

Report on the Officer Involved Fatality of Michael Funk Involving Neenah Police Officers Craig Hoffer and Robert Ross

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I. INTRODUCTION

On December 5, 2015, at approximately 9:45 a.m., Michael Funk was fatally shot by Neenah Police Department (NEPD) Officers Craig Hoffer and Robert Ross during a multi-jurisdictional law enforcement response to an armed hostage situation taking place inside Eagle Nation Cycles, (EN).¹ Pursuant to Wis. Stat. § 175.47, an outside law enforcement agency was assigned to investigate this case, namely, the Wisconsin Department of Justice (DOJ), Division of Criminal Investigation (DCI). DCI Appleton Field Office Special Agent in Charge Michael Sasse assigned Special Agent (SA) Kyra Schallhorn as the lead investigator in this case, and SA Lisa Wilson as the secondary investigator. An additional 24 special agents responded to the incident and assisted in the investigation. Pursuant to Wis. Stat. § 175.47(5)(a), SA Schallhorn, the lead investigator, filed the approved summary report of the investigation on April 28, 2016.

The Winnebago District Attorney's Office requested that the Department of Justice (DOJ) assign a special prosecutor to review the fatal incident due to a potential conflict of interest. In December 2014, EN filed a complaint in Federal court against the City of Neenah, Winnebago County, and the NEPD, including its chief and one of its officers. Because this lawsuit was pending in December 2015,²

¹ EN is located at 206 Main St., Neenah, Wisconsin.

² The case was dismissed on January 20, 2016. *Eagle Nation Cycles, et al, v. City of Neenah, et al*, No. 1:14-cv-01503 (E.D. Wis. January 20, 2016). An Order Denying Motion to Amend Judgment was issued on April 26, 2016. Michael Funk was a named Petitioner in the

the case was assigned to me, Assistant Attorney General (AAG) Shelly Rusch. Special agents obtained and reviewed all computer-aided dispatch (CAD) reports, 911 calls, radio communications, squad car video recordings, body camera recordings, and other surveillance video associated with the hostage situation. I began my review of the case as reports from DCI were approved and filed. By May, 2016, DCI had prepared, assembled, and filed 136 reports consisting of approximately 1560 pdf pages. I reviewed the entire DCI investigation including all recorded digital evidence, with specific attention to the material identified in **Appendix A**. Not only did I review all of the evidence documenting the incident, but I transcribed audio recorded evidence myself and reviewed, listened to, and watched many evidentiary items multiple times. I spent well in excess of 100 hours reviewing and examining the extensive investigatory materials, meeting with DCI personnel, researching the legal issues, and writing this report.

I base this review upon the entire DCI investigation as well as: 1) reports generated by other responding law enforcement agencies; 2) a review of Wisconsin's system of Defensive and Arrest Tactics (DAAT), specifically, approach considerations, including tactical evaluation of a subject and the use of deadly force as an intervention option; 3) previous contacts by Officers Hoffer and Ross with EN and/or Michael Funk; 4) Wisconsin's privilege of self-defense and defense of others, as set forth in Wis. Stat. §§ 939.45, 939.48, and Wis. JI-Criminal 805;³ 5) the training records of Officers Jonathon Kuffel, Hoffer, and Ross; and 6) Wisconsin and Federal case law addressing the affirmative defense of self-defense and deadly force.

The purpose of this review is to determine whether criminal charges should be filed against Craig Hoffer or Robert Ross for fatally shooting Michael Funk on December 5, 2015. It is specifically not the purpose or intent of this review to determine whether police procedures could be improved or even followed or whether the decedent's surviving family should recover damages.

II. SUMMARY CONCLUSION

In determining whether or not to issue criminal charges, prosecutors are guided and informed by ethical duties imposed by our Supreme Court and the American Bar Association. A prosecutor should refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause. SCR 20:3.8(a). The ABA Standards for Criminal Justice Relating to the Prosecution Function, Standard 3-3.9 provides in part that “[a] prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges . . . in the

lawsuit.

³ WI Jury Instruction 805, entitled “Privilege: Self-Defense: Force Intended or Likely to Cause Death or Great Bodily Harm—§ 939.48, is attached, along with Instruction 810 addressing the law of retreat, as **Appendix B**.

absence of sufficient admissible evidence to support a conviction.” *See also, Thompson v. State*, 61 Wis. 2d 325, 330, 212 N.W.2d 109 (1973)(“[. . .] it is an abuse of discretion to charge when the evidence is clearly insufficient to support a conviction,” citing a previous version of Standard 3-3.9).

After consideration of all the available evidence, I conclude that the officers’ use of deadly force was not unreasonable based upon their perceived threat of imminent death or great bodily harm to themselves or others. I do not believe that the State could prove, beyond a reasonable doubt, that the officers’ perceived threat or their beliefs at the time of the shooting were unreasonable. The tragedy in this case is that even while their beliefs and perceptions were not unreasonable; they were, in retrospect, clearly mistaken.

The use of deadly force is an affirmative defense to all degrees of homicide. A person lawfully engaged in self defense, or defense of others, is privileged to utilize deadly force under certain specified circumstances. Wis. Stat. §§ 939.48(1) and (4). Wis. JI-Criminal 805 (**Appendix B**), which defines the privilege, directs that the reasonableness of the officers’ actions be judged from the standpoint of an ordinary, prudent, and reasonably intelligent person in the officers’ position, having the knowledge and training that the officers possessed, and acting under the circumstances that existed at the time. On May 6, 2016, SA Schallhorn and I met with Mr. Funk’s wife, his adult daughter, and his son-in-law in Oshkosh, Wisconsin. I explained my decision, answered their questions, and discussed the complicated facts and issues surrounding the case.

The following sections contain the summary and analysis of the factual evidence, the critical events leading up to the officers’ use of deadly force, and the application of law to the facts, all of which form the basis for this opinion.

III. SCENE LAYOUT

Special agents, with the assistance of the Wisconsin State Crime Lab (WSCL) and the Wisconsin State Patrol (WSP) Technical Reconstruction Unit (TRU), conducted an examination of the crime scene and surrounding area on December 5, 6, and 7, 2015. The crime scene was located at 206 Main Street, Neenah, Wisconsin, and extended to a neighboring alleyway behind the building. The structure located at 206 Main Street is a single story commercial business with a full basement. It houses three separate businesses, identified as Eagle Nation Cycles (EN), Eternal Flame Tattoo and Piercing, and 360 Custom Skate Shop. The majority of the structure is occupied by EN. Gord’s Pub is located in a building to the west of EN, at 210 Main Street. *See* diagram at **Appendix C**. The 200 block of Main Street is oriented in a southwest to northeast fashion. For simplicity and clarity, the front or Main Street side of EN is considered a north facing direction, with the alleyway behind the building running west to east.

The 300 block of West Doty Street is located east of the crime scene. The structure located at 300 West Doty Street is Vicky's Beauty Shop. The property encompasses the area between the alleyway and Martens Street to the south. The north side of the structure extends to the edge of the alleyway.

The alleyway located behind the 200 block of Main Street is an asphalt paved roadway approximately one and a half widths wide. From West Doty Street, the elevation to the west is slightly downward. Located in and around the alleyway on December 5, 2015, were several vehicles, including a blue 2001 Chevrolet Silverado pickup truck, registered to Brian Flatoff. The truck was facing west and was parked at a slight diagonal just to the right side of the back door of EN. None of the buildings along the south side of the alleyway, from EN to the east, provided any egress south or through to Martens Street.

Special Agents documented, collected, and preserved evidence from inside EN and the neighboring alleyway. Evidence collected from inside the building and just outside the back door included a Black Masterpiece Arms 9mm pistol with silencer/suppressor attachment, magazine, and bullets (used by Brian Flatoff); six fired .223 caliber cartridge cases; 25 fired 9mm cartridge cases; multiple fired bullets and/or bullet fragments; a DVR surveillance system; computer equipment; cellular telephones; other weapons and unfired bullets; and other miscellaneous items. Evidence items collected from the alleyway included a Kimber 1911 Pro Carry II .45 ACP (Michael Funk's gun) with magazine and bullets, 18 fired .223 caliber cartridge cases, and a few fired bullets and/or bullet fragments.

With the assistance of the WI DOT and DCI, I prepared an overview of the scene depicting the critical location point references in this report which include: 1) the front and back doors of EN; 2) the pickup truck Flatoff parked near the back door of EN; 3) the rear of Gord's Pub where the Hasty Team assembled; 4) the position of squad car 1 video at the west end of the alley, facing east; 5) the distance from squad car 1 video to Mr. Funk's body; 6) the east end of the alley and Vicky's Beauty Shop, including the northeast corner of that shop where Officers Berna, Hoffer, and Ross were positioned at the time Officers Hoffer and Ross shot Mr. Funk; and 7) the distance between Mr. Funk's body and east corner of Vicky's where the officers who fired the shots were positioned. *See Appendix C.*

IV. SUMMARY OF INCIDENT

The following summary is based upon my review of the DCI case and the material referenced in the first full paragraph of page 2 of this report. On December 5, 2015, at approximately 8:48 a.m., Brian Flatoff drove to EN under the influence of alcohol and brandishing a 9 millimeter Mack 10 handgun. Flatoff entered the business and pointed the gun at employees Michael Funk and Ryan Moderson who

were working on the main floor of the shop. Flatoff demanded to speak with an individual (Vance Dalton) whom Flatoff claimed had stolen his motorcycle. Mr. Dalton was not on the premises. A third man, Michael Petersen, entered the rear door of EN at 9:03:44 a.m., unaware of what was transpiring inside. Mr. Petersen saw Mr. Moderson working on a cycle, Mr. Funk at his desk, and another man standing next to Mr. Funk, whom he did not recognize. After making a remark and getting no response, Mr. Petersen announced that he was going to leave, at which point he noticed that the man, Flatoff, had a gun. Flatoff pointed the gun at Mr. Peterson and said “[y]ou’re not going anywhere.” Mr. Peterson was held hostage during the incident.

Unbeknownst to Flatoff, the owner of EN, Steven Erato, was in the basement, as was George Fuerte, who had been sleeping in another room. Mr. Erato called 911 and remained on the line reporting what he had briefly witnessed upstairs and what he was able to hear throughout the incident. At another point, Mr. Moderson was able to place a cell phone call from inside EN to Mr. Dalton and was able to discretely relay information from inside EN while intermittently walking away from and leaving his phone line open for Mr. Dalton to overhear. At 8:53 a.m., Mr. Dalton called 911 from another phone and relayed what he was hearing and learning to the dispatcher. A NEPD negotiator was also able to speak with Mr. Funk and Mr. Flatoff by calling the EN land line.

By 8:55 a.m., the Winnebago County Communications Center had received a 911 call reporting a hostage situation involving a man who had fired a gun inside EN.⁴ NEPD officers responded, requesting assistance from the Menasha Police Department (MPD) and the Winnebago County Sheriff’s Department.⁵ By 9:00 a.m., information was dispatched that the shooter had a Mack 10 and was holding three people hostage. By 9:03 a.m., Mr. Dalton advised dispatch that the gunman, whose name was Brian, had told the hostages that if the police were called, he would kill them all. Officers were provided a description of the gunman as a white male in a plaid jacket, with long hair and a long beard.

The NEPD began attempts to assemble a “Hasty Team”⁶ to enter EN because of the imminent threat of death to the hostages. At that point in time, only Officer Kuffel, Lt. Shaun O’Bre, and Officer Robert Ross had assembled. By 9:21

⁴ ENC surveillance from inside the shop revealed that at 8:53 a.m., Flatoff fired his gun into the wall above the heads of Funk and Moderson.

