OFFICER-INVOLVED SHOOTING OF JONATHAON TUBBY

Summary and Conclusions

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INTRODUCTION

On Friday, October 19, 2018, at approximately 9:11 p.m., Green Bay Police Department Officer Erik O'Brien shot and killed Jonathon Tubby at the Brown County Jail. Agents with the Wisconsin Department of Justice, Division of Criminal Investigation, investigated the incident and compiled a voluminous case file detailing their investigation. DCI subsequently provided the report to our office to determine if any criminal charges would be filed against Officer O'Brien for this incident. Our office received the complete case file on or about Friday, November 16, 2018, and a formal referral from DCI on or about December 7, 2018. Our office spent considerable time carefully reviewing the detailed reports from all of the investigators who assisted in this investigation. The State also waited to file this report to receive the autopsy for Tubby, which we received on or about January 24, 2019.

This report details what occurred on October 19, 2018, and the conclusions reached by this office in regards to the death of Jonathon Tubby. The purpose of our office's review was to determine whether Officer O'Brien would be charged with homicide in connection with the shooting death of Tubby. There is not any dispute that Officer O'Brien caused the death of Tubby on October 19, 2018. However, in making a decision as to whether to charge Officer O'Brien with homicide, we must also consider statutory defenses to criminal liability. Specifically, Wisconsin law provides defenses to criminal liability if the actor validly acts in defense of himself or in defense of others, see Wis. Stat. §§ 939.48(1), (4), or in the execution of a duty of a public office, see Wis. Stat. § 939.45(3).

After careful consideration of all of the evidence and circumstances surrounding the incident, this office concludes Officer O'Brien shot Tubby while lawfully exercising a privilege to use deadly force. We conclude Officer O'Brien reasonably believed Tubby was armed and posed an imminent threat of death or great bodily harm to either Officer O'Brien or the other officers and civilians on scene. As a result, the State of Wisconsin will not prosecute Officer O'Brien for the death of Jonathon Tubby.

In order to provide a complete understanding of our decision, this report will summarize and analyze the facts as discovered during the course of the investigation conducted by DCI. This report also relates those facts to the relevant legal standard that our office applied in this case.

MATERIALS REVIEWED

As is required in officer-involved shooting, investigators from an outside agency were assigned to conduct the investigation in this case. Agents from the Wisconsin Department of Justice, Division of Criminal Investigation (DCI), along with some assistance from investigators from the Brown County Sheriff's Office, investigated the incident and provided our office with a voluminous amount of material to review. DCI Special Agent ("S/A") Kyra Schallhorn was assigned as the primary lead investigator, with S/A Bradley Kust assisting as the second lead

investigator. In addition to the reports of S/A Schallhorn and S/A Kust, our office also reviewed reports from S/A Eric Beine, S/A Carl Waterstreet, S/A Jed Roffers, S/A Tami Sleeman, S/A Ryan Dobbs, S/A Jeff Wisch, S/A Bryan Kastelic, and DCI Analyst James Gustafson. The State also reviewed supplemental reports from Investigative Sergeants with the Brown County Sheriff's Office, who assisted DCI with their investigation. Specifically, we reviewed reports from Sgt. Brian Slinger, Sgt. Garett Roush, Sgt. Randal Lind, Sgt. Matthew Wilson, and Sgt. Guy Shepardson. These reports detailed the overall investigation as well as specific interviews with officers from the Green Bay Police Department, deputies from the Brown County Sheriff's Office, correctional officers with the Brown County Jail, and civilian witnesses who were at the Brown County Jail sally port the night of October 19, 2018.

In addition to these reports, the State also reviewed various images and audiovisual evidence collected by DCI. We reviewed video footage from the squad cars of Officer Colton Wernecke, Sergeant Thomas Denney, Officer Kevin Stevens, Officer Tyler Haack, and Officer Nicholas Walvort with the Green Bay Police Department, as well as footage from a BearCat armored vehicle that responded to the jail. We also reviewed numerous photographs and diagrams depicting both the overall area of the Brown County Jail's sally port as well as the scene that investigators found after the incident.

There was not any video available from inside the Brown County Jail's sally port which this office was able to review. It is the State's understanding that there are cameras inside the sally port; however, they only capture live images to allow jail staff to monitor what is happening inside the sally port. The cameras were not set up to record. There was video from a pole located outside the jail which we reviewed; however, the video does not contain audio and shows very little of the incident as the camera appears to be stationed a significant distance from the sally port and does not offer a view of inside the sally port. Similarly, we reviewed front-facing video footage from the BearCat armored vehicle in the sally port. The video, however, focuses almost entirely on a cement wall within the Jail and was not pertinent to our review.

We also reviewed an autopsy reported completed by Dr. Vincent Tranchida, which our office received on or about Thursday, January 24, 2019. In addition to Dr. Tranchida's report, we also spoke directly with Dr. Tranchida on January 28, 2019, regarding his findings, reviewed photographs from the autopsy taken by S/A Roffers, and the toxicology report completed as part of the autopsy.

FACTUAL SUMMARY

I. Overview of Investigation

On Friday, October 19, 2018, at about 7:42 p.m., Green Bay Police Department Officer Colton Wernecke and his Field Training Officer, GBPD Officer Erik O'Brien, were on patrol in the City of Green Bay when they conducted a traffic stop of a vehicle with an unregistered license plate that had also driven through a red light. The driver of this vehicle was identified as Jonathon

C. Tubby, who had an active arrest warrant at the time. Also in the vehicle was front passenger Theresa Rodriguez, who also had an active arrest warrant at the time. Marijuana was also located in the vehicle. Officer Wernecke transported Tubby to the Brown County Jail in the back of the squad car.

When officers arrived, they entered the sally port area of the jail. Tubby refused to exit the squad car. Tubby had moved his hands from behind his back to his front and had them up under his shirt. Officer O'Brien saw Tubby with what he believed to be a gun under his shirt pointed up at his chin. Officers retreated and numerous other officers responded to the scene as backup. Tubby remained in the back of the squad car for more than half an hour as officers determined how to proceed. A BearCat armored vehicle backed into position next to the squad car. In order to better see what Tubby was doing, officers broke out the back window the squad car Tubby was in. Officers gave Tubby numerous commands to show his hands, but Tubby did not comply. Officers then sprayed OC spray into the back of the squad car. Tubby exited the squad through the open rear window with at least one hand still under his shirt. Officers then deployed less lethal bean bag shotgun rounds and a police canine in an effort to stop Tubby. Officer O'Brien was located just outside the sally port entrance in a position of cover. As Tubby continued to resist and attempted to flee the sally port, Officer O'Brien heard a "pop" sound. Officer O'Brien believed Tubby had shot and would continue to shoot at other officers with the handgun believed to be concealed under his clothing. Officer O'Brien fired his handgun eight times at Tubby. Tubby died on scene.

In order to provide a clear narrative of what occurred on October 19, 2018, this report summarizes the numerous materials mentioned above. The information below is meant to summarize the pertinent facts in this investigation as it relates to our office's decision. It is not meant to be an exhaustive listing of all of the information in the case. For additional information not discussed below, please refer to the final case file completed by DCI in this case.

II. Background Information

The reports the State reviewed contained significant background information for Officer O'Brien and Jonathon Tubby. We summarize that information below to better contextualize the actions of both officer O'Brien and Tubby on October 19.

Officer O'Brien reported that he has been employed as a patrol officer with the Green Bay Police Department since 2012 after a period of time serving in the United States Army. Officer O'Brien indicated he was a field training officer for the department as well as an instructor in firearms, vehicle contacts, Emergency Vehicle Operators Course, professional communications, and scenarios. Officer O'Brien had also been a member of the GBPD SWAT team since February 2018. Officer O'Brien also indicated he attended specialized training with respect to armed suspects, concealed weapons, and signs of people with a gun.

