No.

20 Q So at the time you stop him, you're confident

21 there's no weapons in the back seat of that

22 squad car?

23 A Yes.

24 Q At some point the decision is made to arrest

25 Mr. Tubby; is that fair?

Page 54

1 A Correct.

2 Q Who made that decision?

3 A I don't recall when or who made that decision.

4 I was under -- or I was informed that he had a

5 warrant. I don't recall if I confirmed that

6 over the radio or if my trainer did.

7 Q So the reason for his arrest was a warrant?

8 A A warrant and the marijuana that was found in

9 the car.

10 Q And at the time he was arrested, Mr. Tubby was

11 searched?

12 A He was.

13 Q And he was searched by you?

14 A He was.

15 Q All right. You previously explained to me how

16 you were trained to search a suspect. Did you

17 follow that training when you searched him?

18 A I did.

19 Q Can you describe how you searched Mr. Tubby in

20 particular?

21 A I searched him the exact way that I had stated

22 earlier.

23 Q All right. Did Mr. -- did Officer O'Brien

24 observe that search?

25 A He did.

Page 55

1 Q All right. Did he ever correct you or tell you

2 that you had made some mistake in searching

3 Mr. Tubby?

4 A No.

5 Q Did you find anything on Mr. Tubby when you

6 searched him?

7 A There were some personal belongings of his. I

8 don't remember what they were. I secured them

9 in a bag that was put in my car.

10 Q Okay. These were just some personal affects

11 that he had on him?

12 A Correct.

13 Q You don't remember specifically what they were?

14 A I do not.

15 Q Do you recall if any of them -- do you recall

16 the approximate size of these things?

17 A I don't.

18 Q Could you say whether or not they were larger

19 or smaller than your average handgun?

20 A I couldn't.

21 Q And you didn't find any -- you didn't find any

22 weapons on Mr. Tubby when you searched him?

23 A I did not.

24 Q He didn't have any firearm on him?

25 A After I searched him, I determined there wasn't

Page 56

1 any weapons on him.

2 Q And you were confident in that search at that

3 time?

4 A At that time, I was.

5 Q And to have missed something as large as a gun,

6 that would be pretty extraordinary, right?

7 MR. GUNTA: Objection to the form of

8 the question. Go ahead and answer if you can.

9 THE WITNESS: It's not outside the

10 realm of possibilities.

11 BY MR. TAHDOOAHNIPPAH:

12 Q But it would be a pretty extraordinary event to

13 miss something that big?

14 MR. GUNTA: Objection to the form of

15 the question.

16 THE WITNESS: I guess can you define

17 "extraordinary"?

18 BY MR. TAHDOOAHNIPPAH:

19 Q Well, you said it's not outside of the realm of

20 possibility, right?

21 A Correct.

22 Q But it is not something within the realm of

23 probability; it would be very unusual for

24 something that large to be missed, right?

25 MR. GUNTA: I'm objecting to the form

Page 57

1 of the question as to the use of the phrase

2 "that large," but subject to the objection, go

3 ahead and answer.

4 THE WITNESS: Weapons come in various

5 sizes and shapes. They aren't as conventional

6 as a normal handgun, so it's possible that

7 individuals can hide items.

8 BY MR. TAHDOOAHNIPPAH:

9 Q They can hide items; that's what you said?

10 A Items, weapons.

11 Q They can hide even some weapons, right?

12 A Correct.

13 Q Okay. But specifically talking about guns,

14 firearms, what is the size -- what is the

15 minimum size of a firearm that you've ever

16 seen?

17 A I couldn't tell you the minimum size of a

18 firearm I've ever seen. I mean, they make very

19 small ones. They make guns that look like

20 phones. There's a wide variety of items

21 available.

22 Q But specifically the size, what is the smallest

23 firearm that you've ever seen?

24 A I've seen firearms smaller than my four fingers

25 together. I've seen firearms that are a few

15 (Pages 54 - 57)

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1 it's a small TV screen, you could say, and it's
 2 on a swivel. It was positioned up towards --
 3 it would have been facing, if anyone, Erik
 4 O'Brien.
 5 Q Okay. Do you know if Officer O'Brien was
 6 looking at that monitor?
 7 A I don't know.
 8 Q So you were driving the squad car, and he was
 9 sitting in the passenger seat?
 10 A Correct.
 11 Q Okay. Up until the point that you pulled into
 12 the sally port, had you seen, heard or sensed
 13 anything suspicious about Mr. Tubby at all?
 14 A No.
 15 Q And you hadn't looked back at him in the back
 16 of the squad at all?
 17 A No, I had not.
 18 Q And you hadn't looked at the monitor at all?
 19 A I had not.
 20 Q So you didn't observe anything about him
 21 putting his hands in front of his body?
 22 A No.
 23 Q So the next thing after you pull into the sally
 24 port is that you get out of the squad car, open
 25 your trunk, and put your weapons inside the

Page 63

1 trunk?
 2 A Once inside the sally port, yes, I removed my
 3 weapons from me and put them in the trunk.
 4 Q And that's standard procedure when you get to
 5 the sally port?
 6 A Correct.
 7 Q And the reason that you were willing to take
 8 off your weapons at that time is that you
 9 didn't perceive any sort of threat from
 10 Mr. Tubby?
 11 A I took them off at that point because it's our
 12 policy.
 13 Q Okay. If you had perceived a threat from
 14 Mr. Tubby, would you still have taken your
 15 weapons off and put them in the trunk?
 16 A Can you read that back, please?
 17 (Last question read.)
 18 THE WITNESS: I guess can you define
 19 in what -- what a "threat" would be? Because
 20 anybody in the back of a squad car could try to
 21 fight me as soon as we got them out.
 22 BY MR. TAHDOOAHNIPPAH:
 23 Q Well, did you think that he was going to fight
 24 you the second that you tried to get him out at
 25 that time?

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1 A Anything could happen. Any cooperative subject
 2 could turn on a second and try to engage me in
 3 some way.
 4 Q I mean, at any point in time I could lunge over
 5 the -- the table right now and start to fight
 6 you, right?
 7 MR. GUNTA: Objection to the form of
 8 the question. Counsel, you know that's
 9 argumentative under the definition. You're not
 10 creating an argument; you're asking an
 11 argumentative question. Objection to the form
 12 of the question. Go ahead and answer it if you
 13 can.
 14 THE WITNESS: It's not outside the
 15 realm of possibilities, sir.
 16 BY MR. TAHDOOAHNIPPAH:
 17 Q But you don't perceive a threat from me, do
 18 you?
 19 A No.
 20 Q And if you do, let me know because I don't want
 21 to be threatening at all.
 22 MR. GUNTA: I do.
 23 MR. TAHDOOAHNIPPAH: Yeah.
 24 BY MR. TAHDOOAHNIPPAH:
 25 Q If -- so what I'm talking about is whether you

Page 65

1 perceive a specific threat, not whether a
 2 threat is in the realm of possibility, whether
 3 you perceive a specific actual threat coming
 4 from a person. Do you understand what I'm
 5 saying?
 6 A Correct.
 7 Q At that time, did you perceive any actual
 8 threat from Mr. Tubby?
 9 A No.
 10 Q And if you had perceived an actual threat,
 11 would you have still put your weapons in the
 12 trunk?
 13 A No.
 14 Q But then you opened the door of the squad to
 15 take him out, right?
 16 A I did.
 17 Q And then what happens next?
 18 A I immediately noticed that it appears that his
 19 hands are in front of him balled up under his
 20 shirt, his jacket. His knees are angled
 21 towards the door that I opened, and he is --
 22 his upper body is leaning into the squad car.
 23 Q All right. You said his hands were balled up
 24 under his shirt or jacket?
 25 A Yes. It appeared that his hands were in front

Page 66

1 of him underneath his jacket.
 2 Q All right. At that point in time, did it look
 3 to you like his hands were a gun?
 4 A At that time I just saw that his hands were
 5 bulged up under his jacket.
 6 Q Did it look like he had anything inside his
 7 hands or just that they were balled up?
 8 A I could only tell that they were balled up.
 9 Q All right. What happened -- you shut the door
 10 at that point in time?
 11 A I had asked him to step out. At one point I
 12 put my hand on his knee to guide him out of the
 13 car, and at one point he makes the comment of
 14 "I'll do it."
 15 Q Okay. What did that mean to you at the time,
 16 "I'll do it"?
 17 A Well, during this whole point, I'm confused as
 18 to why his hands are in front of him. It's
 19 something I don't normally see. It's not
 20 something that someone normally does. Normally
 21 people want to get out of my squad car. They
 22 don't want to be sitting in there because it's
 23 uncomfortable. When I heard that, I was
 24 honestly a little confused. I was a little
 25 frightened as to what he meant by that.

Page 67

1 Q So you didn't take any specific meaning out of
 2 that?
 3 A I didn't know what to think of it.
 4 Q All right. I want you to turn to the sixth
 5 page of the exhibit which is marked Page 5 at
 6 the bottom. If you go to about the fifth
 7 paragraph, it starts with "Officer Wernecke
 8 said he didn't hear Tubby say anything else."
 9 Do you see that?
 10 A Correct.
 11 Q It says "Officer Wernecke said he saw Tubby's
 12 hands balled up in his jacket, and he just saw
 13 a bulge there." Do you see that?
 14 A I do.
 15 Q So that's what we just talked about, right?
 16 You saw his hands, but you didn't see anything
 17 specifically inside of his hands?
 18 A Correct.
 19 Q It says "Officer Wernecke stated that he and
 20 Officer O'Brien were positioned behind the
 21 trunk of the squad"; is that right?
 22 A That is correct.
 23 Q That's where you guys were behind the car?
 24 A Once we shut the door, that's where we were,
 25 yes.

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1 Q So you were looking at Mr. Tubby through the
 2 back window of the squad car?
 3 A Correct.
 4 Q And it says "Officer O'Brien shined his
 5 flashlight into the back window of the squad
 6 and said Tubby had something in his hands." Do
 7 you see that?
 8 A I do.
 9 Q Okay. So the first suggestion that Mr. Tubby
 10 had anything in his hands came from Officer
 11 O'Brien?
 12 A Correct.
 13 Q It says "Officer O'Brien said Tubby had a gun."
 14 Do you see that?
 15 A I do.
 16 Q So at this time it's just you two in the sally
 17 port with Mr. Tubby?
 18 A Correct.
 19 Q And Officer O'Brien specifically says that
 20 Tubby has a gun?
 21 A Yes.
 22 Q Did he say he saw a gun or he just said he had
 23 a gun? What specifically did he say?
 24 A He just makes the statement "He has a gun."
 25 Q Okay. Did you believe he had a gun at that

Page 69

1 point in time?
 2 A At that point I did.
 3 Q And that's based on what Officer O'Brien said?
 4 A Correct.
 5 Q Was there anything else that happened besides
 6 what Officer O'Brien said that led you to
 7 believe that Mr. Tubby had a gun?
 8 A No, sir.
 9 Q And, in fact, in the next sentence it says
 10 "Officer Wernecke said he couldn't see anything
 11 in Tubby's hands." Do you see that?
 12 A Correct, I do.
 13 Q So you were looking at the same vantage point
 14 as Officer O'Brien, but you didn't see a gun?
 15 A We weren't quite at the same vantage point. I
 16 was directly behind where Mr. Tubby was
 17 positioned in the car, and Officer O'Brien was
 18 somewhere to my right shining his flashlight.
 19 I didn't have my flashlight out, so I couldn't
 20 see into the car.
 21 Q Okay. So he's to your right, and he's shining
 22 the flashlight into the car?
 23 A Correct.
 24 Q And it's illuminating the inside of the squad,
 25 right?

<p style="text-align: right;">Page 98</p> <p>1 correct?</p> <p>2 A I --</p> <p>3 Q Or just -- I want you to pay attention to this</p> <p>4 area of the video right here, okay?</p> <p>5 A Okay.</p> <p>6 Q And I'm going to back it up, and we can look at</p> <p>7 this in full speed.</p> <p>8 Okay. So would you agree that you</p> <p>9 could see Mr. Tubby's head come into the frame?</p> <p>10 A If that's him in the video, yes.</p> <p>11 Q Well, would you agree that someone's head came</p> <p>12 into the frame?</p> <p>13 A Someone's head comes into the frame there, yes.</p> <p>14 Q Okay. And you were at the scene at that time,</p> <p>15 right?</p> <p>16 A Correct.</p> <p>17 Q All right. And the person whose head came into</p> <p>18 the frame was on the ground, right?</p> <p>19 A It appears so.</p> <p>20 Q Well, you were there. Was there someone on the</p> <p>21 ground at that time?</p> <p>22 A Yes.</p> <p>23 Q Okay. Was there -- who was that person?</p> <p>24 A Mr. Tubby would have been on the ground.</p> <p>25 Q Okay. Was there anyone else on the ground at</p>	<p style="text-align: right;">Page 100</p> <p>1 MR. TAHDOOAHNIPPAH: Well, we can</p> <p>2 look at the whole thing. I'm just -- you can</p> <p>3 do it on your time. We can take a break. I'm</p> <p>4 asking questions about it right now.</p> <p>5 MR. GUNTA: All right. You go ahead.</p> <p>6 BY MR. TAHDOOAHNIPPAH:</p> <p>7 Q All right. So this -- Mr. Tubby's head comes</p> <p>8 into this video at about nine seconds into the</p> <p>9 video at 9:10:58 p.m., correct?</p> <p>10 MR. GUNTA: Excuse me a second. I'm</p> <p>11 just going to object. I just want to look at</p> <p>12 the video and see what I can see on it. It's</p> <p>13 small. Do you mind if I look at it? I just</p> <p>14 can't tell what you're talking about.</p> <p>15 MR. TAHDOOAHNIPPAH: Yeah.</p> <p>16 BY MR. TAHDOOAHNIPPAH:</p> <p>17 Q Well, the thing that's important for our</p> <p>18 purposes is, Officer Wernecke, can you tell</p> <p>19 what I'm talking about?</p> <p>20 MR. GUNTA: Oh, no, it's also</p> <p>21 important that I know what you're talking</p> <p>22 about, Counsel. So I can't see what you're</p> <p>23 referring to, and I'm just telling you that.</p> <p>24 You're asking my client questions about that,</p> <p>25 and I don't see what you're referring to. I</p>
<p style="text-align: right;">Page 99</p> <p>1 the time?</p> <p>2 A Not to my knowledge.</p> <p>3 Q Okay. And you were at the scene, right?</p> <p>4 A Correct.</p> <p>5 Q You were in the video, right?</p> <p>6 A Correct.</p> <p>7 Q So you have firsthand knowledge, correct?</p> <p>8 A Correct.</p> <p>9 Q And the only person that was on the ground was</p> <p>10 Mr. Tubby?</p> <p>11 A Correct.</p> <p>12 Q No other -- no officer fell down at some point?</p> <p>13 A Not that I'm aware of.</p> <p>14 Q So the person whose head came into the frame</p> <p>15 right then, that was Mr. Tubby?</p> <p>16 A Correct.</p> <p>17 MR. GUNTA: Can I see the whole</p> <p>18 video? I want to make sure that that's</p> <p>19 someone's head, Counsel.</p> <p>20 MR. TAHDOOAHNIPPAH: Well, you're</p> <p>21 free to look at it any time you want. Your</p> <p>22 office has a copy.</p> <p>23 MR. GUNTA: Well, you're not going to</p> <p>24 play the whole thing now? I can ask for the</p> <p>25 rule of completeness so you can show the --</p>	<p style="text-align: right;">Page 101</p> <p>1 have a right to see that.</p> <p>2 BY MR. TAHDOOAHNIPPAH:</p> <p>3 Q Well, Officer Wernecke, do you know what I'm</p> <p>4 talking about?</p> <p>5 A I can see someone's head come into the frame</p> <p>6 at -- at this point.</p> <p>7 MR. GUNTA: What I'm trying to tell</p> <p>8 you is I don't see that, so I would like to</p> <p>9 know where it is.</p> <p>10 MR. TAHDOOAHNIPPAH: All right.</p> <p>11 Let's go off the record.</p> <p>12 (Brief recess taken.)</p> <p>13 BY MR. TAHDOOAHNIPPAH:</p> <p>14 Q All right. So, Officer Wernecke, we were just</p> <p>15 off the record for a few minutes, and you had</p> <p>16 an opportunity to review the video several</p> <p>17 times with your counsel; is that correct?</p> <p>18 A Correct.</p> <p>19 Q All right. Now, going back to nine seconds</p> <p>20 into the video, October 19th, 2018,</p> <p>21 9:10:58 p.m., Mr. Tubby's head is visible on</p> <p>22 the ground in the video; is that right?</p> <p>23 A Correct.</p> <p>24 Q And this is before Mr. Tubby was shot?</p> <p>25 A I don't know exactly when it --</p>

Page 102

1 Q Well, this is you by the concrete barrier,
 2 correct?
 3 A Correct.
 4 Q And this is before you've jumped over it,
 5 right?
 6 A Correct.
 7 Q And so you jumped over it before he was shot,
 8 right?
 9 A When I jumped over the wall, it was
 10 approximately when he was shot. I don't know
 11 exactly which second those rounds started
 12 coming.
 13 Q Okay. Because a few minutes ago we -- you
 14 testified that he was shot at 9:11:01 p.m. Do
 15 you remember that? So are you changing your
 16 testimony now, or are you still confident that
 17 it was 9:11:01?
 18 A I believe I said approximately around that
 19 time. I don't know the exact time.
 20 Q Okay. So as far as when he was shot, it was
 21 when you had completed jumping over the
 22 concrete barrier, as you were jumping over the
 23 concrete barrier or before you jumped over the
 24 concrete barrier?
 25 A It was as I was jumping over and falling to the

Page 103

1 ground.
 2 Q Okay. And in this frame of the video, you
 3 haven't started jumping over the concrete
 4 barrier, have you?
 5 A I haven't yet.
 6 Q So he hasn't been shot yet?
 7 A I don't know.
 8 Q Well, he's still alive at this time, right?
 9 MR. GUNTA: Well, objection to the
 10 form of the question.
 11 THE WITNESS: Yes.
 12 BY MR. TAHDOOAHNIPPAH:
 13 Q All right. And Officer O'Brien hasn't fired
 14 any lethal rounds yet?
 15 MR. GUNTA: Objection to the form of
 16 the question. Go ahead.
 17 THE WITNESS: I don't know.
 18 BY MR. TAHDOOAHNIPPAH:
 19 Q Well, you were there, right?
 20 A I was.
 21 Q And you testified that Officer O'Brien fired
 22 lethal rounds as you were jumping over the
 23 concrete barrier and hitting the ground,
 24 correct?
 25 A Correct.

Page 104

1 Q And you haven't jumped over the concrete
 2 barrier yet, right?
 3 A I have not, yes.
 4 Q So at this time, Officer O'Brien has not yet
 5 fired lethal rounds?
 6 A No.
 7 Q Okay. You're there. Are you looking at
 8 Mr. Tubby?
 9 A I don't recall if I could see him or if my
 10 vision was obscured by the wall there. I can't
 11 tell.
 12 Q All right. So you don't recall whether or not
 13 you saw Mr. Tubby laying like that on the
 14 ground?
 15 A I don't recall.
 16 Q Do you know how he got on the ground at this
 17 particular moment?
 18 A I don't.
 19 Q In between your -- I mean, your head is looking
 20 in his direction, right?
 21 A I'm looking in that general direction, yes.
 22 Q Okay. Is there something that obscures your
 23 line of sight there?
 24 A I can't see into -- from there the wall is
 25 there. I can only see what's directly in front

Page 105

1 of me.
 2 Q Okay. So the wall -- this portion of the wall
 3 right here is what you're talking about?
 4 A Correct.
 5 Q You think that could have obscured your vision
 6 of Mr. Tubby?
 7 A Yes.
 8 Q So you don't recall ever seeing him on the
 9 ground like that?
 10 A Not at that point.
 11 Q Okay. And you don't recall ever -- you don't
 12 recall whether or not your vision was obscured
 13 at this point in time?
 14 A Correct, I don't recall.
 15 Q All right. If you watch his head, it then
 16 moves back out of the frame of the camera,
 17 correct?
 18 A Correct.
 19 Q Okay. How was it that his head moved
 20 backwards?
 21 A I don't know.
 22 Q Okay. Do you know if he was engaged by a
 23 police canine unit at that point in time?
 24 A I did not know at that point.
 25 Q Did you ever see him be engaged by a police

27 (Pages 102 - 105)

<p style="text-align: right;">Page 114</p> <p>1 danger of being killed to fire regardless of</p> <p>2 any potential crossfire?</p> <p>3 MR. GUNTA: And kill another officer</p> <p>4 is what you're asking. Go ahead and answer.</p> <p>5 MR. TAHDOOAHNIPPAH: If you could</p> <p>6 answer the question as posed. There's been a</p> <p>7 lot of interjections and --</p> <p>8 MR. GUNTA: I withdraw the statement</p> <p>9 from the record. You can leave it, obviously.</p> <p>10 MR. TAHDOOAHNIPPAH: Can you please</p> <p>11 repeat the question?</p> <p>12 (Last question read.)</p> <p>13 MR. GUNTA: Go ahead and answer the</p> <p>14 question.</p> <p>15 THE WITNESS: I believe it would be</p> <p>16 justified. However, I didn't want to</p> <p>17 potentially fire at an officer.</p> <p>18 BY MR. TAHDOOAHNIPPAH:</p> <p>19 Q So even if you were fearful, you weren't so</p> <p>20 fearful that you were willing to risk</p> <p>21 crossfire?</p> <p>22 MR. GUNTA: Objection. That isn't</p> <p>23 what he said. Go ahead and answer.</p> <p>24 THE WITNESS: I was fearful for my</p> <p>25 life. I didn't want to pose a danger to</p>	<p style="text-align: right;">Page 116</p> <p>1 jail.</p> <p>2 Q But you don't know why they did that?</p> <p>3 A No.</p> <p>4 Q And you don't know the particular name of the</p> <p>5 person that opened it?</p> <p>6 A I don't.</p> <p>7 Q Okay. The whole reason Mr. Tubby was outside</p> <p>8 of your squad car was because the back window</p> <p>9 had been broken, right?</p> <p>10 A Correct.</p> <p>11 Q But he's locked on the inside otherwise, right?</p> <p>12 A Correct.</p> <p>13 Q And he specifically came out of the back window</p> <p>14 after he was sprayed with OC spray, right?</p> <p>15 A Correct.</p> <p>16 Q Why -- do you know why they were trying to</p> <p>17 force him out of the vehicle?</p> <p>18 A I don't.</p> <p>19 Q Do you know who made the decision to try to</p> <p>20 force him out of the vehicle?</p> <p>21 A I don't.</p> <p>22 Q Has it ever been part of your training as a</p> <p>23 police officer to try to force a potentially</p> <p>24 armed person out of a vehicle?</p> <p>25 A No.</p>
<p style="text-align: right;">Page 115</p> <p>1 Officer O'Brien.</p> <p>2 BY MR. TAHDOOAHNIPPAH:</p> <p>3 Q So your fear wasn't enough that you would have</p> <p>4 risked crossfire?</p> <p>5 MR. GUNTA: Objection to the form of</p> <p>6 the question; asked and answered. Go ahead and</p> <p>7 answer it again.</p> <p>8 THE WITNESS: I was fearful for my</p> <p>9 life and others'. I didn't want to pose a</p> <p>10 threat to Officer O'Brien and potentially shoot</p> <p>11 him.</p> <p>12 BY MR. TAHDOOAHNIPPAH:</p> <p>13 Q Okay. I understand that, but that wasn't the</p> <p>14 question. The question was you weren't so</p> <p>15 fearful that you were willing to risk</p> <p>16 crossfire?</p> <p>17 A Correct.</p> <p>18 Q All right. We talked about this door -- him</p> <p>19 running towards the open door where you were</p> <p>20 also positioned on the outside, right?</p> <p>21 A Correct.</p> <p>22 Q Why was that door open?</p> <p>23 A I don't know.</p> <p>24 Q Do you know who opened it?</p> <p>25 A It would have had to have been somebody in the</p>	<p style="text-align: right;">Page 117</p> <p>1 Q Using your common sense, does it seem like a</p> <p>2 good idea to force someone out of a vehicle if</p> <p>3 that person were armed?</p> <p>4 A No.</p> <p>5 Q But you never did anything to -- did you know</p> <p>6 about this plan before it happened?</p> <p>7 A I did not, sir.</p> <p>8 Q So you were just standing outside of the sally</p> <p>9 port door, and all of a sudden they started</p> <p>10 breaking the window and spraying him with OC</p> <p>11 and you had no idea that that was going to</p> <p>12 happen?</p> <p>13 A Correct.</p> <p>14 Q They didn't share their plans with you?</p> <p>15 A No.</p> <p>16 Q Doesn't that seem dangerous in and of itself?</p> <p>17 MR. GUNTA: Objection to the form of</p> <p>18 the question.</p> <p>19 THE WITNESS: Sorry, can you read the</p> <p>20 question, please?</p> <p>21 (Last question read.)</p> <p>22 THE WITNESS: Yes.</p> <p>23 BY MR. TAHDOOAHNIPPAH:</p> <p>24 Q Okay. Have you ever talked about this incident</p> <p>25 with Officer O'Brien?</p>

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF WISCONSIN
3

4 * * * * *

5
6 Susan Doxtator, Arlie Doxtator,
7 and Sarah Wunderlich, as
8 Special Administrators of the
9 Estate of Jonathon C. Tubby,
10 Plaintiffs,
11 vs. Case No. 1:19-cv-00137-WCG
12 Erik O'Brien, Andrew Smith,
13 Todd J. Delain, Heidi Michel,
14 City of Green Bay, Brown
15 County, Joseph P. Mleziva,
16 Nathan K. Winisterfer, Thomas
17 Zeigle, Bradley A. Dernbach,
18 and John Does 1-5,
19 Defendants.

20 * * * * *

21 DEPOSITION OF: LT. THOMAS ZEIGLE

22 TAKEN AT: Brown County Sheriff's Office
23 LOCATED AT: 2684 Development Drive
24 Green Bay, Wisconsin

25 January 10, 2020

 11:02 a.m. to 3:57 p.m.

 * * * * *

24 REPORTED BY PAULA A. ERICKSON, C.S.R., R.P.R.,
25 C.L.R.

<p style="text-align: right;">Page 10</p> <p>1 Q. Did you have any other career before</p> <p>2 you started in law enforcement?</p> <p>3 A. Just some factory jobs and, you know,</p> <p>4 manual labor jobs like that.</p> <p>5 Q. All right. And you are a lieutenant</p> <p>6 with the Brown County Sheriff's Office?</p> <p>7 A. I am.</p> <p>8 Q. How did you -- How does one become a</p> <p>9 lieutenant?</p> <p>10 A. It's basically a promotional procedure.</p> <p>11 Usually you start as a patrolman and work your</p> <p>12 way up to a sergeant and then a lieutenant, so</p> <p>13 it was basically a seniority process.</p> <p>14 Q. Is there lock step promotions or do you</p> <p>15 need to go through some sort of promotion</p> <p>16 process?</p> <p>17 A. There is a promotional process.</p> <p>18 Q. Is that something that you are</p> <p>19 nominated for or that you volunteer for?</p> <p>20 A. You volunteer for it.</p> <p>21 Q. And is there a -- what is the process</p> <p>22 for each promotion?</p> <p>23 A. To be a sergeant, it's an interview.</p> <p>24 When I got promoted, it was an interview and to</p> <p>25 be honest with you, I can't remember what else.</p>	<p style="text-align: right;">Page 12</p> <p>1 like a multi-agency SWAT team; is that accurate?</p> <p>2 A. Yes.</p> <p>3 Q. Describe to me how that works.</p> <p>4 A. So we have members from the Brown</p> <p>5 County Sheriff's Office, we have a member from</p> <p>6 the Oneida Tribal Police Department on our team,</p> <p>7 we have four members from the De Pere Police</p> <p>8 Department on our team and we have two members</p> <p>9 from the Ashwaubenon Public Safety Department on</p> <p>10 our team.</p> <p>11 Q. Whenever a SWAT team is deployed, do</p> <p>12 officers from all those agencies are they all</p> <p>13 deployed simultaneously or does it just depend</p> <p>14 on who is available?</p> <p>15 A. Whoever is available. You know, if</p> <p>16 somebody is on vacation, they won't be able to</p> <p>17 respond; but generally if we put out a call,</p> <p>18 whoever is available will respond.</p> <p>19 Q. How long have you been a SWAT</p> <p>20 commander?</p> <p>21 A. A SWAT commander for four years, I</p> <p>22 believe.</p> <p>23 Q. All right. So are you the top of the</p> <p>24 line when it comes to the SWAT team or is there</p> <p>25 someone above you?</p>
<p style="text-align: right;">Page 11</p> <p>1 I know since then they changed the process.</p> <p>2 Q. Okay.</p> <p>3 A. But to become promoted to a lieutenant,</p> <p>4 it was an interview with the sheriff and the</p> <p>5 chief and the captain.</p> <p>6 Q. How long have you held the rank of</p> <p>7 lieutenant?</p> <p>8 A. Since 2012.</p> <p>9 Q. Do you have a certain set of officers</p> <p>10 that you supervise?</p> <p>11 A. No. Not really. The reason I say that</p> <p>12 is because the lieutenants work a different</p> <p>13 shift than the patrolman, so basically it</p> <p>14 rotates and we just supervise whoever is on our</p> <p>15 shift at that certain time.</p> <p>16 Q. Okay. So you have responsibility over</p> <p>17 a certain shift and whichever officers are</p> <p>18 working that shift?</p> <p>19 A. That's correct.</p> <p>20 Q. Some other witnesses have testified</p> <p>21 that you are the SWAT commander for the Brown</p> <p>22 County SWAT team; is that accurate?</p> <p>23 A. That's correct. Yes.</p> <p>24 Q. Some other witnesses have also</p> <p>25 testified that the Brown County SWAT team is</p>	<p style="text-align: right;">Page 13</p> <p>1 A. No. I am the top of the line.</p> <p>2 Q. How did you become the SWAT commander?</p> <p>3 A. Through attrition. Basically I started</p> <p>4 out as an operator, worked my way up to being</p> <p>5 assistant team leader, team leader, assistant</p> <p>6 commander, then commander.</p> <p>7 Q. And, again, is that something that you</p> <p>8 apply for or something that someone else</p> <p>9 nominates you for to be the SWAT commander?</p> <p>10 A. Usually you are basically nominated to</p> <p>11 do it by the outgoing commander.</p> <p>12 Q. Uh-huh.</p> <p>13 A. So it's usually just on his word</p> <p>14 basically.</p> <p>15 Q. How many years total have you been on</p> <p>16 the SWAT team?</p> <p>17 A. Since 2002.</p> <p>18 Q. What types of additional training do</p> <p>19 SWAT team members receive?</p> <p>20 A. Our team trains an additional 16 hours</p> <p>21 per month and the way we break it down is we</p> <p>22 have two six-hour blocks and then a separate</p> <p>23 four-hour block and we train everything from</p> <p>24 firearms to less lethal tactics to --</p> <p>25 THE REPORTER: I'm sorry. To what</p>

Page 18

1 A. If I could back up.
 2 Q. Yeah.
 3 A. On my way over, I had called the
 4 communications center on the radio and asked if
 5 the ranking officer on the scene for Green Bay
 6 could give me a call just to give me some more
 7 information; and if I remember correctly
 8 Lt. Allen from the city called me.
 9 Q. Okay. What did you guys talk about on
 10 the phone?
 11 A. Basically the same thing that
 12 Lt. Buckman and I talked about. Just what they
 13 had, the situation, so I told him I was just a
 14 couple minutes out at the time, so...
 15 Q. And what did he tell you about what the
 16 situation was?
 17 A. The same thing. That there was a
 18 gentleman in the back of a Green Bay squad car,
 19 that was making gestures and, you know, led
 20 officers to believe that he had a gun.
 21 Q. All right. After you talked to
 22 Lt. Allen on the phone, what happened next?
 23 A. I arrived on scene at the jail. Parked
 24 outside the sally port and -- Do you want me to
 25 keep going?