⁵ In addition, Appleton Police Department, Fond du Lac Police Department, Town of Menasha Police Department, and the Wisconsin State Patrol all responded to the scene.

⁶ A “Hasty Team” is defined as an immediate reaction team consisting of, preferably, SWAT team members for response to critical (life threatening) incidents.

a.m., dispatch advised that the man (Flatoff) had just issued a threat to start shooting the hostages within five minutes unless Mr. Dalton appeared at the business. By 9:39 a.m., Flatoff announced that he would start shooting hostages within one minute if Mr. Dalton did not appear.⁷ Lt. Tyron Thompson and Officer Hoffer⁸ then arrived at the scene and five NEPD SWAT Team officers quickly formed a Hasty Team. The officers were stacked as follows: Lt. Ty Thompson as number 1, on the ballistic shield and carrying a handgun; Lt. Shaun O'Bre as number 2, following directly behind as the "driver," armed with a rifle; Officer Craig Hoffer as number 3, following as the wingman; Officer Jon Kuffel as number 4, carrying a rifle; and Officer Robert Ross, bringing up the rear as number 5, and also carrying a rifle. A blue pickup truck, registered to Flatoff, was parked at a slight diagonal, facing west/northwest and just to the right of EN's back door.

The stack approached the back door of the business as dispatch had relayed that the front door of EN was locked, but the back door was unlocked. As the team approached, Officer Hoffer "peeled off" from the stack to open the back door. Another officer shouted "police" as the door swung open. The interior of EN was dark and the officers were backlit in the doorway. As Lt. Thompson stepped through the doorway, he immediately fell down an open flight of stairs to the right of the entryway. His right arm struck the wall as he fell, causing him to drop his handgun. As Lt. O'Bre entered directly behind, he too fell down the stairs, landing on top of Lt. Thompson on the basement floor.

Officer Kuffel then shouted instructions to "get down, get down!" Within seconds of issuing commands, Flatoff opened fire on the officers with one of the bullets striking Officer Hoffer in the front forehead area of his helmet. Officer Kuffel returned fire as Officer Hoffer dropped to the ground, stating "I'm hit. I'm hit." Officer Ross never made entry due to the heavy gunfire coming from inside EN. Approximately six seconds later, as shots were being fired, the officers retreated with Lt. Thompson and Lt. O'Bre crawling out on all fours. After the officers cleared the doorway, Officer Kuffel shouted towards the still-open back door "[a]nybody in the building, talk to me." In response, Flatoff unloaded more gunfire (approximately seven shots) towards the open door.

Lt. O'Bre, Lt. Thompson, and Officer Kuffel retreated to the northwest and to the back parking lot of Gord's Pub, while Officer Hoffer, assisted by Sgt. Angela Eichmann, ran to the southeast corner of the alleyway. Officer Ross also ran to the east end of the alley and then to the sidewalk on the east side of Vicky's Beauty

⁷ A police negotiator made phone calls to EN and spoke with both Michael Funk and Brian Flatoff.

⁸ Officer Hoffer was on FMLA leave at the time and was called in from home.

Shop.⁹ Sgt. Eichmann and Officer Ross checked on Officer Hoffer, who had dropped to a seated position against a telephone pole in the grassy area between the sidewalk and street on the east side of Vicky's, to determine whether the bullet had penetrated his helmet. Officer Hoffer had a visible injury to his forehead as a result of impact upon his helmet absorbing the bullet and had a swelling abrasion; however, the bullet had not penetrated the interior helmet wall. See 12 time-stamped still images of the Hasty Team entering and exiting EN, **Appendix D**.

Based upon their collective observations of the persons inside EN in the time they had visual contact, the officers began to discuss how it did not appear, nor did they believe, that anyone was being held hostage inside EN. The exchange included references to a belief that they had been ambushed and "baited" to enter for the purpose of being shot at and killed.¹⁰ This radio traffic information included the NEPD officers behind Gord's Pub, who then began to monitor the west side of EN for a potential sniper/ambush threat.

While on the Doty Avenue sidewalk, two minutes and 22 seconds after Officer Ross had run to safety, officers at the southeast end of the alley heard another round of gunfire coming from the back of EN. Officers Hoffer and Ross immediately took positions behind MPD Officer Raymond Berna, who was kneeling with a ballistic shield at the southeast corner of the alley (the northeast corner of Vicky's), maintaining visual contact with the back door. Their view was obstructed by Flatoff's pickup truck parked to the right side of the door. Officer Hoffer was crouched behind Officer Berna, with Officer Ross taking position to the right of Officer Hoffer.

At 9:45:29 a.m., immediately after hearing shots fired from the back of EN, officers at the southeast end of the alley positioned themselves at the northeast corner of Vicky's. Within seconds, they saw a man come around the driver's side of the blue pickup truck, moving away from the back door of EN. The man was in motion, crouched, and turning. The man, later identified as Michael Funk, appeared to have a gun and his arms were raised and outstretched, as though he was "scoping" or looking for a target in the direction he was pointing a gun. Initially the man had his back towards the officers at the southwest end of the alley. However he then hopped backwards alongside the passenger side of the pickup truck, towards the rear of the truck, and began to spin or turn counter clockwise to his left, with the gun still in his right hand. As the man was in motion, turning from his right to left and towards the officers at the south end of the alleyway, Officers

⁹ Employees and patrons inside the hair salon had been instructed to stay inside and away from the windows and to remain low to the ground.

¹⁰ SWAT training addressed the realities and the importance of recognizing these specific scenarios.

Hoffer and Ross fired, killing the man later identified as Michael Funk. Mr. Funk was found to be holding a gun in his right hand. The gun was identified as a Kimber 1911 Pro Carry II .45 ACP with magazine and bullets. It was approximately ten seconds from the time the officers heard gunfire from the back of EN until they fired their first shot.

After Mr. Funk went down, an officer yelled “[s]how your hands! About 20 seconds later, radio traffic captured officers reporting “suspect down” and “unknown his identity,” as they maintained their positions at the southeast end of the alley. Approximately two minutes later, Sgt. Eichmann and Officers Ross and Hoffer began to talk about the man down, stating their belief that he was the one shooting at them from inside EN and that he appeared to be hiding behind the truck. This communication is captured on Officer Ross’s and Sgt. Eichmann’s body camera audio. About 12 seconds later, dispatch is heard stating “[s]o far, the shooter’s still inside.”

At approximately 10:01:15, after extensive police negotiations, Michael Petersen and Ryan Moderson were allowed to leave and came out the back door of EN with their arms raised. They kept their hands raised until they were taken into police custody. At 12:54 p.m., Flatoff surrendered and was taken into custody. The investigation later determined that Flatoff was armed with a Black Masterpiece Arms 9mm pistol, and it was Flatoff who had fired all rounds inside Eagle Nation Cycles. On December 9, 2015, the Winnebago County District Attorney’s Office charged Flatoff with 16 felony crimes in relation to his conduct at EN on December 5, 2015, including Felony Murder, for the death of Michael Funk. *See Appendix E.*

V. REVIEW OF AUDIO AND VIDEO

Special agents obtained and reviewed multiple audio and video recordings related to this incident, including 911 calls; radio traffic maintained by Winnebago County dispatch; body cameras worn by Lt. O’Bre, Sgt. Eichmann, and Officer Ross; squad car videos from the squad cars of Lt. O’Bre, Sgt. Eichmann, and Officer Ross; the external microphone recordings of MPD Officer Raymond Berna, a DVR surveillance system located within EN; and recorded telephone calls between hostage negotiators and Flatoff. I independently reviewed this evidence, comparing transcriptions for accuracy and transcribing relevant sections of audio evidence myself. *See Appendix A.*

Because of the complexity and ongoing nature of this incident, no single video or audio source captured the entire incident. Lt. O’Bre left squad car 1 running at the west end of the alley, facing east, so that the squad car’s camera captured radio traffic and video footage occurring in the alley, including the back door of EN. The squad car was 158.85 feet from Mr. Funk’s body position when the event concluded.

No law enforcement officer had that vantage point or had access to the video as the events unfolded.

The body camera worn by Officer Ross captured audio and video related to both the Hasty Team entry and events at the southeast end of the alley after the initial shooting and through the shooting of Mr. Funk. The body camera worn by Sgt. Eichmann captured audio and video of officers positioned at the east end of the alley, her recovery of Officer Hoffer, and the events at the south end of Vicky's after the initial shootout and through the shooting of Funk. It is important to note however, that the video from the officers' body cameras does not capture what the officers were seeing from the southwest end of the alleyway because, unlike a stationary video camera, these devices were affixed to the officers' uniforms and the officers were in constant motion, bent down and taking cover. No camera captured a clear view of the officers' observations from the southwest end of the alley.

A video surveillance system located within EN captured only video (no audio) of events occurring inside the business during the incident. Audio was captured from the NEPD negotiator calls to the landline inside EN. It is unclear whether any information from the negotiator calls was relayed to dispatch or the officers. Audio was also captured from 911 calls placed to the Winnebago County Communications Center including: 1) Vance Dalton's call, in which he reported what he was hearing from Ryan Moderson's open line inside the business, and; 2) Steven Erato's calls from the basement of EN. These calls were recorded and preserved. Not all information relayed to the 911 call takers was necessarily relayed via dispatch on the police channel to the officers at the scene. While dispatchers utilized one police radio channel to relay information, the SWAT team members had their own encrypted channel. In addition, individual agencies were able to communicate amongst themselves (e.g., NEPD officers could radio with other NEPD members, while other officers had intra-agency communication).

For purposes of this analysis, I examined not only the information that outside callers provided to dispatch, but focused on what information was actually relayed to Officers Hoffer and Ross prior to the moment they shot and killed Mr. Funk. There is no evidence that *all* 911 or any negotiator call information was relayed via radio traffic to the officers on scene.

The following sources of digital evidence are time stamped; Squad car 1 video/audio, Officer Berna's external microphone as heard from his squad car, the initiating times of the NEPD negotiator and 911 calls, and the EN surveillance video.¹¹ These sources are covered first in **Section A**. The body camera footage is not time-stamped, but where I was able to document critical events within the time-

¹¹ However, based on comparisons with squad car 1 video and negotiator calls, the EN surveillance tape is time-stamped fast by 48 – 49 seconds.

stamped data (e.g., Hasty Team entry, timing of shots fired, when Mr. Funk can be seen flying out the back door of EN, etc.), I was able to assign real time markers to some portions of video-timed body camera evidence. These sources will be covered in **Section B** and sometimes referenced only by the video clip's time passage clock.

Based on a review of all available video and audio recordings, the following is a summary and approximate timeline of events surrounding the incident.

A. Time-Stamped Data

1. Eagle Nation Surveillance¹²

At 8:53 a.m., EN surveillance footage shows Flatoff inside, raising a firearm in his left hand and pointing it directly at Mr. Funk and Mr. Moderson, causing them to raise their hands above their heads. Flatoff appears to be speaking with someone on a cell phone in his right hand. About ten seconds later, Flatoff appears to discharge the firearm into the wall directly behind the two hostages, causing them to visibly flinch.

At about 9:42:03, the back door swings open and the Hasty Team attempts entry. By 9:42:09, the first two officers can be seen falling down the stairway. By 9:42:17, the fire extinguisher located to the left of the screen is struck by gunfire and white dust begins to obscure visibility. Officers begin to retreat and by 9:42:31, Lt. Thompson can be seen with his shield raised as he retreats from the basement stairwell out the door. At 9:42:52, flashes can be seen, which correspond to the seven shots Flatoff fired towards the back door when Officer Kuffel yelled "[t]alk to me!" By 9:45:00 Mr. Funk is seen rising from the ground to a standing position. At 9:45:16, Mr. Funk can be seen with his arms raised walking from the bottom left of the screen toward the open back door. At 9:45:29, Mr. Funk is seen suddenly moving out the door and attempting to slam the door closed with his right hand. The door appears to strike the door jam and bounce open again.