Theresa Rodriguez, Tubby's aunt, provided background information regarding Tubby to S/A Jeff Wisch on October 23, 2018. Rodriguez stated that Tubby had testicular cancer about two years ago. Tubby told his mother about three weeks prior that the doctor told him the cancer came

back. Rodriguez stated she heard this from her sister, who told her that Tubby did not want to go through chemotherapy again and he "wanted the cancer to just eventually take his life." Rodriguez stated she did not talk about it with Tubby, and stated that Tubby continued as his same self over the past three weeks. Rodriguez got choked up and cried at numerous times during the interview. Rodriguez stated that Tubby confided in her about the problems he was having with his girlfriend. S/A Wisch asked Rodriguez about the syringes and rubber tie-offs officers located in Tubby's vehicle. Rodriguez stated she also saw those items and they must have belonged to Tubby for heroin use. Rodriguez stated the bag of marijuana in the vehicle was not hers and must have been Tubby's. Rodriguez stated she knew Tubby was a drug dealer of marijuana but she had not seen him sell marijuana in about a year.

III.7:24 p.m. to 8:22 p.m. – Initial Traffic Stop of the Vehicle Driven by Jonathon Tubby, Arrest, and Transport to the Brown County Jail

The summary for this time period consists of information from interviews with Officer O'Brien, Officer Wernecke, Officer Haack, Theresa Rodriguez, and video footage from the squad car Officer O'Brien and Officer Wernecke were driving on October 19, 2018.

On October 19, 2018, Officer O'Brien was on patrol as a field training officer with Officer Wernecke. Officer Wernecke had been a patrol officer with the Green Bay Police Department for approximately seven weeks at this time and graduated from the Northeast Wisconsin Technical College in Spring 2018. Officer Wernecke was in the first step of a five step field training program with GBPD and was on that date assigned to be field trained by Officer O'Brien. Officer Wernecke and Officer O'Brien were in full uniform. Officer Wernecke reported that he observed a vehicle whose license plate did not look right. Officer O'Brien agreed the license plate was not a Wisconsin-issued license plate. The vehicle eventually proceeded through a red light onto Madison Street from Main Street in the City of Green Bay. Video from squad car #42, the squad car driven by Officer Wernecke and Officer O'Brien, indicates Tubby turned through the red light at about 7:24 p.m. The vehicle ultimately turned into the parking lot of the Hyatt Regency hotel. The vehicle continued driving through the parking lot despite Officer Wernecke turning on his squad's overhead lights. The officers also shone a spotlight and the vehicle and blipped the squad car's siren. The officers found it odd that the vehicle did not initially stop when officers turned on the squad car's lights. The vehicle eventually stopped in the parking lot after driving through the parking lot for about a minute after the squad's lights were turned on. Officer O'Brien requested a second squad arrive to provide cover for the officers and Officer Haack later responded to the scene. Officer O'Brien reported he observed two occupants in the front of the vehicle and he could see movement inside the vehicle.

Theresa Rodriguez, Tubby's aunt, was the front passenger in the vehicle. Rodriguez reported that Tubby accidentally turned through a red light. Rodriguez asked Tubby, "Is that a cop following us?" Rodriguez stated she told Tubby to turn into the hotel parking lot, hoping that the police would not follow them. Rodriguez stated the squad car did follow them and activated its red and blue lights. Rodriguez reported that Tubby did not pull over in the parking lot right away and instead called his girlfriend, who Rodriguez identified as Ronnie John. Rodriguez reported

that Tubby drove around the parking lot for about a minute to talk with John. Tubby told John something like, "Baby, we're being pulled over by the police and I have a warrant so I'll be going to jail. Please know that I love you!" Rodriguez stated that John did not say anything back, which was very upsetting to Tubby. Rodriguez stated she looked over at Tubby and he looked very upset and described him as a "broken man" that John would not say "I love you" to him, while she knew he was going to jail for a while. Rodriguez stated Tubby waited and eventually hung up the phone and stopped the vehicle. The police then approached on each side of the vehicle. Rodriguez stated Tubby had struggled with numerous addictions for many years, including heroin, meth, and marijuana. Rodriguez was unsure if Tubby used any illegal drugs or alcohol on the night of the incident. Rodriguez reported that Tubby was "different" during the traffic stop, but she did not feel that was due to drugs and/or alcohol. Rodriguez felt it was because John did not tell Tubby that she loved him when he needed to hear that.

Officer Wernecke approached the driver's side of the vehicle at about 7:28 p.m. while Officer Haack and Officer O'Brien approached the passenger side of the vehicle. The officers reported that nothing seemed out of the ordinary and the driver, later identified as Jonathon Tubby, was not agitated or argumentative. The front passenger was later identified as Theresa Rodriguez. Officers observed marijuana in the vehicle and had Tubby and Rodriguez exit the vehicle. Officer Wernecke placed Tubby in handcuffs due to the marijuana in the vehicle. Officer Wernecke reported that he placed Tubby's hands behind Tubby's back and locked the handcuffs. Officer Wernecke described his search process and stated that Tubby did not have any drugs or weapons on him. Video shows that Tubby exited with his hands in the air and Officer Wernecke placed Tubby's hands behind his back. Officer Wernecke reported being confident in his search at the time and that Tubby did not have a weapon. Officer O'Brien reported that he could see Officer Wernecke searching Tubby in his peripheral vision, but he was still partially focused on Rodriguez. Officer O'Brien reported that he trusted Officer Wernecke to properly search Tubby. Tubby was cooperative at this point and Officer O'Brien reported it was a normal traffic stop. Officer Wernecke's search of Tubby was completed at about 7:34 p.m.

Tubby originally identified himself to officers with the last name of "Skippergosh." Rodriguez had also originally lied about her identity to Officer Haack due to active arrest warrants. Officers determined Tubby was not being truthful about his identity and checked the name he provided against available mugshots. Tubby's appearance did not match the mugshot for the name Tubby provided. Officer O'Brien reported that as officers attempted to identify Tubby, he had continued interaction with Tubby and Tubby was "quiet, but normal." Rodriguez stated Tubby was arguing with the police officer when confronted about lying about his name. Rodriguez then identified Tubby to Officer Haack. Officers discovered Tubby also had a warrant for his arrest. Tubby was then in the back seat of the squad car. Officer O'Brien reported that he could see in the back seat. Officer O'Brien reported that it was dark in the back seat. Tubby was not making any statements and did not appear to be moving. Officer O'Brien described Tubby as being hunched over with his head against the cage separating the front and back seats. Officer Haack transported Rodriguez to the Brown County Jail about ten to fifteen minutes before Officer O'Brien and Officer Wernecke transported Tubby. Officer Wernecke, Officer O'Brien, and Tubby depart at about 8:10:52 p.m. Tubby was to be booked into the jail on possession of marijuana and obstructing charges and for the active warrant.

Our review of the rear-facing camera from squad #42 provides a clearer depiction of what was occurring in the rear seat of the squad car during this time period. Tubby was placed in the back of the squad car at about 7:35 p.m. Tubby was handcuffed behind his back and seat belted in. Beginning at about 7:40 p.m., Tubby can be seen moving his hands under his buttocks and behind his legs as he is sitting. Tubby was able to get one leg through his handcuffed arms and he put his right hand up under his shirt. Tubby continued to move his right hand further up his shirt, closer to his face. Tubby was able to remove the seatbelt at 7:43 p.m. Tubby was able to get his other leg out from his handcuffed arms. Tubby's right hand went back up under his shirt, Tubby bent forward, and he manipulated his hand under his shirt. Tubby continued to place both hands concealed under his shirt. Tubby largely remained in this position until about 8:07 p.m. The squad car began moving at about 8:10 p.m., which is when the audio from the squad car comes on, although any conversation that may have been occurring is difficulty to hear with the sounds from the engine.

During the transport to the Jail, Officer O'Brien reported that Tubby was very quiet. Officer O'Brien believed he asked Tubby if he was okay and Tubby either did not respond or did not hear him. Officer Wernecke reported there was no conversation with Tubby during the drive to the jail. The transport to the Brown County Jail took approximately twelve minutes.