Page 19

1 Q. Yeah.
 2 A. Okay. Got out of my squad car. At the
 3 time, I was parked probably about 15 yards away
 4 from the entrance for the sally port. I saw
 5 Officer Eric Allen approaching me so I -- and I
 6 think Lt. Allen was right behind him so I talked
 7 with Eric and basically got the same synopsis
 8 that I got from Lt. Allen and Lt. Buckman, that
 9 there was a guy in the squad car in the sally
 10 port that was thought to have a gun.
 11 Q. When you arrived, were there any
 12 other -- was Sgt. Katers there?
 13 A. He was.
 14 Q. Were there any other Brown County
 15 Sheriff's Office officers there?
 16 A. I believe Sgt. Dernbach was already
 17 there.
 18 Q. Anyone else?
 19 A. I don't recall.
 20 Q. All right. What happened next?
 21 A. And I don't recall if it was Eric or
 22 Lt. Allen, I think it might have been Lt. Allen
 23 but they had said that they had come up with a
 24 game plan to use the bear cat, a team of
 25 officers and a canine to basically open up the

Page 20

1 rear door and send in the canine who I now know
 2 is Mr. Tubby to try to, you know, control the
 3 situation that way.
 4 Q. Was the idea that the canine would
 5 remove him from the vehicle?
 6 A. That was my assumption, yes.
 7 Q. All right. What did you do next?
 8 A. I told him I did not agree with that
 9 plan.
 10 Q. All right. Why did you not agree with
 11 that plan?
 12 A. The reason I didn't agree with it is
 13 because based on the information that I got
 14 based on my training I assumed that to be a
 15 barricaded situation, so basically a standoff
 16 with an individual that's armed or potentially
 17 armed; and so, ultimately, it's a barricaded
 18 subject, no different to me than a barricaded
 19 subject in a house and there is different ways
 20 that we approach that type of situation.
 21 And the plan that they had actually put
 22 the safety of Mr. Tubby in more danger than my
 23 plan and it also put the danger of the officers
 24 in harm's way, too, which it might have been a
 25 contingency plan but not a good primary plan.

Page 21

1 Q. All right. You have mentioned that
 2 that plan would put Mr. Tubby in more danger.
 3 Why is that?
 4 A. Well, what we are -- what they would
 5 have been doing if they would have put that plan
 6 in motion is they would have been approaching
 7 him and basically would have caused the
 8 confrontation instead of the plan that I had
 9 come up with, it gave him options to surrender.
 10 Q. So in other words, they are removing
 11 him or approaching the vehicle would be
 12 escalating the situation?
 13 A. Correct.
 14 Q. And with a barricaded subject, you want
 15 to deescalate the situation?
 16 A. Yes. You want to give them options.
 17 You want to give them the opportunity to
 18 surrender.
 19 Q. All right. So why, and I apologize if
 20 I am asking again but I may have missed it, why
 21 exactly is it more dangerous for Mr. Tubby
 22 himself if they approach the vehicle with the
 23 canine?
 24 MR. SPARKS: Just object to form.
 25 Asked and answered. Go ahead.

6 (Pages 18 - 21)

<p style="text-align: right;">Page 22</p> <p>1 THE WITNESS: Okay. So I can answer?</p> <p>2 MR. SPARKS: Yes.</p> <p>3 THE WITNESS: Okay. Just because when</p> <p>4 they would have put that plan in motion when</p> <p>5 they would have started approaching the vehicle,</p> <p>6 it gives basically Mr. Tubby no opportunity to</p> <p>7 surrender. I mean, once they release that</p> <p>8 canine, you know, it's very hard to recall that</p> <p>9 canine so it didn't give him an option to</p> <p>10 surrender if that makes sense.</p> <p>11 BY MR. TAHDOOAHNIPPAH:</p> <p>12 Q. Yeah. In other words, once the plan is</p> <p>13 going, at a minimum he is going to be injured by</p> <p>14 the canine?</p> <p>15 A. That's correct.</p> <p>16 Q. All right. And you said it also</p> <p>17 created more danger for the officers themselves?</p> <p>18 A. That's correct.</p> <p>19 Q. Why was that?</p> <p>20 A. Through my training through the</p> <p>21 National Tactical Officers Association, we</p> <p>22 adhere to what's called Safety Priorities and</p> <p>23 those Safety Priorities help us to plan any type</p> <p>24 of SWAT operation and basically there is four</p> <p>25 steps.</p>	<p style="text-align: right;">Page 24</p> <p>1 Q. Just trying to get kind of a general</p> <p>2 sense however you would describe it.</p> <p>3 A. Sure. I have received an extensive</p> <p>4 amount of training from the National Tactical</p> <p>5 Officers Association. I have been to multiple</p> <p>6 training sessions throughout the country. I</p> <p>7 have been to conferences throughout the country,</p> <p>8 Salt Lake City, Pittsburgh.</p> <p>9 Q. All right. And that's all in</p> <p>10 connection with the National Tactical Officers</p> <p>11 Association?</p> <p>12 A. That's correct.</p> <p>13 Q. Have you received training from some</p> <p>14 other source regarding barricaded subjects?</p> <p>15 A. Yeah. I have also received training</p> <p>16 from Alan Brosnan. He owns -- it's Tactical</p> <p>17 Energetic Entry Systems I believe, so he is a --</p> <p>18 you know, he trains SWAT officers, too, on</p> <p>19 barricaded tactics.</p> <p>20 Q. Any other source of training for</p> <p>21 regarding barricaded subjects?</p> <p>22 A. No. Most of it has been through the</p> <p>23 I'll call it the NTOA. That's just the acronym</p> <p>24 for it, so we don't have to say it all the time,</p> <p>25 but they are the foremost experts in the</p>
<p style="text-align: right;">Page 23</p> <p>1 The first one is hostages, second one</p> <p>2 is civilians or innocent citizens, third is</p> <p>3 officers and then fourth is the suspect or</p> <p>4 suspects, whatever you have.</p> <p>5 So by putting Green Bay's plan in</p> <p>6 motion, by approaching an individual that</p> <p>7 obviously they thought had a weapon, they would</p> <p>8 have been putting the safety of the suspect</p> <p>9 above the officers which in tactical situations,</p> <p>10 you never do, so; and, again, that would have</p> <p>11 been done just by approaching that vehicle.</p> <p>12 Q. And so the reason you are specifically</p> <p>13 saying that is because of the risk that he would</p> <p>14 shoot the officers as they approached?</p> <p>15 A. That's correct.</p> <p>16 Q. You mentioned some specific training in</p> <p>17 from something called the National Tactical</p> <p>18 Officers -- and I missed the last part. What</p> <p>19 was it?</p> <p>20 A. Association.</p> <p>21 Q. Association. All right. How much</p> <p>22 training have you received regarding barricaded</p> <p>23 subjects in particular?</p> <p>24 A. Are you asking for like the number of</p> <p>25 classes I have taken or --</p>	<p style="text-align: right;">Page 25</p> <p>1 country, probably the world as far as teaching</p> <p>2 law enforcement tactics or SWAT-related tactics.</p> <p>3 Q. And NTOA are you like a member of that</p> <p>4 association?</p> <p>5 A. I am an individual member and we also</p> <p>6 have a team membership, too.</p> <p>7 Q. Brown County Sheriff's Office has a</p> <p>8 team membership?</p> <p>9 A. Correct.</p> <p>10 Q. All right. When did you first start</p> <p>11 participating with NTOA?</p> <p>12 A. When I got on the team in 2002.</p> <p>13 Q. On the SWAT team that is?</p> <p>14 A. Correct. Yeah. We had a team</p> <p>15 membership, and I believe I got my individual</p> <p>16 membership in 2007, 2008, somewhere in there I</p> <p>17 have got it. It's in the records or database.</p> <p>18 Q. And you continue to be a member today?</p> <p>19 A. I am.</p> <p>20 Q. All right. You mentioned that they</p> <p>21 have conferences that you have attended?</p> <p>22 A. Yes.</p> <p>23 Q. Is that annual or semi-annual kind of</p> <p>24 thing?</p> <p>25 A. They have an annual conference every</p>

<p style="text-align: right;">Page 26</p> <p>1 year. Usually somewhere, you know, some major 2 city. One year it was in Phoenix, one year was 3 Salt Lake, one year was Pittsburgh, so I believe 4 I have been to -- and then one year in 5 Milwaukee, so I have been to a total of four 6 conferences. 7 Q. All right. And you mentioned some 8 other training that they do. What was that? 9 A. Yeah. So they will put on specific 10 training, you know, where they will teach, you 11 know, what they call resolution of a barricaded 12 subject or they will teach them, you know, a 13 five-day course on hostage rescue, you know. 14 They also teach it's called NTOA 15 Commander I, so there is actually a lot of 16 different subjects that they teach. 17 Q. All right. And are those something 18 that they bring to you or that you go to them? 19 A. We have hosted courses here with the 20 NTOA, but I have also gone to different cities 21 like Eau Claire, for example, couple years ago. 22 Q. How many courses has the Brown County 23 Sheriff's Office hosted for NTOA here? 24 A. Sorry about that. So, personally, I 25 believe I have set up training here for NTOA</p>	<p style="text-align: right;">Page 28</p> <p>1 A. They were. 2 Q. Did they attend that? 3 A. I believe they were, yes. 4 Q. Okay. The NTOA Commander II, was the 5 Green Bay Police Department SWAT team also 6 invited to that? 7 A. I believe they were. 8 Q. And did they attend that? 9 A. I don't recall that specific one. 10 Q. Do you know if the Green Bay SWAT team 11 has a team membership to the NTOA? 12 A. I'm not sure on that. 13 Q. The courses that you have traveled to 14 go to in other places, how many of those have 15 dealt with barricaded subjects? 16 A. So the one conference I took in 17 Milwaukee, that was five days just dedicated to 18 barricaded subjects; and the courses that I have 19 taken like in Phoenix, Salt Lake, and 20 Pittsburgh, I have attended basically four-hour 21 blocks or eight-hour blocks of training and all 22 of those conferences touched on barricaded 23 subjects. 24 Q. Okay. Based on your training in 25 dealing with barricaded subjects, what is the</p>
<p style="text-align: right;">Page 27</p> <p>1 three or four different classes. 2 Q. Were any of those on barricaded 3 subjects specifically? 4 A. So the NTOA Commander I, which is a 5 five-day course, they have a specific block 6 within that NTOA within that week that deals 7 just with barricaded subjects. 8 Q. All right. And was that something that 9 you had put on here at the Brown County 10 Sheriff's Office? 11 A. Yes. 12 Q. And you attended that? 13 A. I did. 14 Q. Any other of the courses that you 15 hosted here at Brown County deal with barricaded 16 subjects? 17 A. We also hosted an NTOA Commander II 18 course which I believe covered barricaded 19 subjects as well. 20 Q. All right. Any other of the courses 21 you hosted here deal with barricaded subjects? 22 A. I don't believe so. 23 Q. All right. The NTOA Commander I 24 course, was the Green Bay SWAT team invited to 25 attend that?</p>	<p style="text-align: right;">Page 29</p> <p>1 proper protocol for engaging such a subject? 2 MR. SPARKS: Object to form. 3 MR. GUNTA: Objection to form. Go 4 ahead. I'm sorry. I apologize. 5 MR. SPARKS: Just object to form. 6 MR. GUNTA: Object to form. 7 THE WITNESS: So I can answer? 8 MR. SPARKS: Go ahead. 9 THE WITNESS: Generally it usually 10 starts out with a patrol-based response, so 11 patrol officers will arrive on scene, you know, 12 take into account, you know, what the weapon is, 13 you know, what the specific threats are. 14 They'll look for staging areas, media, staging 15 and stuff like that; but they'll basically set 16 up an inner and outer perimeter. Inner 17 perimeter protects the actual structure itself. 18 From that point what they will do is, 19 you know, after they have all their assets in 20 place, they'll generally make a phone call to 21 someone inside the structure and they'll try to 22 get them to come out peacefully. 23 If that doesn't happen and there is 24 a -- you know, it depends on the situation but 25 if patrol isn't successful in calling out the</p>

<p style="text-align: right;">Page 30</p> <p>1 subject themselves, that's when the activation 2 is made for the SWAT team to respond. 3 BY MR. TAHDOOAHNIPPAH: 4 Q. All right. You mentioned that the 5 inner perimeter is to contain the structure 6 holding the suspect him or herself? 7 A. Correct. 8 Q. What is the outer perimeter? Where 9 should that be established? 10 A. The inner perimeter is just basically, 11 again, is based on what the individual may have 12 for a weapon, whether it's a rifle or pistol but 13 the outer perimeter is meant to keep the public 14 safely back basically to just give a safety 15 buffer between the inner and the outer 16 perimeter. 17 Q. All right. When the SWAT is activated, 18 what are the -- what's the next step after that? 19 MR. SPARKS: Same objection. Go ahead. 20 THE WITNESS: Okay. So what SWAT will 21 do is we'll respond and basically take the place 22 of the perimeter personnel. We'll also get 23 what's called an emergency team in place which 24 consists of about four or five officers that are 25 in place and ready to go in case the subject</p>	<p style="text-align: right;">Page 32</p> <p>1 that is what? 2 A. Like I said, just to maybe see where we 3 can see him in the house. 4 Q. To obtain some sort of visual contact, 5 is that the goal? 6 A. Exactly. Yep. 7 Q. All right. You mentioned that maybe 8 five minutes would be an appropriate interval of 9 time. Is there some sort of criteria you use to 10 evaluate what the proper interval of time is? 11 A. It usually deals with location, time of 12 day, whatever the criminal offense is. So all 13 of that really we take into account based on how 14 long we are going to try to -- we don't call it 15 negotiating in that situation. We call it 16 communication. 17 Q. Communication? 18 A. Yeah. 19 Q. All right. So after you create this 20 diversion to try to get a visual, what's the 21 next step? 22 A. Next step if we want to we might 23 actually even break out a window or two. 24 Q. And what's the purpose of that? 25 A. Same thing, to see if we can get any</p>
<p style="text-align: right;">Page 31</p> <p>1 does come out and wants to surrender or else if 2 he comes out and points a gun, they are ready to 3 respond. 4 So at that point, you know, depending 5 on the situation, we may give the subject, you 6 know, if it's a criminal barricade situation, 7 NTOA standards, some teams will give them five 8 minutes and once they get on scene, they get 9 their resources in place, they'll make contact. 10 Sir, you have five minutes to surrender; 11 otherwise, you know, the next step is taken. 12 Q. And what would the next step be? 13 A. Next step is it might be something as 14 simple as throwing a rock on the window or 15 throwing a rock on the roof just trying to get 16 him to react. 17 Q. Some sort of display of force of some 18 kind? 19 A. It could be; otherwise, it could just 20 be some type of diversion. 21 Q. Okay. 22 A. Just to see if he opens up a blind just 23 to see if, you know, we can see where he is at 24 in the house or -- 25 Q. All right. And then the purpose of</p>	<p style="text-align: right;">Page 33</p> <p>1 type of reaction. If we haven't had any type of 2 contact with them, you know, sometimes we have 3 individuals that are incapacitated due to 4 alcohol so he might be passed out, just to see 5 if we can get some type of reaction to start 6 some type of dialog with them. 7 Q. All right. So the purpose of trying to 8 get a visual or get a reaction is to determine 9 if they are conscious and to try to establish a 10 dialog? 11 A. Ultimately, yes. 12 Q. All right. What's the next step, 13 breaking a window, you haven't been able to 14 establish a dialog. Let's say you do establish 15 a dialog. You break a window, they pop their 16 head out and you are talking to them and they 17 are responding, would you then negotiate? 18 MR. SPARKS: Object to form. Go ahead. 19 THE WITNESS: Okay. Again, it depends 20 on what type of situation it is. If it's -- 21 we'll say it's a criminal barricade. If it's a 22 criminal barricade, guy in a house, we will 23 generally do what's called a five-minute 24 warning. We'll establish contact with them and 25 let them know you got five minutes to come out</p>

<p style="text-align: right;">Page 46</p> <p>1 A. Yes.</p> <p>2 Q. And you don't like that because none of</p> <p>3 these other steps would have been taken yet?</p> <p>4 A. Correct.</p> <p>5 Q. All right. So what do you tell Officer</p> <p>6 and Lt. Allen?</p> <p>7 A. So they tell me that what their plan</p> <p>8 was is to use a number of officers, go up, open</p> <p>9 up the door with the canine and use the canine,</p> <p>10 then send him into the rear seat with Mr. Tubby.</p> <p>11 Based on everything that I just</p> <p>12 explained here, I didn't think that was -- I</p> <p>13 thought that was possibly a contingency plan but</p> <p>14 not our best laid plan, not our best primary</p> <p>15 plan. And that's what my plan was when I was</p> <p>16 talking to them is to basically treat it like a</p> <p>17 barricaded subject.</p> <p>18 Q. And the training that you just</p> <p>19 discussed that all is talking about a barricaded</p> <p>20 subject within a building?</p> <p>21 A. No.</p> <p>22 Q. No?</p> <p>23 A. A building, house, or vehicle.</p> <p>24 Q. So it includes -- specifically would</p> <p>25 include a situation where someone was barricaded</p>	<p style="text-align: right;">Page 48</p> <p>1 of those guys that will take a suggestion, you</p> <p>2 know, based on rank and just go with it and get</p> <p>3 the job done. Lt. Allen, like I said, I was met</p> <p>4 with some contention from him.</p> <p>5 Q. When you say met with some contention,</p> <p>6 what specifically did he say or do?</p> <p>7 A. He, if I remember right, he said that</p> <p>8 he had talked with Commander Gering who was the</p> <p>9 Green Bay police commander on the phone.</p> <p>10 Lt. Gering was not on scene and they thought the</p> <p>11 best plan was to introduce the canine so when I</p> <p>12 told him my plan, he didn't seem to like that.</p> <p>13 Q. When you say he didn't seem to like it,</p> <p>14 I mean, what specifically whether what he said,</p> <p>15 his body posture, anything, what makes you say</p> <p>16 that?</p> <p>17 A. His body language and just his overall</p> <p>18 demeanor.</p> <p>19 Q. What was your response to that?</p> <p>20 A. I just took note of it and said that</p> <p>21 basically this is the plan that we are going to</p> <p>22 use because a situation like that, somebody has</p> <p>23 to step up and make a decision; and based on my</p> <p>24 years of experience, I thought that was the best</p> <p>25 plan to go with.</p>
<p style="text-align: right;">Page 47</p> <p>1 within a vehicle?</p> <p>2 A. It would.</p> <p>3 Q. That's something that the NTOA</p> <p>4 specifically goes over?</p> <p>5 A. Yes.</p> <p>6 Q. All right. What did you -- you say you</p> <p>7 told them you didn't like the idea, right?</p> <p>8 A. Uh-huh.</p> <p>9 Q. What was their response?</p> <p>10 MR. SPARKS: I'm sorry. Was that a</p> <p>11 yes?</p> <p>12 THE WITNESS: I'm sorry. Yes.</p> <p>13 BY MR. TAHDOOAHNIPPAH:</p> <p>14 Q. What was their response?</p> <p>15 MR. GUNTA: Objection to the form but</p> <p>16 go ahead.</p> <p>17 THE WITNESS: I was met with a little</p> <p>18 bit of I guess contention from Lt. Allen. He</p> <p>19 seemed upset that I wasn't I guess on board with</p> <p>20 their plan.</p> <p>21 BY MR. TAHDOOAHNIPPAH:</p> <p>22 Q. Uh-huh.</p> <p>23 A. I have known Officer Allen for a number</p> <p>24 of years and Eric he is a very solid guy, good</p> <p>25 guy. Lieutenant -- he didn't seem -- he is one</p>	<p style="text-align: right;">Page 49</p> <p>1 Q. Did you tell him that you had authority</p> <p>2 to make the final decision?</p> <p>3 A. With that situation, my objective was</p> <p>4 to basically build a unified command and work</p> <p>5 with Lt. Allen to basically solve the problem,</p> <p>6 so it was a county building so ultimately, you</p> <p>7 know, like I said, somebody has to be in charge.</p> <p>8 I was the lieutenant that day but as far as the</p> <p>9 operational portion of the planning, my intent</p> <p>10 was to work with Lt. Allen to get this to a</p> <p>11 peaceful resolution.</p> <p>12 Q. But did you assert yourself as being in</p> <p>13 command because of the fact that it was a County</p> <p>14 building?</p> <p>15 A. And I'm sorry. Are you talking about</p> <p>16 like overall incident commander, like in charge</p> <p>17 of the whole operation or --</p> <p>18 Q. Well, sure. You know, like we said,</p> <p>19 you have a -- you should understand every</p> <p>20 question, so let me make sure that I understand</p> <p>21 your answer so I can ask good questions.</p> <p>22 Did you view yourself as in charge of</p> <p>23 the overall situation?</p> <p>24 A. Yes.</p> <p>25 Q. Okay. And why was that?</p>

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1 A. Because it was a County facility,
 2 County parking lot, it was a County building.
 3 Green Bay was there and like I said, they had a
 4 lieutenant supervisor in charge so my intent was
 5 to work with him; but, yeah. Overall as far as,
 6 you know, cutting off access to the building and
 7 stuff like that, I mean, that's what I was there
 8 for and to help, like I said, resolve the
 9 situation.
 10 Q. All right. Did you tell Lt. Allen that
 11 you felt that you were in charge of the overall
 12 situation because it was a County property?
 13 A. I don't know if I said I was in charge
 14 because it was a County property, but I told him
 15 that since it's a County facility that I would
 16 have been in charge.
 17 Q. All right. With respect to kind of
 18 formulating a specific plan of how to engage
 19 Mr. Tubby, did you feel that you yourself were
 20 in charge of that as well?
 21 A. Yes, but, again, working with Lt. Allen
 22 to, you know, whether he had any other insight
 23 because when I told him my plan, he didn't seem
 24 to -- he seemed, you know, I guess disappointed
 25 for a word but that didn't mean that we couldn't

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1 go forward and try to work together, you know,
 2 with other tactics or techniques or
 3 communication, you know, we could try.
 4 I mean, it wasn't just shutting down
 5 and saying, you know, I am the sole -- you know,
 6 my word goes. I mean, that's -- we have never
 7 done that with any departments we have worked
 8 with. It's always been a, like I said,
 9 basically a unified command situation. We work
 10 together.
 11 Q. So even though he seemed disappointed,
 12 did he specifically object to the plan that you
 13 offered?
 14 A. No. Not that I recall.
 15 Q. Okay. And what specifically was the
 16 plan that you offered?
 17 A. So if I break it down for you, so we
 18 had officers surrounding the squad car and
 19 basically the scene. We had -- so we had
 20 presence taken care of as far as intervention
 21 options. Dialog, the officers had been trying
 22 to communicate with Mr. Tubby for, I don't
 23 remember exactly when the call came in or when
 24 they got to the sally port, but they would have
 25 started dialog there.

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1 So my plan was just to handle it like a
 2 barricaded situation. You know, we couldn't see
 3 in the back window and so we weren't a hundred
 4 percent sure if Mr. Tubby could hear, so one of
 5 the things like if you break down a front door
 6 or you break out that back window, you at least
 7 have some type of communication port where you
 8 know that the subject can hear you.
 9 Q. So your plan was to break out the rear
 10 window of the squad vehicle?
 11 A. Correct.
 12 Q. Did you have any -- did you
 13 specifically discuss with anyone the next steps
 14 after breaking the window?
 15 A. I don't recall.
 16 Q. In your mind, did you have a plan as to
 17 next steps after breaking out the window?
 18 A. I did, yes.
 19 Q. And what was that?
 20 A. Just like I laid out as far as the
 21 barricade response. So break out the back
 22 window. Introduce the OC, see what type of
 23 reaction we would get. That also gives him an
 24 opportunity to, you know, to talk, to surrender.
 25 Whenever you use OC or CS in any type

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1 of environment whether it's a house or a
 2 vehicle, you have got to give that individual an
 3 escape route or a way out; and the reason I
 4 picked the back window is because if you were to
 5 break that out, it gives him a way out or an
 6 escape route.
 7 If we would have broken out the side
 8 window, there were bars there and there would
 9 have been no way for him to get out of that car.
 10 Q. All right. Why do you need to give the
 11 person an escape route if you are introducing OC
 12 spray or CS?
 13 A. Because if you don't give them an
 14 escape route or a way to get out, they are
 15 basically caged in an environment that's, you
 16 know, flooded with OC or CS. They are basically
 17 trapped in there.
 18 MR. TAHDOOAHNIPPAH: Let's go off the
 19 record for a second.
 20 (Whereupon, a discussion was had
 21 off the record.)
 22 BY MR. TAHDOOAHNIPPAH:
 23 Q. So when you give the person an escape
 24 route, what -- is the hope that they'll use the
 25 escape route to surrender or just that they are

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1 Sgt. Dernbach. Was he on the scene when the
2 bear cat went into the sally port?

3 A. Yes.

4 Q. All right. And we talked a little bit
5 before about sharing the plan, and I believe you
6 said the plan was shared with Katers and
7 Dernbach; is that right?

8 A. I am not a hundred percent sure if
9 Dernbach was aware of the plan but Katers was.

10 Q. Okay. Did you do anything to try to
11 share the plan with Dernbach?

12 A. If he wasn't aware -- If he wasn't on
13 scene when it was talked about, I don't remember
14 if I had a chance to talk to him or not. I
15 don't recall.

16 Q. All right. So same question for
17 Mleziva, did you do anything to share the plan
18 with him?

19 A. No. He would not have been part of the
20 planning process.

21 Q. So when he arrived, there was no
22 attempt made to communicate to him this is
23 what's about to happen or this is what's going
24 on?

25 A. No.

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1 doing, it would have taken eyes off of whatever
2 they were watching at the time and taking their
3 eyes off their area of responsibility.

4 Q. Couldn't you have gotten on the radio
5 and said, okay, everyone stay where you are but
6 here's the plan, what's going to happen?

7 A. Again, the individuals that were aware
8 of the plan were the ones that needed to be
9 aware of the plan, so...

10 Q. So if you weren't aware of the plan,
11 you didn't need to know what the plan was?

12 A. No. That's not what I am saying.

13 Q. Well, some people they didn't get the
14 plan shared with them, right?

15 MR. SPARKS: Object to form. Lack of
16 foundation.

17 THE WITNESS: Correct.

18 BY MR. TAHDOOAHNIPPAH:

19 Q. And so I am just curious as to why it
20 wasn't shared with them and is it your testimony
21 that they didn't need to know?

22 A. No.

23 Q. Okay. So why didn't they know then?

24 MR. SPARKS: Object to form. Go ahead.

25 THE WITNESS: Because, again, to tell

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1 Q. Why not?

2 A. Because we had our primary players in
3 place that were going to move forward with the
4 plan as far as people being in the bear cat.

5 Q. Wouldn't it be important for all the
6 officers on the scene to know what to expect?

7 MR. SPARKS: Object to form. Go ahead.

8 THE WITNESS: There was a number of
9 officers on scene and to go to each individual
10 officer with a game plan, that wouldn't -- I
11 don't know what I want to say here. I don't
12 want to say it would have been a waste of time,
13 but to go to each individual officer and tell
14 them the exact game plan, that just would have
15 been a waste of time in my eyes.

16 BY MR. TAHDOOAHNIPPAH:

17 Q. You couldn't have just huddled everyone
18 up and said one time here's what we are going to
19 do and have everyone go do it?

20 A. Based on the situation, no.

21 Q. Why not?

22 A. Just because it would have taken
23 guys -- some of the guys probably had an area of
24 responsibility or certain job and to bring
25 everybody away from whatever job they were

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1 each individual officer what the game plan was,
2 was just not in the best interest of what was
3 going on at the time.

4 BY MR. TAHDOOAHNIPPAH:

5 Q. And why not?

6 A. Just for times' sake, it would have
7 been a big undertaking to go around to each
8 individual officer and say this is what we are
9 going to do.