2. Dispatch and Negotiator Calls

Beginning at approximately 8:55 a.m., officers were dispatched to EN and began setting up a perimeter on the east end of the alley on West Doty St. at the corner of Vicky's Beauty Shop. Other officers gathered behind Gord's Pub, west of EN, and formed the Hasty Team. A description of the shooter was given over the radio as a white male in a plaid jacket, with long hair and long beard. At 9:22 a.m., dispatch relayed information via the radio that the shooter indicated he will start shooting hostages in five minutes if someone did not arrive at the location. At 9:39

¹² Reported times have been adjusted to correct for the 49-second time-stamp disparity (i.e., if the surveillance records 9:00:49, the real time is 9:00:00).

a.m., dispatch relayed information via the radio that the shooter just told the subjects inside that if someone doesn't get there within the next minute or so, everyone is going to die.

3. Squad Car 1 Video

A review of **squad car 1 video** (corroborated by audio from Officer Ross' body camera data) reveals the following:

- At 9:41:45 a.m., the Hasty Team begins their approach from behind Gord's Pub to the west of EN towards the back door;
- At 9:42:02 a.m., officers make entry into the back door of EN;
- Between 9:42:11 a.m. and 9:42:30 a.m., several exchanges of gunfire are heard. All officers back out or are pulled out of the building;
- At 9:42:48 a.m., an officer is heard shouting "[a]nybody in the building! Talk to me" in response to which seven additional gunshots are fired from inside EN;
- At 9:43:03 a.m. Lt. O'Bre, Lt. Thompson, and Officer Kuffel are seen retreating west, northwest from the back door;
- At 9:43:09 a.m., Officer Ross is seen rounding the southeast corner of the alley, to the east side of Vicky's Beauty Shop.

A review of surveillance from inside EN combined with **conversation from the negotiator's calls**¹³, reflects that at about 9:45:07 a.m., Flatoff told Mr. Funk to close the back door and as Mr. Funk walked towards the back door, hands raised overhead, Flatoff stated, "if you fucking run out that back door I am going to fucking unload on you." Mr. Funk walked slowly toward the back door and at the last minute sprinted out while simultaneously trying to slam the door closed behind him. The second Mr. Funk made the break, Flatoff immediately opened fire.

Between 9:45:30 and 9:45:32 a.m. Flatoff unloaded between five and seven shots in the direction of the back door, at Mr. Funk. These shots can be heard from Officer Ross's and Sgt. Eichmann's body cameras at the east end of Vicky's Beauty Shop. Based upon the digital evidence, two minutes and 38 seconds elapsed between Flatoff's last shot fired at the officers who had retreated (at 9:42:52 a.m.) and the next round of fire discharged at Mr. Funk exiting the rear door (at 9:45:30 a.m.). From the time Officer Ross cleared the southeast corner of the alley to safety, only two minutes and 22 seconds had elapsed before gunfire was heard again coming from the rear of EN.

¹³ My summary of the relevant negotiator calls are attached as **Appendix F**.

A close review of **squad car 1 video** reveals the following movements by Mr. Funk:¹⁴

- At 9:45:29 a.m., the first image of Mr. Funk at the back door is visible.
- At 9:45:30 a.m., he is out the back door.
- At 9:45:32 a.m., he is down on his stomach in front of the truck.
- At 9:45:33 a.m., he is getting up in forward motion.
- By 9:45:34 a.m., he is crouching, bent half forward with his head facing the driver's side back panel of the truck, hopping forward and grabbing a pistol from right hip.
- Between 9:45:36 and :39 a.m., he is hopping backwards, towards the back of the pickup truck, with his arms outstretched facing west towards the back door. He points an extended right arm, then lowers his gun and hops backwards away from (east of) the back of the truck and then pivots, moving clockwise and turning in a southeasterly direction.
- 9:45:38 a.m., first officer shot fired followed by additional shots fired.
- 9:45:40 a.m., Mr. Funk goes down facing southeast.
- 9:45:42 a.m., last shot fired.

4. Officer Berna's External Microphone

Officer Berna's external microphone is accurately time-stamped, and captured the following, of relevance to this investigation:

- 09:39:45 – 54 “Brian just told the subject that we have the open line with that if his (inaudible) does not get there within the next minute or so everyone is going to die.”
- 09:41:22 (Dispatch states and does not spell) “Brian Flatoff”
- 09:42:08 (Loud yelling) “[g]et down, get down. Shots fired, shots fired. Get him out of here.” (A female saying) “this way Hoffer.” (Another voice saying) “it just hit my helmet, I’m good let’s go.” (Another voice yelling) “get out of there, get out of there.”
- 09:42:10 (Can hear first shots fired. Gunshot continuing until 9:42:28).
- 09:42:48 “Talk to me” followed by gunfire.
- 09:43:50 Loud yelling, “Get out of here! Get out of here! Get out!”
- 09:44:36 “ ... officers appear fine, we have one that was hit (inaudible), we’re not sure if these were actual hostages or if it’s a bait pile¹⁵ ... (inaudible) multiple shots fired ...”¹⁶

¹⁴ Still photos from the video are printed one per second between 9:45:28 and 9:45:43, attached as **Appendix G**.

¹⁵ The term “bait pile” is a term used in SWAT training when someone is baiting the officers into a location or setting them up to take them out (shoot and kill them).

- 09:45:30 (Can hear multiple shots are fired which sound to be from the building as they are muffled.)
- 09:45:36 (Can hear a female voice say), “this is him” or “is this him?” (Then a male voice), “this is the bad guy?”
- 09:45:40 (Loud rapid gunfire.)

B. Data Not Real-Time Stamped

1. Sgt. Eichmann’s Body Camera

Sgt. Eichmann’s body camera was activated for approximately one hour, 42 minutes and 9 seconds. I reviewed the audio and visual recordings provided to me in five media files which were not time-stamped. **Media File 2** is 30 minutes, 30 seconds in length and begins when Sgt. Eichmann was at the south end of Vicky’s Beauty Shop, just after the Hasty Team made entry. Relevant excerpts from this source are as follows:¹⁷

- 4:11 – 4:15 (Seven rapid gunshots followed by five return gunshots).
- 4:18 – 4:29 (More gunfire) “I got to go up there.” (Running westbound up alley on right side). (More gunfire heard).
- 4:38 – 4:48 “Hoffer. Here” (she runs behind Hoffer who is running eastbound down the alley and directs him to the right of the alley, on the east side of Vicky’s Beauty Shop).
- 4:52 (*Hoffer sits down on grass leaning back against telephone pole*).
- 4:50 “Did it go through my helmet? . . . no? I’m good then, let’s go.”
- 4:55 “No you’re not good. We got enough guys there.”
- 4:59 “No, we don’t. We don’t . . . have enough fucking guys there.”
- 5:02 “Craig, you know you can’t go back there right now. Sit tight.”
- 5:09 (*Shouting commands at passersby*)
- 5:14 (Voice). “He’s in a helmet but it didn’t go through. He’s not going in.”
- 5:20 “. . . “I’m fine, it did not penetrate the helmet. It did not penetrate the helmet.”
- 5:26 “Whew! Thank God for good new helmets.”
- 5:38 (*Hoffer gets up from sitting on grass, walks around on sidewalk and eventually east of Vicky’s, then approaches corner – SW corner of alley, NE corner of Vicky’s*)
- 5:50 (Shouting at passersby), “[g]et out of here. Get out of here. Gunfire. Get out!”

¹⁶ Emphasis added based upon the heightened condition of the officer’s speech, the cadence of which I describe as out-of-breath, rapid staccato-like outbursts.

¹⁷ The time assignments reflect the minute-second marks into the audio that can be heard on the audio clip, which begins at zero.

7:28 – 7:30 (Gunshots heard from rear of Eagle Nation, approximately seven)
 7:34 “([I]naudible) . . . this is him! . . . More shots fired, he’s out in the back . . .
 7:37 –7:41 (Hoffer and Ross firing)
 7:43 “. . . One’s down. One’s down.”
 7:57 “Show your hands!”
 8:20 “Suspect down One man down back alley . . . long hair, gray black hair.”
 8:35 “Unknown his identity.”
 10:45 “He’s the guy that was shooting at us from inside”
 10:48 (Eichmann) “that was the one that was shooting from inside?”
 10:49 (Male voice) “pretty sure it was, that’s what he looked like.”
 10:54 (Eichmann) “cuz he was hiding behind the truck, so it wasn’t like a my impression was a victim trying to run away, he was”
 11:07 (Dispatch voice) “so far the shooter’s still inside

The following is transcribed from Sgt. Eichmann’s body camera, **Media File 3**, which is 30 minutes and two seconds long. This section occurs as she is conferring with a SWAT team member at the northeast corner of the alley on West Doty Street sometime after Mr. Funk was shot.¹⁸

18:42 (unknown male SWAT) “Who are they negotiating with now?”
 18:45 (Eichmann) “. . . (inaudible) They took a gun away from him when they pulled him in. . . . Up against back here, they took it and set it against the building, yeah, it’s a gun.
 18:54 – 19:24 “We were back here, he comes around on the other side of the truck, but facing the back door and we’re trying to register .. and he comes around on the other side of the truck but facing the back door, and we’re trying to register who he is or what he is and suddenly hear shots fired ... shots were being fired Yeah ... so then he started shooting and we shot back so ... (inaudible) ... I don’t know he’s the suspect, he’s supposedly the owner, ... but he shot. He shot. ... He called him MO. MO the owner, M something ...”

2. Officer Ross’ Body Camera

Officer Ross wore a body camera which captured a total of 3 hours, 23 minutes and 37 seconds. I reviewed these audio and visual recordings in seven media files which were not time-stamped. **Media File 2** covers the assembly, approach and entry of the Hasty Team. I transcribed the following audio, relevant to this review, as follows:

¹⁸ Again, the time assignments reflect the minute-second marks into the 30 minute audio clip and do not reflect real time.

14:34 – 14:39 “Down, Get down!”
 14:40 – 14: 42 First shots fired (Flatoff)
 14:46 “I’m hit. Agh, I’m hit in the head.”
 14:47 Shots fired (volley)
 14:52 – 14:54 “Back out! Back out!” (More shots fired).
 14:58 “Stop fire, stop fire, an officer’s hit!”
 15:05 “Cover the door!”
 15:09 – 15:10 “Get him outa here. Get him outa here”
 15:15 “Anybody in the building, come out, talk to me!”
 15:16 – 15:19 (seven shots fired from inside)
 15:30 – 15:36 (Ross running east down alleyway rounding the southeast corner of the alley which is the northeast corner of Vicky’s Beauty Shop)
 17:58 (Muffled sound of shots fired while Ross is on the sidewalk on the east side of Vicky’s Beauty Shop).
 17:59 (Ross and Eichmann approach the southeast corner of the alley with firearms drawn).
 18:04 (Believed to be Officer Eichmann). “. . . This is him!”
 18:07 – 18:11 (Sound of gunfire from officers).
 18:12 “He’s in the alley, one’s down!”
 18:15 – 18:16 “Shots fired in the alley, one’s down!”
 18:17 “One suspect down.”
 18:27 “Show me your hands!”
 18:58 “Man has long hair, gray and black hair, not sure, not sure.”
 19:04 – 19:05 “Unknown his identity.”
 20:30 – 10:31 (Hoffer). “I’m going over to the ambulance”
 21:11 – 21:14 “We don’t know, did this guy have a beard? OK.”
 21:15 – 21:17 “. . . he’s the guy that was shooting at us from inside . . .”
 21:18 (Eichmann). “That’s the one that was shooting from inside?”
 21:19 – 21:20 “I’m pretty sure it was. That’s what he looked like.”
 21:24 (Eichmann). “He was hiding behind the truck, so it wasn’t like . . .”
 21:26 – 21:31 “That’s because he saw us, he saw us leave that way”
 21:33 (Dispatch). “. . . The shooter is still inside”
 21:34 (Ross). “He’s what?”
 21:35 (Dispatch). “So far the shooter is still inside.”