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

The summary for this time period consists of information from interviews with Officer Wernecke, Officer O'Brien, Officer Haack, Officer Walvort, Office Allen, Lieutenant Allen, Sergeant Denney, Correctional Officer Charles Nelson, and Cpl. Kevin Smith, an investigative report from S/A Beine, and video footage from the squad car #42, from squad car #S53, and from the squad car driven by Officer Walvort.

The Brown County Jail is located at 3030 Curry Lane in the City of Green Bay, Brown County, Wisconsin. This incident occurred in the sally port area of the jail, the entrance to which is located on the west side of the building. The exit is located at the southeast end of the sally port bay. The sally port is an enclosed area in the jail that provides the secure transition of inmates from the custody of police officers to the intake area of the jail. Inside the sally port are numerous parking stalls and doors leaving to various rooms within the jail. For ease of reference, we have included an image from a scan of the area completed by Sgt. Scott Vandevoort of the Brown County Sheriff's Office which provides a largely to scale depiction of the sally port area and the vehicles located in the sally port during the incident (Figure A).

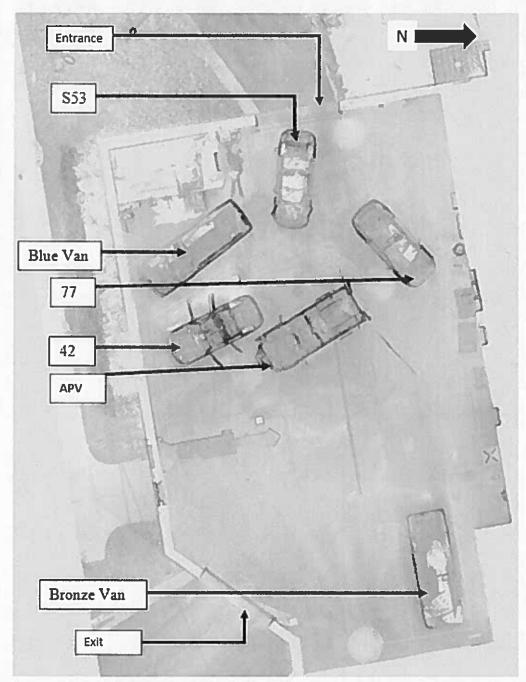


Figure A: FARO Scan of the Brown County Jail Sally Port on October 19, 20181

Squad #42 arrived at the Brown County Jail sally port at about 8:22 p.m. When the officers arrived, Officer Wernecke asked Tubby if he was suicidal or needed medical attention, to which Tubby responded "no." Officer O'Brien and Officer Wernecke placed their gear and weapons in the trunk pursuant to the jail's policy that officers are to not bring weapons into the jail. Officer

¹ As is detailed later, "S53" refers to the squad car driven by Sgt. Thomas Denney, "Blue Van" refers to a jail transport van in the sally port, "77" refers to the squad car driven by Officer Tyler Haack, "42" refers to the squad car driven by Officer Wernecke, and "APV" refers to the BearCat armored vehicle which arrived on scene later in the incident. Note: while the image indicates the doors to squad #42 were open, witness statements and video evidence confirms the doors to squad #42 were closed at all time pertinent to this case.

Wernecke was left unarmed. After placing their gear in the trunk, Officer Wernecke went to the rear driver's side door of the squad and opened the door. Officer O'Brien reported he heard Officer Wernecke ask Tubby twice to get out the squad car. Video indicates that the car door opened soon thereafter and Tubby appeared to say, "No." Officer Wernecke stated, "Step out," but Tubby remained in the squad car with his hands up under his shirt. Officer Wernecke again stated, "Stepping out?" and then stated, "come on, bring your foot out," as he reached into the back seat. Tubby flinched back further into the squad car, still bent forward. Either Officer Wernecke or Officer O'Brien then stated, "Jonathon, bring your foot out." Tubby made an utterance that may have been a, "no." Officer Wernecke noticed the seat belt was not secured around Tubby and that Tubby's hands were not behind him and were instead in front of him and appeared to be up under his jacket. Officer Wernecke reported that Tubby stated, "I'll do it."

During this time, Officer O'Brien saw Officer Wernecke reach into the squad car to help Tubby out and saw a rapid movement or shift in the squad car. At this time, Officer O'Brien's gear was off and in the trunk except the backup weapon in his pocket. Officer O'Brien came around from the back of the squad car and peaked in the open door and saw Tubby reclined away from the door. Officer O'Brien did not see Tubby's hands back where they had been handcuffed previously and observed what he believed to be the barrel of a gun pointing up to the area of Tubby's chin. Officer O'Brien described that he believed the object to be cylindrical and not simply a finger. The object was pushing up under Tubby's clothing and towards his chin. Officer O'Brien reported he made eye contact with Tubby and described Tubby's look as "cold and piercing." Officer O'Brien expressed a belief that it was a suicidal moment for Tubby. Officer O'Brien reported fearing that Tubby could shoot at him and Officer Wernecke. Officer O'Brien slammed the door on Tubby to contain the problem and started to retreat, telling Officer Wernecke, "I think he's got a gun." Tubby remains in the same hunched over position with his hands underneath his shirt in a bunched-up position.

Officer Wernecke reported that he was very uneasy as Tubby should not have been in the position he was in. Officer Wernecke reported that when Tubby said "I'll do it" it was as if Tubby was a completely different person than the calm person Officer Wernecke initially dealt with. Officer Wernecke recalled seeing Tubby's hands balled up in his jacket and he saw a bulge. Officer Wernecke reported that Officer O'Brien told him that Tubby had something in his hands and that Tubby had a gun. Officer Wernecke could not see Tubby's hands and could only see Tubby's silhouette. Officer Wernecke alerted jail staff to what Officer O'Brien observed. Officer O'Brien asked Officer Wernecke what he was thinking and Officer Wernecke told Officer O'Brien that he thought he must have missed something in searching Tubby.

Officer O'Brien instructed Officer Wernecke to get behind him. Officer O'Brien retrieved his handgun from the trunk of the squad car and retreated behind the van parked next to squad #42. Officer O'Brien radioed dispatch and advised that Tubby had something in his hand. Lt. Allen reported that Officer O'Brien seemed calm on the radio. GBPD Officer Tyler Haack arrived first and parked his SUV near the left side of the sally port. Officer O'Brien told Officer Haack that Tubby had a gun and Officer Haack took a position of cover. Officer Haack reported the windows of squad #42 began to fog up and he could not really see anything inside the squad car except some vague movement in the back seat. Officer O'Brien reported that jail staff came to the window in the sally port, but he waved them back knowing they were not armed or protected by body armor.

Jail Corporal Kevin Smith and Correctional Officer Charles Nelson were in the area near the sally port at the time. Cpl. Smith reported that he went to the intake area and observed GBPD Officer O'Brien with his handgun drawn and positioned behind the jail's transport van. Cpl. Smith reported that Officer O'Brien told him that he believed his prisoner had a knife and/or a handgun. The three officers then waited for backup.

At about 8:26 p.m., Tubby can be seen in video looking around the squad car and a large bulge and be seen under his shirt. Tubby kept moving and manipulating his hands. At 8:28 p.m., officers yelled something to Tubby potentially along the lines of "Jonathon, put it down," and Tubby replied, "Fuck you. I'll do it." At this time, Tubby was looking out the back window of the squad car. Officers again yelled, "Jonathon, put it down." A short time later, Tubby moved all the way around in the seat, faced backwards out the rear window of the squad car, and was breathing heavily. At 8:29 p.m., Tubby stated, "I'll fuckin' do it at the first fuckin' person to open this door," and then "I'm not goin'." Tubby then possibly started crying and a large bulge under his shirt can be seen.