10 Q. And you couldn't have used the radio to
11 just tell everyone at one time?

12 A. Again, at the time I didn't think that
13 was necessary.

14 Q. So you just didn't think it was
15 necessary that everyone on the scene knew the
16 plan?

17 MR. SPARKS: Object to form.

18 THE WITNESS: No. That's not what I am
19 saying. I just said I am saying that I didn't
20 think it was important. I thought the main
21 players that were part of the plan --

22 BY MR. TAHDOOAHNIPPAH:

23 Q. Uh-huh.

24 A. -- were aware but some of the other
25 people that were around there, no. They didn't

18 (Pages 66 - 69)

<p style="text-align: right;">Page 70</p> <p>1 know the plan.</p> <p>2 Q. And you didn't think it was necessary</p> <p>3 for them to know the plan even though they were</p> <p>4 at the sally port?</p> <p>5 MR. GUNTA: Objection to the form.</p> <p>6 MR. SPARKS: Join.</p> <p>7 THE WITNESS: Yeah. I guess I don't,</p> <p>8 no.</p> <p>9 BY MR. TAHDOOAHNIPPAH:</p> <p>10 Q. Even though if something were to happen</p> <p>11 they are there and they are on duty, they would</p> <p>12 be required to act?</p> <p>13 MR. SPARKS: Object to form. Vague.</p> <p>14 Calls for speculation. Go ahead.</p> <p>15 MR. GUNTA: Join.</p> <p>16 THE WITNESS: Do you want me to answer?</p> <p>17 MR. SPARKS: Yeah. Go ahead.</p> <p>18 THE WITNESS: I'm sorry. Can you</p> <p>19 repeat the question one more time.</p> <p>20 MR. TAHDOOAHNIPPAH: Can you please</p> <p>21 read it back?</p> <p>22 (Whereupon, the record was read</p> <p>23 as requested.)</p> <p>24 MR. SPARKS: Same objection. Go ahead.</p> <p>25 MR. GUNTA: Renewed.</p>	<p style="text-align: right;">Page 72</p> <p>1 A. Correct.</p> <p>2 Q. And you were personally observing that?</p> <p>3 A. I did.</p> <p>4 Q. And I think before we used the</p> <p>5 Exhibit 21 in front of you to talk about what</p> <p>6 your general area was during the incident. Do</p> <p>7 you recall that?</p> <p>8 A. I do.</p> <p>9 Q. Okay. Do you have access to a pen of</p> <p>10 some sort or if you can just grab that pen and</p> <p>11 just circle kind of the area that you were in</p> <p>12 during the night of October 19, 2018.</p> <p>13 A. I'm sorry. Just to confirm, so when I</p> <p>14 saw Sgt. Katers break out the window or just</p> <p>15 during the entire time?</p> <p>16 Q. The general area you were in the entire</p> <p>17 time.</p> <p>18 A. Okay. So it would have been in the</p> <p>19 paved driveway portion here and then partially</p> <p>20 in the grass area right there.</p> <p>21 Q. All right. So about how many feet is</p> <p>22 it from this part of the pavement to the</p> <p>23 entrance to the sally port?</p> <p>24 MR. SPARKS: Just real quick to clarify</p> <p>25 what part of the pavement are you talking about</p>
<p style="text-align: right;">Page 71</p> <p>1 THE WITNESS: Again, in a situation</p> <p>2 like that, officers are required to respond</p> <p>3 based on what is put in front of them, so...</p> <p>4 BY MR. TAHDOOAHNIPPAH:</p> <p>5 Q. So it's not important that they know</p> <p>6 what to expect other people will be doing?</p> <p>7 MR. SPARKS: Same objection.</p> <p>8 MR. GUNTA: Join.</p> <p>9 THE WITNESS: Again, based on the I'll</p> <p>10 call it the totality of the circumstances, the</p> <p>11 situation, I informed the major players that</p> <p>12 were involved in putting forward the plan what</p> <p>13 the plan was. I didn't have time to let</p> <p>14 everybody know exactly what was going on.</p> <p>15 BY MR. TAHDOOAHNIPPAH:</p> <p>16 Q. Okay. But in an ideal world, you'd</p> <p>17 agree that it would be important for everyone</p> <p>18 that was there to know what the plan was?</p> <p>19 MR. SPARKS: Same objection. Go ahead.</p> <p>20 THE WITNESS: In an ideal world,</p> <p>21 correct.</p> <p>22 BY MR. TAHDOOAHNIPPAH:</p> <p>23 Q. After the window was breached,</p> <p>24 Sgt. Katers used some sort of implement to knock</p> <p>25 out the glass; is that correct?</p>	<p style="text-align: right;">Page 73</p> <p>1 there?</p> <p>2 BY MR. TAHDOOAHNIPPAH:</p> <p>3 Q. The part of the pavement that's been</p> <p>4 circled.</p> <p>5 MR. SPARKS: There are several parts of</p> <p>6 the pavement circled here. I just want to make</p> <p>7 sure it's clear on the record.</p> <p>8 BY MR. TAHDOOAHNIPPAH:</p> <p>9 Q. Do you understand the question?</p> <p>10 A. I do. Just to confirm so my distance</p> <p>11 here to the apron of the concrete here?</p> <p>12 Q. Yeah.</p> <p>13 A. So at any time based on where I was</p> <p>14 moving so probably ten feet.</p> <p>15 Q. And the distance from the apron to the</p> <p>16 concrete where you were, I mean, whether you are</p> <p>17 here on the left side or your right I guess or</p> <p>18 the other left side, that's ten feet regardless,</p> <p>19 right?</p> <p>20 A. Approximately.</p> <p>21 Q. After Sgt. Katers breaks out the glass,</p> <p>22 what happened next?</p> <p>23 A. So after Sgt. Katers broke out the</p> <p>24 glass, if I recall correctly Officer Allen was</p> <p>25 in the turret and he grabbed his OC spray that</p>

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1 was on his duty belt and sprayed it into the
 2 back of the squad car through the broken out
 3 back window.
 4 Q. Okay. Didn't someone hand him a larger
 5 canister to use?
 6 A. After that, correct.
 7 Q. After that. So he first sprayed his
 8 own in there; is that right?
 9 A. That's correct.
 10 Q. And then someone handed -- was there a
 11 problem with his that someone needed to hand him
 12 the larger canister?
 13 A. Yes. The smaller canister that, you
 14 know, we commonly wear on our duty belts it
 15 doesn't spray that far and there is not that
 16 much concentration at all. It's more of a
 17 stream, so it's just not that much OC that gets,
 18 you know, put into the back there.
 19 Q. So the larger canister has the
 20 advantage of having more propulsion and also a
 21 higher concentration of OC itself?
 22 A. That's correct.
 23 Q. All right. So who got the larger
 24 canister for him to use?
 25 A. I did.

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1 Q. Where did you get that from?
 2 A. I got that from the back of our
 3 lieutenant's squad car.
 4 Q. You said our lieutenant's squad car?
 5 A. Uh-huh.
 6 Q. You share that -- do all the
 7 lieutenant's share the squad car?
 8 MR. SPARKS: Is that a yes?
 9 THE WITNESS: Yes.
 10 BY MR. TAHDOOAHNIPPAH:
 11 Q. So that's the one that you drove to the
 12 scene?
 13 A. Correct.
 14 Q. So you went back and got it from
 15 wherever it was parked and brought it into the
 16 sally port?
 17 A. I went and retrieved it and then
 18 actually it got handed up to Officer Allen
 19 through different officers.
 20 Q. Okay. Then what happened next?
 21 A. Officer Allen sprayed the larger
 22 canister in through the broken rear window.
 23 Q. Okay. Did it hit Mr. Tubby, the stream
 24 of OC spray?
 25 A. I don't know if it hit him, but I know

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1 it went into the back seat area.
 2 Q. All right. What happened next?
 3 A. At some point in there I talked with
 4 Lt. Allen and at the time, he did not have
 5 anybody -- any of his officers with the
 6 capability of using less lethal like a 12-gauge
 7 beanbag round or anything like that so I made
 8 the suggestion to him that you might want to get
 9 one of your officers with less lethal on the
 10 scene.
 11 Q. Okay. And what did he do?
 12 A. He -- I don't know the officer's name
 13 but one of the officers ended up accessing their
 14 12-gauge which fires a 12-gauge beanbag round so
 15 they had it on scene at that time.
 16 Q. All right. When Officer Allen sprayed
 17 that OC spray, had anyone directed him to do
 18 that?
 19 A. I don't -- I don't know. I am not
 20 sure.
 21 Q. All right. So it wasn't you directed
 22 him to do it?
 23 A. No.
 24 Q. You didn't said, okay. Enough time has
 25 passed waiting for compliance. Go ahead and use

Page 77

1 the OC spray now?
 2 A. No.
 3 Q. Did you think enough time had elapsed
 4 to move on to the next step based on your
 5 training from the NTOA?
 6 A. I thought enough time had elapsed.
 7 Q. How much time had elapsed?
 8 A. I guess from when are you referring to?
 9 Q. From when the window was broken to when
 10 OC spray was introduced into the vehicle.
 11 A. This is a guesstimate. Ten seconds if
 12 I recall correctly.
 13 Q. All right. What happened after the
 14 less lethal shotgun was given to the Green Bay
 15 police officer?
 16 A. Again, I don't know where that was --
 17 where that occurred, you know, between the OC
 18 deployment with the larger canister so I don't
 19 know exactly where that occurred but after
 20 Officer Allen sprayed in the back seat, at some
 21 point Mr. Tubby got up out of the back seat and
 22 onto the trunk of the squad car.
 23 Q. All right. Could you see him from
 24 where you were at that point in time?
 25 A. I could see him, yes, jump out from the

20 (Pages 74 - 77)

Page 114

1 suicidal subject?
 2 A. No.
 3 Q. Okay. Why did you consider him to be a
 4 criminal barricade versus a barricaded suicidal
 5 subject?
 6 A. Because at the time he was -- his
 7 actions he was holding the other officers all at
 8 bay and not complying with their legal, lawful
 9 order to take him into custody.
 10 Q. So it was the fact that he had -- I
 11 mean, suicidal subjects they may not comply with
 12 officers that are around them, right?
 13 A. Correct.
 14 Q. So was it more the fact that he was
 15 already in custody or that there were -- is that
 16 what made you think of it as a criminal
 17 barricade situation?
 18 A. That was part of it, yes.
 19 Q. I think, you know, when we talked about
 20 criminal barricade before, we talked about some
 21 certain crimes like someone that commits a
 22 homicide and then is barricaded in the house.
 23 Do you recall that?
 24 A. I do.
 25 Q. Does the severity of the crime factor

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1 A. I did not.
 2 Q. Did you look into the sally port at
 3 all?
 4 A. I don't recall. When I arrived at the
 5 scene, Officer Allen and Lt. Allen met me, if I
 6 refer to Exhibit 21 again --
 7 Q. Sure.
 8 A. -- over in this grassy area there is a
 9 parking lot over on my left-hand side here so
 10 they met me over there and that's when we
 11 initially made contact with each other.
 12 Q. All right. So you don't recall if you
 13 had gone and looked what's inside the sally port
 14 before you talked to them?
 15 A. I don't recall. I don't believe I did,
 16 but I don't recall for sure.
 17 Q. More than likely didn't just given the
 18 layout of the scene?
 19 A. Correct.
 20 Q. Going back to the continuum for dealing
 21 with a criminal barricade, I believe you
 22 testified the first kind of step in that
 23 continuum is that the patrol officers are on the
 24 scene. Do you recall that?
 25 A. I do.

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1 into the analysis of how to handle a criminal
 2 barricade situation?
 3 A. Absolutely.
 4 Q. Do you know what crime Jonathon Tubby
 5 was arrested for?
 6 A. I do not.
 7 Q. Did you do anything at the time to try
 8 to find out?
 9 A. After the fact after, I don't know if
 10 it was the night after, I became aware of what I
 11 believe it was a warrant for failure to report
 12 to jail.
 13 Q. So but you didn't find that out until
 14 after the fact?
 15 A. Correct.
 16 Q. And you didn't do anything on the scene
 17 to determine what his crime had been that he was
 18 being arrested for?
 19 A. No.
 20 Q. And that he was not something that
 21 Lt. Allen or Officer Allen told you?
 22 A. Not that I recall, no.
 23 Q. Before you talked to Lt. Allen, had you
 24 gone into the sally port to assess the situation
 25 for yourself?

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1 Q. Okay. As it relates to Jonathon Tubby,
 2 when you got there, were patrol officers on the
 3 scene?
 4 A. Yes.
 5 Q. The next step in the continuum I think
 6 you said was to make sure that there was an
 7 inner perimeter. Do you recall that?
 8 A. I do.
 9 Q. Did you assess whether there was an
 10 inner perimeter?
 11 A. I did.
 12 Q. Okay. Was there an inner perimeter?
 13 A. There was.
 14 Q. And how was that formed?
 15 A. If I can refer to Exhibit 21 here.
 16 That was formed by officers basically creating
 17 an arc around the actual scene and the squad car
 18 with guns drawn.
 19 Q. Okay. Below this where this diagram
 20 cuts off there is a door, a garage door, right?
 21 A. Correct.
 22 Q. And when the bear cat came in, that
 23 garage door was left open, was it not?
 24 A. I believe it was, yes.
 25 Q. So didn't that break the inner

30 (Pages 114 - 117)

<p style="text-align: right;">Page 118</p> <p>1 perimeter?</p> <p>2 A. Based on the time of night, there was</p> <p>3 really no activity back in that area. Our major</p> <p>4 focus, again, was just I am sure the deputy or</p> <p>5 officers' focus was this way but, yes, this was</p> <p>6 open, so...</p> <p>7 Q. So there was a break in the perimeter?</p> <p>8 A. It wasn't -- if I recall, I don't know</p> <p>9 if there was other officers covering that</p> <p>10 officer visually. I just did not see down that</p> <p>11 way at all. There may have been officers</p> <p>12 looking that way. I don't know.</p> <p>13 Q. So you are not sure whether there was a</p> <p>14 break in the inner perimeter?</p> <p>15 A. Correct. I don't know.</p> <p>16 Q. Did you do anything that night -- The</p> <p>17 next step in the continuum is having an outer</p> <p>18 perimeter; is that right?</p> <p>19 A. Correct.</p> <p>20 Q. Did you do anything to assess whether</p> <p>21 there was an adequate outer perimeter?</p> <p>22 A. We did. We eventually put an officer</p> <p>23 out on the entrance on St. Anthony Drive to</p> <p>24 restrict access to the jail area.</p> <p>25 Q. So that people with arrestees weren't</p>	<p style="text-align: right;">Page 120</p> <p>1 were they trying to communicate with him for?</p> <p>2 MR. SPARKS: Objection. Form. Vague</p> <p>3 as to time. Go ahead.</p> <p>4 THE WITNESS: When I arrived on scene,</p> <p>5 I heard them -- you know, heard officers trying</p> <p>6 to talk with Mr. Tubby.</p> <p>7 BY MR. TAHDOOAHNIPPAH:</p> <p>8 Q. All right. The next step in the</p> <p>9 continuum is to activate a SWAT team; is that</p> <p>10 right?</p> <p>11 A. Sometimes based on the situation, yes.</p> <p>12 Q. All right. How long are you supposed</p> <p>13 to wait between the phone call step and the</p> <p>14 activate the SWAT team step typically?</p> <p>15 A. It really depends. Teams are</p> <p>16 different. Like with my chain of command that I</p> <p>17 have to make a call to the sheriff and let him</p> <p>18 know exactly what's going on and then he makes</p> <p>19 the determination whether the SWAT team is</p> <p>20 activated or not.</p> <p>21 Q. But that's obviously a practical</p> <p>22 consideration for the Brown County Sheriff's</p> <p>23 Office, right?</p> <p>24 A. I am not sure what you mean by that,</p> <p>25 sir.</p>
<p style="text-align: right;">Page 119</p> <p>1 constantly driving up the driveway and piling up</p> <p>2 in a traffic jam?</p> <p>3 A. Correct or citizens coming to bail</p> <p>4 somebody out or something of that nature.</p> <p>5 Q. All right. So is that the sole -- is</p> <p>6 that the one thing that's the only thing to</p> <p>7 establish the outer perimeter?</p> <p>8 A. That is, yeah, that's the main entrance</p> <p>9 for the I guess the jail property, so, yes.</p> <p>10 Q. All right. The next step in the</p> <p>11 continuum we discussed for criminal barricades</p> <p>12 you refer to as phone call. Do you recall that?</p> <p>13 A. I do.</p> <p>14 Q. Was there ever any attempt made to do a</p> <p>15 phone call step with Jonathon Tubby?</p> <p>16 A. No. Because the dialog that the</p> <p>17 officers were engaged with him in was</p> <p>18 sufficient. I mean, they were close enough in</p> <p>19 distance where he should have been able to hear</p> <p>20 what they were, you know, asking him to do so...</p> <p>21 Q. And did they, in fact, try to</p> <p>22 communicate with him?</p> <p>23 A. I heard -- yeah. I heard officers</p> <p>24 trying to communicate with him, yes.</p> <p>25 Q. Okay. How long was that -- how long</p>	<p style="text-align: right;">Page 121</p> <p>1 Q. Well, you are talking about what you as</p> <p>2 a Brown County Sheriff's Office lieutenant have</p> <p>3 to do to activate a SWAT team, right?</p> <p>4 A. Correct.</p> <p>5 Q. I am talking about the continuum for</p> <p>6 the NTOA. Did they have a recommendation as to</p> <p>7 how long you are supposed to attempt to engage</p> <p>8 the subject in dialog before you start to</p> <p>9 activity a SWAT team?</p> <p>10 A. No. There is no -- they don't set a</p> <p>11 standard for amount of time that you are</p> <p>12 supposed to talk with somebody from a</p> <p>13 patrol-based response up until you try to active</p> <p>14 the SWAT team, no. They don't talk about that.</p> <p>15 Q. On this night of October 19, 2018, was</p> <p>16 a SWAT team ever activated?</p> <p>17 A. Are you referring to Brown County SWAT</p> <p>18 or Green Bay SWAT or both?</p> <p>19 Q. Any SWAT team.</p> <p>20 A. I know Brown County SWAT was not</p> <p>21 activated. As far as Green Bay SWAT, I do not</p> <p>22 believe they were activated and the only reason</p> <p>23 I am aware of that is because Commander Gering</p> <p>24 was consulted at home, so; but as far as</p> <p>25 actually getting the Green Bay SWAT team on</p>

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1 have been a mistake?

2 A. It's something that should have been

3 included, yes.

4 Q. Like you have five minutes or we are

5 going to deploy OC spray, something like that?

6 MR. SPARKS: Object to form. Go ahead.

7 THE WITNESS: We probably would not

8 have let him know what we were exactly going to

9 do for a tactic, but we would let him know that

10 it's in his best interests to surrender or to

11 follow our commands.

12 BY MR. TAHDOOAHNIPPAH:

13 Q. All right. At the time that window was

14 broken, was there some exigency that existed

15 that required a law enforcement to have a visual

16 of him immediately?

17 MR. GUNTA: Objection to the form of

18 the question. Calls for a legal conclusion.

19 MR. SPARKS: Join.

20 THE WITNESS: Just so I am certain, can

21 you repeat your question?

22 MR. TAHDOOAHNIPPAH: Can you read it

23 back, please?

24 (Whereupon, the record was read

25 as requested.)

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1 MR. GUNTA: Same objection.

2 MR. SPARKS: Join.

3 THE WITNESS: We wanted to make sure,

4 again, we talked about the communication portal

5 and like I said, with the windows fogged up, you

6 needed as much visual input of what he was doing

7 in there as possible.

8 So I guess from my perspective, there

9 was an exigency to get that window out of the

10 way so we could see exactly what's going on and

11 exactly what we have.

12 BY MR. TAHDOOAHNIPPAH:

13 Q. What were you specifically concerned

14 about with not being able to see him?

15 A. The weapon.

16 Q. So you wanted to see whether he had

17 actually had a weapon?

18 A. Correct.

19 Q. Was there any other reason why you

20 couldn't have just waited longer to see if he

21 would voluntarily surrender before breaking the

22 window?

23 MR. SPARKS: Object to form. Go ahead.

24 THE WITNESS: The jail property is open

25 to the public and so we always run the risk of,

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1 you know, having somebody walk up on scene and

2 being involved in the situation so in my

3 analysis of what was going on, this is a

4 situation that needed to be addressed and

5 controlled as soon as possible.

6 BY MR. TAHDOOAHNIPPAH:

7 Q. So part of your motivation was the

8 desire to return the jail to normal operations?

9 MR. SPARKS: Object to form.

10 Mischaracterizes his prior testimony. Go ahead.

11 THE WITNESS: That's part of it, yeah.

12 Yes.

13 BY MR. TAHDOOAHNIPPAH:

14 Q. Is there any other -- is there a second

15 sally port to this jail?

16 A. No.

17 Q. Is there another entrance that could be

18 used?

19 MR. SPARKS: Object to form. Vague.

20 THE WITNESS: To get into the jail?

21 BY MR. TAHDOOAHNIPPAH:

22 Q. Is there any other entrance that could

23 be used to get an arrestee into the jail?

24 A. Yes.

25 Q. Just one other or multiple other

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1 entrances?

2 A. Commonly the two entrances that are

3 used are, and I'll refer to Exhibit 21 again,

4 the primary entry is the sally port obviously

5 here and then there is a service door and it

6 would be to my right here, just off side,

7 outside the apron there. That will actually

8 lead -- actually, it's going to be up here.

9 That actually leads into the booking area, so

10 that's a secondary point of entry.

11 Q. Do you have any other points of entry

12 for arrestees?

13 A. No.

14 Q. Is there like a public point of entry

15 for people that are visiting the jail?

16 A. There is.

17 Q. How many of those are there?

18 A. Just one main one.

19 Q. All right. Where is that in relation

20 to the sally port?

21 A. That is going to be, again, referring

22 to Exhibit 21 it's not even on this actual

23 exhibit but it's going to be way to the right,

24 probably 20 yards, somewhere around there.

25 Q. Is it on -- Is the door facing the same

<p style="text-align: right;">Page 138</p> <p>1 pretty long time in a hostage situation and that 2 in a suicidal situation the officers themselves 3 might just leave, why force the situation to a 4 head with regard to Jonathon Tubby? 5 MR. SPARKS: Object to form. Lacks 6 foundation. Go ahead. 7 THE WITNESS: Again, he had plenty of 8 opportunity to follow the officers' directions 9 and submit to arrest or, you know, get him the 10 help he needed or whatever was going to happen. 11 There was plenty of opportunity to do that. 12 BY MR. TAHDOOAHNIPPAH: 13 Q. But with another hour don't you think 14 he might have just calmed down and voluntarily 15 surrendered? 16 MR. GUNTA: Object to the form of the 17 question. Calls for speculation. 18 MR. SPARKS: Join. Join. 19 THE WITNESS: I don't know, sir. 20 BY MR. TAHDOOAHNIPPAH: 21 Q. Do you have any reason to think that he 22 would not have just calmed down if he had not 23 had extra time? 24 MR. SPARKS: Object to form. Calls for 25 speculation.</p>	<p style="text-align: right;">Page 140</p> <p>1 THE WITNESS: And I am not saying 2 Mr. Tubby was under the influence of something 3 but this could be just anybody 4 if somebody is under the influence of something, 5 they could go for days. 6 BY MR. TAHDOOAHNIPPAH: 7 Q. You think they could go for days -- I 8 mean, if they are in the back of the squad car, 9 they are not taking anything additional, right? 10 MR. SPARKS: Objection to form. 11 Incomplete hypothetical. Calls for speculation. 12 Go ahead. 13 MR. GUNTA: Join. 14 THE WITNESS: Not a hundred percent for 15 sure. 16 BY MR. TAHDOOAHNIPPAH: 17 Q. The fact that the doors to the sally 18 port were open, did that cause you any sort of 19 concerns as far as maintaining a perimeter? 20 MR. GUNTA: Objection. Asked and 21 answered. 22 THE WITNESS: If we would have closed 23 the garage doors, what in effect that would have 24 done is it would have had cut off any officers 25 potential escape route and that's one of the</p>
<p style="text-align: right;">Page 139</p> <p>1 MR. GUNTA: Join. 2 THE WITNESS: I don't know. 3 BY MR. TAHDOOAHNIPPAH: 4 Q. You don't have any reason to think that 5 he would not have just calmed down? 6 MR. SPARKS: Same objection. Asked and 7 answered. 8 MR. GUNTA: Join. 9 THE WITNESS: The way that he was 10 acting in the back of the squad car, I did not 11 foresee him calming down. 12 BY MR. TAHDOOAHNIPPAH: 13 Q. Well, what specifically did you see him 14 doing in the back of the squad car that leads 15 you to say that? 16 A. A lot of -- a lot of moving around. 17 You could hear him basically yelling back at the 18 officers and stuff like that. You know what 19 specifically he said, I can't remember but it 20 was animated. 21 Q. Well, wouldn't that eventually just 22 tire him out? 23 MR. SPARKS: Objection. Calls for 24 speculation. 25 MR. GUNTA: Join.</p>	<p style="text-align: right;">Page 141</p> <p>1 last things that we want to do also, so it was 2 ultimately a double-edged sword in that 3 situation. 4 BY MR. TAHDOOAHNIPPAH: 5 Q. So was it a conscious decision to leave 6 the doors open? 7 A. Yes because I think if somebody would 8 have made the suggestion to close the garage 9 doors, that would have been the equivalent of 10 being in a cage basically again without any 11 avenue of escape for the officers. 12 Q. So if someone had suggested closing 13 them, would you have ordered them to remain 14 open? 15 A. More than likely. 16 Q. What type of training does the SWAT 17 team receive on intervening to prevent excessive 18 force and now I am talking about the Brown 19 County SWAT team receive to prevent excessive 20 force by another officer? 21 A. Since I have been on the team, that is 22 not a topic we have ever trained. 23 Q. What type of training do Brown County 24 Sheriff's officers receive in general regarding 25 intervention to prevent excessive force?</p>

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1 A. I have been here since '94 and the one
2 training that I personally received was during a
3 DAT instructor session. It's called -- the
4 acronym is Defensive and Arrest Tactics. It's
5 what all DAT instructors in Wisconsin are
6 taught.

7 Q. So was the training to become an
8 instructor or is this training received from an
9 instructor?

10 A. It was to become an instructor, a DAT
11 instructor.

12 Q. And you received training during then
13 regarding intervention for -- to prevent
14 excessive force?

15 A. Correct. And what happens is the
16 instructor whose name is Gary Klugiewicz. Gary
17 set up a scenario, basically a hands-on scenario
18 with intervention options, you know, strikes and
19 stuff like that where the role player officer
20 basically went overboard and delivered excessive
21 amounts of strikes and, you know, to the point
22 where it was, you know, extremely excessive; so
23 it was a scenario to see how the potential
24 instructors would react to that to see if they
25 would step in and stop that type of behavior.

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1 Q. And so that's the one time that you
2 received that type of training?

3 A. Correct.

4 THE WITNESS: Can I ask something?

5 MR. SPARKS: Sure.

6 THE WITNESS: I said that was a DAT
7 instructor. That might have been in like a DAT
8 instructor refresher where we went through
9 training after we got our instructor
10 certification in DAT but it was DAT related,
11 so...

12 MR. SPARKS: Forrest, do you mind if we
13 take a quick five-minute bathroom break?

14 MR. TAHDOOAHNIPPAH: Yeah. That's
15 fine.

16 (Whereupon, a short recess was
17 taken.)

18 BY MR. TAHDOOAHNIPPAH:

19 Q. All right. Lt. Zeigle, did you know
20 any of the Green Bay police officers that were
21 on the scene?

22 A. I knew Officer Eric Allen, I knew
23 Lt. Nate Allen, one of the retired Green Bay
24 lieutenants was actually doing a ride-along that
25 night.

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1 Q. Jerry Johnson?

2 A. Jerry Johnson. Yeah. I know Jerry. I
3 believe he was riding with his daughter Christy
4 Johnson.

5 Q. Uh-huh.

6 A. Now it's Shield I think but, yeah. She
7 was there I think; but other than that, a couple
8 of the canines too, Joe Merrill and Scott
9 Salzmann.

10 Q. And did you know any of the other
11 officers there?

12 A. I did not.

13 Q. How well do you know Officer Salzmann?

14 A. Other than some joint SWAT training
15 that we do every year, I don't know him.

16 Q. Do you socialize with any of those
17 officers you just talked about outside of work?

18 A. No.

19 Q. Do you ever notice Officer Salzmann's
20 tattoos on his forearm?

21 A. No.

22 Q. What did you do today to prepare for
23 your deposition?

24 A. I took a look at the notice of the
25 complaint, a portion of video footage from a

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1 Green Bay squad car that was -- that were out
2 front by the sally port door. One other thing I
3 think. Oh, interview with Agent Waterstreet.

4 Q. Did you review anything else?

5 A. No.

6 Q. Did you meet with counsel?

7 A. Prior to today?

8 Q. Yeah.

9 A. Yes.

10 Q. Was anyone else there?

11 A. No.

12 Q. When was that?

13 A. About a week ago. I can't remember the
14 specific date.

15 Q. All right. I am going to show you a
16 video clip which has been marked previously in
17 this case as Exhibit 3. Can you see that all
18 right from your perspective?

19 A. I can, yes.

20 Q. All right. This officer right here on
21 the left side of the frame, do you see him?

22 A. I do.

23 Q. Do you know who that is?

24 A. Can we dim the light maybe?

25 MR. GUNTA: Just so you know, they are

37 (Pages 142 - 145)

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF WISCONSIN
3 -----

4 SUSAN DOXTATOR, ARLIE
5 DOXTATOR, and SARAH
6 WUNDERLICH, as special
7 administrators of the Estate
8 of Jonathon C. Tubby,
9 Plaintiffs,

10 -vs-

Case No. 1:19-cv-137-WCG

11 ERIK O'BRIEN, ANDREW SMITH,
12 TODD J. DELAIN, HEIDI
13 MICHEL, CITY OF GREEN BAY,
14 BROWN COUNTY, JOSEPH P.
15 MLEZIVA, NATHAN K.
16 WINISTERFER, THOMAS ZEIGLE,
17 BRADLEY A. DERNBACH, and
18 JOHN DOES 1-5,
19

20 Defendants.
21 -----

22 Examination of THOMAS DENNEY, taken at
23 the instance of the Plaintiffs, under and pursuant to
24 the applicable Rules of Civil Procedure, before
25 SAMANTHA J. SHALLUE, a Registered Professional
Reporter and Notary Public in and for the State of
Wisconsin, at the Green Bay City Hall, 100 North
Jefferson Street, Green Bay, Wisconsin, on
December 18, 2019, commencing at 1:35 p.m. and
concluding at 6:33 p.m.