Officer Ross’ Media File 5 is 30 minutes and two seconds long. The following is transcribed from audio of Officers Ross and Hoffer.

00:17 “that was scary as Hell”
 00:18 – 00:24 “. . . and I didn’t think about it until you guys started getting fired at and I got no place to shoot at.”
 00:26 – 00:32 “yeah I never even got to um . . . fire . . . we fuckin’ stopped in the (inaudible) that’s why I fucking got shot.”

00:33 – 00:37 “they tripped over something. I didn’t see any inside I just saw the dude and a bunch of motorcycles it looked like.
00:38 – 00:39 “Well there was fucking three dudes or four dudes in there. . .”
00:40 “Was there? I just saw the one.”
00:56 – 00:59 “They ambushed us, motherfuckers. . . . There was nobody in there as a hostage.”
1:00 “No. Fuck that.”

Later on the sidewalk east of Vicky’s Hair Ross and Hoffer talking with other SWAT team member.

2:14 “What does this guy look like?”
2:15 “We have no idea.” “We have no idea anymore.”
2:25 -2:37 “It was all bullshit. It was all set up to come in. They . . . standing around, there was four or five of them standing around doing nothing and we walked in and all of a sudden we started taking fire from them. . . . Yeah, there was no fucking hostage anywhere. . .”
2:37 “. . . Ambush”

Ross interacting with another officer

21:21 “What happened?”
20:22 “So, we got called . . .”
21:13 “So there’s a guy in there. He’s got hostages. He’s going to shoot ‘em if somebody doesn’t show up. (inaudible) . . .”
21:18 “So they go in, start taking fire inside and return a little bit of fire in there and it just becomes a jumble in the door (inaudible). . . . One person inside . . .”
22:56 “So we withdraw. Hoff and I end up over here, um Hoff gets checked out, comes back, (inaudible) . . . Ray and the Lieutenant are here and (inaudible) . . . guy comes out, all sneaky with a gun (inaudible) . . .”
23:24 “So guy came out, shot was fired, Craig and I returned fire, he went down.”
23:28 “Where did you see him?”
23:30 “We saw him come out from the exit he was facing the opposite way, cuz he saw, he thought . . . most of the team . . . backed that way . . . he’s got a gun . . .”
23:40 “Honestly I didn’t process a gun, I processed a gunshot.”

VI. STATEMENTS OF LAW ENFORCEMENT OFFICERS

On December 9, 2015, SA Schallhorn and SA Wilson interviewed NEPD Officers Kuffel, Hoffer, and Ross. On December 5, 2015, other SAs interviewed Lt. O’Bre, Lt. Thompson, and Sgt. Eichmann. I address these interviews in two

subsections based upon the vantage points of the officers at the time Mr. Funk was shot. As described previously, Lt. O'Bre, Lt. Thompson, and Officer Kuffel were positioned at the rear of Gord's Pub, northwest of the EN backdoor and notably outside the view of the backdoor of EN, Mr. Funk's exit, or the other officers' shooting. See Section A. Section B consists of the four officers at the southeast corner of the alley who observed the person (later identified as Mr. Funk) exiting the rear of EN and moving in an easterly direction in the alley. In order, these are MPD Officer Ray Berna, NEPD Officer Hoffer, and Offer Ross, along with Sgt. Eichmann.

A. Vantage Point from Northwest Side of Back Door (Thompson, O'Bre, and Kuffel).

1. NEPD Lieutenant Tyron Thompson

Lt. Thompson is the training lieutenant for the NEPD. On December 5, 2015, at about 9:19 a.m., Lt. Thompson was off-duty when he received a SWAT page indicating that there was a hostage situation at Eagle Nation Cycles. Lt. Thompson responded to the NEPD to collect his gear.

Lt. Thompson recalled arriving on scene at about the same time as Officer Hoffer, parking his squad car one block west of EN and meeting up with Lt. O'Bre, Officer Ross, and Officer Kuffel behind Gord's Pub. As soon as he arrived, dispatch advised that the suspect inside the building had made a threat to begin killing hostages within one minute. Lt. Thompson stated that the officers then decided to enter the building through the back door in the alleyway.

Lt. Thompson stated that he was the first officer to enter the building and was holding a tactical shield in his right hand and his duty-issued pistol in his left hand. He was looking through a small window in the tactical shield, which made it difficult for him to see. Upon entry, Lt. Thompson moved to the right and immediately fell down a flight of stairs, with Lt. O'Bre falling directly behind him. When Lt. Thompson regained his balance and stood up, he heard gunshots, which he described as "lighter" gunfire, followed by louder, more intense gunfire. Lt. Thompson thought he heard approximately 20 gunshots total. Lt. Thompson stated that when he went back up the stairs, he held his tactical shield higher to try to provide cover for the other officers as they exited the building through the rear door. Once outside the door, Lt. Thompson heard Officer Kuffel say something like, "Hoffer's hit!" Lt. Thompson then observed Officer Hoffer on the ground near the building and heard automatic gunfire coming from inside the building in their direction.

Lt. Thompson recalled that he retreated to the west of EN to take cover near the back of Gord's Pub, along with Lt. O'Bre and possibly Officer Kuffel. He believed that Officer Hoffer went to the east, near West Doty Street, to take a position of cover there. Approximately two minutes later, Lt. Thompson heard more gunfire

although he could not identify where the gunshots were coming from. Lt. Thompson did not see Mr. Funk exit the building or the officers at the east end of the alley shooting.

The first time Lt. Thompson saw Mr. Funk is when he approached the two individuals who were exiting the back door, identified as Michael Petersen and Ryan Moderson. Then, Lt. Thompson observed an individual lying face down in the alleyway near the back door to EN. He did not know how this individual got there or how long this individual had been lying in the alleyway.

2. NEPD Lieutenant Shaun O'Bre

Lt. O'Bre, a former tactical team leader for the NEPD, had 26 years of law enforcement experience on December 5, 2015, when the weapons call at EN was dispatched. He was the NEPD day shift supervisor that day and responded to the call. Lt. O'Bre parked his squad car on the west end of the alley with the front of the car facing the rear door of EN. (Squad Car 1 Video source). Lt. O'Bre directed other officers to various perimeter locations, communicated with dispatch, and began to coordinate offers for a Hasty Team entry. Lt. O'Bre had Officer Ross meet him near the southwest corner of Gord's Pub. Lt. O'Bre heard dispatch relay that the suspect was giving five minutes to speak with someone or he would start shooting people. Officer Kuffel began to organize the Hasty Team as Lt. O'Bre heard dispatch relay that the suspect was now stating he would start shooting hostages in one minute unless the person he wanted to speak with arrived.

Lt. O'Bre described Lt. Thompson as the lead officer with a ballistic shield in his right hand and a handgun in his left hand when the Hasty Team made its entry. Lt. O'Bre indicated he was second in the stack with his rifle; and Officers Kuffel, Hoffer, and Ross were behind him. When entry was made, Lt. O'Bre described the interior as "pitch black" with the officers backlit from the brightness of the outdoors. Lt. O'Bre observed an individual wearing a plaid coat, which matched the description dispatch had provided of the suspect.

Lt. O'Bre indicated that he and Lt. Thompson stepped to the right upon entering, and both fell down an open stairwell, landing on the cement floor at the bottom. Lt. O'Bre immediately got up and began to climb the stairs but saw vapor trails from bullets crossing overhead. He believed the gunshots were coming through the wood wall of the stairwell or crossing above the cement floor. Lt. O'Bre then observed the muzzle blast from his fellow officers returning gunfire near the rear doorway. Lt. O'Bre and Lt. Thompson crawled out the rear door on their hands and knees while their fellow officers returned gunfire. Officer Kuffel grabbed Lt. O'Bre and pulled him out the doorway. Lt. O'Bre, Lt. Thompson and Officer Kuffel retreated to the west and back to the southwest corner of Gord's Pub, while Officer Ross and Officer Hoffer went to the east.

Lt. O'Bre reported that he believed the officers may have been set up for an ambush. As a result, he and other officers began to strategize and coordinate new contingency plans. The officers located at the back of Gord's Pub continued to cover the southwest corner of EN (the area closest to the rear door), the west side of EN, as well as second story locations which were a safety concern for officers if the situation was indeed an ambush setup for law enforcement.

Lt. O'Bre stated he heard additional gunfire and knew a subject was down outside the business near the alley, but he could not see any of this from his location. Lt. O'Bre remained on the southwest corner of Gord's Pub, covering the rear door and west side of EN when the Bearcat armored vehicle arrived and extricated the individual who was down in the alley. From Lt. O'Bre's position, he could not see the extrication.

3. NEPD Officer Jonathan Kuffel

Officer Kuffel is the SWAT team leader for the NEPD and a master firearms instructor. He has extensive training in SWAT team operations and teaches law enforcement nationwide. Officer Kuffel was off-duty on December 5, 2015, when he was called in at approximately 9:11 a.m., having been told that gunshots had been fired and there was a hostage situation at EN. While responding to the NEPD, Officer Kuffel asked dispatch to page the NEPD SWAT team to report to the incident. Officer Kuffel also requested that the Winnebago County SWAT team and Bearcat armored vehicle respond, as well as the Appleton Police Department snipers and their armored vehicle. Officer Kuffel went to the NEPD to assemble his gear as he continued to listen to radio traffic. Officer Kuffel heard Lt. O'Bre managing the scene and dispatching other officers. He heard someone announce "if someone is not there in five minutes he will start killing people." Officer Kuffel did not know who that someone was, but knew that the hostage taker was demanding that someone be at the location within five minutes.

Officer Kuffel arrived and went to the area behind Gord's Pub, where Lt. O'Bre and Officer Ross were located. Officer Kuffel ascertained that they were already five minutes into the countdown, that the suspect was named Brian, that Brian had a beard, long hair, was wearing a flannel shirt, and was armed with a shotgun or a Mac 10. Officer Kuffel next heard dispatch announce that the suspect was going to start shooting hostages in one minute unless the person he wanted on the premises appeared.

As soon as Lt. Thompson and Officer Hoffer arrived, Officer Kuffel started stacking the officers for a "hasty entry" into the building. Officer Kuffel advised that the SWAT team is trained for such a response in an active shooter-type situation. The Hasty Team approached the back of the building and entered through the back door. Officer Kuffel recalled looking into the business and seeing bikes, toolboxes, and other items. He also saw two people inside. Officer Kuffel recalled

Lt. Thompson saying something such as “police,” “hands,” or “get down,” and that both he and Lt. Thompson were giving commands and yelling.

Officer Kuffel stated that the two individuals he saw inside the building did not acknowledge the police presence, were not reacting to commands, and acted as though the police were not even there. Officer Kuffel said the two individuals split, with one walking to Officer Kuffel’s left, and the other (with a beard and longer hair) going to his right. Officer Kuffel said he could only see the individuals from the chest up due to an obstructed view. Officer Kuffel said that as the two individuals split, he thought they were flanking the officers. Officer Kuffel said it was as if the people inside the business were doing a room entry on the police, and that it “was not right.” Officer Kuffel said he believed it was an ambush or a “bait pile,”¹⁹ and the individuals were trying to get the officers inside.