GBPD Sergeant Thomas Denney arrived on scene at about 8:30 p.m. Sgt. Denney reported that when he arrived, Officer O'Brien advised him that Tubby's hands were in front of him and officers could not see Tubby's hands. Sgt. Denney learned that Tubby would not get out of the vehicle and his hands were positioned underneath his shirt in an upward position toward Tubby's chin area. Officers could see that Tubby was facing out the rear window. Sgt. Denney reported that his impression from the information that had been relayed to him was that Tubby was armed with a gun and suicidal. During this time, Tubby can also be heard in the video footage from the squad car making several utterances. At 8:31 p.m., Tubby stated, "Fuck you, I'll fuckin' do it." Tubby stated, "Fuck you," and moved in the back seat. Tubby then stated, "shut the fuck up." GBPD Officer Nicholas Walvort arrived at about 8:31 p.m. An officer can be heard on video stating, "He's looking right at me," and, "He's got something in his shirt, pointed up at his chin." Officers can be heard discussing the situation and how to handle it as they wait for the BearCat to arrive. At 8:32 p.m., Tubby stated, "I can fuckin' hear you." Officer Walvort told Officer Wernecke to get a rifle out of Officer Walvort's squad car as Officer Wernecke was unarmed.

Officer O'Brien reported that he advanced to behind the van next to squad #42 and was able to see into the back passenger side window of the squad car. Officer O'Brien saw Tubby completely turned around and facing the back window. Officer O'Brien believed Tubby could see all the police resources arriving on scene through the back window of the squad car. Officer O'Brien stated he saw Tubby's left hand come up and wipe the side of his face, which confirmed to Officer O'Brien that Tubby was no longer handcuffed behind his back. Officer O'Brien reported he moved further along the side of the van and then heard another officer state that Tubby was looking at Officer O'Brien. Officer O'Brien stated his fear was that Tubby could take a shot at him. Officer O'Brien stated he could see Tubby moving around, transitioning from looking out the back window to looking at Officer O'Brien. Officer O'Brien reported that he was using his flashlight to look into the squad car and that the rear windows were fogging up. Officer O'Brien reported that he gave loud, clear commands to Tubby to wipe the windows. Officer O'Brien stated that one time, on the passenger side window, he saw a hand come up and wipe the window. Officer O'Brien stated he knew that Tubby could hear him and he continued to give commands to Tubby to wipe the windows, but Tubby only wiped the window one time.

Numerous officers from both the Green Bay Police Department and from the Brown County Sheriff's Office confirmed hearing Officer O'Brien yelling numerous commands to Tubby. Multiple officers also reported that they could see the windows to the squad car were all fogging up and making it difficult to see Tubby inside. Officer O'Brien repeatedly gave commands for Tubby to wipe off the windows to allow officers to see inside. It was eventually decided that additional SWAT officers would respond to the scene. Officer O'Brien can be heard on video stating, "Jonathon, wipe the windows so they're clean," from outside the squad car in the sally port. Tubby continued to move around the back seat and look around. An officer, believed to be Officer O'Brien, continued to tell Tubby to wipe the windows several times. Tubby was crying, sighing, and moaning at this time. At 8:42 p.m., another officer stated, "Near the passenger side. He's looking back at us right now." A second officer then stated, "He's probably looking at you, O'Brien. I don't know if you can see that window, but I think he's looking at you." Over several minutes, Officer O'Brien continued to yell for Tubby to wipe the windows. At 8:44 p.m., Tubby stated, "Get the fuck away." Tubby yelled something and Officer O'Brien continued to tell Tubby to wipe the windows clean through about 8:46 p.m. Tubby then yelled, "fuck you." At 8:48 p.m., an officer stated that it still looked as if Tubby had his hand up by his neck.

During this time, numerous other officers arrived at the sally port. GBPD Officer Eric Allen arrived with GBPD Officer Matthew Lynch as they were members of the SWAT team. Officer Allen learned that Tubby's hands were under his clothing in a manner that appeared as if Tubby had been holding a gun towards his chin. Tubby stated, "I'll do it!" which law enforcement took to mean Tubby was talking about killing himself. Officers continued to discuss multiple options of how to safely remove Tubby from the vehicle. Officer Allen and GBPD Officer Scott Salzmann suggested deploying the BearCat armored response vehicle, which was authorized by GBPD Lieutenant Nathan Allen. Lt. Allen reported he also requested additional less lethal equipment. Lt. Allen made the decision to deploy SWAT team members along with a K-9 to go towards the vehicle in the BearCat to see what they could observe inside the squad car. Officers asked Officer O'Brien if he wanted the whole BearCat armored vehicle. Officer O'Brien reported that he believed officers only needed a shield to approach the vehicle, but deferred to other officers with more experience. At this point, it appeared that Officer O'Brien's role was diminished and other officers, including the SWAT team members, ran the situation.

At about 8:50 p.m., Tubby turned around and faced the camera inside the squad car directly. Tubby appeared to have an object under his shirt with his right hand. Tubby was visibly sweating. An officer, again presumably Officer O'Brien, can be heard in the video yelling, "Jonathon, wipe those windows," and Tubby replies, "fuck you." At 8:54 p.m., Officer O'Brien again asks for Jonathon to wipe the windows and Tubby replies, "fuck you." Officer O'Brien relayed to other officers that Tubby's hands were up by his face but he could not tell if they were empty.

At 8:56 p.m., there appeared to be a cylindrical object in Tubby's right hand underneath his shirt. The object is pointed upward and is cradled by Tubby's left hand over his shirt. Tubby appears to be putting the object near his mouth at times. At 9:01 p.m., Tubby put the object in his mouth and turned and again faced the back window. At 9:02 p.m., Tubby turns back toward the camera. There are several clear views of the apparent object underneath Tubby's shirt (Figures B-D). Tubby placed the object in his mouth and moaning. Tubby continued to look around out the windows of the squad car.



Figure B: Camera Footage from Squad #42 (9:02:29 p.m.)



Figure C: Camera Footage from Squad #42 (9:02:35 p.m.)



Figure D: Camera Footage from Squad #42 (9:02:39 p.m.)

V. 9:02 p.m. to 9:13 p.m. - Critical Incident Response

The summary for this time period consists of information from interviews with Officer Merrill, Officer Walvort, Sgt. Katers, Officer Stevens, Sgt. Denney, Officer Allen, Officer O'Brien, Officer Wernecke, Lt. Allen, Deputy Jerome, Deputy Winistorfer, Officer Christensen, Correctional Officer Lemke, Deputy Dernbach, Officer Salzmann, and Officer Haack, and video footage from the squad car #42 and from squad car #S53.

The BearCat arrived in the sally port at about 9:02 p.m. and was positioned next to the driver's side of squad #42. GBPD Officer Joseph Merrill was driving the BearCat but he reported that his visual through the BearCat was very limited. Officer Merrill could see Tubby's hands folded up underneath his shirt. Officers behind a shield approached the squad car and closed the trunk of the squad car, which had remained open. At about 9:05 p.m., Officer Eric Allen opened the turret on top of the BearCat and a spotlight was directed into the back of the squad car. BCSO Lt. Thomas Zeigle made the decision to break the back window of squad #42 to allow officers better visibility into the vehicle and to offer better communication with Tubby. At 9:06 p.m. Officer Allen shot a dowel round at the back window of the squad car, breaking a portion of the back window. There was movement visible in the back seat of the squad again, but nothing can be observed. Officer Allen shot a second round at the rear window. Officer Walvort reported that Tubby appeared "emotionally distraught" and was crying at this point. Tubby continued to refuse commands to show his hand. At 9:08 p.m., Sgt. Katers of the Brown County Sheriff's Office cleared the remaining glass from the rear window of squad #42. Sgt. Denney reported he chambered a bean bag round in his less lethal weapon and crouched down behind a patrol vehicle.

Officers continued to yell for Tubby to "show his hands." Tubby did not comply. Officer Allen reported he gave Tubby numerous commands to show his hands but Tubby did not comply.