<p style="text-align: right;">Page 10</p> <p>1 an incident that resulted in a fatal shooting</p> <p>2 at the Brown County Jail in the sally port</p> <p>3 area. Do you recall that?</p> <p>4 A I do.</p> <p>5 Q All right. And you were personally on scene at</p> <p>6 that time?</p> <p>7 A Yes.</p> <p>8 Q Okay. Why did you first go to the sally port?</p> <p>9 A So I heard Officer O'Brien get on the radio,</p> <p>10 and he said -- and I don't remember the exact</p> <p>11 words, but they were something to the effect of</p> <p>12 "We have a prisoner in the jail who is not</p> <p>13 getting out of the squad car, and he has</p> <p>14 something in his hands."</p> <p>15 Q All right. And where were you at the -- where</p> <p>16 were you when you heard this?</p> <p>17 A I was on the east side of Green Bay. I kind of</p> <p>18 remember. I think I was in the area of</p> <p>19 University and Danz. So I was in the</p> <p>20 neighborhood of five minutes away.</p> <p>21 Q Okay. So as a sergeant, do you still go out on</p> <p>22 patrol, or do you spend most of your time in</p> <p>23 the office?</p> <p>24 A No, the vast majority would be out on patrol.</p> <p>25 Q All right. So you happened to be within a few</p>	<p style="text-align: right;">Page 12</p> <p>1 A I mean, quite frankly, I think he's just</p> <p>2 interested in my work and he enjoys the time we</p> <p>3 get together. So it's something he does maybe</p> <p>4 once a year.</p> <p>5 Q All right. So you come to the sally port. Do</p> <p>6 you bring him with you when you come to the</p> <p>7 sally port?</p> <p>8 A That's correct.</p> <p>9 Q All right. What happens after you arrive at</p> <p>10 the sally port?</p> <p>11 A So I pull into the sally port just inside the</p> <p>12 entrance door, park my squad car, get out, and</p> <p>13 I see Officer O'Brien and Officer Wernecke</p> <p>14 behind a blue transport van that was parked</p> <p>15 near the entrance door.</p> <p>16 Q Okay. Let's find -- in front of you there</p> <p>17 should be something that was marked previously</p> <p>18 as Exhibit No. 1.</p> <p>19 A Okay.</p> <p>20 Q And if you turn to the last page of that</p> <p>21 Exhibit 1, there's a scene diagram that we have</p> <p>22 been using.</p> <p>23 MR. GUNTA: That's it.</p> <p>24 BY MR. TAHDOOAHNIPPAH:</p> <p>25 Q All right. So there should be a vehicle that's</p>
<p style="text-align: right;">Page 11</p> <p>1 minutes, and you hear on the radio that there's</p> <p>2 someone in the sally port with something in his</p> <p>3 hands?</p> <p>4 A Correct.</p> <p>5 Q And it was not specified what that something</p> <p>6 was?</p> <p>7 A That's correct.</p> <p>8 Q So you didn't hear "He has a gun in his hands,"</p> <p>9 for example?</p> <p>10 A I did not hear Officer O'Brien state over the</p> <p>11 radio "He has a gun in his hands."</p> <p>12 Q All right. And did you have a ride-along with</p> <p>13 you at that time?</p> <p>14 A I did.</p> <p>15 Q Okay. Who was that?</p> <p>16 A That was my father.</p> <p>17 Q All right. What's his name?</p> <p>18 A William F. Denney.</p> <p>19 Q All right. Was he ever a law enforcement</p> <p>20 officer?</p> <p>21 A No.</p> <p>22 Q What was his profession?</p> <p>23 A He's an accountant.</p> <p>24 Q Okay. And why did he happen to be with you</p> <p>25 that day?</p>	<p style="text-align: right;">Page 13</p> <p>1 marked "Denney" on it. Do you see that?</p> <p>2 A I do.</p> <p>3 Q Is that -- that's where you pulled in?</p> <p>4 A Correct.</p> <p>5 Q All right. And there's another squad that's</p> <p>6 marked "Haack" on there, and was that -- do you</p> <p>7 know Officer Haack?</p> <p>8 A Yes, that's where his patrol vehicle was</p> <p>9 parked.</p> <p>10 Q All right. So you pull in, and where do you</p> <p>11 observe -- you said you observed O'Brien?</p> <p>12 A O'Brien and Officer Wernecke.</p> <p>13 Q Okay. Where were they when you pulled in?</p> <p>14 A So they were standing right near the back side</p> <p>15 of the transport van. And the back side would</p> <p>16 be the side closest to the entrance door that's</p> <p>17 shown in the diagram.</p> <p>18 Q Okay. What happened next?</p> <p>19 A So I noticed that Officer O'Brien had his</p> <p>20 handgun out. I asked O'Brien just a very</p> <p>21 simple "What do you have?" or "What's going</p> <p>22 on?"</p> <p>23 Q Okay. When you asked him that, did you just</p> <p>24 roll down your window and shout at him? Did</p> <p>25 you ask him on the radio? How were you</p>

<p style="text-align: right;">Page 22</p> <p>1 there's a microphone that's attached just below</p> <p>2 my chin.</p> <p>3 Q And everyone that's on duty that has their</p> <p>4 radio on can hear what you're saying?</p> <p>5 A Yeah, assuming they're on the radio channel</p> <p>6 we're using they would hear it.</p> <p>7 Q All right. So you requested SWAT to come in.</p> <p>8 What happened next?</p> <p>9 A And I just want to clarify. I requested the</p> <p>10 SWAT officers to come in because I knew that</p> <p>11 they had unique training and more experience in</p> <p>12 some of these situations than others. I did</p> <p>13 not -- you know, I did not, like, activate a</p> <p>14 SWAT call. I wouldn't even have the authority</p> <p>15 to do that.</p> <p>16 Q Okay.</p> <p>17 A If I wanted to do that, I would call Lieutenant</p> <p>18 Gering, tell him what the situation was, and</p> <p>19 then he would make that call. So I asked them</p> <p>20 to come.</p> <p>21 Q Okay. I mean, that's an important distinction.</p> <p>22 Thanks for that clarification.</p> <p>23 So you requested specific officers</p> <p>24 that you knew had the SWAT training to come in.</p> <p>25 Who were those officers?</p>	<p style="text-align: right;">Page 24</p> <p>1 A Yeah, for SWAT operation he would be the</p> <p>2 highest-ranking one there.</p> <p>3 Q All right. And you mentioned you identified</p> <p>4 these officers because you knew they were on</p> <p>5 the SWAT team and that SWAT-team training</p> <p>6 was -- gave them some unique training that</p> <p>7 might be valuable in this situation?</p> <p>8 A Correct.</p> <p>9 Q Okay. What kind of training did you think was</p> <p>10 going to be helpful in this situation?</p> <p>11 A Yep. So, you know, this situation, what we had</p> <p>12 here, it looked to me like an armed, barricaded</p> <p>13 subject, and, really, the training from a</p> <p>14 patrol standpoint is pretty clear. If you have</p> <p>15 an armed, barricaded subject, that is probably</p> <p>16 going to be a SWAT function and not a patrol</p> <p>17 function. Patrol's function there would be to</p> <p>18 contain and stabilize the situation to the</p> <p>19 degree possible and wait for -- and notify</p> <p>20 SWAT.</p> <p>21 Q All right. So do you know what about their</p> <p>22 training enables them to better deal with an</p> <p>23 armed, barricaded subject?</p> <p>24 A You know, I'm going to have to defer to them.</p> <p>25 I'm not a trained SWAT operator, so I think I'd</p>
<p style="text-align: right;">Page 23</p> <p>1 A So I -- Officer Salzmann was working, Officer</p> <p>2 Eric Allen, Officer Joe Merrill, and Officer</p> <p>3 Matt Lynch were working. Those are the ones</p> <p>4 that I can think of offhand.</p> <p>5 Q All right. And their rank is all officer, so</p> <p>6 they all report to you or were reporting to you</p> <p>7 on that day?</p> <p>8 A Yes. I think there is one important thing to</p> <p>9 know here is Eric Allen at the time was an</p> <p>10 assistant team leader. So the SWAT team has a</p> <p>11 different rank structure than we have. They</p> <p>12 have the commanders and then the assistant</p> <p>13 commanders who are -- in this case, they're all</p> <p>14 lieutenants. Then they have a team leader and</p> <p>15 a couple assistant team leaders. The team</p> <p>16 leaders and the assistant team leaders often</p> <p>17 act as, like, the leadership actually on the</p> <p>18 ground. Oftentimes the commander might be in a</p> <p>19 staging area or something like that, not</p> <p>20 actually on the ground in the middle of the</p> <p>21 situation. So I guess it's worth noting that</p> <p>22 Eric was an assistant team leader.</p> <p>23 Q All right. So between Salzmann, Allen,</p> <p>24 Merrill, and Lynch, Allen is kind of the</p> <p>25 higher-ranking officer amongst those four?</p>	<p style="text-align: right;">Page 25</p> <p>1 have to defer to them on that point.</p> <p>2 Q Okay. So you don't have any inkling, idea,</p> <p>3 notion at all about what kind of training they</p> <p>4 might have that helps them with that</p> <p>5 particular --</p> <p>6 A I mean, I know they have some different tools</p> <p>7 at their disposal. Obviously, they're trained</p> <p>8 in the use of the BearCat. They're trained in</p> <p>9 the use of the 40-millimeter gun which has some</p> <p>10 different options. It has the wooden dowel,</p> <p>11 foam rounds. It has the gas rounds. Those are</p> <p>12 some things that patrol doesn't do. You know,</p> <p>13 they just have a bunch of other tools like</p> <p>14 that, and, like I said, if I speak any further,</p> <p>15 I think I'm probably speaking about things I'm</p> <p>16 not knowledgeable enough to talk about.</p> <p>17 Q All right. Do you know whether the SWAT team</p> <p>18 has any sort of training on crisis negotiation?</p> <p>19 A Sure. So we have a crisis negotiation unit,</p> <p>20 and that unit is attached to the SWAT team.</p> <p>21 Although they're different people. You're</p> <p>22 either a negotiator or a SWAT operator. You</p> <p>23 are not both.</p> <p>24 Q Okay. So Salzmann, Allen, Merrill, Lynch, none</p> <p>25 of those guys were negotiators?</p>

<p style="text-align: right;">Page 34</p> <p>1 squad car?</p> <p>2 A My goal was to keep the situation stable so</p> <p>3 that we could ultimately move to a resolution,</p> <p>4 and I thought part of keeping that situation</p> <p>5 stable was getting some more officers there. I</p> <p>6 think it's also worth noting that at that point</p> <p>7 we believe that we have an armed, barricaded</p> <p>8 subject in a squad car. You know, initially we</p> <p>9 had -- when I pulled up, we had three officers</p> <p>10 even with access to a firearm on scene. None</p> <p>11 of us had helmets on; none of us had ballistic</p> <p>12 vests on.</p> <p>13 In the sally port, there's somewhat</p> <p>14 limited cover. You know, the cover that we're</p> <p>15 working with there would be the engine blocks</p> <p>16 of vehicles. That's what accurate cover would</p> <p>17 be. So getting more officers there allows us</p> <p>18 to do some things that we eventually did do.</p> <p>19 Many of the officers donned ballistic helmets</p> <p>20 and ballistic vests that offer more protection</p> <p>21 than the vests that we wear every day. So</p> <p>22 having more officers there, you know, does</p> <p>23 stabilize the situation, and it lets officers</p> <p>24 don some equipment that renders them safer than</p> <p>25 they were before.</p>	<p style="text-align: right;">Page 36</p> <p>1 show up. There's steps that we need to take to</p> <p>2 keep the officers safe, and that, at that</p> <p>3 point, is my function. Let's contain the</p> <p>4 situation or maybe more accurately, let's keep</p> <p>5 the situation contained, and let's take all the</p> <p>6 steps that we can reasonably take to keep the</p> <p>7 officers safe. And in going through those</p> <p>8 steps to keep the officers safe, that, to me,</p> <p>9 is a rapidly evolving situation. An armed,</p> <p>10 barricaded subject is not something that we</p> <p>11 deal with every day. It's not everyday life.</p> <p>12 It's an unusual call at the Green Bay Police</p> <p>13 Department.</p> <p>14 Q All right. So obviously there's a lot going on</p> <p>15 in the sally port as far as officers are</p> <p>16 arriving, a BearCat's arriving. I assume some</p> <p>17 Brown County deputies started arriving at some</p> <p>18 point, right?</p> <p>19 A Correct.</p> <p>20 Q So there's a lot going on outside of Officer</p> <p>21 Wernecke's squad car. Is there anything about</p> <p>22 Mr. Tubby or the interior of Officer Wernecke's</p> <p>23 squad car that is evolving in any way on the</p> <p>24 night of October 19th, 2018?</p> <p>25 A I guess there's two things that come to mind</p>
<p style="text-align: right;">Page 35</p> <p>1 Q All right. When he's in the squad car, those</p> <p>2 doors are locked from the inside, right? He</p> <p>3 can't open the door and run out?</p> <p>4 A They're locked from the -- or they're locked,</p> <p>5 and you can't unlock them from the inside.</p> <p>6 Q All right. And the space between the rear</p> <p>7 seats and the front seats has some sort of</p> <p>8 barricade, right?</p> <p>9 A Correct.</p> <p>10 Q What is that barricade?</p> <p>11 A Most of them are a combination of Plexiglas and</p> <p>12 metal.</p> <p>13 Q All right. And then there's a window, rear</p> <p>14 window, right?</p> <p>15 A Correct.</p> <p>16 Q So he's not getting out of the squad car unless</p> <p>17 someone is opening the door or breaking the</p> <p>18 window?</p> <p>19 A I would say it's unlikely that he's getting out</p> <p>20 without that happening.</p> <p>21 Q All right. So what about the situation was</p> <p>22 rapidly evolving?</p> <p>23 A I mean, I guess to me the situation is -- I</p> <p>24 go -- I mean, we're having a lot of officers</p> <p>25 showing up; we're having a lot of resources</p>	<p style="text-align: right;">Page 37</p> <p>1 when you ask me that. One is, you know, we</p> <p>2 could see that Mr. Tubby was moving around in</p> <p>3 the back of the squad car. At some points it</p> <p>4 looks like he's going towards the driver's</p> <p>5 side; at other points it looks like he's going</p> <p>6 towards the passenger side of the back seat.</p> <p>7 At some points, too -- and this is early on</p> <p>8 after I show up -- I can tell that he's -- what</p> <p>9 direction he's facing, that he's facing back</p> <p>10 towards officers. That just tells me that he's</p> <p>11 no longer buckled in or it certainly doesn't</p> <p>12 look like he's buckled in and he appears to</p> <p>13 have free rein of the back seat.</p> <p>14 I think the other thing that's</p> <p>15 noteworthy here is that -- and this started</p> <p>16 happening pretty quickly after I showed up.</p> <p>17 The back seat -- the windows in the squad car</p> <p>18 started fogging up, and that got progressively</p> <p>19 worse. Pretty quickly after I showed up, you</p> <p>20 know, we were really no longer able to see into</p> <p>21 the squad car because the windows were fogged</p> <p>22 up. That was obstructing our view.</p> <p>23 MR. GUNTA: Excuse me.</p> <p>24 (Discussion off the record.)</p> <p>25 BY MR. TAHDOOAHNIPPAH:</p>

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1 should just say I could see that there was a
 2 handgun and a taser inside the trunk, and as I
 3 said, the trunk was open. This would -- this
 4 would be how we -- what we commonly do when we
 5 go to the jail. We exit our vehicle, we secure
 6 all of our weapons inside the trunk, and then
 7 we have the prisoner step out.
 8 So I could see that there was a taser
 9 and a handgun inside the trunk. I don't
 10 remember -- at some point -- I don't remember
 11 if we communicated to the individuals in the
 12 BearCat "Hey, there's a gun and a taser in the
 13 trunk, and the trunk is open" or if we -- I
 14 would guess that we communicated that to them,
 15 but at some point they obviously became aware
 16 that the gun and the taser were in the trunk.
 17 So Officer Lynch and Officer
 18 Christensen exit the BearCat or the armored
 19 vehicle with a ballistic shield. They use the
 20 ballistic shield as cover. They approach the
 21 back side of this patrol vehicle that Jonathon
 22 was in. One of them has the shield; the other
 23 one has a handgun out. They shut the trunk to
 24 secure the taser and the handgun inside, and
 25 then they retreat back into the BearCat.

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1 Q All right. You said before you could see
 2 Jonathon kind of moving around, and was that
 3 through the back window of the squad car?
 4 A I don't remember exactly what window I was
 5 looking at. If I'm looking at the diagram, it
 6 appears that it would probably have to be the
 7 back window of the squad car.
 8 Q Okay. But if the trunk is open, wouldn't that
 9 have obscured the back view anyways?
 10 A Yeah, so I would not have a completely
 11 unobstructed view into that, but I think if you
 12 look at the diagram it's fairly clear that I am
 13 offset, you know, at an angle and behind the
 14 vehicle that Jonathon's in. So the trunk does
 15 not open to the point where it's resting on the
 16 rear windshield. The trunk opens to, you know,
 17 about a point, maybe around 90 degrees, and
 18 then there still is a space here between the
 19 trunk and the rear windshield. And, you know,
 20 where my patrol vehicle was at, I was at
 21 actually a pretty good angle to have some view
 22 through that space.
 23 Q So it was partially obstructed by the trunk,
 24 but not fully obstructed?
 25 A I could see into the back windshield partially,

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1 yes.
 2 Q Until -- at some point it fogged up too much
 3 where you could no longer see inside at all?
 4 A Correct.
 5 Q So you were -- nothing going on -- you could
 6 see nothing?
 7 A No. You know, at points I thought maybe
 8 when -- I don't know if it was Jonathon was in
 9 the right spot or the light was just right or
 10 something, at points I thought maybe I would
 11 catch just a glimpse of him moving from one
 12 side to the other. I know that the officers on
 13 scene did some communicating. "Oh, I think he
 14 just moved all the way to the passenger seat."
 15 You'll hear some things like that if we have
 16 audio of that, but we basically couldn't see at
 17 all.
 18 Q All right. You talked about the use of
 19 something called a "ballistic shield"?
 20 A Hm-hm.
 21 Q What is a ballistic shield?
 22 A So it's a shield that can be carried by an
 23 officer, and it offers protection from a
 24 firearm. It can stop bullets, and it can stop
 25 more than the vest that officers wear.

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1 Q All right. So when you're holding it in front
 2 of you, what areas -- kind of going vertically
 3 from your feet to your head, what areas does it
 4 cover?
 5 A And I'll just say that I have absolutely no
 6 formal training with the ballistic shield, but
 7 just based on my knowledge of law enforcement
 8 and common sense, you would want to cover the
 9 vital areas. So you would want to cover the
 10 head, the upper central nervous system where
 11 all of your vital organs are. That would be
 12 the area you'd want to cover. You know, it's
 13 big enough probably to cover the entire upper
 14 half of someone's body and probably some of
 15 their lower half, but not all of it.
 16 Q All right. And you've personally seen
 17 ballistic shields in general, and you also
 18 specifically saw the ballistic shield used that
 19 day, right?
 20 A Correct.
 21 Q And I'm just trying to get a sense of how big
 22 this is. So it seems like it's several feet
 23 tall?
 24 A That sounds accurate to me.
 25 Q Enough to cover the upper half of your body and

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1 benefit of, you know, a year having passed and
2 having found out more information, who was
3 involved in the plan to approach the vehicle
4 with the shield?

5 A So the version of events that I have been told
6 is that Nate Allen, Lieutenant Nate Allen, and
7 Eric Allen, the assistant team leader of the
8 SWAT team, had a discussion about how to
9 approach the situation. They decided that it
10 would be wise to call Commander Gering. He's
11 the -- he's Lieutenant Gering, but for SWAT
12 purposes, he's the SWAT commander, Commander
13 Gering. They called him, spoke with him about
14 it. Lieutenant Gering, he advised that he
15 thought it would be -- and I don't -- I
16 probably don't know each specific step of the
17 plan, but his recommendation was that they make
18 an approach on one of the doors of the -- the
19 rear doors of the vehicle with the ballistic
20 shield, they open the door, and they use a
21 canine to extract Jonathon using ballistic
22 cover. That was my understanding of the plan,
23 and, like I said, I may not know the specifics
24 of each and every step, but that was my
25 understanding of it.

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1 I then learned that after that plan
2 was discussed with Commander Gering, Lieutenant
3 Zeigle from the Brown County Sheriff's
4 Department arrived on scene, and then, I guess,
5 interjected himself into the discussion or
6 interjected himself into the planning of how
7 this situation was going to be addressed.
8 Lieutenant Zeigle, as I understand it, said
9 that he did not like that plan and that he
10 thought that we should do it a different way.
11 The different way was to break out the rear
12 windshield of the vehicle and go from there.

13 I had heard that Lieutenant Zeigle
14 said that because the Brown County Jail is a
15 county facility and he works for the sheriff's
16 department, the County, that we were going
17 to -- that he said that we had to do it his
18 way. That is my understanding of what
19 happened. Like I said, I was not present for
20 that. My knowledge of that is based on two
21 reports prepared by Lieutenant Gering and
22 Lieutenant Allen, and then just a firsthand
23 conversation with -- when I say "firsthand,"
24 it's a firsthand after the fact, a day-later
25 conversation with Lieutenant Allen about what

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1 had taken place.

2 Q All right. So at the time that all this was
3 happening, did you have any way to know the
4 plan that was being developed?

5 A No. At some point when the BearCat came in,
6 Nate Allen came in and said that they were
7 going to break out the rear window on the squad
8 car. He told me that. I didn't know what all
9 the steps of the plan were or what exactly was
10 supposed to come next. I didn't know how that
11 plan was developed or who was involved in the
12 developing of that plan, but he did tell me
13 that as the BearCat is coming into the sally
14 port and the plan is being put into motion.

15 Q All right. So no one ever got on the radio and
16 said, "Okay everyone, here's what's going to
17 happen: our plan is to do this, and then we
18 expect this to happen; then we're going to do
19 this," and laid it all out so everyone would
20 know what to expect as they observed it?

21 A No. No, no one got on the radio and laid out a
22 step-by-step detailed plan.

23 Q So when these guys start approaching the
24 vehicle, you're just looking at them like,
25 "Okay, I guess they're approaching the vehicle

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1 now," and you --

2 A Like, approaching the vehicle with the shield?

3 Q With the shield, yeah.

4 A I mean, I wouldn't say I was surprised by that
5 because that -- to be honest with you, that
6 move made sense to me because the handgun and
7 the taser were in there and the trunk was wide
8 open. That move made sense to me.

9 Like I said before, you know, I think
10 we have to keep the big picture in mind. At
11 some point the goal is to get Jonathon out of
12 the car and get him safely into the booking
13 area. And before that happens, if I'm in
14 charge of the plan, I would want that trunk
15 closed so that the weapons are secured and
16 they're not even part of that situation. So
17 when they came out with the shield and they
18 approached the trunk, I guess that didn't
19 surprise me to see. That made sense to me.

20 Q It didn't surprise you, but it wasn't something
21 that you knew was going to happen ahead of
22 time?

23 A Correct.

24 Q And you say it makes sense to you, but it still
25 doesn't make sense to me because to me it just

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<p>1 question? Do you want to hear it again?</p> <p>2 THE WITNESS: I guess say it one more</p> <p>3 time. I apologize.</p> <p>4 MR. TAHDOOAHNIPPAH: Just read it</p> <p>5 back, please.</p> <p>6 (Last question read.)</p> <p>7 THE WITNESS: As I understand it, the</p> <p>8 plan was certainly to break the window. I</p> <p>9 don't know if OC spray was -- I'm not 100</p> <p>10 percent sure if OC spray was something that was</p> <p>11 discussed outside of the sally port before we</p> <p>12 ever brought the BearCat in. I don't know that</p> <p>13 for sure.</p> <p>14 BY MR. TAHDOOAHNIPPAH:</p> <p>15 Q All right. So those are the two plans. Both</p> <p>16 of them involve forcing Mr. Tubby out of the</p> <p>17 vehicle. Fair?</p> <p>18 A Yeah, I think that's accurate.</p> <p>19 Q Okay. If he is armed, why would anyone want to</p> <p>20 force him out of the vehicle?</p> <p>21 A You're going to have to ask the people that</p> <p>22 were involved in developing the plan of how</p> <p>23 this situation was going to be approached, but</p> <p>24 what I would offer is that we have to keep in</p> <p>25 mind the big picture here, that at some point</p>	<p>1 hour? And by "you," just law enforcement in</p> <p>2 general. Was there any reason why law</p> <p>3 enforcement couldn't have waited one more hour</p> <p>4 to see what would happen?</p> <p>5 A I mean, you'd have to ask the people that were</p> <p>6 involved in the plan and had all the</p> <p>7 information. You would have to ask them.</p> <p>8 Q But from your perspective as a sergeant with</p> <p>9 the Green Bay Police Department, is there any</p> <p>10 reason?</p> <p>11 A I didn't see anything, like, a bright-line rule</p> <p>12 that we use in law enforcement that said we</p> <p>13 absolutely could not wait another hour. I</p> <p>14 didn't see anything like that. I mean, what</p> <p>15 was the best way to handle it is a different</p> <p>16 question, but I didn't see any circumstances</p> <p>17 arise that led me to believe that we had</p> <p>18 reached some point where we could not wait</p> <p>19 another hour.</p> <p>20 Q Was there any circumstances that arose that led</p> <p>21 you to believe you couldn't have waited another</p> <p>22 four hours?</p> <p>23 A I didn't see any circumstances come up that led</p> <p>24 me to believe that we couldn't wait another</p> <p>25 four hours, but what I would say is, like, we</p>
Page 75	Page 77
<p>1 Mr. Tubby -- the goal is to take Mr. Tubby and</p> <p>2 get him into the sally port as safely as we</p> <p>3 possibly can. That is the plan at some point.</p> <p>4 I mean, we certainly can't leave him in the</p> <p>5 back of the squad car forever.</p> <p>6 Q But you could leave him in there for an hour,</p> <p>7 right?</p> <p>8 A You're going to have to ask the people that</p> <p>9 were involved in making that plan what the</p> <p>10 thought was, why they decided to take the</p> <p>11 action that they did, why they decided to take</p> <p>12 the action that they did at the time that they</p> <p>13 did. You're going to have to ask them.</p> <p>14 Q But from your perspective, your vantage point</p> <p>15 on the scene, was there any reason you couldn't</p> <p>16 have just waited an additional hour to see what</p> <p>17 would happen?</p> <p>18 A I guess to me the situation -- this question is</p> <p>19 starting to ask about hindsight. I'm not sure</p> <p>20 what an hour would have done. Would it have</p> <p>21 made it worse? Would it have made it better?</p> <p>22 I don't know what an hour transpiring would</p> <p>23 have done.</p> <p>24 Q Well, specifically the question is was there</p> <p>25 any reason why you could not have waited an</p>	<p>1 have to keep the big picture in mind. At some</p> <p>2 point, like, we need to move towards a</p> <p>3 resolution, and I would say certainly</p> <p>4 throughout the process, however long it may be,</p> <p>5 we want to be seeing progress towards that</p> <p>6 resolution. Progress of some nature.</p> <p>7 Q All right. You've said today, this afternoon</p> <p>8 several times that you perceived Mr. Tubby to</p> <p>9 be -- I'm trying to remember the exact phrase,</p> <p>10 sorry -- you said several times that you</p> <p>11 perceived him to be an armed, barricaded</p> <p>12 subject; is that right?</p> <p>13 A Correct.</p> <p>14 Q And I think you may have said even that he was</p> <p>15 an armed, suicidal, barricaded subject?</p> <p>16 A I would say that's accurate with what my --</p> <p>17 with what I believed at the time. I don't</p> <p>18 remember if I said it or not.</p> <p>19 Q All right. But certainly at the time you</p> <p>20 perceived him to be both armed and suicidal?</p> <p>21 A Yeah, that was my perception, and, you know, it</p> <p>22 was based on the totality, but based a lot on</p> <p>23 the information that Officer O'Brien had</p> <p>24 provided me.</p> <p>25 Q All right. When someone is suicidal, doesn't</p>

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1 here's a guy that's not really armed but
 2 instead is kind of faking this so he can go to
 3 the hospital, the psych ward or somewhere else
 4 besides the jail that's 50 feet away?
 5 MR. GUNTA: I'm going to object on
 6 multiple grounds at this time. The question
 7 has been asked and answered I've counted a
 8 minimum of four times. The speculation you're
 9 asking this officer to involve himself in is
 10 not based upon a legitimate hypothetical
 11 question, but is based upon an assumption and
 12 statements on your part. So I'm going to
 13 object to the question, and I would like to ask
 14 that -- you have explored this area now over
 15 and over and over again for the past 20
 16 minutes -- that you move on. However, subject
 17 to my objections, you can go ahead and answer
 18 the question if you can.
 19 MR. TAHDOOAHNIPPAH: Do you remember
 20 what the question was?
 21 THE WITNESS: No, I'm going to need
 22 you to restate it.
 23 MR. TAHDOOAHNIPPAH: Okay. Let's
 24 read it back with the stipulation that your
 25 objections you just made apply to the question

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1 that is going to be read back. Fair?
 2 MR. GUNTA: That's fair.
 3 MR. TAHDOOAHNIPPAH: All right. And
 4 I'm, of course, stipulating to the fact that
 5 they apply, not that they're valid objections,
 6 but just so you don't have to remake them, in
 7 other words. Make sense?
 8 MR. GUNTA: I understand that you may
 9 not feel that they're valid objections.
 10 MR. TAHDOOAHNIPPAH: Okay. Go ahead
 11 and read it back, please.
 12 (Last question read.)
 13 THE WITNESS: So the way you pose
 14 that specific question, no. It did not enter
 15 my possibility [sic] that he had done what he
 16 had done in an attempt to avoid going to jail
 17 and instead going to the hospital, the psych
 18 ward or somewhere else. And here's why: if you
 19 want to go to the hospital or the psych ward or
 20 somewhere else, you can tell the officer "Hey,
 21 I'm thinking about killing myself. I'm
 22 suicidal." You can tell the officer "I'm
 23 having a lot of chest pain right now. I think
 24 I'm having a heart issue." Like, there are any
 25 number of ways to make that happen, and they're