Officer Kuffel said “all hell broke loose” as gunshots were fired and he felt the percussion on his face of rounds going off. He said it was either an automatic weapon or someone pulling the trigger as fast as possible. Officer Kuffel heard someone yell out “I’m hit.” Officer Kuffel said Lt. O’Bre and Lt. Thompson were gone, and Officer Hoffer was on his back as the shooting from inside continued. Officer Kuffel believed whoever was shooting was trying to kill the officers. Officer Kuffel said he used his .223 caliber AR-15 rifle and directed fire into the building to stop the ambush.

Officer Kuffel felt gunfire coming from the area where he had observed the individual move to his right and fired back in that direction, at which point he hit something that made a sound (“whoosh”). He said it was as if a smoke bomb had gone off in the building, and he believed he hit a fire extinguisher. Officer Kuffel said everything went in slow motion as the fire extinguisher expelled and it was at this point when his memory went black, and he no longer had clear recollection. He recalled that he was low to, or on, the ground outside the building and saw Officer Hoffer on his back, grabbing his head. Officer Kuffel said there were more gunshots fired from inside and it felt as though those gunshots were right next to him, on the other side of the wall. He feared that the people inside were coming out after them, so he leaned back into the doorway and fired another two or three gunshots in the same direction. At that point, he saw Lt. O’Bre’s head appear from the basement stairway and he ceased fire.

Officer Kuffel then moved back to the area behind Gord’s Pub as did Lt. Thompson and Lt. O’Bre. Officer Kuffel heard via radio traffic that Officer Ross was with Officer Hoffer at the other end of the alley. Officer Kuffel said he heard additional gunfire and heard on radio traffic that a subject was down in the alley, although he was unable to see any of this activity.

¹⁹ The term “bait pile” is a term used in SWAT training when someone is baiting the officers into a location or setting them up to take them out (shoot and kill them).

Officer Kuffel said the Winnebago County Bearcat armored vehicle arrived, and officers discussed rescuing the individual that was down in the alley. A rescue team retrieved the individual from the alley and transferred him to the Gold Cross paramedics. Officer Kuffel said he and Lt. O'Bre stayed behind Gord's Pub during the rescue. When Lt. Thompson, who was part of the rescue team, came back, Lt. Thompson told Officer Kuffel that the individual had a gun in his hand and his finger was on the trigger or in the trigger guard.

Officer Kuffel was asked about his contacts with and/or knowledge of EN prior to December 5, 2015. Officer Kuffel explained that he had been involved in the execution of a search warrant there in September 2012, which was now the subject of a lawsuit by EN against the city of Neenah. Officer Kuffel said he was a part of the entry team for that search warrant, and he believed that he took Michael Funk into custody on that day. Officer Kuffel recalled that Mr. Funk had a loaded .45 caliber handgun on him at the time. Officer Kuffel said he has also probably dealt with others affiliated with EN during traffic stops while on patrol. Officer Kuffel did not recognize any person inside EN when the Hasty Team attempted entry and he did not recognize the individual who was down in the alley. Officer Kuffel had never heard of Brian Flatoff and never had any prior contact Flatoff.

B. Vantage Point from Southeast End of Alley (Berna, Hoffer, Ross and Eichmann).

1. MPD Officer Raymond Berna

On December 5, 2015, at 8:59 a.m., Officer Berna was dispatched to EN in Neenah for a report of a man with a gun inside and possible hostage situation. Officer Berna went to the east side of Vicky's Beauty Shop where he met with MPD Lt. Angela Hanchek and NEPD Sgt. Angela "Woldt."²⁰ Officer Berna was given a ballistic shield with the word "POLICE" written in large bold letters on the front, which he positioned in front of him on the northeast corner of Vicky's Beauty Shop to provide cover as he monitored the back door of EN.

Officer Berna saw the NEPD Hasty Team assemble on the southwest side of EN enter through the back door and almost immediately take gunfire. Officer Berna heard one NEPD officer yell, "I'm hit" and saw Officer Hoffer fall backwards out the doorway and onto the ground. Officer Berna also saw the other NEPD officers quickly exit the building, retreating backwards, while gunshots were still being fired. Officer Berna saw Sgt. Eichmann assist Officer Hoffer back to their position at the east end of the alley and heard Officer Hoffer say that he had been shot in the helmet. He also heard Officer Hoffer ask if the round had gone through his helmet. Officers Hoffer and Ross then took up positions behind Officer Berna, at the southeast corner of the alley (also the northeast corner of Vicky's Beauty Shop).

²⁰ Officer Berna wrote his report referring to NEPD Sgt. Angela Eichmann by her former name, "Sgt. Woldt." For clarity sake, I will refer to her henceforth as Sgt. Eichmann.

Officer Berna was in a kneeling position behind the shield; Officer Hoffer was positioned over his right shoulder and Officer Ross behind and to the right of Officer Hoffer.

According to Officer Berna, a man exited the back door of EN, facing northwest and he heard several gunshots from the man's general direction. The man appeared to be holding something in his hands as both of his shoulders were rolled forward and his hands remained together in front of his body as if in a shooter's stance. The man had longer hair, was large in stature, and was wearing a black and yellow vest. The man positioned himself behind the blue truck in the alley, still facing northwest with his hands together in front of his body. The man appeared to be holding something and he looked like he was trying to take a position of cover behind the truck. The man then started to sidestep across the alley toward the side of Vicky's Beauty Shop. The man continued to point his hands toward the area just west of EN.

Officer Berna then saw a silver handgun in the man's hands as the man turned. Officer Berna heard another officer from behind him give a command to the effect of "[p]olice, show me your hands" or "[p]olice, drop the gun." Officer Berna then observed the man, who was about halfway across the alleyway turn to face their position and begin to raise his arms, still holding the gun and pointing it directly at Officer Berna's position. Officer Berna said that he feared for his safety, at which point he heard officers behind him begin to fire at the man. Officer Berna saw the man fall to the ground and land face down with his head closest to Officer Berna and his feet away from Officer Berna. The man's head was moving slightly, and Officer Berna heard an officer yell "[s]tay down, don't move!"

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Officer Berna heard other officers discuss approaching the man to provide medical aid, and also heard them decide against an approach because the man was out in the open and the building had not been cleared. The officers expressed safety concerns about approaching the man down, as the back door of EN was still open and persons inside would have a direct line of fire on anyone approaching.

2. NEPD Officer Craig Hoffer

When SAs Schallhorn and Wilson took a statement from Officer Hoffer on December 9, 2015, they saw an observable mark above his right eyebrow and black eye. Officer Hoffer said that his black eye resulted not from being hit in the eye, but from blood pooling around his right eye from the mark and swelling above the eye. Officer Hoffer was hired by the NEPD in November 2004. He served three years on patrol, then five years in the Lake Winnebago Area Metro Enforcement Group (LWAM), and returned to patrol for the past three years. Officer Hoffer has been with the NEPD SWAT team for about nine years, serving as its leader for about

18 months and then serving as the assistant team leader. Officer Hoffer is a trainer and instructor for law enforcement.

On December 5, 2015, Officer Hoffer was off-duty when, at about 9:13 a.m., Officer Ross called him to ask if he was coming in for the hostage situation at EN in which there was one hostage taker and an unknown number of hostages. The Winnebago County 911 and the NEPD contacted Officer Hoffer minutes later to request that he respond. Officer Hoffer had been on FMLA leave as of November 14, 2015, however, because of the armed hostage situation, he reported to the NEPD for duty. Officer Hoffer said that as he was nearing the NEPD, he spoke to Officer Kuffel, who told him to gear up quickly because the hostage taker had started a countdown.

Officer Hoffer said that he and Lt. Thompson went to the scene together and ran to Officer Kuffel's position behind Gord's Pub. Lt. O'Bre and Officer Ross were also assembled there. Almost immediately upon Officer Hoffer's arrival, Officer Kuffel advised that the hostage taker had given a one-minute countdown. Officer Kuffel said they had to make entry and lined the officers up in the order previously described.

Officer Hoffer said that Lt. Thompson and Lt. O'Bre entered the back door of EN at approximately the same time, with Officers Kuffel and Ross behind them. Officer Hoffer said he penetrated the back door and was scanning the environment, which did not look like a hostage situation to him. He saw three to four people inside, but they were all spread out, with gaps of space between them. Officer Hoffer saw someone near the desk but could not see anyone's hands and did not recognize anyone.²¹ Officer Hoffer said it seemed very quiet in the shop and he did not recall hearing anybody say anything. Officer Hoffer said that nothing inside the shop indicated to him that anybody was in distress; nobody looked like they were in distress and nobody said anything to indicate distress. Officer Hoffer said it was as though the people inside were taking up ambush positions.

Officer Hoffer said that he was barely inside the door when someone started shooting and he felt an impact against his helmet at which point he experienced a flash of light and a second of blurriness in his right eye. Officer Hoffer recalled realizing that he'd been shot in the head and wondered if his extremities still worked and if the shot had penetrated his helmet. Officer Hoffer said he recalled yelling "I'm hit" and calling out "shots fired" and "officer hit." Officer Hoffer saw Officer Kuffel returning fire from the outside corner of the door with limited penetration into the shop. Officer Hoffer told Officer Kuffel that he was "good,"

²¹ SA Wilson wrote Officer Hoffer's statement. The first full paragraph on page 7 of the report states: ". . . he saw one person standing by the desk that he knows Funk has used before from past professional experience." SA Schallhorn was present during the interview and clarified that Officer Hoffer recognized the *desk* as being the desk Mr. Funk used, but did not recognize Mr. Funk.

meaning not critically wounded and remembered getting up and running alongside the pickup truck parked by the back door as Sgt. Eichmann grabbed him and led him around the corner of Vicky's Beauty Shop. Officer Hoffer said he did not lose consciousness and while the injury to his head hurt, it was not excruciating. He said others were checking him out for other injuries and encouraging him to get medical attention, but he stated that he was fine and decided to remain on scene because there weren't enough tactical personnel there yet.

Officer Hoffer said that Officer Kuffel checked on him via the encrypted SWAT radio channel and he and Officer Kuffel agreed that their observations upon entry into the shop indicated a set-up versus a hostage situation. Officer Hoffer said that his impression was based upon the fact that the people inside were too spread out, and nobody looked like they were in distress when the police made entry for rescue. Officer Hoffer said that Officer Berna was at the alley corner of Vicky's Beauty Shop with a shield and he was on the Doty Street side of Vicky's Beauty Shop when he heard gunshots coming from the alley. Officer Hoffer said he moved from the Doty Street side of Vicky's Beauty Shop toward the alley corner of the shop when he saw an unknown person coming out of EN.

Officer Hoffer stood in a crouched position to the right of Officer Berna with his rifle raised while looking through the scope. He saw a man wearing an EN shirt by the rear alley-side wheel of the pickup truck. Officer Hoffer said he could see the man's back and it looked like the man was scanning for another target in the direction of Gord's Pub, where the other Hasty Team officers had gone. Officer Hoffer said the man backed up to the end corner of the truck, his right hand came down and Officer Hoffer could see a silver handgun in his hand. Officer Hoffer observed the male turn in a counter-clockwise manner toward Officer Hoffer's (and others') position at the alley corner of Vicky's Beauty Shop.

Officer Hoffer recalled thinking that if the man saw the shield with the word "Police" on it, he would start firing at them. Officer Hoffer explained that the man had a gun; he believed the situation was a set-up; they had just been fired at and believed that this individual posed a threat to himself and the officers around him. Officer Hoffer said he started shooting as the male was turning toward them and did so to stop the threat of the man shooting him and others first. Officer Hoffer said he could feel someone to his right side was also shooting a rifle. Officer Hoffer said that he felt like he stopped shooting as the male was going down and he no longer perceived the male as a threat.