Our review of video from inside squad #42 is instructive into Tubby's mental state during this time period. At 9:04 p.m., Tubby still had his hand under his shirt (Figure E) and then put an object in his mouth and stated what sounds like, "I'll fuckin' do it" (Figure F). Tubby kept moving around and putting the object in his mouth or near his mouth. At 9:05 p.m., Tubby faced the back window and a short time later stated, "I'll fuckin' do it."



Figure E: Camera Footage from Squad #42 (9:04:31 p.m.)



Figure F: Camera Footage from Squad #42 (9:04:35 p.m.)

In the video, the first wooden dowel round was fired at 9:06 p.m. into the back window. Tubby moved away from the breaking glass and said, "Fuck you." Tubby then appeared to move the object up to his eye level and point it out the back window for a split second (Figure G). At 9:07 p.m., an officer can be heard stating, "Jon, put your hands up where I can see them." Seconds later, an officer stated, "Jon, put your hands up." Tubby made moaning noises. A second wooden dowel round was then fired into the rear window of the squad car. An officer on a loud speaker then stated, "Jonathon, put your hands up." Tubby is facing back toward the back window but is leaning back in the seat. Officers then remove the remaining glass and Jonathon shield his face from the breaking glass. At 9:08 p.m., an officer stated, "Put your hands up, Jonathon," and Tubby can be heard making moaning and crying noises. The officer on the loud speaker then states, "Jonathon, put your hands up." Tubby stated, "What are you guys doing to me?" At 9:09 p.m., an officer stated, Jonathon put your hands up, bud, so I can see them. Come on, Jonathon." An officer then stated, "Jonathon, we don't want to hurt you. Put your hands up, bud. Come on, Jonathon." Tubby was moaning and crying. Tubby stated, "Help me. Help me." An officers stated, "Jonathon, put your hands up for me." Tubby then states, "I'm scared" and "Why is this happening? Why is this happening?"



Figure G: Camera Footage from Squad #42 (9:06:46 p.m.)

Tubby then looks out the back window. At 9:10 p.m., an officer states, "Jonathon, put your hands up for me, bud." An officer states a short time later, "Put your hands up for me, Jonathon. I can see that one is clear. Let me see your other hand." Tubby states, "What's happening?" An officer states, "Let me see your other hand, Jonathon. Let me see your other hand, bud." A short time later, at 9:10:58 p.m., Officer Allen deployed oleoresin capsicum (OC) spray (also known as "pepper spray") into the back of squad #42. Tubby jumped up and down in the back of the squad car. Officer Allen retreated into the BearCat and the BearCat moved back. Tubby holds up his shirt to deflect the spray. Tubby yells, "fuck you, fuck you, fuck you," and starts bouncing up and down in the seat. Once officers deployed the OC spray, the incident unfolded quite quickly. At 9:11:05 p.m., Tubby began climbing out of the back of the squad car through the back window and out of view of the camera inside squad #42.

Tubby can be seen from the squad car footage from squad #S53 crawling out the back window of squad #42. Tubby exited the vehicle face first. Tubby's left hand was visible outside of his shirt but his right hand was still concealed under his shirt. Tubby's left hand was cradled under his right hand, which is up under his shirt. Officer Walvort reported that Tubby's hand was balled up under his shirt and he could see a bulge under Tubby's shirt. Sgt. Denney heard someone say, "He's coming out!" Officer Stevens reported that his first thought when Tubby exited the squad car with his hands under his shirt was that Tubby had a gun given the way his hands and posture were at the time. Sgt. Denney similarly reported that when Tubby exited the vehicle, he believed Tubby had a gun under his shirt from the position of Tubby's hands. Deputy Dernbach reported that he could also see something bulging out from under Tubby's shirt.

Tubby gets onto his knees on the trunk of the squad car and was facing the sally port door (Figure H). Tubby then got on his feet (Figure I). Sgt. Denney is believed to be the officer that shot one bean bag round at Tubby's stomach area. Video shows that Tubby was hit by what is believed to be a less lethal beanbag round and his body flinched away from the direction of the shot. Tubby fell down onto his buttocks on the trunk of the squad car, and then fell off the trunk on the passenger side. Tubby then began to run towards the garage door where Officer O'Brien and other officers were located. Multiple officers reported that they could not see Tubby's hands at all as he was running.

Officer O'Brien had been by the entrance door and saw Tubby scramble up and out of the back window of squad #42. Officer O'Brien could see Tubby's left hand but stated that his right hand was still up under his shirt. Officer O'Brien realized his position was not safe so he moved behind the sally port door jamb. Officer O'Brien temporarily lost his sight of Tubby at that point.



Figure H: Camera Footage from Squad #53 (9:11:14 p.m.)



Figure I: Camera Footage from Squad #53 (9:11:15 p.m.)

Some officers reported hearing a second round from a less lethal round be fired. Investigators later located a second bean bag round in the sally port, indicating there was in fact a second less lethal round fired at Tubby. GBPD Officer Scott Salzmann also deployed his K-9, Pyro, to engage with Tubby. Officer Salzmann reported that after he deployed his K-9 he heard a round from a less lethal weapon be fired. Tubby ran in the direction of the sally port entrance door. Officer O'Brien reported there was a moment when he heard scrambling or a commotion from inside the sally port. Officer O'Brien reported being behind cover and could not see anything. Officer O'Brien reported he peeked back around the corner of the door jamb and saw Tubby running in his direction with his right hand still concealed under his clothing. Officer O'Brien described Tubby's pace of travel to be "rushing" toward the sally port door. Officer O'Brien reported that he retreated back to his position of cover, and, simultaneously Tubby came back into Officer O'Brien's line of sight from that position of cover. Officer O'Brien stated that Tubby was at the rear panel of Sgt. Denney's squad car. At some point, the K-9 on scene began to drag Tubby back into the garage area of the sally port as he was almost outside. Other officers reported the K-9 did not seem to have much effect on Tubby. Deputy Winistorfer saw Tubby was about ten feet away with his hands under his shirt with what looked like something pointed to his head. Other officers reported that Tubby was closing the distance between himself and the other officers by the garage door. This area was a staging area where officers had gathered to be out of the line of fire. Brown County Jail Correctional Officer Mitch Lemke, who was in a room adjacent to the sally port, reported that he heard an officer say "put your hands up" as Tubby ran towards the sally port entrance.

Officer O'Brien reported hearing a "pop" sound. Officer O'Brien observed Tubby's body was descending in a downward direction and his right hand was still concealed. Tubby's body was twisting to the left and he was looking across his body to the left and toward the officers that were located behind Sgt. Denney's squad car. Officer O'Brien reported that he was concerned that Tubby was shooting at his fellow officers located behind Sgt. Denney's squad car and believed the "pop" sound he heard to be Tubby shooting the gun he had concealed under his clothing. Officer O'Brien stated Tubby was looking at those officers and his hand was concealed and pointing right at the officers. Officer O'Brien believed Tubby had shot and would continue to shoot at the other officers.

Officer O'Brien believed at that time he shot three to five rounds at Tubby. Officer O'Brien stated he later found out that he had shot more than that. Officer O'Brien fired a total of eight rounds, five of which hit Tubby. The rounds were described by numerous witnesses as being fired "rapidly." Officer Salzmann reported the gun shots occurred almost simultaneously with the second less lethal round being fired. Several officers described Officer O'Brien as backpedaling when he fired. Officer O'Brien stated the purpose of his shooting was to stop the threat. Officer O'Brien stated he stopped shooting when Tubby was no longer looking at the officers and was no longer pointing what he believed to be a gun at them or anyone else. Officer O'Brien stated that Tubby's body rolled on the ground. Officer O'Brien stated he was already retreating as he shot and he continued to move back and away from the scene. Deputy Dernbach from the Sheriff's Office grabbed Officer O'Brien's shoulder and walked him back to a squad located farther back from the scene. Officer O'Brien then re-holstered his handgun.

From the available video evidence, approximately ten seconds passed from the time Tubby began to climb out of the squad car to the end of the final "bang" sound.