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1 really pretty simple. And to be honest with
 2 you, at least from my perspective, they're
 3 fairly commonly used among people who are
 4 arrested. It's not an everyday thing, but it's
 5 certainly not an unusual thing that would be
 6 noteworthy to me.
 7 So it never crossed my mind that he
 8 was doing this in an attempt to go to the
 9 hospital, the psych ward or someplace besides
 10 jail. I didn't perceive that as a reasonable
 11 explanation of his conduct that night.
 12 BY MR. TAHDOOAHNIPPAH:
 13 Q The way you kind of hedged that question makes
 14 me think that maybe you did think that he was
 15 faking it for some other reason?
 16 A Yeah. So here's where I was at mentally. I
 17 believed that the most probable explanation for
 18 what Officer O'Brien had observed was that he
 19 was armed with a handgun and suicidal. That
 20 was what I believed was the most probable.
 21 Q Okay.
 22 A Did it enter my mind that it was possible that
 23 he did not actually have a handgun and he was
 24 faking it? That possibility entered my mind,
 25 but it is not what I believed to most probably

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1 be true.
 2 Q Okay. What caused that possibility to enter
 3 your mind?
 4 A What caused that possibility to enter my mind
 5 is that O'Brien had -- **no one had told me "I**
 6 **saw a gun."** That's what caused that
 7 possibility to enter my mind.
 8 Q Okay. O'Brien just said he had seen something?
 9 A He said that his hands were in his shirt, and
 10 it looked like he had something in his hands
 11 pointed up at his chin. That's what he said.
 12 Q All right. When we were talking about kind of
 13 ineffective searches a moment ago, you
 14 mentioned a couple times where, like, knives or
 15 scalpels had been missed. Do you remember
 16 that?
 17 A Correct.
 18 Q Was there any suggestion on the night of
 19 October 19th that he might have not had a gun
 20 but instead had, like, a knife or a scalpel or
 21 a weapon that wasn't a gun?
 22 A Again, that is something that entered my mind,
 23 but based on what Officer O'Brien told me, my
 24 belief was that he was armed with a handgun.
 25 That just seemed like the most probable --

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1 I would guess that it was not the reason that
 2 Officer Eric Allen used the OC spray. And, you
 3 know, you'll have to ask him exactly what it
 4 was, but I don't know, but I suspect that it
 5 wasn't to force him out of the squad car. That
 6 was not the purpose of the OC.
 7 Q When he was sprayed, what did you think was
 8 going to happen?
 9 A I didn't know what was going to happen.
 10 Q Did anyone share with you a plan as to what
 11 they expected would happen next?
 12 A I don't remember anyone sharing a plan with me
 13 of what they expected to happen next or what
 14 they expected to follow the use of the OC. I
 15 don't remember anyone discussing that.
 16 Q Have you ever been exposed to OC spray?
 17 A Yes.
 18 Q When was that? Or, excuse me, how many times?
 19 A So I was, like, formally sprayed in the face
 20 with it in the recruit academy. So that would
 21 be about ten years ago.
 22 Q Okay.
 23 A Just in my line of work, I've been exposed to
 24 it indirectly. You know, maybe it bounces off
 25 the ground or I get some on my hand and then I

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1 do this. So I've been kind of indirectly
 2 exposed to it maybe five times since then.
 3 Q Okay. What are the effects that it has on the
 4 human body?
 5 A I mean, it causes a burning sensation in, like,
 6 your eyes and any skin that it touches. It'll
 7 cause you to -- I mean, it'll cause your tear
 8 ducts to, like, go in overdrive. So you'll
 9 cry, you'll have a difficult time keeping your
 10 eyes open, you'll feel a burning sensation.
 11 Q You'll have difficulty seeing if your eyes are
 12 closed and watering, right?
 13 A That's correct.
 14 Q Okay. Does it disorient you?
 15 A I don't know that I would say it disorients
 16 you. It does make it hard to see, but I don't
 17 know that it, like -- I guess disorient is not
 18 how I would characterize it.
 19 Q Okay. Is it painful?
 20 A Yes.
 21 Q How painful is it?
 22 A You know, it varies by the person. So it's
 23 uncomfortable to me, it's painful to me, but
 24 I'm fairly able to overcome it. I don't like
 25 it, but if I got sprayed with OC and I had to

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1 open my eyes and do something, I could do it.
 2 There are other people where if they get
 3 sprayed with OC, they're done. They can't do
 4 anything. So it just depends on the person.
 5 Q When you were intentionally exposed, they just
 6 sprayed it in your face?
 7 A Yeah.
 8 Q How far away were they?
 9 A Pretty close. I mean, within ten feet. It was
 10 pretty close.
 11 Q How long did they hold their finger down to
 12 spray you?
 13 A The training is about a one-second burst. I
 14 don't remember, but I would guess that it was
 15 about a one-second burst.
 16 Q Okay. How long of a burst did -- how many
 17 bursts did Mr. Tubby get?
 18 A Two, I believe, although I'm not 100 percent
 19 sure.
 20 Q Do you know how long they were?
 21 A I don't recall how long they were.
 22 Q Is there any sort of standard procedure on how
 23 long they should be?
 24 A You know, it's a one-second burst, but
 25 obviously your perception of time in a

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1 situation under stress can be affected. It's
 2 also worth noting that when you're that far
 3 away I think that can affect it, too, just
 4 because it takes a while for the stream to get
 5 there. So you spray it, you may see that the
 6 stream's going a little to the left or a little
 7 to the right or a little bit off aim, and then
 8 you -- as you see the stream heading towards
 9 whatever your target is, you may make an
 10 adjustment. So those are, I guess, things that
 11 could cause you to deploy the spray for a
 12 longer time than you might expect.
 13 Q All right. So when he was sprayed, you don't
 14 necessarily think that the idea was to force
 15 him out of the car?
 16 A Yeah. And I don't know exactly what the
 17 purpose was, but I would guess that that was
 18 not the goal of the OC.
 19 Q Okay. If he was armed, would you agree that
 20 that would have been a bad goal, to force him
 21 out of the car when he's armed?
 22 A Yes. Well, I -- yes and no. Force him out of
 23 the car in that exact situation, yes, I believe
 24 that that would be a bad goal.
 25 Q All right. You had the beanbag gun. What

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1 get up there and I need to make a quick
2 decision because I do not want to be out in
3 this spot very long.
4 So as I moved out, I see Jonathon
5 coming up out of the rear window of the
6 vehicle, and I'm thinking "I'm going to look --
7 I'm going to look for his hands. If I don't
8 see his hands, I'm going to deploy the beanbag
9 gun." The thought being if he comes out, like,
10 with his hands up like "I give up," or
11 something like that, I don't want to shoot him
12 with a beanbag gun because he doesn't need to
13 be shot with a beanbag gun. So that was kind
14 of my thought. It was going to be a simple
15 decision. If he's not showing his hands, I'm
16 going to hit him with the beanbag gun, you
17 know, based on the totality of everything I
18 know, mainly being we believe there's a firearm
19 involved.
20 So as he comes out, he comes out in
21 what I would describe as just a very -- it
22 looked a little awkward to me, the way he came
23 out, probably because he was handcuffed and,
24 you know, didn't have, I guess, full use of
25 his -- all of his extremities, but it was fast.

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1 He came out of that car fast. Faster than I
2 would expect someone would be able to
3 handcuffed in front. He came out. I did my
4 quick assessment. I didn't see his hands. I
5 discharged one round from the beanbag gun at
6 that point.
7 Q Okay. Did you give a warning before you fired
8 that?
9 A I did not.
10 Q Okay. And that was because he came up so fast?
11 A Correct.
12 Q Any other reason?
13 A No. It wasn't a conscious decision by me to
14 not give a warning. It was just I came out, I
15 made my -- it all happened so fast that I did
16 not. I didn't make a conscious decision "You
17 know what, I'm not going to give a warning."
18 It's just the way it happened, you know, due to
19 the circumstances, that mainly being, you know,
20 the time and the stress.
21 Q All right. Did you hit him?
22 A That one I could tell. That one I saw the
23 round fly towards him. I saw it hit him, like,
24 in the lower abdomen.
25 Q Okay. Then what happened?

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1 A So he kind of fell -- he was getting up to his
2 feet as I hit him, and he kind of fell down
3 onto the trunk. Then as he fell onto the
4 trunk, basically his fall continued off to
5 the -- it would be the driver's side of the
6 patrol vehicle that he came out of, and he fell
7 onto the ground there.
8 Q Okay. So he was -- he was on the ground?
9 A And when we say "on the ground," I'm saying on
10 the ground very briefly because as he gets to
11 the ground, he gets back up, and he gets up
12 fast.
13 Q Okay. And at this point in time when he hits
14 the ground, you're still standing to the
15 driver's side rear of your squad?
16 A Yes.
17 Q All right. And you're holding the -- you've
18 still got the beanbag gun aimed at him?
19 A Correct.
20 Q All right. So you're looking right at him?
21 A Correct.
22 Q Okay. What happens next?
23 A So he gets up, and he starts running from my
24 left to right. He starts running towards the
25 open sally port door.

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1 Q All right. At this point in time, had you seen
2 his hands?
3 A I did not observe his hands.
4 Q Could you tell that he was in handcuffs?
5 A Okay. So as he gets up, he starts running. I
6 do not see his hands. As he continues running,
7 I have the beanbag gun out, and I'm tracking
8 him. And this is where my -- where my memory
9 in one respect gets fuzzy, and that's most
10 likely due to the stress of the situation. I
11 thought that I fired another beanbag round, but
12 I really wasn't sure and I really don't
13 remember when exactly I fired it.
14 But as he comes -- as he's getting
15 closer to the door -- if you look at the
16 diagram, I would say as he's getting to -- you
17 can see how there's this yellow line painted
18 here for the parking spot for the transport
19 van, and that yellow line comes to an elbow.
20 As he's getting to that point, I'm tracking him
21 and I see where his hands are. Or I should say
22 where his hands are inside his shirt, and his
23 hands are up like this, and I could kind of see
24 his elbow here, his right elbow which is what I
25 would have a view of. It's kind of out to his

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1 on that.

2 Q All right. What happens next in this series of

3 events as far as you personally observed after

4 rescue decides not to take him?

5 A So at that point some of the -- one or more of

6 the sheriff deputies that were on scene got,

7 like, some of those little cones out and they

8 started marking some of the evidence, like some

9 of the shell casings that were on the ground.

10 Crime scene tape went up to secure the crime

11 scene. I stayed for a period of time basically

12 just as crime scene security to make sure that

13 no one came in and disturbed any of the

14 evidence.

15 Q Did anyone move his body during that point in

16 time?

17 A No.

18 Q Okay.

19 A I don't know how long I was there. It

20 wasn't -- it didn't feel like very long.

21 Eventually there were enough deputies there and

22 they were like, "Hey, you probably don't need

23 to stay. We'll take over the crime scene." I

24 said, "Okay," and I headed back to the police

25 department.

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1 Q Okay. So you went back to the police

2 department office?

3 A Yes.

4 Q Okay. What did you do next?

5 A So at the police department -- I mean, then --

6 so we have, like, a critical-incident policy.

7 This would be a critical incident, an officer

8 using deadly force. So we head up to the

9 second floor. All officers involved are in

10 there. We're told not to talk amongst each

11 other about it. At that point we started what

12 ends up being a very long process of waiting

13 for what ultimately ends up being a combination

14 of DCI and the sheriff's department to come and

15 start the -- I guess start the investigation.

16 When I say "start the investigation," I mean

17 determine who's going to interview the officers

18 who are witnesses and all that. So we were

19 just there in a holding pattern.

20 Eventually DCI came. They

21 photographed my clothes because I had some

22 blood on my clothes. It was determined that I

23 was not going to be giving my interview that

24 night, that I was going to give it at a later

25 date. So eventually I -- shortly after I had

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1 my photos taken, I went home.

2 Q When Jonathon Tubby was shot, where was your

3 dad at?

4 A I don't know. I think he was out here in this

5 grassy area somewhere, but I don't know for

6 certain. I wasn't focused on where my dad was

7 at that point.

8 Q Did he come with you when you had to go back to

9 the police department?

10 A Yeah. So I -- well, my squad car was here and

11 it was part of the scene, so we weren't going

12 to move it. So my dad -- it was Officer Ecker

13 and someone he was training -- he was field

14 training another officer -- they gave us a

15 ride. Officer Delsar. That's who it was.

16 They gave me and my dad a ride back to the

17 police station. We rode in the back seat of

18 the squad car together.

19 Q Okay. Did he then go home, or did he still

20 just wait with you while you waited for --

21 A Once we got back to the police station I just

22 told him, "Dad, I don't think there's much more

23 for you to do," and he headed home.

24 Q All right. When you talked about approaching

25 Jonathon when he was on the ground, you said

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1 that there was someone that was aiming a rifle

2 at him?

3 A Right.

4 Q And you said that that was in case deadly force

5 was needed again?

6 A Right. And obviously that situation never

7 happened, but in case he's really not dead and

8 he does have a gun and he presents that gun

9 again. That would be one example of how

10 perhaps a deadly force situation could arise

11 again. Obviously that never happened, so that

12 ended up not being needed.

13 Q So your use of the word "again" leads me to

14 believe that you think that a deadly force

15 situation had arisen at some point in time

16 before he was shot?

17 A Yes. I mean, deadly force criteria was met

18 when Officer O'Brien discharged his firearm.

19 Q Okay. Why do you say that?

20 A Because Jonathon -- he presented an imminent

21 threat of death or great bodily harm. And I

22 think it's important to note here that that

23 imminent threat is -- it's in the perception of

24 the officer, and the perception of the officer

25 is based on all of the information that he had

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1 the reason I did not see the canine, did not
 2 recognize that the canine was being deployed on
 3 Jonathon was just those human performance
 4 factors. The tunnel vision.
 5 I think it's also worth noting
 6 that I'm behind my -- behind my patrol vehicle.
 7 As I'm tracking, I'm moving to my right a
 8 little bit. Obviously, the dog is short and
 9 running on the other side of the patrol
 10 vehicle, so there were probably windows where I
 11 just couldn't have seen the dog, but I think
 12 most of the reason I didn't see the dog was
 13 tunnel vision. My focus was on Jonathon.
 14 Q So you never saw the dog?
 15 A I didn't. I didn't know a dog had been
 16 deployed until well after I left the sally port
 17 that night.
 18 Q Okay. Had you seen the dog and had the dog
 19 been engaged with Jonathon, would deadly force
 20 still have been justified in your view?
 21 A Yes. To put it simply, yes, because the deadly
 22 force is justified because of all the factors
 23 we talked about before: because of the
 24 perception that Jonathon is armed with a gun,
 25 that Jonathon is running at officers. Just

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1 because there's a dog engaged on Jonathon does
 2 not mean that those factors aren't present.
 3 Q Wouldn't you be concerned about crossfire and
 4 killing the dog?
 5 A I don't want dogs to get hurt, I like dogs, but
 6 I do have a hierarchy of how I value life, and
 7 humans would be above dogs. So if I'm putting
 8 a dog in danger to prevent a human from being
 9 in danger, that would be acceptable to me.
 10 Q And there's -- so there's no formal policy
 11 about not using force against someone that's
 12 engaged with a canine unit?
 13 A Not that I know of.
 14 Q All right. We're going to look at an exhibit
 15 that was marked previously today as Exhibit
 16 No. 3, but if you turn to it in front of you,
 17 you're not going to see anything interesting
 18 because it's just a slip sheet of a video that
 19 is on my computer that we are going to look at.
 20 The last time we did this we kind of dimmed the
 21 lights because it made it easier to see the
 22 video, so let's do that again.
 23 All right. Can you see the screen of
 24 the computer with the video on it?
 25 A Yes.

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1 Q Okay.
 2 MR. TAHDOOAHNIPPAH: Mr. Gunta, can
 3 you see it?
 4 MR. GUNTA: I can this time, yes.
 5 MR. TAHDOOAHNIPPAH: All right.
 6 Mr. Castro?
 7 MR. CASTRO: Yes, I can.
 8 BY MR. TAHDOOAHNIPPAH:
 9 Q Now, can you -- do you know who this person
 10 here on the far left side is?
 11 A Honestly, no. I mean, I can see it's a
 12 sheriff's deputy, but I don't know who that is.
 13 Q Okay. And then there's someone here that's
 14 wearing plain civilian clothing. Do you see
 15 him?
 16 A I do.
 17 Q Do you know who that is?
 18 A It's Jerry Johnson.
 19 Q Okay. Who is Jerry Johnson?
 20 A Jerry Johnson is a retired lieutenant from the
 21 Green Bay Police Department. He was doing a
 22 ride-along that night.
 23 Q Do you know who he was riding along with?
 24 A He came to the sally port with Officer Walvort.
 25 He was out riding with Officer Walvort at the

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1 time of the incident.
 2 Q Okay. Now, there's a group of about four
 3 officers over here on the right side.
 4 MR. GUNTA: Counsel, I don't mean to
 5 interrupt you. Can you just bring it a little
 6 closer because I can't see what they're dressed
 7 like?
 8 MR. TAHDOOAHNIPPAH: Yep.
 9 MR. GUNTA: Okay. Go ahead.
 10 THE WITNESS: I mean, can I tell who
 11 they are?
 12 MR. TAHDOOAHNIPPAH: Yeah.
 13 THE WITNESS: No. I can tell they're
 14 sheriff's deputies. The one individual here, I
 15 can't tell if maybe that's not a sheriff's
 16 deputy, if maybe that's a Green Bay PD uniform.
 17 It looks like maybe his pants are darker, but
 18 I'm not sure if it's that or if it's just the
 19 way that the video looks. But they look like
 20 mostly sheriff's deputies. Maybe that one
 21 officer, I can't tell if he's a Green Bay
 22 police officer or a sheriff's deputy.
 23 BY MR. TAHDOOAHNIPPAH:
 24 Q All right. But other than Mr. Johnson, do you
 25 know the names of any person depicted here?

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1 A No, I either don't know them or just don't
 2 recognize them in the video.
 3 Q Okay. I'm going to play the video one time
 4 straight through, and I want you to tell me if
 5 you can ever see yourself on this video.
 6 A Okay.
 7 Q Could you ever see yourself in the video?
 8 A Yes.
 9 Q Okay. We'll play it again, and when you can
 10 see yourself, I want you to tell me so I can
 11 pause it.
 12 A I can see myself now.
 13 Q Okay. Which one are you now?
 14 A You can see I'm holding the beanbag shotgun.
 15 I've got it shouldered.
 16 Q That's you right there?
 17 A Yeah, behind a number of -- I mean, from the
 18 point of view that we're at, I'm behind a
 19 number of officers, yeah.
 20 Q All right. So I want you to tell me -- we're
 21 going to look through it again one more time,
 22 and I want you to tell me if you can identify
 23 the moment that Officer O'Brien shoots Jonathon
 24 Tubby.
 25 A Okay. So there's a moment here where you can

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1 see part of Jonathon Tubby's body come just
 2 into view. It was -- it was just before that.
 3 It was a moment before that.
 4 Q So the moment before that, that's when he got
 5 shot?
 6 A Yeah. You know, obviously, I can't be
 7 specific, but it was just a moment before that.
 8 And the reason that I believe that is it looks
 9 like that is Jonathon falling to the ground,
 10 and I know that he was shot just before he fell
 11 to the ground.
 12 Q All right. But you were actually physically
 13 there?
 14 A Correct.
 15 Q And you actually saw him get shot?
 16 A Correct.
 17 Q So you can definitively say that he was not on
 18 the ground before he got shot, right?
 19 A No. He was running towards Officer O'Brien
 20 when he got shot.
 21 Q All right. So if you go to the video, you can
 22 see him right about here, correct?
 23 A Correct.
 24 Q And that's about nine seconds into the video at
 25 9:10:58 p.m.?

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1 A That's the time stamp on the video right now.
 2 Q Okay. So your testimony is that at this
 3 particular moment in time he had been shot?
 4 A Yes.
 5 Q All right. And then his head leaves the frame
 6 of the camera, right?
 7 A It does.
 8 Q Okay. Do you know why his body was moving at
 9 that point in time?
 10 A I know now why it was, but I did not at the
 11 time.
 12 Q Okay. At the time --
 13 A Or I didn't recognize it at the time would
 14 probably be more accurate.
 15 Q All right. So the canine is dragging him? Is
 16 that what your testimony is?
 17 A Yeah, that's what Officer Salzmann told me.
 18 Q All right. Would you agree with me that you
 19 can see his right hand right there?
 20 A I'm going to get closer.
 21 Q Yep, that's fine.
 22 A I guess at the moment, no. What are you
 23 thinking is his right hand?
 24 Q That object by the bumper. I'll replay it for
 25 you.

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1 A One more time, if you don't mind.
 2 Q Yep.
 3 A I mean, that looks to me like a hand. Whether
 4 it's his right hand or his left hand, I don't
 5 know. Can I 100 percent say that that's his
 6 hand? No, but it looks like his hand.
 7 Q All right. So you would agree that it looks
 8 like a hand, but you just couldn't say right or
 9 left?
 10 A I would agree that it looks like a hand, yeah.
 11 Q All right. Now, this is still nine seconds
 12 into the video, but his head is not visible
 13 right now, right? He's already exited the
 14 frame at this particular point?
 15 A I'm almost positive you are correct. My only
 16 cause for hesitation in saying that I'm not 100
 17 percent sure his head left the frame is that I
 18 believe that that's one of the rear tires of my
 19 patrol vehicle and it's dark and his hair was
 20 dark. So I don't know how well his hair would
 21 stand out against that tire.
 22 Q Okay.
 23 A Well, now I see --
 24 Q Did you see his head hit the ground in those
 25 last couple frames?

47 (Pages 182 - 185)

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF WISCONSIN

3 -----
4 SUSAN DOXTATOR, ARLIE DOXTATOR,
5 and SARAH WUNDERLICH, as Special
6 Administrators of the
7 Estate of Jonathon C. Tubby,

8 Plaintiffs,

9 vs.

Case No. 1:19-cv-00137-WCG

10 ERIK O'BRIEN, ANDREW SMITH,
11 TODD J. DELAIN, HEIDI MICHEL,
12 CITY OF GREEN BAY, BROWN COUNTY,
13 JOSEPH P. MLEZIVA, NATHAN K. WINISTERFER,
14 THOMAS ZEIGLE, BRADLEY A. DERNBACH,
15 and JOHN DOES 1-5,

16 Defendants.
17 -----

18 Deposition of SCOTT SALZMANN

19 Friday, December 20, 2019

20 9:04 a.m. to 12:29 p.m.

21 Reported by Jennifer M. Steidtmann, RPR, CRR, CRC
22
23
24
25

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1 Q You say "issues the OC from what I believe", what do
 2 you mean by that?
 3 A I can't see it.
 4 Q Do you hear it?
 5 A No.
 6 Q Do you see him pressing it down?
 7 A No.
 8 Q Okay.
 9 A I told you that.
 10 Q So you just believe that because you knew that was
 11 the plan?
 12 A Yes.
 13 Q Okay. Go ahead.
 14 A Okay. At this time Officer Eric Allen starts to bend
 15 back down out of the turret, turn to look at me to
 16 tell me to deploy Pyro; and simultaneously as Officer
 17 Eric Allen's doing that, Officer Merrill in the
 18 BearCat says he's coming out and begins to back that
 19 BearCat up, I believe.
 20 Q All right. Up until this point from the time you
 21 first pulled the BearCat in to the time that Officer
 22 Merrill says he's coming out, where is Pyro?
 23 A In the back of the BearCat.
 24 Q Okay. Is he on a leash?
 25 A Yes.

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1 Q Are you holding on to the leash?
 2 A Yes.
 3 Q Okay. Is he -- does he bark at all?
 4 A No.
 5 Q Is he whining at all?
 6 A No.
 7 Q He's just -- all this stuff is going on and he's just
 8 silent?
 9 A He's ready.
 10 Q All right. Then Officer Merrill says he's coming
 11 out.
 12 What happens next?
 13 A As I said, simultaneously to Officer Eric Allen
 14 bending down looking at me telling me to deploy Pyro,
 15 Officer Merrill says he's coming out. I open up the
 16 back door, both back doors to the BearCat, and Pyro
 17 immediately jumps out and rounds the corner of the
 18 BearCat before I can fully get out.
 19 As I get out of the BearCat and round the
 20 corner, I see Mr. Tubby stumbling backwards, back
 21 towards the patrol car. I see his hands up in his
 22 shirt. Then he starts running towards the blue
 23 transport van.
 24 Q All right. Let me pause you right there because I
 25 just want to understand everything that's going on.

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1 You open the doors of the BearCat. That's
 2 the rear doors?
 3 A Yes.
 4 Q Okay. They swing open?
 5 A Yes.
 6 Q Okay. Are you letting Pyro off the leash at this
 7 point?
 8 A No.
 9 Q You're still holding on to the leash?
 10 A I have a 15-foot lead in my hand.
 11 Q Okay.
 12 A And he has about six to eight feet.
 13 Q Okay. So he's six to eight feet ahead of you on the
 14 leash, and he rounds -- so he rounds the corner ahead
 15 of you, right?
 16 A Yes.
 17 Q Okay. You round the corner of the BearCat, and you
 18 see Jonathon Tubby?
 19 A Yes.
 20 Q Okay. You said you saw him next to Officer
 21 Wernecke's squad car?
 22 A I saw him stumbling backwards towards, yes.
 23 Q Okay. And that is depicted on the -- Exhibit 13 by
 24 kind of a marking next to squad car?
 25 A Yes.

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1 Q All right. Is -- you said he's stumbling? All
 2 right.
 3 So he's on two feet?
 4 A Yes.
 5 Q Okay. And you said you saw his hands?
 6 A Under his shirt.
 7 Q Under his shirt. Both hands under his shirt?
 8 A Yes.
 9 Q All right. Did you see a gun inside his hands?
 10 A I did not.
 11 Q All right.
 12 A Can't see his hands at that time.
 13 Q His hands are under his shirt, period?
 14 A Period.
 15 Q All right. So you can't see any handcuffs on him
 16 either?
 17 A No.
 18 Q Then what happens?
 19 A Mr. Tubby stumbles backwards and then starts running
 20 towards the blue transport van and towards the
 21 entrance of the sally port where I know several other
 22 officers are standing.
 23 Q All right. Did you know that because it was the plan
 24 for them to stand there, or do you know that because
 25 you can actually see them?