Officer Hoffer said he yelled to the male to show his hands. Officer Hoffer said he thought he yelled this before shooting, but realized, after watching video from Officer Ross's body camera, that he yelled after the male was on the ground. Officer Hoffer said he saw some small movement from the male and then no further movement. Officer Hoffer said he could see a gun with the barrel pointed at him and others by the male's right hand. Officer Hoffer said someone suggested moving to the man, but that he said no because he believed this incident was a set-up, and by

going to the location where the man was down, the officers would be exposed to the back doors of EN. Officer Hoffer said he believed that this man was the suspect, and the priority order for protection of human life in this situation was first the hostages, second the civilians, third the police, and last the suspect(s).

Officer Hoffer said it was decided to get a rescue team to the male in the alley by utilizing the Bearcat armored vehicle. Officer Hoffer said that the male was retrieved and taken to the ambulance nearby. Officer Hoffer was checked out by the ambulance crew who assessed him and checked his eyes. He said that he was cleared and was provided an ice-pack. Officer Hoffer went back to the scene to help as additional police personnel were still needed for the perimeter. Officer Hoffer said that while out on the perimeter, his eye was becoming too swollen for him to be effective. Officer Hoffer briefed the Appleton Police Department SWAT team, told Officer Kuffel of his condition and status, and then went to Theda Clark Hospital.

On April 19, 2016, at my request, SA Schallhorn spoke with Officer Hoffer again, and asked whether, at any point during the incident, he recognized Michael Funk. Officer Hoffer said he did not and that the first time he heard Mr. Funk was the man down in the alley was when he was at the hospital emergency room being checked for his head injury. Officer Hoffer stated that when he first made entry to EN, he was focused on people's hands, bodies, and potential weapons, not on faces. He added that he was only inside the business for a very short time before he was struck by gunfire. When Officer Hoffer first saw the man outside the back door of EN, he saw only his back. Officer Hoffer said that when the man started to spin around towards him, he was focused on his gunsight and not the face of the person.

DCI Agents questioned Officer Hoffer about any prior contacts with or knowledge of EN or Michael Funk. Officer Hoffer explained that when he was with the LWAM in 2012, he wrote a search warrant for EN and was present when the warrant was executed. Officer Hoffer recalled that Michael Funk was present during the search and that police took a .45 caliber Kimber handgun from him. Officer Hoffer said that the NEPD is being sued as a result of this search warrant, but he is not named in the lawsuit, nor is LWAM.

Officer Hoffer said that, within the last three months, he handled a criminal damage complaint at EN after someone shot out the front window of the shop. Officer Hoffer met with Steven Erato and Mr. Funk and worked with them to download photos from their surveillance video, which enabled Hoffer to identify the party involved. As a result, he was able to make an arrest of the person responsible for the damage to EN. Officer Hoffer said both men seemed happy with the fact that he was able to identify the perpetrator and make a quick arrest. Officer Hoffer said that while Mr. Funk assisted him in obtaining surveillance video, he could see that Mr. Funk was carrying a sidearm, based upon the outline of it on his clothing.

Officer Hoffer said that he assisted in providing surveillance in 2010 or 2011 when the FBI and ATF met with Mr. Erato regarding threats made to a LWAM

officer. Officer Hoffer had no prior dealings with Brian Flatoff. Officer Hoffer did not recognize or identify Mr. Funk during the incident on December 5, 2015.

3. NEPD Officer Robert Ross

Officer Ross is a member of the NEPD SWAT team. On December 5, 2015, he was working the day shift on patrol when he was dispatched to a weapons call at EN. Officer Ross stopped two blocks away from EN, got his AR-15 .223 caliber rifle and put on a plate carrier that said "Police" on it. Lt. O'Bre radioed to Officer Ross to meet him behind Gord's Pub to be part of the Hasty Team. Lt. O'Bre told Officer Ross that there was a hostage inside who had announced that if "he" is not here in five minutes, the hostage taker will start killing them. Officer Ross said there was a baseline description of the hostage taker provided as a man with a beard, long hair, and wearing a flannel shirt.

Officer Kuffel arrived on scene and joined Officer Ross and Lt O'Bre. Officer Ross said that information came over the radio that the hostage-taker had shortened the countdown, stating that he would start shooting hostages in one minute if "he" did not get to the shop. Officer Kuffel told them that the Hasty Team had to make entry for the hostages and gave the SWAT team members the entry order.

Officer Ross said they approached the back door of EN in the alley and that Lt. Thompson entered first with the shield yelling "Police!" Lt. O'Bre entered second, however both Thompson and O'Bre fell down almost immediately. Officer Ross said that Officers Kuffel and Hoffer then entered at almost the same time and that someone in the shop started firing at them. Officer Ross heard someone say "officer hit" or "I'm hit," and he saw Officer Hoffer fall down in front of him.

Officer Ross saw an exchange of gunfire and recalled seeing a male inside the shop in the back corner after the Hasty Team opened the door to enter. Officer Ross said this male looked relaxed, like he was "chilling." Officer Ross said this male had a long ponytail and something red either on him or near him. Officer Ross said this male's demeanor struck him as "odd." Officer Ross said he lost track of this male once the Hasty Team started taking fire.

Officer Ross said he was providing cover at the doorway and never made it inside the shop because of heavy gunfire. Officer Ross said that Officer Kuffel yelled towards the inside of the shop "[l]et me know if you're in there," in response to which more gunfire came from inside EN. Officer Ross said his perception at this time was that they had been ambushed because the male he saw inside the shop was relaxed, and because the Hasty Team immediately started taking gunfire upon entry. Officer Ross moved to the back of a truck parked in the alley maintaining cover on the back door of EN while Officer Hoffer retreated east down the alley around the corner of Vicky's Beauty Shop and the other officers moved back toward

Gord's Pub. At that point, Officer Ross retreated, running to the corner of Vicky's Beauty Shop.

Officer Ross said he was on the Doty Street side of Vicky's Beauty Shop when he heard gunfire and saw Officer Hoffer move to the alley corner of Vicky's Beauty Shop, facing the back side of EN. Officer Ross moved to a position to the right of Officer Hoffer, raised his rifle and looked down the scope. Officer Ross said that he recalled feeling like he was in an exposed position in the middle of the alley.

Officer Ross said he then saw a male behind the parked truck, facing the back door of EN, and looking in the direction where some of the Hasty Team members had retreated. Officer Ross said this man was holding a gun and bouncing around, while facing away from him and other officers at the southeast alley corner. Officer Ross said this male was holding the gun downward in his hand and he thought this male was looking for targets down the alley in the direction the other Hasty Team members ran. Officer Ross said this male then turned toward Officer Ross's position. Officer Ross said he thought that this male was the male who had just been shooting at them during their attempted entry into EN. Officer Ross said this male had a ponytail, was looking toward where some of the Hasty Team members just ran, and that he believed that this male had just tried to kill him and others when they attempted entry. Officer Ross said he considered this male an "absolute threat" and believed he could easily turn his weapon on Officer Ross and others at the corner as well as the civilians in the area, including those behind them and those inside Vicky's Beauty Shop. Officer Ross said he thought there was a great chance that this male could kill himself and others.

Officer Ross said he heard a gunshot as the male turned toward Officer Ross's position at the corner. Officer Ross said he thought it was this male starting to shoot, and Officer Ross then began firing at the male. Officer Ross said the male went down to the ground. Officer Ross said he thought the male was still moving on the ground, trying to get up, and Officer Ross recalled that his final two gunshots struck the male as he was moving on the ground. Officer Ross said that he then covered the door to EN, while Officer Hoffer covered the male and gave him commands to not move.

Officer Ross stated that he knew EN was a motorcycle club but that he had never been inside the business or met with anyone associated with the business. Officer Ross said that he did not recognize anyone inside EN and had never met Brian Flatoff before.

4. NEPD Sgt. Angela Eichmann

On December 5, 2015, Sgt. Eichmann has been in law enforcement for 24 years, had worked with the NEPD for 20 years and was working the day shift when, at approximately 8:56 a.m., she heard dispatch state there was a man with a gun inside EN. Dispatch relayed information that gunshots had been fired and

there were possible hostages. Dispatch requested that all units on duty respond to the location. Sgt. Eichmann and Officer Ross went to the alley at Doty Street behind Vicky's Beauty Shop and covered the back door of EN. They were joined by MPD Lt. Angela Hanchek and MPD Officer Ray Berna. Sgt. Eichmann noted a truck parked outside the back door of EN. Sgt. Eichmann and the other officers stayed in their position as they waited for the Neenah SWAT team to arrive.

Sgt. Eichmann said that she was aware of at least two other people inside EN. She had heard over the radio that the person inside EN was giving five minutes before he was going to start shooting hostages. Sgt. Eichmann then heard over the radio that the shooter was giving one minute before he was going to start killing hostages. After the one minute notification, Sgt. Eichmann saw the SWAT team come around the west corner of EN and enter the back door of the building. Sgt. Eichmann heard the officers yelling "let me see your hands," and then heard gunshots fired. Sgt. Eichmann said it was more than one or two gunshots and seemed more like ten. Sgt. Eichmann heard someone on the radio say "shots fired."

Sgt. Eichmann saw the SWAT team backing out and knew someone had been hit by gunfire. When Sgt. Eichmann saw an officer down outside the rear door of EN, she ran down the alley toward him and saw that it was Officer Hoffer. Sgt. Eichmann directed Officer Hoffer as they ran back to the east end of the alley where she had been holding the perimeter outside Vicky's Beauty Shop. Officer Hoffer told Sgt. Eichmann that he was shot in his helmet but was okay.

Sgt. Eichmann observed an individual with long hair come out the back door of EN and walk around the parked truck that was in the alley. This person was looking toward the back door of EN. Sgt. Eichmann did not know who this person was or what he was doing. Sgt. Eichmann heard someone giving directions to the individual in the alley, but she did not know what was said. Sgt. Eichmann stated that she heard gunshots coming from the direction where the individual was standing.

Sgt. Eichmann said that Officer Ross had a rifle and he shot at the individual in the alley. Officer Ross was not the only officer who fired, but Sgt. Eichmann did not know who else fired their weapon. Sgt. Eichmann said the individual must have turned to face the officers because of the direction he fell. Sgt. Eichmann said the individual's head was facing toward them, and he fell on his stomach. The individual did not move after he fell. Sgt. Eichmann radioed "shots fired" and "suspect down."

Sgt. Eichmann observed the Bearcat armored vehicle back into the alley from the west and saw the SWAT officers get out of the vehicle and approach the individual who was down in the alley. One of the SWAT officers reached down and picked up a small, silver handgun, and put it down against the side of the building.

Sgt. Eichmann said this was the first she saw a gun related to this individual. SWAT officers picked up the individual from the alley and put him in the Bearcat armored vehicle.

VII. WITNESS INTERVIEWS

During the investigation, DCI Agents conducted a neighborhood canvass and interviewed witnesses. Twelve individuals were interviewed regarding their history with, and knowledge of, Brian Flatoff. However, none of those peoples witnessed the events at EN on December 5, 2015. Thus, their statements are not summarized below.

Ryan Moderson and Michael Peterson were held hostage by Flatoff inside EN and were interviewed regarding what they witnessed. George Fuerte and Steven Erato were located in the basement during the hostage stand-off and were interviewed regarding their knowledge of the incident. Their statements are summarized in **Section A**.

Twenty-eight individuals who lived or worked within the surrounding area were interviewed, and while almost all of them were aware of heavy police presence in the area, most did not have any specific information about the incident. Several individuals heard gunshots but provided no additional information. Of the 28 people interviewed, only eight had any specific information about the scene or shooting events. I summarize their statements in **Section B**. DCI could locate no citizen eyewitness to the shooting of Mr. Funk.