VI. Additional Investigation

Once Tubby fell to the ground, Tubby's hands were still under his shirt. GBPD Officer Cody Christensen, who had gone to render aid to Tubby, reported that Tubby's hand was tucked up under his shirt and it looked like Tubby had a gun. Officers approached Tubby behind a shield. Officer Christensen stated it was difficult to get Tubby's hand out from underneath his shirt. Officer Christensen reported that he thought Tubby had his fingers extended, mocking the way a gun looks. Officer Christensen believed it was a gun because of the way Tubby's hand was positioned. Officers then determined that Tubby did not have a weapon.

S/A Beine collected overall photographs of the scene and collected evidence from the sally port. S/A Beine reported that Tubby's body was located between squad #S53 and a storage room located in the southwest corner of the sally port. S/A Beine located five shell casings near the west overhead door threshold on the asphalt outside the sally port. Additional casings were located near squad #S53. Two bean bag projectiles were located, one between squad #42 and the blue transport van and one by the passenger's side rear tire under the rear of the bumper of squad #S53, consistent with it being fired at Tubby as he ran towards the entrance door to the sally port.

In the early morning of October 20, 2018, S/A Waterstreet collected Officer O'Brien's handgun, which was found to have five rounds left inside the magazine and an additional round in the chamber. S/A Schallhorn and S/A Kust also conducted a walkthrough of the scene with Officer O'Brien to determine Officer O'Brien's position when he fired and the direction of the shots. Officer O'Brien identified the southern door jamb of the sally port entrance door as the "cover" he was standing behind when he fired. Officer O'Brien believed he fired between three and five shots and stated that his firearm was loaded before the incident with thirteen rounds in the magazine and an additional round in the chamber. Investigators noted Officer O'Brien was calm and cooperative during this time period.

S/A Roffers reviewed Tubby's Facebook account and noted several concerning Facebook posts and status updates on Tubby's profile. S/A Roffers specifically noted posts from July 29, 2018, August 7, 2018, and September 16, 2018. These posts can fairly be characterized as Tubby expressing some measure of depressive thought. For the specific content of these posts, please see the DCI Case File. On October 22, 2018, investigators searched the vehicle Tubby was driving when he was stopped by Officer Wernecke and Officer O'Brien on October 19, 2018. Investigators located a syringe on the front driver's seat and a rubber tourniquet on the driver's side rear seat.

S/A Schallhorn also reviewed radio traffic from October 19, 2018, regarding this incident. The radio traffic S/A Schallhorn reviewed was consistent with the reports from officers on scene. The communications corroborate the reports that officers believed Tubby had something under his shirt pointed up at his chin, that the windows were fogged up making it difficult to see if there was anything in Tubby's hands, and that he was turned around in the squad car facing out the back window.

Numerous officers reflected on the incident. Officer O'Brien reported that he had no other force options available to him and he did what he had to do. Officer O'Brien stated he believed Tubby was shooting at the officers and putting their lives in danger. Officer O'Brien stated he believed Tubby was going to kill his fellow officers or him. Sgt. Denney reported that officers were in a dangerous situation. Tubby was believed to have a gun and officers could not see him. Sgt. Denney reported that when Tubby was running towards the officers it appeared that Tubby had a gun in his shirt. Sgt. Denney feared for his life and the lives of the other officers in the sally port. Deputy Dernbach, who had been near Officer O'Brien when he fired at Tubby, reported that if Officer O'Brien had not fired, then he would have. Deputy Dernbach stated he truly believed Tubby had a weapon under his shirt and would have injured other officers. Officer Salzmann reported that he believed Tubby was armed and believed that when Tubby was running in the direction of the officers that he was going to hurt the officers.

VII. Autopsy

Chief Medical Examiner Dr. Vincent Tranchida, a forensic pathologist, conducted an autopsy on Tubby at the Dane County Medical Examiner's Office on Saturday, October 20, 2018. Special Agent Jed Roffers of the Wisconsin Department of Justice, Division of Criminal Investigation, attended the autopsy. Our office received Dr. Tranchida's Autopsy Report on

January 24, 2019. The State also spoke with Dr. Tranchida directly on January 28, 2019, to discuss his autopsy report.

Dr. Tranchida reports the cause of Tubby's death to be gunshot wounds to the head, neck, and torso. Dr. Tranchida concluded the manner of death to be homicide. It is important to note—and this was something Dr. Tranchida stressed to our office as well—that the medical use of the term "homicide" refers only to that the decedent's death was caused by another person. In other words, the death was not caused by natural causes, was not accidental, nor was it a suicide. Dr. Tranchida's conclusion that Tubby's death was a homicide is not a legal conclusion.

Dr. Tranchida identified five (5) entry wounds and two (2) exit wounds, with three (3) metal projectiles recovered from inside Tubby's body. The gunshot wound to Tubby's head, which Dr. Tranchida found to be the most significant, entered in the right posterior portion of the scalp and lodge in the left side of the neck with a downwards path. Dr. Tranchida reported the path of the wound may have been caused if Tubby was turned away from the trajectory of the bullet or if his head was down and hunched over running towards the trajectory of the bullet. Tubby also had a gunshot wound to his neck, which entered in the posterior of the neck and traveled in a right to left and downwards path before exiting the left side of the neck. Tubby was also shot twice in the upper back and once in the posterior left shoulder. Dr. Tranchida was unable to estimate the proximity from which the bullets were fired, but indicated that he did not note any evidence that the bullets were fired from close range.

Dr. Tranchida also noted a patterned injury to the left upper abdomen of Tubby suggestive of a bean bag round impact.

As is customary in the autopsy process, Dr. Tranchida also reviewed Tubby's toxicology report. Dr. Tranchida noted an "acute intoxication due to the combined effects of methamphetamine and methadone." Dr. Tranchida also noted signs of acute marijuana use and recent Alprazolam, fentanyl, morphine, codeine, and hydrocodone/hydromorphone use. Dr. Tranchida reported to our office that the methamphetamine, methadone, and marijuana use were likely sooner in time to Tubby's death given their presence in Tubby's blood. The other drugs found in Tubby's system were found in his urine, indicating recent, but not acute use of those substances.

LEGAL ANALYSIS

Based upon the materials our office has reviewed, there are very few factual issues that could be in dispute in this case. We are comfortable that the statements, video, audio footage, and forensic evidence provide a clear picture of the events that led to the death of Mr. Tubby. There does not appear to be any significant follow-up investigation that would need to be done prior to making a charging decision.

The decision of whether to file criminal charges, in any case, is extremely fact-dependent. Ethically and legally, the State can proceed with criminal charges only when the prosecutor finds

the charges are supported by probable cause. In practice, however, our office commonly employs a higher standard in filing criminal charges. In addition to probable cause, our office will typically only file criminal charges if there exists sufficient evidence to support a conviction beyond a reasonable doubt. This higher threshold, commonly referred to as a "convictability" standard, is commonly utilized in prosecutors' offices nationwide. See, e.g., American Bar Association, Fourth Edition, Criminal Justice Standard for the Prosecution Function, Standard 3-4.3(a). As part of our charging decision, our office considers not only the alleged facts which would support guilt but also potential defenses an individual may have to the charges. In a prosecution for battery, for instance, our office would be derelict in its heavy responsibilities were it not to consider evidence of provocation on the part of the alleged victim or a viable self-defense claim a defendant may have.

The State was asked to review whether Officer O'Brien would be charged with homicide, meaning that he caused the death of another human being. There is no dispute in this case that Officer O'Brien caused the death of Jonathon Tubby. However, consistent with our ethical obligation, the State must also consider the existence and validity of any potential defense Officer O'Brien may have to criminal conduct. Our office views three statutory defenses or privileges that may be applicable under these circumstances. Our decision as to whether to file criminal charges against Officer O'Brien therefore hinges on the veracity of these defenses. First, Officer O'Brien professed that he killed Tubby essentially in an act of self-defense or in defense of the other officers and citizens around the sally port. See Wis. Stat. § 939.48. The second potential defense is the "public officer" privilege. See Wis. Stat. § 939.45. We discuss each of these potential defenses in turn.