<p style="text-align: right;">Page 86</p> <p>1 A Before I even entered the BearCat, I knew there were</p> <p>2 officers standing near the entrance of the sally</p> <p>3 port.</p> <p>4 Q All right. And that door was open?</p> <p>5 A Yes. At the time that I saw that, the door was open,</p> <p>6 yes.</p> <p>7 Q Okay. Did you ever think maybe it would be a good</p> <p>8 idea since that door was open to put Officer</p> <p>9 Merrill's K-9 by the door?</p> <p>10 A I did not think of that, no.</p> <p>11 Q Okay. Did -- were you aware if there were other K-9</p> <p>12 units on the scene from Brown County?</p> <p>13 A Yes.</p> <p>14 Q Did you ever consider maybe putting their K-9s by the</p> <p>15 door?</p> <p>16 A I did not think of that, no.</p> <p>17 Q Did you ever think of, like, let's just shut this</p> <p>18 down to contain the situation a little better?</p> <p>19 A I did not think of that, no.</p> <p>20 Q All right. So he's running towards the transport</p> <p>21 van. Is he running towards the transport van or</p> <p>22 towards the door? And I just ask that because the</p> <p>23 line that is drawn, you drew this line on here?</p> <p>24 A Yes.</p> <p>25 Q All right. It kind of goes first towards the</p>	<p style="text-align: right;">Page 88</p> <p>1 couldn't see?</p> <p>2 A I inferred that he was on his feet running towards</p> <p>3 the van and then running towards the entrance of the</p> <p>4 sally port.</p> <p>5 Q Would running into the van be consistent with someone</p> <p>6 that can't see?</p> <p>7 A Not necessarily. It's consistent with somebody who's</p> <p>8 try to flee or get to a different position.</p> <p>9 Q Okay. So not necessarily, but possibly?</p> <p>10 A It's possible, yes.</p> <p>11 Q Okay. So he runs into the transport van. Then at</p> <p>12 this point in time do you have a firearm on you?</p> <p>13 A Yes.</p> <p>14 Q Do you have it drawn?</p> <p>15 A No.</p> <p>16 Q Okay. Is that -- in your training, is it appropriate</p> <p>17 to have a firearm drawn while you're also handling</p> <p>18 the K-9?</p> <p>19 A It's not ideal, however we can do it, but there's</p> <p>20 other officers that already have lethal cover.</p> <p>21 Q Uh-huh.</p> <p>22 A My job is less lethal with the K-9, so I do not draw</p> <p>23 my firearm.</p> <p>24 Q And you don't think, oh my God, there's an imminent</p> <p>25 threat of death or great bodily harm to someone, I</p>
<p style="text-align: right;">Page 87</p> <p>1 transport van, then kind of curves around towards the</p> <p>2 door?</p> <p>3 A And that's exactly what he did.</p> <p>4 Q Okay. So he ran towards the van first?</p> <p>5 A Yes.</p> <p>6 Q Did he ever, like, run into the van?</p> <p>7 A I believe he did, yes.</p> <p>8 Q Okay. So he's kind of -- I mean, he can't -- maybe</p> <p>9 can't see, who knows.</p> <p>10 Did you attribute him running into the van</p> <p>11 to the OC spray?</p> <p>12 MR. GUNTA: Objection to the form of the</p> <p>13 question. Multiple in form.</p> <p>14 Go ahead and answer.</p> <p>15 THE WITNESS: I don't know what he's</p> <p>16 seeing, thinking, or feeling at that time.</p> <p>17 BY MR. TAHDOOAHNIPPAH:</p> <p>18 Q Well, did you infer that he couldn't see from the OC</p> <p>19 spray because he ran right into a van?</p> <p>20 A With all due respect, sir, I don't know what he was</p> <p>21 seeing, thinking, or feeling at the time.</p> <p>22 Q Yeah. Obviously don't know what another person's</p> <p>23 mind-set is.</p> <p>24 Did you infer from what you observed that</p> <p>25 the OC spray was affecting him sufficient that he</p>	<p style="text-align: right;">Page 89</p> <p>1 should just pull my gun out and kill this guy right</p> <p>2 now?</p> <p>3 A So the way I interpret that, there's two parts to</p> <p>4 that question.</p> <p>5 Q Uh-huh. Why don't you answer each one.</p> <p>6 A Yes, there's an imminence.</p> <p>7 Q Okay.</p> <p>8 A Not to my sense but to others.</p> <p>9 Q And that is the officers by the door?</p> <p>10 A Correct.</p> <p>11 Q Okay.</p> <p>12 A Do I think to draw my firearm to answer the second</p> <p>13 part of that, no, because I have the K-9.</p> <p>14 Q All right. So you think that there was an imminent</p> <p>15 danger of death or serious bodily harm to the</p> <p>16 officers standing by the door?</p> <p>17 A Yes.</p> <p>18 Q Why did you think that?</p> <p>19 A The totality of the circumstances indicated that</p> <p>20 Tubby was armed. He never did anything to -- to show</p> <p>21 that he was not armed, and his behavior and</p> <p>22 mannerisms when he was out was consistent with hands</p> <p>23 up the shirt still concealing and running towards</p> <p>24 officers that I believed he was armed and trying to</p> <p>25 get to them.</p>

<p style="text-align: right;">Page 90</p> <p>1 Q Why did you believe that he was armed?</p> <p>2 A Again, the totality of the circumstances with the</p> <p>3 information that was previously given over the radio,</p> <p>4 the fact that when he got out his hands were still</p> <p>5 concealed in his shirt, and he was crouched a little</p> <p>6 forward and running towards officers.</p> <p>7 Q All right. Well, you said you heard he had something</p> <p>8 in his hands, right?</p> <p>9 A Yes.</p> <p>10 Q No one ever told you that he had a gun?</p> <p>11 A No.</p> <p>12 Q And you never saw a gun?</p> <p>13 A No.</p> <p>14 Q You never saw anything in his hands?</p> <p>15 A I could not see his hands, no.</p> <p>16 Q Right. So you never saw anything in them?</p> <p>17 A Right.</p> <p>18 Q But yet you have now jumped to the conclusion in your</p> <p>19 mind that he was armed?</p> <p>20 MR. GUNTA: Objection to the form of the</p> <p>21 question.</p> <p>22 BY MR. TAHDOOAHNIPPAH:</p> <p>23 Q And I want to understand why you made that jump?</p> <p>24 MR. GUNTA: Objection to the form of the</p> <p>25 question.</p>	<p style="text-align: right;">Page 92</p> <p>1 together, right?</p> <p>2 A With handcuffs, yes.</p> <p>3 Q Yeah. So if someone gets the handcuffs into front,</p> <p>4 it would have the same shape and form that you</p> <p>5 observed under Jonathon Tubby's shirt, right?</p> <p>6 A There's a possibility for that, yes.</p> <p>7 Q And I don't mean to pick on you, but you said he was</p> <p>8 in a manner -- behavior and mannerisms consistent</p> <p>9 with going towards the officers at the door, right?</p> <p>10 A Yes.</p> <p>11 Q But a moment ago you said that his behavior was</p> <p>12 consistent with someone that was trying to flee?</p> <p>13 A No. You asked me if his behavior was consistent with</p> <p>14 somebody that had been sprayed, and I said that's not</p> <p>15 necessarily it. I said that behavior is somebody</p> <p>16 who's trying to run from officers or run towards</p> <p>17 them.</p> <p>18 Q That's what you're saying, that your answer to my</p> <p>19 question didn't involve fleeing?</p> <p>20 A I did say fleeing, yes.</p> <p>21 Q You did say fleeing?</p> <p>22 A Yes.</p> <p>23 Q Okay. So how do you know whether he was fleeing --</p> <p>24 whether he was trying to flee or run at these</p> <p>25 officers to pose some kind of threat?</p>
<p style="text-align: right;">Page 91</p> <p>1 Go ahead and answer.</p> <p>2 THE WITNESS: Based on my training and</p> <p>3 experience.</p> <p>4 BY MR. TAHDOOAHNIPPAH:</p> <p>5 Q So it's based on your training as a Green Bay police</p> <p>6 officer that because you couldn't see his hands and</p> <p>7 someone had said something's in his hands that he was</p> <p>8 armed?</p> <p>9 A With the totality of the circumstances, yes.</p> <p>10 Q All right. And you said his behavior and his</p> <p>11 mannerisms made you think that he was posing a threat</p> <p>12 to the officers at the door?</p> <p>13 A Yes.</p> <p>14 Q Because you thought he was -- because of why?</p> <p>15 A Because he was running towards them with his hands</p> <p>16 concealed up his shirt consistent with that of</p> <p>17 somebody possibly armed and running towards where</p> <p>18 several other officers were.</p> <p>19 Q Okay. Well, wasn't having your hands up your shirt</p> <p>20 like that also consistent with someone that just is</p> <p>21 handcuffed?</p> <p>22 A That is not the way that we handcuff.</p> <p>23 Q Well, people are handcuffed behind, right?</p> <p>24 A Behind, yes.</p> <p>25 Q But when they're handcuffed, their wrists are put</p>	<p style="text-align: right;">Page 93</p> <p>1 A Because my perception at the time. That's what I</p> <p>2 know. That's what I can testify to.</p> <p>3 Q Just your subjective -- you can just define his state</p> <p>4 of mind now --</p> <p>5 MR. GUNTA: All right.</p> <p>6 BY MR. TAHDOOAHNIPPAH:</p> <p>7 Q -- to know whether he was escaping or running towards</p> <p>8 the officer?</p> <p>9 MR. GUNTA: Objection to the form of the</p> <p>10 question.</p> <p>11 Counsel, you're just about over the line</p> <p>12 with argumentative.</p> <p>13 But you go ahead and answer. That was</p> <p>14 on -- that type of mannerism and argumentative</p> <p>15 conduct towards this witness is uncalled for.</p> <p>16 Please try to control it. I know you're emotional.</p> <p>17 We all are.</p> <p>18 Read him back the question and you answer</p> <p>19 the question if you can.</p> <p>20 (RECORD READ.)</p> <p>21 THE WITNESS: I do not know his state of</p> <p>22 mind. I know my state of mind based on the totality</p> <p>23 of the circumstances, and I believed that he was</p> <p>24 armed based on his behavior and that he was running</p> <p>25 towards officers in an attempt to hurt them. That's</p>

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- 1 Q Yeah.
- 2 A I apologize for jumping in.
- 3 Q Which, you know, makes sense in this circumstance,
- 4 but I was just making clear on the record what you
- 5 were doing with your hands when you said that.
- 6 A I understand.
- 7 Q Anything else that made it -- that was -- made it in
- 8 your mind, any other factor that was unique to posing
- 9 a threat instead of merely trying to escape?
- 10 A I would go back to what I stated earlier on the
- 11 reasons that I listed that I felt.
- 12 Q Right. And you don't have anything -- nothing
- 13 additional that we haven't talked about already?
- 14 A No.
- 15 Q All right. Let's go back to the diagram. You have
- 16 him kind of running towards the transport van, right?
- 17 A Yes.
- 18 Q Then he turns and kind of rounds the transport van,
- 19 right?
- 20 A Yes.
- 21 Q Then there's kind of a circle that you drew?
- 22 A Yes.
- 23 Q What does the circle represent?
- 24 A That is where Pyro -- I believe Pyro engaged him.
- 25 Q Okay. When Pyro engaged him, was he still on his

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- 1 leash or had you let go of the leash?
- 2 A He was still on lead.
- 3 Q On lead, sorry. Not leash.
- 4 All right. So you were about six to eight
- 5 feet behind at this point in time?
- 6 A That is correct.
- 7 Q Can you use a pen and just draw which angle you were
- 8 at behind Pyro?
- 9 A I believe that's already depicted in the solid
- 10 circle. There's a hollow circle and then a solid
- 11 circle just behind that at the transport van. That's
- 12 about where I was.
- 13 Q Okay. Story. I misunderstood.
- 14 The hollow circle is where Pyro engaged?
- 15 A Engaged.
- 16 Q Okay. And then you are represented by the filled-in
- 17 circle?
- 18 A Yes.
- 19 Q Okay. When Pyro engaged Mr. Tubby, where did he
- 20 engage him?
- 21 A In the back area.
- 22 Q So he bit him in the back somewhere?
- 23 A Somewhere in the back. Tubby's back was facing me,
- 24 I believe he got him in the buttock area.
- 25 Q All right. And so when you say "got him", you mean

Page 100

- 1 he bit him?
- 2 A He bit him, yes.
- 3 Q Okay. What happened -- what happened next?
- 4 A So as Pyro engaged Tubby in the rear buttock area, I
- 5 immediately applied more back pressure to stop Tubby
- 6 from continuing advancing further towards officers.
- 7 Q Can I -- just let me just pause you right there.
- 8 So the idea of pulling back is you're
- 9 trying to stop Tubby's forward momentum?
- 10 A Yes.
- 11 Q All right. Go ahead.
- 12 A Simultaneously, and when I say simultaneously in my
- 13 mind it was simultaneously, Pyro engages Mr. Tubby, I
- 14 hear a shot, which I believed to be a less lethal
- 15 round from a less lethal shotgun.
- 16 Q Okay. Did you hear -- sorry. You heard the less
- 17 lethal.
- 18 Did you see the less lethal hit him?
- 19 A I did not.
- 20 Q Okay. What happened next?
- 21 A Simultaneously to that, the first round, I hear
- 22 multiple rounds from what I believe to be a .45
- 23 caliber handgun.
- 24 Q All right. That's pretty specific as far as caliber
- 25 goes. How are you able to make that sort of judgment

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- 1 knowing the caliber of a gun when you hear it?
- 2 A I know typically Green Bay Police Department has
- 3 carried .45 caliber handguns. We've recently
- 4 transitioned to allowing officers to carry a 9
- 5 millimeter. Usually .45 caliber is a little more
- 6 deep than a 9 millimeter. I just -- when I said .45,
- 7 I assumed that based on the deep throaty sound of it.
- 8 It sounded just a little more loud than a 9
- 9 millimeter.
- 10 Q Yeah. And at that time you had been with the Green
- 11 Bay Police Department for, like, four years?
- 12 A I'm sorry?
- 13 Q On October 19, 2018, you had been a police officer
- 14 for about four years?
- 15 A No.
- 16 Q For how long? Oh, for about 13 years?
- 17 A 2005 to 2018, yeah.
- 18 MR. GUNTA: That's about 13 years.
- 19 THE WITNESS: 13 years, yeah.
- 20 BY MR. TAHDOOAHNIPPAH:
- 21 Q All right. So over about 13 years of listening to
- 22 .45 caliber handguns and training potentially in the
- 23 field a few times, you kind of have learned what it
- 24 sounds like?
- 25 A You get an idea, yes.

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1 Q And you're a firearms instructor also?

2 A Yes.

3 Q So you have some sort of additional familiarity with

4 that?

5 A Yes.

6 Q And you also said you could tell the sound between a

7 less lethal?

8 A Yes. I could tell the difference between the first

9 shot I heard and the multiple shots after that, was a

10 clear distinct difference.

11 Q Can you describe kind of the difference in the

12 sounds?

13 A So again, the less lethal impact round came from a

14 shotgun, which again is going to be a little deeper,

15 a little louder, what I would describe as just a

16 little more throaty --

17 Q Okay.

18 A -- versus then a smaller -- smaller size, smaller

19 caliber handgun, which is going to -- that's still

20 going to have a deep throaty sound, just not as much

21 as a shotgun.

22 Q So does it have distinct sounds?

23 A To some people, yes. To me, yes.

24 Q Not to everyone?

25 A I can't comment on what everyone perceives.

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1 Q But certainly to you they have a different sound?

2 A To me they had a different sound.

3 Q Okay. Your familiarity with bean bag shotguns comes

4 from your training and experience as a Green Bay

5 police officer?

6 A Yes.

7 Q Do you have any other experience with bean bag

8 shotguns outside of being a police officer?

9 A Outside, no.

10 Q You don't go shoot them for fun or something?

11 A Bean bag shotguns?

12 Q Yeah.

13 A No.

14 Q Do you shoot for fun, recreational shooting of

15 handguns?

16 A I do hunt.

17 Q You hunt?

18 A Yeah.

19 Q So that's with a rifle or shotgun?

20 A I hunt with a shotgun.

21 Q Okay. So do you ever shoot recreationally with a

22 handgun?

23 A Yes.

24 Q So you have some familiarity with those sounds, but

25 you don't ever go shooting bean bag guns for fun,

Page 104

1 right?

2 A No.

3 Q So all your familiarity with that sound comes from

4 being a police officer?

5 A Comes from training and experience, yes.

6 Q As a police officer?

7 A As a person.

8 Q But you have training and experience with a bean bag

9 shotgun because of your occupation as a police

10 officer?

11 A Yes.

12 Q All right. You think a reasonable police officer

13 with your experience can tell the difference between

14 a bean bag shotgun and a handgun?

15 MR. GUNTA: Objection. Vague.

16 Go ahead.

17 THE WITNESS: I can only answer to what I

18 perceive. I don't know what somebody else would

19 perceive.

20 BY MR. TAHDOOAHNIPPAH:

21 Q So you don't have an opinion on whether it would be

22 reasonable or unreasonable to mistake a bean bag

23 shotgun for a real gun?

24 A No, I do not have an opinion on that.

25 Q One way or the other?

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1 A One way or another.

2 Q That's not a mistake that you made, though?

3 MR. GUNTA: Objection to the form of the

4 question.

5 THE WITNESS: What is the question?

6 BY MR. TAHDOOAHNIPPAH:

7 Q Mistaking a bean bag gun for a real gun wasn't a

8 mistake that you made on October 19, 2018?

9 MR. GUNTA: Objection to the form of the

10 question.

11 THE WITNESS: I don't think there's any

12 mistake. I -- I heard what I thought was a bean bag

13 round simultaneously with multiple lower caliber,

14 what I thought were handgun rounds.

15 BY MR. TAHDOOAHNIPPAH:

16 Q All right. And what you subsequently learned was

17 that the sound that you thought was a bean bag was a

18 bean bag, right?

19 A Subsequently learned, yes.

20 Q And the sound that you thought was a handgun was a

21 handgun?

22 A Subsequently, yes.

23 Q Yeah. So you didn't make any sort of mistake in

24 confusing the two?

25 MR. GUNTA: Objection to the form of the

27 (Pages 102 - 105)

<p style="text-align: right;">Page 130</p> <p>1 A No.</p> <p>2 Q Has he ever tried to blame Brown County for what</p> <p>3 happened?</p> <p>4 A No.</p> <p>5 Q Do you think that there was some pressure from Brown</p> <p>6 County to try to clear the sally port?</p> <p>7 MR. GUNTA: I'm just going to object to</p> <p>8 the form of the question.</p> <p>9 If you understand the question, go ahead</p> <p>10 and answer.</p> <p>11 THE WITNESS: Are you asking if Brown</p> <p>12 County felt pressure to clear the sally port to</p> <p>13 maintain normal business?</p> <p>14 MR. TAHDOOAHNIPPAH: Yeah.</p> <p>15 THE WITNESS: I believe that is a factor,</p> <p>16 yes.</p> <p>17 BY MR. TAHDOOAHNIPPAH:</p> <p>18 Q You think that's a factor in the -- you think that</p> <p>19 was a factor in the decision as to when to try to</p> <p>20 break the -- breach the rear window of the squad?</p> <p>21 A That I can't testify to. I don't know what the</p> <p>22 factors were that went into that decision-making.</p> <p>23 Q But you do -- you would agree that there was at least</p> <p>24 on some level pressure by Brown County to get the</p> <p>25 sally port cleared to resume standard operations of</p>	<p style="text-align: right;">Page 132</p> <p>1 Q Other than your meeting on Tuesday, have you spoken</p> <p>2 with Mr. Gunta about this incident?</p> <p>3 A No.</p> <p>4 Q About this deposition?</p> <p>5 A Other than Tuesday?</p> <p>6 Q Other than Tuesday.</p> <p>7 A No.</p> <p>8 Q Have you ever spoken with any of the lawyers from</p> <p>9 Brown County about this incident?</p> <p>10 A No.</p> <p>11 Q About this deposition?</p> <p>12 A No.</p> <p>13 Q All right. Let's go back to this Exhibit 13 and the</p> <p>14 last page, which is this diagram. I have been told</p> <p>15 but I want you to correct me if I'm wrong that this</p> <p>16 was generated by something called a FARO scan?</p> <p>17 A I don't know what it was generated by.</p> <p>18 Q Have you ever heard of something called a FARO scan?</p> <p>19 A I have not.</p> <p>20 MR. GUNTA: Let the record reflect I</p> <p>21 haven't either. I don't know what it is.</p> <p>22 BY MR. TAHDOOAHNIPPAH:</p> <p>23 Q And I may be mispronouncing it, but I think it's</p> <p>24 F-A-R-O.</p> <p>25 A Again, this -- my understanding of this image was</p>
<p style="text-align: right;">Page 131</p> <p>1 the jail?</p> <p>2 A Yes, I would agree with that.</p> <p>3 Q Okay. Other than Officer O'Brien and DCI, have you</p> <p>4 talked to anyone else about this incident?</p> <p>5 A I talked to my wife.</p> <p>6 Q All right. Anyone else?</p> <p>7 A No.</p> <p>8 Q All right. You didn't meet with Officer O'Brien,</p> <p>9 Officer Wernecke, and Sergeant Denny along with</p> <p>10 counsel --</p> <p>11 MR. GUNTA: Me.</p> <p>12 BY MR. TAHDOOAHNIPPAH:</p> <p>13 Q -- on Tuesday?</p> <p>14 A Oh, yes. A deposition prep if that's what you're</p> <p>15 asking, yes.</p> <p>16 Q Well, did you discuss the incident?</p> <p>17 A Yes.</p> <p>18 Q All right. Well, I want to know anyone you've ever</p> <p>19 talked to about this incident.</p> <p>20 A Okay.</p> <p>21 Q So apart from your wife, DCI, your meeting on Tuesday</p> <p>22 with counsel and the other officers, and Officer</p> <p>23 O'Brien for emotional support, have you talked to</p> <p>24 anyone else about this incident?</p> <p>25 A No.</p>	<p style="text-align: right;">Page 133</p> <p>1 compiled by DCI. I don't -- I don't know how they</p> <p>2 got it or what they used to get it.</p> <p>3 MR. GUNTA: I'm not sure if it was FARA or</p> <p>4 FARO. I got someone looking at it, too. I don't</p> <p>5 know what it is.</p> <p>6 MR. TAHDOOAHNIPPAH: All right.</p> <p>7 BY MR. TAHDOOAHNIPPAH:</p> <p>8 Q And you don't know anything about it?</p> <p>9 A No, I don't.</p> <p>10 MR. TAHDOOAHNIPPAH: All right. I'm going</p> <p>11 to just hand you what's been marked as Exhibit 3.</p> <p>12 That's not going to be too exciting, just for the</p> <p>13 purposes of the record.</p> <p>14 MR. GUNTA: He'll explain it to you.</p> <p>15 BY MR. TAHDOOAHNIPPAH:</p> <p>16 Q That sheet of paper is what we call a slip sheet,</p> <p>17 which, you know, most of the things that we have are</p> <p>18 paper documents, the other exhibits you have, but</p> <p>19 sometimes there's things like audio recordings, video</p> <p>20 recordings where you couldn't put an exhibit sticker</p> <p>21 on an audio or video recording. So we use that which</p> <p>22 represents a video recording that I'm going to show</p> <p>23 you --</p> <p>24 A Okay.</p> <p>25 Q -- as soon as we get my computer turned on and we get</p>

1 IN UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF WISCONSIN
3
4

5 Susan Doxtator, Arlie Doxtator,
6 and Sarah Wunderlich, as
7 Special Administrators of the
8 Estate of Jonathon C. Tubby,
9 Plaintiffs,

10 vs. File No. 1:19-cv-00137-WCG

11 Erik O'Brien, Andrew Smith,
12 Todd J. Delain, Heidi Michel,
13 City of Green Bay, Brown
14 County, Joseph P. Mleziva,
15 Nathan K. Winistorfer, Thomas
16 Zeigle, Bradley A. Dernbach,
17 and John Does 1-10,
18 Defendants.
19

20 DEPOSITION OF COMMANDER KEVIN WARYCH
21

22 DATE: July 10, 2020

23 TIME: 9:24 a.m.

24 PLACE: Green Bay City Hall (* Witness Location *)

25 100 North Jefferson Street

 Green Bay, Wisconsin 54301

REPORTED BY: PAULA K. RICHTER, RMR, CRR, CRC

(By videoconference)

<p style="text-align: right;">Page 86</p> <p>1 MR. CASTRO: Some of them I've 2 noticed and some of them I haven't necessarily. 3 So I'm not sure what exactly is the issue. 4 MR. TAHDOOAHNIPPAH: Because I'm on 5 my -- I have the audio on cellphone, which is 6 supposed to not use bandwidth and be more 7 reliable. So I'm going to continue to try to -- 8 MR. GUNTA: It could be on this end. 9 It's just that sometimes, just like before, you 10 come through very clearly, and then you drop off, 11 and then you come through very clearly again. So 12 I honestly don't know what the problem is, but 13 that's what's happening, and all we ask is just to 14 repeat the question. 15 (Off the record.) 16 BY MR. TAHDOOAHNIPPAH: 17 Q. It's obviously also very important that you 18 hear the questions, Commander Wernecke, so please 19 continue to let me know that you can't. 20 A. Sure thing. 21 Q. In a barricade situation where the suspect is 22 believed to be suicidal, is it the practice of the 23 Green Bay Police Department to attempt to slow 24 down the interaction? 25 MR. GUNTA: Form and scope. Go</p>	<p style="text-align: right;">Page 88</p> <p>1 MR. GUNTA: Objection to scope and 2 form again. 3 Go ahead. 4 THE WITNESS: I can't answer that 5 question because I'm not in that situation. You 6 know, there's so many variables. You know, did 7 the officer have time? Did the behavior that was 8 displayed to the officer escalate the situation so 9 then the officer had to respond? There's no way I 10 could answer that question. 11 BY MR. TAHDOOAHNIPPAH: 12 Q. Well, isn't de-escalation a practice that's 13 utilized by the Green Bay Police Department for 14 barricade suicidal situations? 15 A. Yes. 16 Q. And isn't that de-escalation a practice 17 that's used because there's a known risk of injury 18 if a barricaded subject is aggressively 19 confronted? 20 MR. GUNTA: Objection; form and 21 scope. 22 Go ahead. 23 THE WITNESS: Yes. 24 BY MR. TAHDOOAHNIPPAH: 25 Q. All right. Is containment a concept that</p>
<p style="text-align: right;">Page 87</p> <p>1 ahead and answer. 2 THE WITNESS: I think regardless of 3 the situation, all -- excuse me. Regardless of 4 the situation, I think every officer tries to slow 5 down every incident to methodically investigate, 6 make sure nothing is missed. 7 BY MR. TAHDOOAHNIPPAH: 8 Q. But with respect to a suicidal barricade 9 situation, in particular if the officer escalates 10 the situation, that creates a risk of harm to the 11 suspect and the officer. Agree? 12 MR. GUNTA: Outside the scope and 13 objection to form. 14 Go ahead. 15 THE WITNESS: Sir, that was a 16 statement. If you could phrase that in a 17 question, I would be more than glad to answer. 18 BY MR. TAHDOOAHNIPPAH: 19 Q. Well, the statement was, I think, probably, 20 is it important to slow down the interaction -- or 21 excuse me. I think the statement was it's 22 important not to escalate the situation where 23 there's a barricade suicidal situation because the 24 officer or the suspect may be hurt. And I want to 25 know if you agree with that statement.</p>	<p style="text-align: right;">Page 89</p> <p>1 you're familiar with? 2 MR. GUNTA: You just dropped off 3 completely from our end. 4 BY MR. TAHDOOAHNIPPAH: 5 Q. You can probably see I'm trying to hold the 6 phone close to my mouth so that you can really 7 hear me. Can you hear me now? 8 A. Yes. 9 Q. All right. Is containment a concept that 10 you're familiar with, a law enforcement concept 11 you're familiar with? 12 MR. GUNTA: Objection; form and 13 scope. 14 Go ahead. 15 THE WITNESS: Yes. 16 BY MR. TAHDOOAHNIPPAH: 17 Q. Is it the practice of the Green Bay Police 18 Department to try to use containment in a 19 barricade suicidal situation? 20 MR. GUNTA: Objection to form. 21 THE WITNESS: Yes. 22 BY MR. TAHDOOAHNIPPAH: 23 Q. All right. And is it the practice of the 24 Green Bay Police Department to use containment in 25 that situation because if the situation is not</p>

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1 contained, the person could pose a risk to others?

2 MR. GUNTA: Objection; scope and

3 form.

4 Go ahead.

5 THE WITNESS: What situation are you

6 referring to? Just a general hypothetical

7 barricaded subject, or are you referring back to

8 the Tubby incident?

9 BY MR. TAHDOOAHNIPPAH:

10 Q. A general barricade suicidal situation.

11 MR. GUNTA: Same objections.

12 Go ahead.

13 THE WITNESS: Then the answer is

14 yes.

15 BY MR. TAHDOOAHNIPPAH:

16 Q. And for the Tubby situation specifically,

17 wouldn't you agree that containment would be

18 important in that situation to prevent any sort of

19 risk of harm to others?

20 MR. GUNTA: Objection; scope and

21 form.

22 Go ahead.

23 THE WITNESS: I would defer to

24 Lieutenant Zeigle, who was running that operation.

25 BY MR. TAHDOOAHNIPPAH:

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1 Q. And would you defer to Lieutenant Zeigle

2 because of his expertise in the area or because he

3 was the ranking Brown County officer on the scene

4 or both?

5 A. Primarily because he was in charge of that

6 operation because of the sally port being the

7 jurisdictional authority of the Brown County

8 Sheriff's Office.

9 Q. All right. And the -- it's the practice of

10 the Green Bay Police Department to use containment

11 for a barricaded situation also because if you

12 don't contain the person, they may just try to

13 flee or escape law enforcement. Fair?

14 MR. GUNTA: Objection; scope and

15 form.

16 THE WITNESS: Yes.

17 BY MR. TAHDOOAHNIPPAH:

18 Q. In dealing with a barricade situation, is it

19 the practice of the Green Bay Police Department to

20 try to create an avenue for the person to

21 surrender?

22 MR. GUNTA: Objection to form and

23 scope.

24 THE WITNESS: Could you clarify?

25 Are you speaking hypothetical or the Tubby

Page 92

1 incident?

2 BY MR. TAHDOOAHNIPPAH:

3 Q. I'm just speaking generally for all barricade

4 situations.

5 A. For incidents that the Green Bay Police

6 Department has jurisdictional authority over and

7 is the lead investigation agency, yes, we have --

8 we always try to develop avenues for people to

9 surrender so that -- with the overall goal of

10 everybody's safety.

11 Q. In creating an avenue for their surrender, is

12 it the practice of the Green Bay Police Department

13 to create a physical space for the person to exit

14 the barricade?

15 MR. GUNTA: Objection; scope and

16 form.

17 Go ahead and answer.

18 THE WITNESS: I really can't answer

19 that question because every situation is

20 different. I don't know what -- I mean, it's not

21 just as easy saying yeah, there's an avenue to

22 surrender because the situation dictates what the

23 avenue is or where they are or what's going to

24 occur. And generally speaking, our goal is for

25 that person to peacefully surrender.

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1 BY MR. TAHDOOAHNIPPAH:

2 Q. All right. If there is an avenue for

3 surrender, is it the practice of the Green Bay

4 Police Department to have an arrest team ready in

5 case the person does not surrender?

6 MR. GUNTA: Objection; scope and

7 form.

8 But you can go ahead, sir.

9 THE WITNESS: Yes. The supervisor

10 on a scene that we have the authority to do so

11 will identify a group of officers to be the arrest

12 team.

13 BY MR. TAHDOOAHNIPPAH:

14 Q. All right. If the arrest team is located in

15 the BearCat, is it the practice of the Green Bay

16 Police Department to have the door open to allow

17 the arrest team to exit expeditiously?

18 MR. GUNTA: Objection; scope and

19 form.

20 Go ahead.

21 THE WITNESS: Are you referring to

22 the Tubby incident on this situation?