A. Witnesses Inside EN.

1. Ryan Moderson (RM)

RM stated that he arrived at EN somewhere between 8:15 and 8:30 a.m. on December 5, 2015. RM spoke with Mr. Funk and then began to work on a motorcycle. About 20 minutes later, he heard a truck pull up to the back door and he saw Mr. Funk walk toward the back door. He then saw Mr. Funk walk backwards with his hands raised as Brian Flatoff walked toward him with a gun and instructed him to call Vance Dalton. RM called Mr. Dalton three times before reaching him and was able to quietly instruct him to call the police because Flatoff had a gun. RM said he made it look as though he was having a normal conversation with Dalton and was then able to set the phone down without disconnecting the call. RM said that Flatoff fired a round into the ceiling near Mr. Funk's desk. Flatoff instructed RM to start putting the motorcycle in dispute back together, which he did. RM said that Flatoff stayed close to Mr. Funk's desk most of the time and never let him get too far away. He also said that Flatoff kept asking where Mr. Dalton was and that he, RM, said that Dalton was on his way. RM said that he

could have run out the back door if he'd really wanted to but was worried that Flatoff would shoot Mr. Funk if he did.

RM estimated that 45 minutes into the hostage incident, he was near the lunch counter on a bar stool, smoking a cigarette, when he saw the back door by the alley open. RM stated that Flatoff and Mr. Funk were close to each other, near the desk. RM immediately saw a police shield coming through the door and he heard an officer say “[p]olice, put the gun down.” RM stated he heard this repeatedly and got down behind the counter. RM stated there was an exchange of gunfire. RM estimated he heard ten to 15 gunshots fired and described the gunshots as being very fast. RM stated there was approximately a one minute delay, and then he heard five to ten additional gunshots. RM said he did not see where these gunshots were from, but they were likely from Flatoff. RM stated he was still behind the counter and didn’t actually see who was shooting. RM said the shooting sounded like it was coming from inside the building because it was very loud.

RM said when the shooting ended; there was a heavy, smoke-type fume in the air, which he described as a yellowish powdery substance.²² RM heard Flatoff talking on the phone with someone and then heard him say “[s]hut the back door.” RM stated he didn’t know where Funk went, and he didn’t see Funk inside anymore. After some additional time, RM said Flatoff told Michael Peterson and himself to “get out of here.” At that point RM walked out the back door and immediately surrendered to the police. RM stated that when he exited the back door, he saw Mr. Funk lying face-down in the alley behind the shop.

2. Michael Peterson (MP)

On December 5, 2015, at about 9:00 a.m., MP walked into EN unaware of the hostage situation or a gunman inside. MP stated when he walked in, he saw a mechanic working on a motorcycle and saw Michael Funk sitting at his desk. MP saw another unknown man standing by Mr. Funk at the desk. MP indicated that he made a remark but nobody responded and after a moment, he said that he was going to leave. MP stated that the unknown male then turned to him and he could see the man was holding a gun. The man said “you’re not going anywhere” and instructed him to sit down. MP stated that the mechanic and Mr. Funk “looked really scared.”

Later, MP saw the rear door of the shop open and he saw at least two police officers, with the first officer having a shield in front of him. MP heard the officers shouting into the shop telling the gunman to drop his weapon and to get onto the floor. MP heard officers repeat these commands. MP observed gunshots being exchanged between the officers and the gunman but could not state who shot first.

²² The investigation later determined that a fire extinguisher had been struck by a bullet.

MP said he immediately dropped to the floor and tried to hide near a table. MP said there was a lot of smoke in the room.

MP believed the gunman told Mr. Funk to close the door. MP then heard gunshots from inside the shop. MP stated that he could not see who or what was being shot at. MP continued to lie on the floor under the table, and consequently could not see what was happening. MP stated that the gunman was on the phone with the police and shortly thereafter told MP and the mechanic to get out. MP said he and the other individual went to the back door and walked out. Immediately outside the door, MP and the other individual encountered police officers and were taken into custody. The squad car video shows both MP and RM coming out of the back door with their hands in view, surrendering to law enforcement.

3. Steven Erato (SE)

SE advised that he is the owner of EN, has known Mr. Funk for 20 years and that he and Mr. Funk run EN together. SE stated that he arrived at EN at about 8:15 a.m. on December 5, 2015, and that Mr. Funk was already at his desk in the garage. After speaking for a short while, SE went into the basement to work out in the exercise area. At about 9:00 a.m., he came up the open back stairway and saw Mr. Funk seated at the desk, waving his hand as if he wanted SE to go back downstairs. SE saw his mechanic, RM, standing by the stove facing him and also saw a man with a black hooded sweatshirt, facing RM. SE stated that he thought this man was just "blowing off steam" about something, so he went back downstairs.

At about 9:10, SE heard what sounded like a single gunshot from upstairs and immediately called Mr. Funk who told SE to call the police. SE then called 911 and spoke with a dispatcher, advising that he thought there was an active shooter at EN in the upstairs garage area.²³ About 45 minutes later, SE heard a lot of yelling followed by the sound of rapid gunfire. SE estimated that he heard about two dozen shots fired from the upstairs garage area. Erato said that after what felt like hours, the dispatcher told him he could come out, and he exited the business from the rear door.

Just before 9:28 a.m., SE asked the 911 dispatcher why it was taking so long for law enforcement to intervene. The dispatcher explained that it was a "real time situation," which required more time. During the call, SE expressed frustration and referenced how little time it took the NEPD to rush into EN based upon "false drug information," which was the reason he had a lawsuit against the NEPD pending. SE also expressed that his partner Mr. Funk had a "concealed/carry" permit and that if Mr. Funk were permitted to have his gun at EN, the situation would already have been resolved. SE stated that his partner cannot carry because he (SE) is a convicted felon.

²³ Dispatch records confirm that SE called 911 at 9:09:51.

4. George Fuerte (GF)

GF stated that he was employed as a tattoo artist working within the EN business and has been staying in a spare bedroom in the basement of the business. He stated that on December 5, 2015, he awoke to the sound of people upstairs and eventually heard what sounded like gunfire. GF came up from the basement, and heard someone say "close the door, I don't want to get shot." GF observed an unknown individual holding a gun that looked like a Mac 10 or Uzi style firearm with a silencer and a "decent sized" clip. GF described the person as a white male with shoulder length hair and goatee, wearing a beanie hat and a gray, hooded sweatshirt. The unknown individual saw GF and said "I didn't see you here" and instructed him to leave. GF exited the back door of EN and encountered law enforcement. When GF exited the back door, he observed Mr. Funk lying face-down on the ground.

B. Witnesses Outside EN.

1. Mayor Dean Kaufert (DK)

DK, who owns a bar/restaurant located one block east of EN, was on his way to his business when, at approximately 9:15 a.m., he saw "police caution" tape establishing a perimeter around EN. DK observed several police officers, many of whom were in SWAT/tactical gear. DK saw several officers set up on the northeast corner of Vicky's Beauty Shop, where West Doty Street intersects with the alley directly behind EN. The officers had their long guns drawn and were pointing their weapons down the alleyway. DK estimated that he was about 100 yards southeast from where he saw the officers on the corner near Vicky's Beauty Shop.

DK heard what sounded like multiple gunshots fired from inside EN and saw one police officer drop to his knees and other officers tending to him. DK heard and saw the officers on the corner of Vicky's Beauty Shop discharge their long guns and fire multiple rounds. DK also heard an officer yell verbal commands, "show me your hands" or "let me see your hands" and "drop the gun." DK did not know if he heard the verbal commands or the gunfire first. DK could not see down the alleyway behind EN and therefore could not see the person to whom the officers were issuing commands.

2. (SP)

SP is the owner of Cranked Bike Studio and arrived to work at about 9:15 a.m. on December 5, 2015. SP stated that he was not allowed access because the area was cordoned off with police tape. He also noticed a large police presence. SP pulled into the parking lot across from Vicky's Beauty Shop to watch what was going on and shortly after arriving, heard multiple gunshots, which sounded like fully automatic gunfire. SP was located approximately 100 feet away from the

officers who were standing at the corner of Vicky's Beauty Shop. SP thought there were three officers at that spot when the gunshots were fired, but he couldn't say for sure. SP stated that he was about 100 feet away from the officers and recalled that one officer had a rifle. This was the officer SP observed shooting. Although he couldn't see what the officer was shooting at, SP did observe the officer was shooting in a south to southwest direction towards the alley.

3. (LM)

LM worked at Vicky's Beauty Shop on December 5, 2015, and arrived to work at about 7:40 a.m. At approximately 9:15 a.m., while she was working on a customer's hair, she observed police officers, with their guns drawn, running outside of the business. LM told Vicky Head, who is the owner of the shop and Ms. Head then locked the front door. Officers came to the door and asked how many people were inside and instructed LM and Vicky to "shelter in place." At about 10:00 a.m., LM heard police officers yelling repeatedly "drop your weapon." LM heard this over a speaker located inside the business that was monitoring the audio from a surveillance camera attached to the rear of the business near the alley.²⁴ LM then heard 10 to 30 gunshots. After these shots were fired, she and others in the shop stayed down for their safety until the police came in and instructed everyone to leave.

4. Vicky Head (VH)

VH is the owner of Vicky's Beauty Shop. She arrived at work on December 5, 2015, at about 7:00 a.m. At about 9:00 a.m., she noticed a lot of law enforcement officers outside her shop. She locked the front door of the shop and advised that the back door, on the west side of the building near the alley, was always locked. At about 9:10 a.m., a female officer came to the door to say that there was an active shooter in the area at the rear of the shop and all of the women inside the shop should stay away from the back wall. VH stated that she had four customers in the business at that point, one of whom was 92 years old.

VH stated that at about 10:00 a.m., she heard the police yelling very loudly "[p]ut your weapon down," and the police repeated the command at least four times. VH observed four police officers outside the front of her business, some armed with long guns and some with pistols. VH then heard 15 to 20 gunshots in a continuous fire pattern coming from the same area she'd heard the officers issuing commands. VH said she heard both the commands and gunshots over a speaker located inside the business that was monitoring the audio from a surveillance camera attached to the rear of the business near the alley. Upon hearing the gunshots, VH and the others in the business laid low on the floor. Approximately 20 minutes after the first gunshots, VH heard the police yelling loudly again and then heard another 15 to 20

²⁴ The investigation later revealed that the surveillance camera was not recording at the time.

gunshots coming from the same area. About 10 – 15 minutes after the second volley of shots, VH heard more yelling from the same area.

5. (KR)

KR stated that she was in her apartment sleeping when she was awakened by several sirens. KR looked out her windows and observed several squad cars in the area. KR monitored the Winnebago County scanner and heard the dispatch of “shots fired, 200 block of Main Street, Neenah.” KR’s windows face both Main and Doty Streets, and she observed many law enforcement officers and a “tank type vehicle” in the area.

KR stated that between 10:30 a.m. and 11:00 a.m., she heard 15 to 20 gunshots coming from the area southwest of her apartment, toward Vicky’s Beauty Shop. KR heard police officers yelling, but she could not hear what they were saying. KR stayed in her apartment and continued to listen to the scanner. Approximately one hour after the first gunshots, KR heard an additional 15 to 20 gunshots. Between the first and second sets of gunshots, KR heard officers yelling “[g]et down – put your hands up.”

6. (SS)

SS stated that he was standing near an empty lot on Martens Street and saw SWAT team members gathering their equipment. SS stated that he saw the SWAT team members get their shields up and charge toward Eagle Nation Cycles. SS stated that he then heard 10 to 15 gunshots. SS stated that he could not see who was shooting or where the shooting was coming from. SS stated that he went inside his house and he heard several more gunshots. SS stated that he heard SWAT team members say “[g]et down!” and “[p]ut your gun down!” SS stated that after the second set of gunshots he heard SWAT team members say “Steve put your gun down.”