I. Self-Defense and Defense of Others

Wis. Stats. § 939.48(1) describes the privilege of self-defense:

A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his or her person by such other person. The actor may intentionally use only such force or threat thereof as the actor reasonably believes is necessary to prevent or terminate the interference. The actor may not intentionally use force which is intended or likely to cause death or great bodily harm unless the actor reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself.

A person is furthermore privileged to use force to defend others under the same conditions and by the same means as they would use to defend themselves, assuming there is a reasonable belief that the other person or persons would be privileged to act in self-defense. See Wis. Stat. § 939.48(4). For purposes of our decision, we do not view a substantial difference in this case as to whether Officer O'Brien's actions were in defense of himself or were also in defense of the other officers that were near him around the sally port entrance door. Those beliefs were likely concurrent in

Officer O'Brien's mind, and given the substantial overlap between the self-defense law and the defense of others law, our decision will discuss both together.

There are essentially two components to analyze whether Officer O'Brien's actions on October 19, 2018, were legally permissible as self-defense, both of which involve subjective and objective elements. First, Officer O'Brien must have "reasonably believed that he...was facing a threat of 'imminent death or great bodily harm.'" State v. Jackson, 2014 WI 4, ¶ 59, 352 Wis. 2d 249, 841 N.W.2d 791 (quoting Wis. Stat. § 939.48(1); Wis. JI—Criminal 805). Second, Officer O'Brien must have "reasonably believed that the amount of force used was 'necessary to prevent' the threat." Id. In an instance like this case where Officer O'Brien used force likely to cause death or great bodily harm, he can only use that force if he reasonably believed the force used "was necessary to prevent imminent death or great bodily harm" to himself or others. Wis. JI—Criminal 805.

A. Officer O'Brien's Reasonable Belief that he Faced a Threat of Imminent Death or Great Bodily Harm

The first step in our self-defense analysis requires that Officer O'Brien "reasonably believed that he...was facing a threat of 'imminent death or great bodily harm.'" <u>Jackson</u>, 352 Wis. 2d 249, ¶ 59. We conclude Officer O'Brien both subjectively believed he faced such a threat on October 19, but also that his belief was also objectively reasonable. We do not believe a reasonable argument can be made that Officer O'Brien did not subjectively believe Tubby posed a threat of imminent death or great bodily harm. Officer O'Brien reported not only to investigators but contemporaneously to other law enforcement officers in the sally port at the time that he believed Tubby had a firearm in his hands under his shirt. The reports detail the lengthy period of time where Tubby either was non-compliant with repeated requests from officers to show his hands and to comply with officers. Officer O'Brien reported that as Tubby ran towards his location, he was concerned that Tubby was shooting at his fellow officers. Officer O'Brien reported believing that Tubby was pointing a gun right at the officers. Officer O'Brien believed Tubby had fired a gun and would continue to shoot at officers. Based on the materials we have reviewed, we find Officer O'Brien believed Tubby posed a threat of imminent death or great bodily harm to himself or the numerous other officers, jail personnel, and civilians on scene on October 19.

Even though Officer O'Brien subjectively believed there to be a threat of imminent death or great bodily harm and that the deadly force he used was necessary to prevent that threat, his subjective beliefs must still be objectively reasonable. Reasonableness is judged from the standpoint of what "a person or ordinary intelligence and prudence would have believed in [Officer O'Brien's] position under the circumstances that existed at the time." Wis. JI—Criminal 805. Two points bear particular emphasis. First, the relevant analysis is not based on present retrospection. Rather, we must analyze the circumstances that existed at the time of the incident and how an ordinary, prudent, and reasonably intelligent person in Officer O'Brien's position would react in that situation. A second, related point to stress is that a person's belief may be mistaken and still be objectively reasonable under the circumstances. "The reasonableness of the actor's beliefs, moreover, is not defeated by a subsequent determination that his beliefs were mistaken." Maichle

<u>v. Jonovic</u>, 69 Wis. 2d 622, 628, 230 N.W.2d 789 (1975); see also Wis. JI—Criminal 805 ("A belief may be reasonable even though mistaken.").

In light of these considerations, we conclude Officer O'Brien's beliefs in this instance were reasonable under the circumstances. We understand that at first blush, facts such as Tubby being handcuffed and unarmed may call into question the reasonableness of Officer O'Brien's belief that Tubby posted a threat of imminent death or great bodily harm. However, we believe an "ordinary, prudent, and reasonable intelligent person" would conclude as Officer O'Brien did that Tubby posed such a threat. We stress a few points. First, Officer O'Brien did not conduct the search of Tubby before Tubby was placed in the back of the squad car. Officer Wernecke had been an officer for less than two months at the time of the incident and was still being field trained by another officer. Officer Wernecke reported that after Tubby refused to get out of the squad car that he told Officer O'Brien that he might have missed something during the search of Tubby given Tubby's behavior in the back of the squad car. Tubby also made statements such as, "I'll do it," and, "I'll fuckin' do it at the first fuckin' person to open this door," which indicated he was armed and contemplating harming himself or others. We therefore conclude, especially in light of the images from inside the squad car showing the manner in which Tubby was holding his hands under his shirt, that Officer O'Brien reasonably believed Tubby was armed at that time. Tubby continued to look out the back window at officers, including at Officer O'Brien, and disregarded repeated requests for compliance. Our office cannot nor will not speculate as to why Tubby did not comply with the officers' repeated requests for compliance. The fact is that he chose not to comply. Officers were not able to see into the back of the squad car to see what Tubby was doing due to the fogged up windows. And finally, again, the images of the cylindrical looking object under Tubby's shirt, in our view, would certainly lead a reasonable person to conclude Tubby was armed.

Since we conclude that an ordinary and prudent person would similarly believe Tubby was armed at the time, it would necessary follow that Tubby posed a threat of imminent death or great bodily harm to Officer O'Brien or others. After Tubby exited the squad car through the window, he continued to have his hand under his shirt in a manner that led numerous officers to report that they believed Tubby may have been armed. He continued to run towards Officer O'Brien and other officers despite being hit with a less lethal bean bag round. Officer O'Brien reported that as Tubby ran in his direction, Tubby was twisting towards the other officers in the sally port. Officer O'Brien heard a "pop" sound, which may have been from the second bean bag round deployed by officers. In any event, Officer O'Brien believed that this noise was Tubby firing at other officers. Officer O'Brien then shot Tubby.

As noted above the fact that Tubby was ultimately unarmed does not render Officer O'Brien's self-defense claim invalid. While that fact certainly makes the incident all the more tragic, the relevant standard we must apply looks at Officer O'Brien's subjective belief that Tubby had a firearm and whether that subjective belief was objectively reasonable under the circumstances. Again, the statements not only from Officer O'Brien but from other officers on scene indicate that numerous officers believed Tubby may have been armed, was running towards officers, and was turning in a manner that led Officer O'Brien to believe he would shoot at the officers in the sally port.

Those reports from other officers present in and around the sally port on October 19 are particularly instructive as those officers were in similar circumstances to Officer O'Brien on that night and can best gauge whether Officer O'Brien's belief was reasonable. Sgt. Denney reported that he feared for his life and the lives of other officers as it appeared that Tubby was running with a gun under his shirt. Deputy Dernbach reported that had Officer O'Brien not shot at Tubby then he would have shot Tubby given the threat he perceived. Officer Salzmann similarly believed Tubby was armed and would hurt the officers in the sally port. We find these beliefs consistent with the facts in the case and wholly reasonably under the circumstances.

In summary, we find that Officer O'Brien actually believed Tubby posed a threat of imminent death or great bodily harm and we find that his belief was reasonable under the circumstances.