23 BY MR. TAHDOOAHNIPPAH:

24 Q. I'm referring to general practice for the

25 BearCat.

<p style="text-align: right;">Page 98</p> <p>1 MR. GUNTA: Objection to scope and 2 form. 3 Go ahead. 4 THE WITNESS: Yes. 5 BY MR. TAHD00AHNIPPAH: 6 Q. All right. If there is a barricade situation 7 where the suspect is believed to be armed, is it 8 the practice of the Green Bay Police Department 9 for the officer to communicate that to others? 10 MR. GUNTA: Objection; scope and 11 form. 12 Go ahead, sir. 13 THE WITNESS: Yes. 14 BY MR. TAHD00AHNIPPAH: 15 Q. And I want to rephrase that question because 16 I want it to be clear what I'm asking. 17 In the situation where there is -- 18 in a barricade situation where the suspect is 19 believed to be armed, is it the practice of the 20 Green Bay Police Department to communicate the 21 belief that the person is armed to other officers? 22 A. Yes. 23 Q. And that's obviously important for officer 24 safety. Agree? 25 A. Yes.</p>	<p style="text-align: right;">Page 100</p> <p>1 that threat at the time. So does the officer need 2 to specifically say what the threat is? No. It's 3 what they believe, what they perceive, what they 4 encounter. So there's many threats, and then the 5 officers respond to those threats. 6 BY MR. TAHD00AHNIPPAH: 7 Q. Right. So if the officer perceives that the 8 threat is a gun, it would be important for that 9 officer to say, communicate, I think I see a gun. 10 Agree? 11 A. Yes. 12 Q. So if the officer says -- perceives a gun, it 13 would be inappropriate for them to say something 14 else, like, I see a knife? 15 MR. GUNTA: Objection to the form 16 and objection to scope. 17 Go ahead. 18 THE WITNESS: You'd have to ask the 19 officers who are experiencing that. 20 BY MR. TAHD00AHNIPPAH: 21 Q. Well, if you were experiencing the belief 22 that someone had a gun, would you say that they 23 had a gun? Would you tell other officers that you 24 saw a gun? 25 MR. GUNTA: Object to the form and</p>
<p style="text-align: right;">Page 99</p> <p>1 Q. And it's important to unambiguously 2 communicate that the person is believed to be 3 armed. Agree? 4 MR. GUNTA: Scope and form. 5 Go ahead, sir. 6 THE WITNESS: If the officers have 7 time and the ability to communicate, yes. 8 BY MR. TAHD00AHNIPPAH: 9 Q. Right. And you want to be unambiguous and 10 say, we think this person is armed or this person 11 has a gun or a firearm or whatever the case may 12 be, correct? 13 A. What do you define as unambiguous? What do 14 you mean by that? 15 Q. You want to clearly say, I believe this 16 person is armed or I believe this person has a gun 17 or I believe that this person has a firearm as 18 opposed to saying, I believe this person may have 19 something. Agree? 20 MR. GUNTA: Objection; scope and 21 form. 22 Go ahead. 23 THE WITNESS: The officers perceive 24 a threat, and what that threat is could be 25 different for every officer who's experiencing</p>	<p style="text-align: right;">Page 101</p> <p>1 scope. 2 Go ahead. 3 THE WITNESS: I would report what I 4 saw, what I perceived, what I felt and what I 5 believed to be whatever that threat was. 6 BY MR. TAHD00AHNIPPAH: 7 Q. So if you perceived the threat to be a gun 8 and you were on the radio calling for assistance, 9 you would use the word "gun." Fair? 10 MR. GUNTA: Objection to form and 11 scope. 12 Go ahead. 13 THE WITNESS: Yes. 14 BY MR. TAHD00AHNIPPAH: 15 Q. Is it consistent with Green Bay Police 16 Department practices to bring a ride-along to an 17 armed barricade situation? 18 MR. GUNTA: Objection to form and 19 scope. 20 Go ahead. 21 THE WITNESS: Can you rephrase the 22 question, please? 23 BY MR. TAHD00AHNIPPAH: 24 Q. Is it consistent with the policies or 25 practices of the Green Bay Police Department to</p>

<p style="text-align: right;">Page 102</p> <p>1 have an officer bring a ride-along to an armed 2 barricade situation? 3 MR. GUNTA: Objection to form and 4 scope. 5 Go ahead. 6 THE WITNESS: No. 7 BY MR. TAHDOOAHNIPPAH: 8 Q. If there's a situation that an officer 9 responds to with a ride-along and it then develops 10 into a situation where there is an armed 11 barricaded subject, what would Green Bay Police 12 Department practices be with respect to the 13 ride-along? 14 MR. GUNTA: Objection to scope and 15 form. 16 Go ahead and answer. 17 THE WITNESS: The goal -- or the 18 overall priority for this is the ride-along's 19 safety. So if the officer responds to a situation 20 that develops into something more severe and 21 dangerous, the officer needs to make sure -- or 22 that ride-along should not be there, the officer's 23 direction is to put that ride-along or to try to 24 find a safe location for that ride-along so that 25 they are not in harm's way.</p>	<p style="text-align: right;">Page 104</p> <p>1 accepted police practices in Green Bay, Wisconsin 2 to have a ride-along recording law enforcement's 3 response to what was believed to be an armed 4 barricade situation? 5 MR. GUNTA: Scope and form 6 objections. 7 Go ahead, sir. 8 THE WITNESS: Can you rephrase that? 9 I think I know the answer, but I just want to make 10 sure. 11 BY MR. TAHDOOAHNIPPAH: 12 Q. Yeah. Would it be inconsistent with the 13 locally accepted police practices in your area to 14 have a ride-along using a cellphone to record the 15 law enforcement response to an armed barricade 16 situation? 17 A. Yes. 18 Q. All right. 19 MR. TAHDOOAHNIPPAH: I would like to 20 take a lunch break if that's okay with everyone. 21 MR. GUNTA: How long do you want to 22 take? 23 MR. TAHDOOAHNIPPAH: If we can come 24 back at 1:00, that would be perfect for me. 25 MR. GUNTA: Okay. I take it you're</p>
<p style="text-align: right;">Page 103</p> <p>1 BY MR. TAHDOOAHNIPPAH: 2 Q. So would that mean having the officer leave 3 the scene with the ride-along or just having the 4 ride-along kind of move themselves farther away, 5 or could it be either or both? 6 MR. GUNTA: Objection to form and 7 scope. 8 THE WITNESS: It's all situational. 9 I mean, you don't know. I mean, you don't know. 10 Does the officer have time where the location is 11 occurring? I mean, there's so many variables 12 involved. So the officer's direction is to make 13 sure they get that ride-along to safety and not be 14 in the situation that they're in. 15 BY MR. TAHDOOAHNIPPAH: 16 Q. I take it then that it would be inconsistent 17 with Green Bay practices to have a ride-along 18 using a cellphone to record law enforcement 19 response to an armed barricade situation? 20 MR. GUNTA: Objection; scope and 21 form. 22 Go ahead. 23 THE WITNESS: Yes. 24 BY MR. TAHDOOAHNIPPAH: 25 Q. Would it be inconsistent with the locally</p>	<p style="text-align: right;">Page 105</p> <p>1 going to deal with the sergeant after 1:00 at some 2 time? 3 MR. TAHDOOAHNIPPAH: Yeah. That's 4 fine. 5 THE WITNESS: Am I still on at 1:00 6 as well? 7 MR. TAHDOOAHNIPPAH: Yeah. 8 (A break was taken from 12:21 p.m. 9 until 1:02 p.m., after which time Exhibit 10 was 10 marked for identification.) 11 BY MR. TAHDOOAHNIPPAH: 12 Q. Commander Warych, good afternoon. 13 A. Good afternoon. 14 Q. I have marked an exhibit Warych 10. It 15 should be available for you, so please pull that 16 up on your screen, and let me know when it's 17 viewable. 18 A. Yes, it is. I can view that. 19 Q. Have you ever seen this before, this 20 document? 21 A. Yes. 22 Q. What is it? 23 A. These are the procedures attached to Policy 24 300, use of force, in the Green Bay Police 25 Department policy manual.</p>

1 UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF WISCONSIN

3 - - - - -
4 Susan Doxtator, Arlie Doxtator,
5 and Sarah Wunderlich, as Special
6 Administrators of the Estate of
7 Jonathon C. Tubby,

8 Plaintiffs,

9 vs.

Case No.

1:19-cv-00137-WCG

10 Erik O'Brien, Andrew Smith, Todd
11 J. Delain, Heidi Michel, City of
12 Green Bay, Brown County, Joseph P.
13 Mleziva, Nathan K. Winisterfer,
14 Thomas Zeigle, Bradley A.
15 Dernbach, and John Does 1-5,

16 Defendants.

17 - - - - -
18 DEPOSITION OF: NATHAN ALLEN

19 TAKEN AT: GREEN BAY CITY HALL

20 LOCATED AT: 100 North Jefferson Street
21 Green Bay, Wisconsin
22 January 9, 2020

23 8:30 a.m. to 1:38 p.m.

24 REPORTED BY: VICKY L. ST. GEORGE, RMR.

25 - - - - -
JOB NO. 3786670

<p style="text-align: right;">Page 42</p> <p>1 A. No.</p> <p>2 Q. All right. So what did you tell Agent Waterstreet?</p> <p>3 A. That I asked Denney to -- Denney and the other</p> <p>4 officers to yell commands at Tubby, and I believe</p> <p>5 Erik O'Brien went around the transport van in the</p> <p>6 front to get a closer distance between him and the</p> <p>7 squad car that Tubby was in to yell at him to wipe</p> <p>8 the windows.</p> <p>9 Q. All right. So what actually happened was that there</p> <p>10 was officers that yelled verbal commands for Jonathan</p> <p>11 to wipe the windows of the squad?</p> <p>12 A. Yes.</p> <p>13 Q. Was there a response?</p> <p>14 A. No.</p> <p>15 Q. Do you know whether he could hear those commands?</p> <p>16 A. Yes. After watching the squad video, you can hear</p> <p>17 the commands clearly.</p> <p>18 Q. Well, the squad video, that has like a microphone?</p> <p>19 A. Yes, it does.</p> <p>20 Q. That picks up sound?</p> <p>21 A. Um-hum.</p> <p>22 Q. And microphones don't pick up the sound in the same</p> <p>23 way that the human ear does, right?</p> <p>24 A. I don't know.</p> <p>25 MR. GUNTA: Objection to the form of the</p>	<p style="text-align: right;">Page 44</p> <p>1 could hear them was these -- is the squad video?</p> <p>2 A. Yeah, at least we know that they -- you could hear</p> <p>3 the voices inside the squad car.</p> <p>4 Q. You know that the microphone could pick up the voices</p> <p>5 in the squad car?</p> <p>6 A. Yes, yes, that's what I meant to say.</p> <p>7 Q. All right. So there is no response as far as wiping</p> <p>8 the windows down. How long did that kind of attempts</p> <p>9 to give commands last?</p> <p>10 A. I don't have an exact time for you. I know I gave --</p> <p>11 I asked Denney and O'Brien to give those commands,</p> <p>12 and I walked over to meet lieutenant -- not</p> <p>13 lieutenant, Eric Allen on the sidewalk to formulate</p> <p>14 this game plan.</p> <p>15 Q. All right.</p> <p>16 A. But the initial commands, he wasn't -- he didn't do</p> <p>17 anything. So when there was no response after a</p> <p>18 handful of commands, that's when I walked to the</p> <p>19 sidewalk and we started formulating a game plan.</p> <p>20 Q. What did you guys talk about?</p> <p>21 A. How do we extract him out of this vehicle if he's not</p> <p>22 going to come out.</p> <p>23 Q. All right. What were -- what's the kind of ideas to</p> <p>24 extract him did you come up with?</p> <p>25 A. My initial plan was to break out the passenger side</p>
<p style="text-align: right;">Page 43</p> <p>1 question. Go ahead.</p> <p>2 THE WITNESS: There is a microphone in the</p> <p>3 front and the back of the squad. So it was pretty</p> <p>4 clear when I was listening to and watching the squad</p> <p>5 video. So whether -- I don't know whether Tubby had</p> <p>6 a hearing impairment or not, but it was very clear as</p> <p>7 day on the video.</p> <p>8 BY MR. TAHDOOAHNIPPAH:</p> <p>9 Q. Well, you could adjust a microphone to be sensitive or</p> <p>10 not sensitive somehow, right?</p> <p>11 A. Yeah, but it's through a shut windows rolled up squad</p> <p>12 car.</p> <p>13 Q. Right. But I'm just trying to understand why you</p> <p>14 think that the microphone is an accurate</p> <p>15 representation of what a human being could hear. So</p> <p>16 why do you think that?</p> <p>17 A. I guess I'm not -- I'm not an audiologist, so I</p> <p>18 couldn't tell you.</p> <p>19 Q. So you couldn't say for sure whether he could hear</p> <p>20 those commands or not?</p> <p>21 A. I can tell you for sure that commands were given.</p> <p>22 Q. But not whether he heard them?</p> <p>23 A. I'm not -- I'm not Mr. Tubby, so I'm not sure what he</p> <p>24 had heard inside the squad car.</p> <p>25 Q. And the only basis you have at all to say that he</p>	<p style="text-align: right;">Page 45</p> <p>1 driver window, the back window, and spray OC and</p> <p>2 attempt to incapacitate him.</p> <p>3 Q. All right. Was there a reason why you wanted to do</p> <p>4 the passenger side window?</p> <p>5 A. Because -- the driver's side passenger window.</p> <p>6 Q. The driver's side passenger window?</p> <p>7 A. Yeah. The driver's side rear passenger window.</p> <p>8 Q. The driver's side rear window?</p> <p>9 A. Yeah.</p> <p>10 Q. Side window?</p> <p>11 A. Side window.</p> <p>12 Q. Is there a reason why you wanted to do that window?</p> <p>13 A. Because there is a cage on that window, so you still</p> <p>14 hold containment.</p> <p>15 Q. And containment is an important -- is important in</p> <p>16 this situation?</p> <p>17 A. Extremely, extremely important.</p> <p>18 Q. All right. And then you said the OC could</p> <p>19 incapacitate him?</p> <p>20 A. Yes.</p> <p>21 Q. How does that work?</p> <p>22 A. Well, people have different effects that happen to</p> <p>23 them when they get sprayed. More often than not</p> <p>24 though it's an irritant to the eyes, and your eyes</p> <p>25 start to water and you start drooling and your nose</p>

<p style="text-align: right;">Page 46</p> <p>1 starts running. And my hope was that if that</p> <p>2 happened and you give him the OC, the irritant, that</p> <p>3 he takes his hands out from underneath his shirt and</p> <p>4 starts wiping his face, and you can then plainly see</p> <p>5 that whether he has a gun or not in his hands.</p> <p>6 Q. All right. And that was important because at this</p> <p>7 point in time you still weren't sure whether he</p> <p>8 actually did have a gun?</p> <p>9 A. No. And you still can't see inside.</p> <p>10 Q. All right. It sounds like that was the initial plan,</p> <p>11 but you decided against it?</p> <p>12 A. Yes.</p> <p>13 Q. And why was that?</p> <p>14 A. Because OC is a control or is something to</p> <p>15 incapacitate somebody, it's not a punishment. If I</p> <p>16 lock the doors, I put you in there and I spray OC in</p> <p>17 there, what are your options for getting out or</p> <p>18 surrendering. Turns into a torture chamber.</p> <p>19 Q. Yeah.</p> <p>20 A. Not good.</p> <p>21 Q. Because you don't -- you certainly have no viable way</p> <p>22 to get out?</p> <p>23 A. No.</p> <p>24 Q. And --</p> <p>25 A. There is no clear way to see if this guy is going to</p>	<p style="text-align: right;">Page 48</p> <p>1 A. Those guys are all holding perimeter on the vehicle.</p> <p>2 So they all had their assignments.</p> <p>3 Q. Okay.</p> <p>4 A. Eric had showed up after the fact, and we had plenty</p> <p>5 of security set up in the sally port.</p> <p>6 Q. And holding the perimeter, that goes along with kind</p> <p>7 of this notion of trying to -- of containment, right?</p> <p>8 A. Well, for containment and then to observe, you know,</p> <p>9 maybe at some point while we're over there talking</p> <p>10 the game plan, Tubby does wipe the windows or tries,</p> <p>11 attempt to make contact with us and then they can</p> <p>12 just radio that over the air to Eric and I or whoever</p> <p>13 else is standing next or outside the sally port.</p> <p>14 Q. All right. So Officer Allen's position on the SWAT</p> <p>15 team wasn't necessarily the reason you were talking to</p> <p>16 him, but it is the reason why you gave him the phone</p> <p>17 with Lieutenant Gering?</p> <p>18 A. Yes, because he's a SWAT team leader.</p> <p>19 Q. What did you do when he was talking to Lieutenant</p> <p>20 Gering on the phone?</p> <p>21 A. I believe I got a radio transmission from dispatch</p> <p>22 that said hey, the county lieutenant is looking to</p> <p>23 talk to you. Do you have a phone or a phone number</p> <p>24 that he can call you at.</p> <p>25 Q. Okay.</p>
<p style="text-align: right;">Page 47</p> <p>1 surrender, hey, I give, I give.</p> <p>2 Q. Yeah. I can understand that. And was that something</p> <p>3 that you kind of realized yourself, or was that</p> <p>4 something that Officer Allen pointed out to you, or</p> <p>5 was that something that someone else pointed out to</p> <p>6 you?</p> <p>7 A. No, that's kind of with discussions with Eric and</p> <p>8 myself that yeah, this is -- great idea at first but</p> <p>9 how does he tell us clearly that hey, I give, I give.</p> <p>10 Q. Right. Okay. So you kind of scrap that idea?</p> <p>11 A. Yes.</p> <p>12 Q. What's the next idea you come up with?</p> <p>13 A. The next idea was -- I believe the next idea was hey,</p> <p>14 do you think we should get ahold of Lieutenant Gering</p> <p>15 who is the SWAT commander and let's get his input,</p> <p>16 maybe we want to suit up the SWAT team and do this as</p> <p>17 a full SWAT call.</p> <p>18 Q. So did you then in fact call --</p> <p>19 A. I called Lieutenant Gering, I gave him kind of a</p> <p>20 brief overview because I said hey -- because Eric</p> <p>21 Allen is a team leader on the SWAT team, and he was</p> <p>22 my team leader when I was on the SWAT team.</p> <p>23 Q. Is that the reason you were talking to him in the</p> <p>24 first place versus talking to Denney or O'Brien or</p> <p>25 Wernecke or someone else?</p>	<p style="text-align: right;">Page 49</p> <p>1 A. My phones were currently tied up, my other phone. My</p> <p>2 personal phone was in my squad bag, so I had to wait</p> <p>3 for Officer Allen to get done talking to Lieutenant</p> <p>4 Gering.</p> <p>5 Q. All right. Then what happened next?</p> <p>6 A. Eric gets off the phone with Lieutenant Gering, they</p> <p>7 run me down with the new plan of let's bring the</p> <p>8 BearCat inside the sally port, we'll drive it up, you</p> <p>9 know, within a few feet of the squad car that Mr.</p> <p>10 Tubby is in, see if we can observe anything.</p> <p>11 If not, the plan would be to take a shield</p> <p>12 team around the front of the BearCat. You want me to</p> <p>13 draw this out or can you --</p> <p>14 Q. I can kind of visualize.</p> <p>15 A. All right. They have a shield team lethal cover walk</p> <p>16 around the front of the BearCat, in between the</p> <p>17 BearCat and the squad car, open the rear door, and</p> <p>18 then we give him commands. And if he didn't come</p> <p>19 out, we would send the dog in from the rear of the</p> <p>20 BearCat to extract him.</p> <p>21 (Exhibit 15 marked.)</p> <p>22 BY MR. TAHDOOAHNIPPAH:</p> <p>23 Q. You've been handed Exhibit 15, and this is to kind of</p> <p>24 follow-up on your suggestion to draw it out. The</p> <p>25 BearCat is depicted in this diagram, correct?</p>

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1 A. Yes.

2 Q. It says here "Lieutenant Zeigle said that the Brown

3 County Jail sally port is a county building and said

4 he wanted us to break out a window."

5 Do you see that?

6 A. Yes.

7 Q. Is that -- and that's what he said?

8 A. I'm sure that's paraphrased but yes, that's what he

9 had said.

10 Q. All right. And he specifically wanted you to break

11 out the rear window of the squad car?

12 A. I believe that's what he had told Eric Allen. You

13 have to ask him that question.

14 Q. Okay.

15 A. But it was the -- break out a window was the plan

16 going forward, I guess was his plan going forward.

17 Q. All right. You know that as a matter of what

18 happened, the rear window was the window that ended up

19 getting broken, right?

20 A. Yes.

21 Q. Do you know whose idea it was to break the rear window

22 instead of the side window?

23 A. You're going to have to speak with Eric Allen. I

24 don't remember the conversation. I know there was a

25 break a window. I don't remember anything off the

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1 top of my head about specifics of breaking a window,

2 of which window we were going to break.

3 Q. Do you know -- so I would presume then that you don't

4 know why they decided to break the rear window versus

5 the side window?

6 A. I would assume that had to come from somebody.

7 Q. Do you have any idea as to why they would want to do

8 that?

9 A. No good reason.

10 Q. I mean the rear window doesn't have a cage on it, does

11 it?

12 A. No, it does not.

13 Q. So that would prevent a -- it would create an escape

14 route by breaking the rear window instead of the side

15 window?

16 A. Yes.

17 Q. All right. Here it says that you told -- it says here

18 "Lieutenant Zeigle then said no, I want you to break

19 out a window. I said okay, Tom, once we break out the

20 window, then what?"

21 Is that what you told him?

22 A. Yes.

23 Q. Lieutenant Zeigle said "well, we need to see what we

24 have."

25 Is that what he said?

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1 A. Yes.

2 Q. Says "I informed him that we have a suicidal

3 barricaded subject who is possibly armed in the back

4 of a squad car and again advocated for our plan."

5 Do you see that?

6 A. That was me explaining this is what we have.

7 Q. So in other words, you didn't agree that you needed to

8 break the window to see what you had because you

9 already had a working knowledge of the situation?

10 A. Yes.

11 Q. Do you think that he doubted that there was a suicidal

12 barricaded subject who was possibly armed in the back

13 of the squad car?

14 MR. SPARKS: Object to form.

15 THE WITNESS: You'll have to ask him.

16 BY MR. TAHDOOAHNIPPAAH:

17 Q. But did you -- you didn't interpret his behavior at

18 the time to express some doubt as to whether there was

19 really a suicidal barricaded subject in the squad?

20 A. You'll have to ask him. I think he was more

21 irritated in what I was questioning him.

22 Q. You think he was irritated that you were questioning

23 him?

24 A. Yes.

25 MR. SPARKS: Object to the form.

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1 BY MR. TAHDOOAHNIPPAAH:

2 Q. In other words, he was irritated that you were -- was

3 he just -- do you know why he was irritated?

4 A. Reaction when I questioned him of what do we do next.

5 Q. He didn't appreciate kind of having his authority

6 challenged?

7 MR. SPARKS: Object to the form.

8 THE WITNESS: I don't know if it was his

9 authority, maybe it was his idea of how to resolve

10 it.

11 BY MR. TAHDOOAHNIPPAAH:

12 Q. Do you think he was irritated at all that the

13 situation itself was occurring and preventing normal

14 operation of the jail?

15 MR. SPARKS: Same objection.

16 THE WITNESS: No, no.

17 BY MR. TAHDOOAHNIPPAAH:

18 Q. So you don't think that there was some pressure on the

19 part of Brown County to get the situation resolved so

20 they could just resume normal jail operations?

21 MR. SPARKS: Object to the form, calls for

22 speculation.

23 THE WITNESS: No.

24 BY MR. TAHDOOAHNIPPAAH:

25 Q. Did you ever sense any pressure yourself from anyone

<p style="text-align: right;">Page 122</p> <p>1 Q. And that's Captain Ben Allen?</p> <p>2 A. Yes, he was a lieutenant at the time. He's now a</p> <p>3 captain.</p> <p>4 Q. Was he coming onto duty, or was he just showing up</p> <p>5 because he heard you were involved?</p> <p>6 A. No, I -- I attempted to call -- he was the only</p> <p>7 detective lieutenant I could get ahold of at the</p> <p>8 time.</p> <p>9 Q. Okay.</p> <p>10 A. I did get ahold of Gering, he's a lieutenant</p> <p>11 detective, but his was debrief what had happened. He</p> <p>12 wasn't in town I don't believe or something. And</p> <p>13 then I called Ben, and Ben responded to the area.</p> <p>14 And he's in charge of the --</p> <p>15 MR. TAHDOOAHNIPPAH: Off the record.</p> <p>16 (Discussion off the record.)</p> <p>17 BY MR. TAHDOOAHNIPPAH:</p> <p>18 Q. So I think we were at the part where you're on the</p> <p>19 scene still, your brother shows up. What did you do</p> <p>20 next?</p> <p>21 A. When Ben was there we did a walk-through of where</p> <p>22 everything was positioned. My original plan, the</p> <p>23 plan that Keith, Eric and I agreed to and thought was</p> <p>24 our best course of action, and then what had happened</p> <p>25 when we were -- I guess when that plan was taken off</p>	<p style="text-align: right;">Page 124</p> <p>1 A. Yeah, I think it was appropriate. It's an option and</p> <p>2 it's appropriate. If he doesn't comply with commands</p> <p>3 to show us his hands, the next progression is</p> <p>4 introducing OC which is a much lower level of force</p> <p>5 than the use of lethal force or shooting him.</p> <p>6 Q. Do you think that introducing OC though into a</p> <p>7 confined space, do you think that forced him out of</p> <p>8 the vehicle?</p> <p>9 MR. SPARKS: Object to the form.</p> <p>10 MR. GUNTA: Objection to the form of the</p> <p>11 question. Go ahead and answer.</p> <p>12 THE WITNESS: I don't know if it forced</p> <p>13 him out of the vehicle.</p> <p>14 BY MR. TAHDOOAHNIPPAH:</p> <p>15 Q. Do you think it was foreseeable that he would try to</p> <p>16 exit the vehicle when OC spray was introduced given</p> <p>17 that he had an escape route?</p> <p>18 A. I think breaching the back window gives you an escape</p> <p>19 route on the onset, and introducing OC is more of a</p> <p>20 control thing. And the hope was to force him to show</p> <p>21 us his hands.</p> <p>22 Q. So the primary deficiency you think in the plan</p> <p>23 executed was just creating that escape route by</p> <p>24 breaching the back window?</p> <p>25 A. Yes.</p>
<p style="text-align: right;">Page 123</p> <p>1 the table and then when Lieutenant Zeigle showed up</p> <p>2 and this is the plan.</p> <p>3 Q. Did you think it was a mistake to take your plan off</p> <p>4 the table?</p> <p>5 A. Yes.</p> <p>6 Q. Why is that?</p> <p>7 A. I believe to this day that if we went with our plan,</p> <p>8 Jonathan would have went to the hospital with some</p> <p>9 dog bites and that would have been the end of the</p> <p>10 day.</p> <p>11 Q. Is there anything particular about the plan that was</p> <p>12 executed that you think -- or what about the plan that</p> <p>13 was executed do you think led to his death rather than</p> <p>14 just some dog bites?</p> <p>15 A. Once you breached that back window, you lose all</p> <p>16 containment and you -- he's now in charge, and you're</p> <p>17 reacting off of whatever he decides to do.</p> <p>18 Q. Anything else?</p> <p>19 A. It was just a real bad plan.</p> <p>20 MR. GUNTA: I'm sorry, I didn't hear you.</p> <p>21 THE WITNESS: It was just a real bad plan.</p> <p>22 BY MR. TAHDOOAHNIPPAH:</p> <p>23 Q. And that's the lack of containment. Was the</p> <p>24 introduction of OC spray, do you think that was</p> <p>25 appropriate at the time?</p>	<p style="text-align: right;">Page 125</p> <p>1 Q. Is there anything else about that plan that you think</p> <p>2 was a bad idea?</p> <p>3 A. Breaching the back window gives him, even prior to us</p> <p>4 introducing OC, if he has the gun, he can see where</p> <p>5 we're at and he can start shooting.</p> <p>6 Q. Any other deficiencies in that plan that was executed?</p> <p>7 A. I'm sure there is, you know -- we could "what if"</p> <p>8 that to death.</p> <p>9 Q. Yeah. Well, let's talk about the open doors for a</p> <p>10 moment. Both the garage doors were open to the sally</p> <p>11 port?</p> <p>12 A. Yes.</p> <p>13 Q. Do you know why that was?</p> <p>14 A. I think it allows officers a better cover than a</p> <p>15 squad car.</p> <p>16 Q. An open door provides for cover?</p> <p>17 A. No, the walls here, if we've got -- those.</p> <p>18 Q. So the idea was to open the doors so that the walls</p> <p>19 could be used for cover?</p> <p>20 MR. GUNTA: Objection to the form of the</p> <p>21 question. Go ahead and answer.</p> <p>22 THE WITNESS: Yeah. I wouldn't want to</p> <p>23 get into shooting, shoot-out in a confined area like</p> <p>24 that where my only cover is a car door.</p> <p>25 BY MR. TAHDOOAHNIPPAH:</p>

<p style="text-align: right;">Page 134</p> <p>1 A. It's looked into, but it's not a disqualifier.</p> <p>2 Q. When you say it's looked into, is it looked into how?</p> <p>3 A. You're questioned on it. And then if we don't maybe</p> <p>4 get what we're looking for, we'll call the</p> <p>5 jurisdiction and maybe pull the report to see what</p> <p>6 all happened.</p> <p>7 Q. So what exactly happened could influence whether or</p> <p>8 not the person would be hired as a police officer?</p> <p>9 A. Between what happens and the truthfulness of the</p> <p>10 officer.</p> <p>11 Q. So if someone omitted disclosing a disorderly conduct</p> <p>12 on their employment application, would that be</p> <p>13 disqualifying?</p> <p>14 MR. GUNTA: Objection to the form of the</p> <p>15 question. Go ahead.</p> <p>16 THE WITNESS: Can you ask that again?</p> <p>17 MR. TAHDOOAHNIPPAH: I'll ask the reporter</p> <p>18 to read it back.</p> <p>19 (Record read.)</p> <p>20 THE WITNESS: It could be, yes.</p> <p>21 BY MR. TAHDOOAHNIPPAH:</p> <p>22 Q. Is military service something that is part of the</p> <p>23 background check conducted by the professional</p> <p>24 standards division?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 136</p> <p>1 honorable, it just depends on the specific</p> <p>2 circumstances underlying the discharge?</p> <p>3 A. Between the circumstances and the potential</p> <p>4 candidate's honesty about that.</p> <p>5 Q. So again, if someone had omitted a less than honorable</p> <p>6 discharge from their employment application, would</p> <p>7 that be disqualifying?</p> <p>8 MR. GUNTA: Objection to the form of the</p> <p>9 question. Go ahead and answer.</p> <p>10 THE WITNESS: It could be. I guess we all</p> <p>11 understand in that professional standards doing</p> <p>12 backgrounds, we all make mistakes when we're young</p> <p>13 and however you learned or come back from that I</p> <p>14 guess.</p> <p>15 BY MR. TAHDOOAHNIPPAH:</p> <p>16 Q. And if you are omitting it from your employment</p> <p>17 application, it probably seems --</p> <p>18 A. That's bad.</p> <p>19 Q. That's bad. Let's say that someone omitted like a</p> <p>20 criminal history or military service less than</p> <p>21 honorable discharge from their employment application</p> <p>22 but no one finds out about it until later. Is there</p> <p>23 any policy about whether to discipline or terminate</p> <p>24 that person?</p> <p>25 MR. GUNTA: Object to the form of the</p>
<p style="text-align: right;">Page 135</p> <p>1 Q. Are there any policies about hiring people that have</p> <p>2 had something other than an honorable discharge?</p> <p>3 A. I don't think there is a policy whether we would hire</p> <p>4 that person or not if they had a dishonorable</p> <p>5 discharge. Is that what you're asking?</p> <p>6 Q. Yeah. So there is several levels of discharge from</p> <p>7 the military, right?</p> <p>8 A. Yes, yes, there are.</p> <p>9 Q. And honorable is typically I would assume you would</p> <p>10 like to see?</p> <p>11 A. Yes.</p> <p>12 Q. So if it's something that is not honorable, is that</p> <p>13 disqualifying?</p> <p>14 A. It could be. It just depends on I guess what it is</p> <p>15 or why they were discharged.</p> <p>16 Q. Okay. So does it depend on -- there are several</p> <p>17 discharge categories, right?</p> <p>18 A. Yeah, to my knowledge there is.</p> <p>19 Q. There is like a dishonorable discharge?</p> <p>20 A. Yes.</p> <p>21 Q. Would that categorically be disqualifying?</p> <p>22 A. Dishonorable discharge could be somebody just went</p> <p>23 AWOL, and I don't think that would disqualify you</p> <p>24 from gaining employment.</p> <p>25 Q. Okay. So when it comes to something that is less than</p>	<p style="text-align: right;">Page 137</p> <p>1 question.</p> <p>2 THE WITNESS: That has happened.</p> <p>3 BY MR. TAHDOOAHNIPPAH:</p> <p>4 Q. It has happened?</p> <p>5 A. Yes.</p> <p>6 Q. When has that happened?</p> <p>7 A. We've had an incident where somebody failed to</p> <p>8 disclose an incident after the background was</p> <p>9 completed and then they go back and look into it.</p> <p>10 And if the severity is enough, I guess they would</p> <p>11 look to seek termination.</p> <p>12 Q. So again, it depends on the circumstances of the crime</p> <p>13 or military discharge itself?</p> <p>14 A. Yes.</p> <p>15 Q. Does the mere fact of the omission lead to any sort of</p> <p>16 discipline?</p> <p>17 MR. GUNTA: Object to the form of the</p> <p>18 question. Go ahead and answer.</p> <p>19 THE WITNESS: That would be up to the</p> <p>20 chief of police. That's not my realm.</p> <p>21 BY MR. TAHDOOAHNIPPAH:</p> <p>22 Q. What did you do to prepare for your deposition today?</p> <p>23 A. I met with Attorney Gunta yesterday and reviewed all</p> <p>24 my documents.</p> <p>25 Q. Was anyone else there?</p>

Wisconsin Department of Justice Division of Criminal Investigation



Interactive Case File

18-7807

**Green Bay PD OID
Jonathon C. Tubby**

S/A Kyra Schallhorn

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BC JCT000668

Sgt. Katers said the next plan was to get a canister of oleoresin capscum (OC) spray and deploy it into the squad car. Officer Eric Allen obtained a canister and sprayed Tubby direct. Sgt. Katers saw Tubb get out of the back window seconds within being sprayed and ran toward officers by the entrance garage door of the sally port. Sgt. Katers said Officer Salzmänn deployed his dog and Sgt. Katers heard a bean bag shotgun be deployed along with gun shots.

Sgt. Katers got a shield and approached Tubby with officers and started to render aid to Tubby. The jail nurse came out to assist and continued aid until rescue arrived when they declared Tubby deceased.

Sgt. Katers continued scene security and added he couldn't see much during the shooting but heard the shots be fired after the bean bag shotgun deployment. Sgt. Katers said he is a member of the Brown County SWAT Team and was familiar with the difference of a less lethal and lethal weapon.

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ACTIVITY:

On Saturday, October 20, 2018, Special Agent (S/A) Carl G. Waterstreet of the Wisconsin Department of Justice, Division of Criminal Investigation (WI DOJ/DCI) assisted with an Officer Involved Shooting investigation that occurred within the Brown County Jail, City of Green Bay, Brown County, WI. As part of that investigation, S/A Waterstreet interviewed Deputy Joseph P. Mleziva of the Brown County Sheriff's Office.

INTERVIEW OF DEPUTY MLEZIVA:

Deputy Mleziva was assigned to the afternoon shift working the East side of Green Bay, Denmark and Manitowoc section, field training Deputy King Jerome. Deputy Mleziva said Lieutenant (Lt.) Thomas Zeigle instructed him to respond to the Brown County Jail to assist with a male subject, later identified as Jonathan C. Tubby (M/I-DOB-12/24/1991) who was inside the back of a Green Bay squad car holding something to his chin.

It took Deputy Mleziva approximately fifteen (15) minutes to get to the Jail and observed several officers already on scene. Deputy Mleziva observed the bearcat armored vehicle next to a Green Bay squad car, several officers with lethal cover, and an officer with less lethal cover all pointed towards the Green Bay squad car. Deputy Mleziva was told Tubby was arrested and had slipped his hand cuffs and was now in the back of the car with what they thought was a gun.

Deputy Mleziva observed an officer from the turret of the bearcat fire a less lethal round into the back window of the squad car, and then saw an officer clear the back window out with a window break tool. Deputy Mleziva heard officers give Tubby several verbal commands, however he did not comply. Eventually he observed an officer deploy oleoresin capicum(OC) into the back of the Green Bay squad car.

Deputy Mleziva saw a dark haired male (Tubby) get out of the back of the squad through the window in an aggressive manner. Deputy Mleziva disengaged to the south side of the garage door and heard several officers yelling, "stop, show hands". Deputy Mleziva heard what he believed to be a bean bag shot gun discharge and then several gun shots. Deputy Mleziva said he pulled a few officers aside and attempted to develop a plan in a calm manner. Deputy Mleziva looked around the corner of the garage door and observed Tubby laying on the floor. Several officers were rendering aid and eventually a nurse came out and assisted with aid. Deputy Mleziva started scene security and a crime scene log until 12:15 a.m. when he was relieved to respond to the Green Bay Police Department.

ACTIVITY

On Saturday, October 20, 2018, Special Agent (S/A) Ryan Dobbs of the Wisconsin Department of Justice – Division of Criminal Investigation (DCI), interviewed Brown County Sheriff's Department (BCSO) - Jail Division Correctional Officer (C/O) Mitch W. Lemke in reference to an officer involved shooting which occurred at 3030 Curry Lane, City of Green Bay, Brown County, Wisconsin. The officer involved shooting resulted in the death of Jonathon Collins Tubby, M/I, DOB 12/24/1991.

At approximately 2:10 a.m., S/A Dobbs made contact with C/O Lemke in the main lobby sitting area of the Brown County Jail (BCJ). C/O Lemke voluntarily spoke with S/A Dobbs in reference to the officer involved death investigation. C/O Lemke indicated he was currently working a 6:30 p.m. (Friday, October 19, 2018) to 6:30 a.m. (Saturday, October 20, 2018) shift.

C/O Lemke was working on the security team at the BCJ and shadowing C/O Delorit at the time of the incident. C/O Lemke indicated he and C/O Delorit were processing a subject's property in the arrest area, when C/O Lemke observed Green Bay Police Department (GBPD) officers frantically waving for assistance. C/O Lemke advised he observed officers with TASER's drawn, pointing them toward the rear of their squad car. C/O Lemke described his view being at the rear of the GBPD squad car, whereas the squad car's trunk was facing the arrest area windows. C/O Lemke advised C/O Delorit who advised the on duty BCJ Corporal of an incident in the sally port. During the incident, C/O Lemke indicated he heard officers directing the subject to un-fog the windows. C/O Lemke indicated he heard a bean bag shot. C/O Lemke advised he heard an officer say "Put your hands up," when the subject began running toward the sally port overhead door entrance (which he observed as well). C/O Lemke indicated he heard approximately five to ten shots, which he believed to be gun shots. C/O Lemke advised the on duty BCJ nurse, who was staged by the main BCJ intake area, was called for. C/O Lemke observed officers checking each other for injuries. C/O Lemke remained in the arrest area for the duration of the incident until law enforcement gained control and secured the scene.

C/O Lemke had completed BCSO Statement Form, prior to his interview with S/A Dobbs. S/A Dobbs did obtain a copy of C/O Lemke's statement form, which was electronically attached to this report.

At approximately 2:21 a.m., the interview with C/O Lemke concluded.

storage devices, the monitor, keyboard, and modem are all instrumentalities of the crime of narcotics trafficking and should all be seized as such.

- s. Furthermore, based in part on your affiant's training and experience, as well as the facts and circumstances outlined in this affidavit, your affiant will request the authorization to seize, for later analysis, any electronic data processing and/or storage devices, electronic communication systems which also includes electronic data processing units and/or data storage devices and all electronic memory contained within seized electronic devices, which includes cellular telephones, computers or electronic communication devices and components, which also includes electronic processing units, internal storage devices, together with indicia of use, ownership, possession, or control of such records. The actual analysis of any seized digital evidence will be conducted at a later time due to the protracted time necessary for a full and thorough forensic examination.

FACTS AND CIRCUMSTANCES

9. On the evening of Friday October 19, 2018, the Wisconsin Department of Justice (WI DOJ) – Division of Criminal Investigation (DCI) was contacted by the Green Bay Police Department to investigate an officer involved shooting, which resulted in the death of Jonathon C. Tubby, M/N, DOB: 12/24/1991. The incident occurred earlier that same evening within the sally port of the Brown County Jail.

Earlier that evening at approximately 7:26 p.m, the Green Bay Police Department initiated a traffic stop of a vehicle in the City of Green Bay for displaying unauthorized vehicle registration plates (the registration plate displayed was not associated with the vehicle). The vehicle was a green 1997 Pontiac Grand AM, VIN #1G2NE52T5VC855119.

The vehicle was occupied by the following two individuals:

Theresa A. Rodriguez, F/H, DOB: 11/29/1983
Jonathon C. Tubby, M/N, DOB: 12/24/1991

Both of the aforementioned individuals had arrest warrants; Tubby's arrest warrant was a Felony bench warrant for failure to appear. As a result, both individuals were taken into custody without incident.

The vehicle was removed via law enforcement ordered tow, and later secured into the GBPD impound garage.

In accordance with the WI DOJ/DCI follow-up investigation, Special Agent Carl Waterstreet conducted an visual examination the green 1997 Pontiac Grand AM at the GBPD garage, from the exterior of the vehicle. The vehicle was previously occupied by Rodriguez and Tubby prior to their arrests.

Report Date: 10/23/2018

Primary Information

Description: Interview with Jerry Johnson
Reporting LEO: Sleeman, Tami M (Appleton Narcotics DCI / Wisconsin Department of Justice DCI)
Backup LEO: Waterstreet, Carl G (Appleton HT DCI / Wisconsin Department of Justice DCI)
Approval Status: Approved
Approved Date: 11/12/2018
Approved By: Sasse, Michael C (DCI Appleton Field Office / Wisconsin Department of Justice DCI)

Subjects

<u>Relationship</u>	<u>Name</u>	<u>Bio</u>	<u>DOB</u>
Interviewed	Johnson, Jerry (Person)	59 yr. old, White, Male	08/22/1959

Narrative begins on the following page.

11/15/2018 10:44:53

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BC JCT000778

On Friday, October 19, 2018, at approximately 7:30PM, the Green Bay Police Department initiated a traffic stop on a vehicle in the City of Green Bay for displaying unauthorized vehicle registration plates. It was later determined that Jonathon C. Tubby (12/24/1991) was driving the vehicle. Theresa A. Rodriguez (11/29/1983) was the passenger in the vehicle. Both Tubby and Rodriguez were arrested and transported to the Brown County Jail separately.

An incident occurred while in the sally port of the Brown County Jail with Tubby and law enforcement. Tubby died as a result of an officer involved shooting.

On October 19, 2018, the Green Bay Police Department contacted the Wisconsin Department of Justice – Division of Criminal Investigation to lead the investigation into the officer involved shooting.

On Tuesday, October 23, 2018, at 12:40PM, DCI Special Agents Tami Sleeman and Carl Waterstreet interviewed Jerry Johnson (08/22/1959). Johnson was doing a ride-a-long with the Green Bay Police Department on the evening of Friday, October 19, 2018. Johnson retired from the Green Bay Police Department as a police officer.

On October 19, 2018, Johnson advised that sometime between 7:30PM and 8:00PM, a call came into dispatch about an incident at the Brown County Jail in the sally port. Johnson arrived at the scene as a ride-along. Johnson stated that he was outside the sally port during the incident. Johnson stated that he observed a Green Bay Police Officer bring Green Bay Police Officer Colton Wernecke back towards the sally port entrance near a patrol vehicle at which time Officer Wernecke was provided an exterior vest, helmet and a rifle.

Johnson stated that the BearCat arrived on scene. Johnson advised that he did take several pictures and a video of the incident to include the BearCat when it was in the sally port. Johnson had been on the SWAT team when he worked for the Green Bay Police Department and was going to give the video to Green Bay Police Officer Eric Allen who had been in the BearCat at the time of the incident.

Johnson observed an officer in the BearCat spray OC Spray into the back window of the patrol vehicle, where Tubby had been seated. Johnson advised that an officer in the BearCat also used a tool to break out the back window so law enforcement could see into the back seat where Tubby was at.

At one point another patrol vehicle pulled up outside of the sally port and parked to the right (east) side of the entrance door. There was an arrestee in the back seat of the patrol vehicle and Sgt. Thomas Denney asked Johnson to stay by the patrol vehicle and watch the arrestee.

Johnson stated that he heard someone say, “he” was coming out (Johnson believed they were referring to Tubby). Johnson stated that he looked around the area to see where his daughter was, who was also a Green Bay Police Officer and then continued to stay near the patrol vehicle where

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BC JCT000779

the arrestee was in. Johnson said that Tubby was out of the vehicle “fast” and Johnson was not sure how Tubby got out so fast. Johnson said that he heard a “pop” like a bean bag round being used, then a short pause and then gun fire. With Johnson's experience as a police officer and a member of the SWAT team, Johnson knew the difference between a “bean bag” round being fired and a firearm.

Johnson advised that it happened quickly, approximately 10 seconds. Johnson stated that Officer Erik O'Brien fired his firearm.

Johnson provide S/A Waterstreet with the photographs and video via email. A copy of the photograph's and video have been uploaded into the DCIR electronic files.

The interview ended at 1:05PM.

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Officer Salzmänn thought he heard a less lethal shot fired and then heard shots fired from a handgun. As Officer Salzmänn heard the shots, Officer Salzmänn saw Tubby “tense up and become rigid.” Officer Salzmänn saw Tubby fall to the ground.

Officer Salzmänn stated that it all happened very quickly anywhere from three to five seconds.

Officer Salzmänn advised that he is a firearms instructor and is familiar with the sound of a firearm and a less lethal (bean bag rounds). Officer Salzmänn advised that the less lethal and the firearm shots were almost simultaneous. Officer Salzmänn stated that he heard two less lethal and six to eight rounds from what sounded like a .45 caliber firearm.

Officer Salzmänn stated that he was in the direction of where the rounds were being fired towards and pulled Pyro back. Officer Salzmänn stated that the subject had fallen on his stomach and with assistance from Pyro, Tubby was rolled onto his back. Tubby’s hands were still up under his shirt and were up towards Tubby’s face. Officer Salzmänn observed blood in the upper torso area of Tubby. Officer Salzmänn observed Tubby “tense up” when the shots were fired.

Officer Salzmänn went back to the BearCat and then brought Pyro back to his patrol vehicle using the exit sally port door. Officer Salzmänn put Pyro back in his vehicle.

Officer Salzmänn went back to the entrance of the sally port. Officer Salzmänn said that Tubby still had his hands under his shirt. Other Officers approached Tubby with a shield for protection. As officers were securing Tubby, Officer Salzmänn went back in the area of the BearCat at which time Officer Merrill checked Officer Salzmänn to make sure Officer Salzmänn was ok. Officer Salzmänn went back to check on Pyro to make sure Pyro was ok.

Officer Salzmänn believed that Tubby was armed and Officer Salzmänn believed that when Tubby was running in the direction of the officers that Tubby was going to hurt the officers.

Officer Salzmänn spoke with Officer O’Brien who had fired the shots at Tubby. Officer O’Brien was taken away from the scene.

ADDITIONAL INFORMATION

Officer Salzmänn was provided a map of the scene. Officer Salzmänn drew on the map. The map showed the positions of the vehicles within the sally port. It should be noted that the patrol vehicle that Tubby had been in showed the doors of the vehicle to be open. The doors were not open during the incident. A copy of the diagram has been attached to this report.

The interview ended at 11:48AM.

times with no compliance. Officer Allen could see a bulge in Tubby's shirt. Tubby was "mumbling" but Officer Allen could not make out what Tubby was saying.

Tubby was sitting backwards in the back seat, looking out the back window. Officer Allen advised Tubby, that Officer Allen was going to deploy OC. Officer Allen gave another command for Tubby to show his hands, with no compliance. Officer Allen sprayed OC (Oleoresin Capsicum) into the back seat area. Officer Allen then told Officer Salzmänn to deploy his K-9, at the same time Officer Merrill advised that Tubby was coming out of the car. Officer Allen repositioned himself so he could see Tubby. Tubby was already standing outside of the vehicle on the concrete floor, by the time Officer Allen could see Tubby. Tubby's hands were still under his shirt with his hands positioned towards Tubby's face. Officer Allen observe K-9, Pyro engaging Tubby on Tubby's right side.

Officer Allen observed the subject run toward the entrance of the sally port door. Officer Allen heard two rounds from a less lethal, referring to bean bag rounds. Officer Allen then heard several shots from a firearm. Officer Allen did not know or see who fired their firearm(s) or the less lethal.

Officer Allen got out of the BearCat and observed officers near Tubby, providing first aid. Officer Allen got back into the BearCat and rendered his 40mm, less lethal safe.

Officer Allen did not recognize Tubby or did not have any prior dealing with the Tubby in the past.

The interview ended at 12:20PM.

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bar on the top and spot lights on the sides. S/A Schallhorn knows from the investigation that it was squad #42.

Officer Wernecke was wearing his full GBPD uniform, including a long sleeved uniform shirt with shoulder patches and a metal badge on the front. He also wore a baseball style cap with a stitched badge on the front.

Officer Wernecke carries a Glock 17 9mm handgun. He also has access to a rifle, which is kept in the front seat of the squad, between the driver and passenger seats. On October 19, Officer Wernecke was driving the Dodge Charger squad #42, and Officer O'Brien was riding in the passenger seat.

Officer Wernecke attended roll call at 2:15 p.m. and then prepared to go on patrol. A part of making the squad ready for patrol was searching the back seat of the squad before shift. Officer Wernecke said he checks the squad and makes it squad ready before every shift. Officer Wernecke said there was no one else in the back seat of the squad on October 19 before Tubby was placed in the back of the squad.

Officer Wernecke was asked about the earlier part of his shift before his eventual contact with Tubby. He said he and O'Brien went to a weapons call on the west side of the city. The call was for a male who had been running through yards and who had entered a home. The male was apparently on drugs and hallucinating that people were chasing him. The male was taken into custody and was transported to St Mary's Hospital to be medically cleared. Officer Wernecke said another squad did the transport of the male.

Officer Wernecke was asked about his contact with Tubby and what first alerted him to the vehicle Tubby was driving. Officer Wernecke stated that he noticed a large Wisconsin license plate with red letters, with no month or year sticker. He said the plate didn't look right. He started following the vehicle, heading westbound on Main St, just before Madison. The vehicle turned right or northbound on to Madison, turning through an "orange" light without stopping first. The vehicle then turned left into the parking lot of the Hyatt Regency hotel.

As Officer Wernecke followed the vehicle into the hotel parking lot, under the arm that controlled traffic into the lot, he turned on his squad lights. The vehicle continued driving through the parking lot. Officer Wernecke briefly turned on his squad siren and then turned it off again, as the vehicle kept driving through the lot. Officer Wernecke said he thought it was odd that the vehicle was not stopping. The vehicle eventually did stop in the lot, facing eastbound toward Madison St. Officer Wernecke called out the traffic stop over the radio.

Officer Wernecke stated that Officer O'Brien had requested a second squad to respond when the vehicle wasn't stopping. GBPD Officer Tyler Haack showed up on scene.

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BC JCT000856

Brown County Sheriff's Office**Continuation**

Incident Report Number 18-043577	Incident Location: 3030 Curry LN, Green Bay, WI, 54311	Incident Date: 10/19/2018
<p>in color. Officer Haack stated that he wasn't sure if it was the handcuffs or something else as he wasn't able to see that well.</p> <p>Officer Haack said that once the back window was raked out he observed the male subject get up higher in the back seat of the squad and started making his way out of the back window of the car. Officer Haack stated that he observed one of the subject's hands up under his shirt with a noticeable bulge in the center of the shirt. Officer Haack wasn't sure what hand this was and said that he could only see the one hand at that time, but believed that it was his right hand that he could see up under the shirt. Officer Haack described the bulge under the shirt as being extremely distinct towards his sternum area. Officer Haack stated that the male got out of the car and started running towards the sally port entrance door where other units (officers) were positioned. Officer Haack said that the male was running towards the officers with his hand still up under his shirt. Officer Haack wasn't sure if the male subject was saying anything or not and described the male running towards the officers to his right angling away from his location. Officer Haack also stated that he recalled someone (officer) deploying a bean bag round, which didn't seem to faze the guy at all. Officer Haack said that he wasn't sure if the k-9 was actually deployed on the subject or not. I asked Officer Haack if he observed the subject get hit with the bean bag round and he said that he heard the bang as the subject was running towards the officers by the entrance to the sally port. Officer Haack stated that he could see the subject closing the distance between himself and the officers by the garage door.</p> <p>Officer Haack stated that while he couldn't tell what the subject had under his shirt it appeared from his vantage point to be a gun, knife or some type of weapon up under his shirt. Officer Haack said that he could see Officer O'Brien kind of crouch down and then heard a couple loud bangs before seeing the subject fall to the ground. I asked Officer Haack if he actually saw the shooting and he stated that it was more something that he heard, but at the same time he could see the muzzle flash from the weapon. Officer Haack didn't recall the exact number of rounds that were fired, but described it as being more than one and estimated it to be around five (5). Officer Haack stated that his knowledge Officer O'Brien was the only one who fired their weapon.</p> <p>I then asked Officer Haack what he observed after the shooting and he stated that he went to a position of cover by the back of the Bear Cat at that point. Officer Haack stated that he observed a group of officers go up to the subject and begin life saving measures. Officer Haack said that his role at that point was scene security as other officers were handling the subject who was on the</p>		
Reporting Officer(s): Slinger, Brian R.	Payroll Number: 235	Pages: 5 Of 6

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BC JCT000891

Brown County Sheriff's Office		Continuation
Incident Report Number 18-043577	Incident Location: 3030 Curry LN, Green Bay, WI, 54311	Incident Date: 10/19/2018
<p>reported that the OC caused a reaction in the male almost immediately because he observed him starting to "bounce and jump" all over in the back of the squad car. Then, Officer Eric Allen told him to back the BearCat up so that they could gain a better vantage point of the male. He advised that as he started to back up he heard that the male was getting out and to get the dog so he stopped the BearCat. He said that he heard K-9 Officer Salzmann say that he was deploying out of the back. He said that he could see the male "duck and roll" out of the back seat through the rear window and over the trunk of the squad car. He reported he didn't see the male after that but heard "a lot of yelling." He said that he asked Sgt. Katers if the dog was biting the male because as a dog handler and trainer it was a concern for him. He advised that Sgt. Katers told him that the dog was on the male so his thought was to get out and position himself at the back of BearCat to assist if needed.</p> <p>Officer Merrill reported that as he stepped out of the BearCat he heard "five, six, seven shots maybe" and thought to himself that it was too many rounds from a shotgun deploying a bean bag round and that it sounded different than a bean bag round. He reported that he peaked around the back of the BearCat and could see that K-9 Officer Salzmann's dog was still biting the male. He said that he heard Officer Salzmann giving the dog a verbal command to release ("out") but the dog wasn't obeying the command. He said that Officer Salzmann was near the squad parked at the entrance of the sally port. He further advised that he only saw Officer Salzmann, his dog, and the male. He reported that he yelled to Officer Salzmann "Tac out. Do a tac out." which meant to perform a tactical release on the dog to release the bite on the male. He then observed Officer Salzmann do a tactical release on his dog. He said that he then told Officer Salzmann to control the dog's head because he didn't want anyone else getting bit unintentionally. He reported that Officer Salzmann and his dog came towards him and he told Officer Salzmann to get his dog outside; away from everybody, which he did.</p> <p>As that was happening, Officer Merrill said that he heard Sgt. Denny, Officer Stevens, and Officer Christensen were quickly formulating a plan out loud to deal with the male because he was lying on the ground not moving but his hands were still up underneath his shirt. He said that he yelled out loud that he would get a shield. A plan was devised to approach the subject with the shield, lethal force, and a hands team. He said that he approached the male with the shield, Sgt. Denny (GBPD) and Officer Kevin Stevens went hands on, and someone was there with lethal force. He reported that he placed the shield on the male's upper torso and the male's hands were pulled from underneath his shirt. He said that he observed the male's hands were in handcuffs and at the time his hands were empty. He advised that he removed the shield from the male and he could tell that the male wasn't responding as there was no struggle or fight. He said that he put the shield back in the BearCat.</p> <p>Officer Merrill said that as he looked back at the male he could tell he had been shot so at that point he wanted to make sure everyone was ok. He advised</p>		
Reporting Officer(s): Roush, Garrett J.	Payroll Number: 283	Pages: 4 Of 6

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BC JCT000896

Brown County Sheriff's Office**Continuation**

Incident Report Number 18-043577	Incident Location: 3030 Curry LN, Green Bay, WI, 54311	Incident Date: 10/19/2018
<p>Haack's location. Officer Walvort explained that the Bear Cat was coming in from the opposite side where the exit garage is for the sally port. Officer Walvort stated that the Bear Cat pulled up next to Officer O'Brien's squad on the driver's side as he was back by Officer Haack's squad. Officer Walvort said that he then observed Officer Allen come out of the turret from the Bear Cat with what he thought was a 40mm round gun (less lethal rounds) that he fired through the back window of the squad to open it up so that we could see inside. Officer Walvort said that the window shattered to the right side (passenger side) and that is when he could see the subject in the squad slid over towards the driver's side of the backseat. Officer Walvort said that someone in the Bear Cat then was able to break out the driver's side of the rear window so they could get a better view inside the car and of the subject.</p> <p>Officer Walvort said that he observed the subject in the back of the squad sit up and reposition in the back of the car once the window was broken out. Officer Walvort described the subject as looking emotionally distraught and crying as the subject was looking directly back at him and Officer Haack. Officer Walvort stated that he heard Officer Allen giving the subject commands to show us his hands, but the subject was refusing to obey commands and wasn't showing his hands.</p> <p>Officer Walvort said that another officer then proceeded to pass a larger can of some sort of chemical spray to Officer Haack who then passed that on to the officers in the Bear Cat (believes Officer Allen). Officer Walvort said that the chemical was then sprayed into the back of the squad car through the broken out window. Officer Walvort said that the spray/chemical seemed to impact the subject's behavior with him moving around more in the back in the car. Officer Walvort stated that he thinks he recalls hearing the subject yelling something and then a short time later he observed the subject start to come out of the back window. Officer Walvort described the subject coming out of the back window as coming out head first. I then asked Officer Walvort if he could see the subject's hands at that point and Officer Walvort said that when the subject had gotten out he saw what he believed to be the subject's left hand (not sure) balled up under his shirt. Officer Walvort said that the hand wasn't really exposed and showed me how it was balled up under his shirt. Officer Walvort indicated that he could see a bulge under the shirt somewhere up by the subject's chest area. Officer Walvort said that the subject then started running and/or stumbling towards the garage door (entrance) where Officer O'Brien and some others were. Officer Walvort said that an Officer to his right that he believed to be Sgt. Denney then fired the bean bag (less lethal) round. Officer Walvort didn't actually see the firing of the bean bag rounds, but said that based on his experience that was the gun that was fired. Officer Walvort described the sound of the bean bag gun as being much quieter</p>		
Reporting Officer(s): Slinger, Brian R.	Payroll Number: 235	Pages: 4 Of 5

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BC JCT000903

Brown County Sheriff's Office**Continuation**

Incident Report Number	Incident Location:	Incident Date:
18-043577	3030 Curry LN, Green Bay, WI, 54311	10/19/2018

than that of an actual firearm, which is how he was able to tell the difference between the two of them. Officer Walvort also said that he observed the rounds fired from the bean bag gun bouncing, but didn't know if the rounds actually hit the subject or not.

Officer Walvort said that at this time the subject was now on the other side of Sgt. Denney's squad making it hard for him to see everything that was going on as the squad was no between him and what was going on. Officer Walvort then said that Officer Salzmann had deployed his k-9 partner, but wasn't sure if he actually observed the dog being deployed or just saw the dog later on the subject's lower extremity. Officer Walvort indicated that he was moving towards the garage entry door from his previous position when he observed Officer Salzmann's k-9 partner engaged with the subject somewhere from the chest down (thought legs). Officer Walvort said that it was right around that time that he heard gun shots as he described the explosions as being louder than that of the previous shots. Officer Walvort didn't see any muzzle flash or the actual shots being fired, but he did see blood coming from the subject giving him the belief that someone used their firearm. Officer Walvort stated that at the time the shots went off he wasn't aware of who actually shot their weapon. Officer Walvort said that the subject was on the ground motionless and he observed Officer O'Brien taking a deep breath (autogenic). Officer Walvort said that he then went outside the sally port area near the flowers and bushes.

Upon completion of the initial interview I reviewed my notes with Officer Walvort and asked him if there was anything that needed to be changed, added, or deleted from the notes that I took. This was the point in the interview with Officer Walvort described the subject as being emotionally distraught and that he could hear the subject crying. I also asked Officer Walvort if he recalled how many shots he heard and he said that he didn't know for sure, but said that it was more than one or two. Officer Walvort said that he wasn't involved in any of the life-saving efforts on the subject, but was aware that the subject was being treated by someone. Officer Walvort said that eventually he was assigned to be Officer O'Brien's companion Officer so he eventually gave Officer O'Brien a ride back to the police department.

The interview was then concluded and I turned off the digital recording device. I later created a DVD copy of the audio interview and placed it into evidence at the Brown County Sheriff's Office. A copy with all three interviews that I completed was also made and turned over to Brown County Investigative Lt. Jim Valley so that he could turn it over to DCI Investigators. END//

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