B. Officer O'Brien's Reasonable Belief that the Amount of Force Used was Necessary to Prevent Imminent Death or Great Bodily Harm to Himself or Others

The second step in our self-defense analysis requires that Officer O'Brien "reasonably believed that the amount of force used was 'necessary to prevent' the threat." <u>Jackson</u>, 352 Wis. 2d 249, ¶ 59. A person can use force likely to cause death or great bodily harm only when it is "necessary to prevent imminent death or great bodily harm" to himself or others. Wis. Stat. § 939.48(1). We conclude Officer O'Brien both subjectively believed the deadly force he used on October 19 was necessary and that his belief was also objectively reasonable.

Again, we do not believe a reasonable argument can be made that Officer O'Brien did not believe the amount of force he used was necessary. Officer O'Brien reported that he believed he had no other force options available to him and that he felt he had to use deadly force. Officer O'Brien believed that Tubby was putting the lives of the other officers in danger. Officer O'Brien stated he shot Tubby to stop the threat and stopped shooting when Tubby was no longer pointing what he believed was a gun at the other officers. Therefore, we conclude that Officer O'Brien subjectively believed that he needed to use deadly force to terminate the threat Tubby posed.

We similarly conclude that the amount of force Officer O'Brien used in this instance was objectively reasonable. Officers attempted for more than forty minutes to try and have Tubby show his hands so they could confirm he was unarmed. At no point did Tubby either verbalize that he was unarmed nor display to officers both of his hands. Tubby then climbed out of squad #42 with one of his hands underneath his shirt. As detailed above, our office concludes Officer O'Brien reasonably believed that Tubby was armed and that he may have been attempting to turn around and fire his weapon at the other officers in the sally port. Officer O'Brien made his decision to use deadly force after more than forty minutes of Tubby being actively non-compliant with officers. The officers on scene made numerous attempts to peacefully resolve the situation by simply asking Tubby to show his hands and exit the vehicle.

In addition, officers used less lethal equipment to try and deal with the situation as well, using pepper spray, bean bag rounds, and a K-9. None of these means appeared to work. In fact, after being hit with a less lethal bean bag round as he stood on top of the squad car, Tubby continued to run with his hand under his shirt directly at officers. Officers then still used less lethal means including a second attempt at hitting Tubby with a bean bag round. Officer O'Brien did not have any less lethal capabilities at the time he was faced with making his decision. Given those circumstances, we believe it equally reasonable for Officer O'Brien to elect to use deadly force to terminate that threat.

We also considered that Officer O'Brien shot his firearm eight times, with five of those rounds hitting Tubby. We note that numerous witnesses described the gunshots occurring "rapidly," as if they occurred in immediate succession to one another. The rapid nature of the shots is confirmed by audio recordings from squad #42. It does not appear that Officer O'Brien paused at any point between shots, but rather, as he indicated, he continued to fire until he no longer perceived Tubby to be a threat to himself or other. We conclude the amount of forced used in this instance to be reasonable.

We also considered whether Officer O'Brien had the ability to retreat in this instance. In Wisconsin, an individual has no duty to make a reasonable attempt to retreat. See, e.g., State v. Wenger, 225 Wis. 2d 495, 503, 593 N.W.2d 467 (Ct. App. 1999); State v. Herriges, 155 Wis. 2d 297, 303, 455 N.W.2d 635 (Ct. App. 1990); see also Wis. JI—Criminal 810 ("There is no duty to retreat."). However, "whether the opportunity to retreat was available may be a consideration regarding whether [Officer O'Brien] reasonably believed the force used was necessary to prevent or terminate the interference." Wenger, 225 Wis. 2d at 503. We are unaware of any prior legal decision that have concluded that officers have the same duty to retreat as ordinary citizens. Indeed, it would make for poor public policy and would possibly put civilians at risk were law enforcement officers required to retreat as a first option when faced with a situation where they reasonably believed another posed an imminent threat of death or great bodily harm. In some instances, retreat may essentially amount to a dereliction of duty. In this instance, even if it were feasible for Officer O'Brien to have retreated, we conclude that he was not required to and was acting within the bounds of his duties as a law enforcement officer in choosing to use force sufficient to terminate the perceived threat.

II. Public Officer Privilege

Apart from the statutory privilege of self-defense, police officers, by the nature of their possession, have additional statutory privileges outlined in § 939.45. Wis. Stat. § 939.45(3) provides:

The fact that the actor's conduct is privileged, although otherwise criminal, is a defense to prosecution for any crime based on that conduct. The defense of privilege can be claimed under any of the following circumstances:

(3) When the actor's conduct is in good faith and is an apparently authorized and reasonable fulfillment of any duties of a public office

This "public officer" privilege is available when one acts in accord with their duties as a public officer. This privilege has two elements. The first is that the actor acted in "good faith," meaning that the actor believed "his conduct was an authorized and reasonable fulfillment of his duties" as a police officer. Wis. JI—Criminal 870. Second, the actor's conduct was "an apparently authorized and reasonable fulfillment of the duties of a public office." <u>Id.</u> "Apparently authorized" means that a "reasonable person would believe that the defendant had the authority to act in the manner he did" and "reasonable fulfillment" means the actor's conduct was "necessary and proportional in responding to the interests at stake." <u>Id.</u> Our Supreme Court has explained the purpose of this privilege thusly:

The statutory privilege defense was intended to protect a public officer who, but for the defense provided in sec. 939.45, would be guilty of a crime if he or she were acting as a private citizen, and whose unlawful conduct has "sufficient value to society so that it ought not subject the actor to criminal liability." The statutory privilege defense is designed to provide a justification for conduct which "must be in accord with the actor's function as a public servant, and must be necessary and proportional to the protection and furtherance of the interests at stake."

State v. Stoehr, 134 Wis. 2d 66, 85–86, 396 N.W.2d 1787 (1986) (citations omitted). The Court of Appeals also addressed this privilege in State v. Schoenheide, 104 Wis. 2d 114, 310 N.W.2d 650 (Ct. App. 1981). The court in Schoenheide concluded that a firefighter could not use this privilege as a defense in a prosecution for drunk driving as Schoenheide responded to a fire because firefighters are not "apparently authorized" as part of their duties to drive while intoxicated. Id. at 116.

The analysis for the applicability of this privilege largely mirrors the analysis under the privilege of self-defense or defense of others. First, we conclude Officer O'Brien was acting in good faith in this instance. Our analysis for whether Officer O'Brien's conduct was "apparently authorized" and a "reasonable fulfillment" of his duties is consistent with our analysis with respect to the reasonableness of Officer O'Brien's self-defense claim. We conclude a reasonable person would believe Officer O'Brien was authorized to act in the manner he did and that Officer O'Brien's actions were "necessary and proportional" to address the circumstances he faced on October 19, 2018. Therefore, we conclude Officer O'Brien's actions were also privileged under Wis. Stat. § 939.45(3).

III.Summary

The facts as they have been presented strongly support the conclusion that Officer Erik O'Brien elected to use deadly force against Jonathon Tubby because of his concern that Tubby presented a substantial risk of death or great bodily harm to officers and other individuals, which necessitated the use of deadly force. The evidence strongly suggests that Officer O'Brien's belief was reasonable, and that his use of deadly force was warranted under the circumstances he faced on October 19, 2018.

CONCLUSION

Jonathon Tubby's death was undoubtedly a tragic event. Our office cannot pretend to offer an explanation for the choices Tubby made on October 19, 2018. Rather, our responsibility is to evaluate the actions of Officer O'Brien, who responded to Tubby's actions by utilizing deadly force. Officer O'Brien's actions appear to be appropriate and consistent with the legal principles governing the use of deadly force by law enforcement officers in the State of Wisconsin. Therefore, in this office's opinion, Officer O'Brien did not commit any criminal wrongdoing and he was justified in using deadly force when he shot Jonathon Tubby. Our office therefore concludes that Mr. Tubby's death, while tragic and regrettable, was justified under the circumstances. Therefore, no criminal charges will be brought against Officer O'Brien.

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February 1, 2019