7. (SK)

SK was at 214 Main Street with her young son watching TV on December 5, 2015, when she saw a K-9 near the house. SK had observed several police officers lined up in what she described as a “stack” on a front yard to the east of her location. She stated that she was on the phone with her mother at 8:38 a.m. when she heard, what she believed to be, about five gunshots in rapid succession. SK said that approximately 15 to 20 minutes later, she heard a second volley of shots. She and her son were vacated from the residence at about 9:57 a.m. and she reported seeing nothing else regarding the shots fired.

8. (EH)

EH stated that he was at his residence on Brien Street on December 5, 2015, when at about 9:30 a.m. he saw several people outside, including neighbors, and heard about four to five gunshots. EH stated that he called his wife at approximately 9:42 a.m. to tell her to be careful. EH stated that while he was on the phone, he heard a second set of gunshots but did not know how many. EH stated that he also saw several police officers posted near Vicky's Beauty Shop. EH did not witness anyone go into or exit from EN.

VIII. AUTOPSY

On December 7, 2015, Deputy Medical Examiner and Forensic Pathologist Dr. Kristinza Giese conducted an autopsy of Michael Funk at the Fond du Lac County Medical Examiner's Office. DCI Special Agent Jay Yerges was present during the autopsy, documenting the process and collecting items of evidentiary value. Provisional autopsy findings indicated that Mr. Funk had nine identifiable entrance wounds and died as a result of multiple gunshot wounds. The majority of these wounds were to the left side of Mr. Funk's back; his left shoulder, and his left torso, hip, and leg. Mr. Funk also sustained one wound to the right lower back and right buttock. Three of the nine shots were fired from front to back. Dr. Giese extracted 17 metal bullet fragments from Mr. Funk's body.

On May 11, 2016, the final autopsy report was submitted and reviewed. Dr. Giese documented two gunshot entry wounds within one inch of each other on the left shoulder area, with an intersecting wound path. The bullet direction of these two wounds is front to back and left to right, downward. Multiple bullet fragments were recovered from these two shots. Dr. Giese documented two gunshot entry wounds within approximately two inches of one another on the left side of the back, noting that the trajectory was back to front, left to right and downward. These gunshot wounds intersect in the body so that a definitive wound path cannot be determined. Dr. Giese recovered multiple bullet fragments from these two entry wounds.

Dr. Giese documented a gunshot entry wound on the midline upper back, noting the direction or trajectory as back to front, left to right and slightly upward. Multiple bullet fragments were recovered from this wound site. Dr. Giese documented a gunshot entry wound on the left side of the torso with the direction noted as front to back, left to right and downward. Bullet fragments were recovered from this wound as well. Dr. Giese noted a gunshot wound on the left lower side of the back and noted the direction of the bullet traveling from back to front, left to right and downward. Bullet fragments were recovered from the pelvic area as a result of this gunshot wound.

Dr. Giese documented a gunshot wound on the left hip (side) with the path of travel from slightly back to front, left to right and downward. Bullet fragments were recovered. Dr. Giese examined a gunshot entry wound to the right buttock with two exit wounds and no bullet fragments remaining in the body. The exit wounds were noted on the lower right side of the back and the right buttock, with the direction of travel from back to front, right to left and upward. Dr. Giese was able to extract 17 projectile fragments from the body of Mr. Funk.

Dr. Giese observed three "graze-type" wounds including one to the upper and outer left arm area and two on the upper back. Finally, Dr. Giese documented gunshot wounds with abrasions on the left chest area and abdomen.

IX. WISCONSIN STATE CRIME LAB (WSCL)

On December 22, 2015, a total of 110 ballistic items were transported to the Milwaukee WSCL and submitted for forensic analysis. The items included four firearms, spent cartridge cases, fired bullets, and bullet fragments from the scene as well as from the autopsy. Firearms and Toolmarks Examiner Mark Simonson analyzed all of the evidence and signed a finalized report on April 26, 2016. On May 18, 2016, DCI obtained Mr. Simonson's report. Mr. Simonson examined the 17 bullet fragments recovered at the autopsy and, of the fragments suitable for testing, was able to conclude that all of the fragments recovered came from the rifles of Officer Hoffer and Officer Ross. Some of the bullet wounds on autopsy were "through and through," and did not leave behind ballistic evidence for testing.

Mr. Simonson examined the Rock River Arms model LAR-15, 223 Remington semi-automatic rifle used by Officer Hoffer on December 5, 2015, and identified eight cartridge cases recovered at the scene, which were fired from this rifle. The analysis revealed that two bullet fragments recovered at autopsy were fired through the barrel of Officer Hoffer's rifle. DCI Special Agent Jay Yerges reported that Dr. Giese recovered these fragments from Mr. Funk's mid back and left mid back.

Mr. Simonson examined the Rock River Arms model LAR-15, 223 Remington semi-automatic rifle that Officer Ross used on December 5, 2015, and identified 11 cartridge cases recovered at the scene which were fired from this rifle. Mr. Simonson determined that seven bullet fragments, which were retrieved from the autopsy, were fired through the barrel of Officer Ross's rifle. Dr. Giese reported finding these fragments at the autopsy from the following locations in Mr. Funk's body; left abdominal tissue, backside of right thoracic spinal column, posterior shoulder/inferior neck, left thigh soft tissue, the skin of mid back after manipulation, the lumbar spine, and the right chest cavity.

Mr. Simonson examined the Rock River Arms model LAR-15, 223 Remington semi-automatic rifle used by Officer Kuffel on December 5, 2015, and

compared cartridge evidence found at the scene. Mr. Simonson concluded that three cartridges found outside the back door to EN and three found inside were fired from Officer Kuffel's rifle.

Mr. Simonson examined the Masterpiece Arms model MPA930T, 9mm caliber semi-automatic pistol used by Brian Flatoff on December 5, 2015. Mr. Simonson noted that the pistol had been submitted with two magazines, and 39 unfired 9mm caliber cartridges. Both magazines had a 33 cartridge capacity. Mr. Simonson compared ballistic evidence recovered at the scene and found that 25 of the cartridge cases and eight of the bullet fragments recovered from inside EN were fired from Brian Flatoff's pistol.

X. LEGAL ANALYSIS

A. Source Review

In this section, I examine the law of self-defense and defense of others, as set forth in Wisconsin statutes, jury instructions, and case law interpreting the application of the affirmative defense. I reviewed federal case law, examined and considered officer-training in Wisconsin's system of Defensive and Arrest Tactics (DAAT), and examined the personal training records of Officers Hoffer and Ross.

There is no question that Officers Ross and Hoffer intentionally shot and killed Michael Funk on December 5, 2015. The evidence also establishes that they did not recognize the man they shot, they saw the man with a gun in his hand turning towards them, and they believed the man was the armed hostage-taker and posed an imminent threat of death or great bodily harm. Wisconsin acknowledges privilege as a defense to otherwise criminal conduct where a privilege by statute, in this case, self defense (defense of others) exists. Wis. Stat. §§ 939.45(6), 939.48(1) and (4).

Wis. Stat. § 939.48 (1) reads:

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.

Wis. Stat. § 939.48 (4) reads:

A person is privileged to defend a 3rd person from real or apparent unlawful interference by another under the same conditions and by the same means as those under and by which the person is privileged to defend himself or herself from real or apparent unlawful interference, provided that the person reasonably believes that the facts are such that the 3rd person would be privileged to act in self-defense and that the person's intervention is necessary for the protection of the 3rd person.

Because the evidence establishes that Officers Hoffer and Ross believed Mr. Funk was in fact the armed hostage-taker and was scoping for targets with his handgun as he turned towards them in the alleyway, any criminal charge against them would be countered with the affirmative defense. The State would then be required to convince a jury beyond a reasonable doubt that the officers' beliefs and perceptions in that moment were unreasonable. A jury would be instructed on the elements of the crime and the privilege and law of self-defense, before being asked to reach a verdict. *See Appendix B.*

Specifically, jurors would be instructed that the law of self-defense allows a person to use intentional force against another if; 1) he believed there was an actual or imminent unlawful interference with his person, 2) the amount of force used was necessary to prevent or terminate the interference, and, 3) those beliefs were reasonable.²⁵ The jurors would also be instructed that a defendant may intentionally use force intended to cause death or great bodily harm only if he reasonably believes that the force used was necessary to prevent imminent death or great bodily harm to himself or others.

The jury instruction defines "reasonable beliefs" as follows:

- A belief may be reasonable even though mistaken.
- The standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.
- The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

A jury is instructed to consider not only what a "reasonable person" would have believed, but to make this determination from the standpoint of the defendant

²⁵ The instruction would include "or another" in addition to "himself" pursuant to Wis. Stat. § 939.48(4).

at the time.²⁶ The law also instructs that a person has no duty to retreat. Wisconsin Jury Instruction 810 states:

. . . in determining whether the defendant reasonably believed the amount of force used was necessary to prevent or terminate the interference, you may consider whether the defendant had the opportunity to retreat with safety, whether such retreat was feasible, and whether the defendant knew of the opportunity to retreat.

At this juncture, the State is required to prove, *beyond a reasonable doubt*, that the defendant did *not* act lawfully in self-defense. (Emphasis added). The jury is instructed to find the defendant *not guilty* if they are not satisfied, beyond a reasonable doubt that the defendant did not act in self-defense. The language from the jury instruction is confusing because of double negatives. In essence, unless the State is able to prove beyond a reasonable doubt that the officers' use of deadly force was unreasonable, the jury would be instructed to find the officers not guilty.

The United States Supreme Court established the standard that any law enforcement officer's use of deadly force must be objectively reasonable in light of the severity of the alleged crime at issue, whether the suspect posed an imminent threat to his or her safety and/or the safety of others, and whether the suspect was actively resisting or attempting to evade arrest by flight. *Graham v. Conner*, 490 U.S. 386, 396 (1989), citing *Tennessee v. Garner*, 471 U.S. 1, at 8 – 9 (1985). The Court cautioned that in judging the reasonableness of a particular use of force, the focus must be "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Conner*, supra, at 396 (further citation omitted). The Court stated: "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation. *Id.*, at 396-397.

I include the following information from the DOJ Defensive and Arrest Tactics (DAAT)²⁷ material used to train officers on the use of deadly force. The manual defines deadly force as the intentional use of a firearm or other instrument, the use of which would result in a high probability of death. The definition of subject behavior that justifies an officer's use of deadly force is: behavior which has caused or imminently threatens to cause death or great bodily harm to you or another person or persons.

²⁶ This "reasonable person" would likely consist of expert testimony from other SWAT team law enforcement personnel who are trained in "hasty team" entries, ambushes, "bait piles," and related firearm issues.

²⁷ A training guide for law enforcement officers published by the Wisconsin DOJ Law Enforcement Standards Board in August 2007. Officers Hoffer and Ross were trained with DAAT.

Officers are trained that an imminent threat is an immediate threat or a threat “about to happen.” To be considered *imminent*, a threat must meet three criteria: 1) the subject must indicate his intent to cause great bodily harm or death to you or someone else (e.g., a subject deliberately pointing a weapon at you, stating an intention to kill you, rushing at you with a knife, etc.); 2) the subject must have a conventional or unconventional weapon capable of inflicting great bodily harm or death; and 3) the subject must have a means of using the weapon to inflict harm.²⁸

The subject of “preclusion” is addressed within the DAAT system and instructs that deadly force may be used only if no other reasonable option is available. In other words, deadly force is a last resort. The officer must be able to articulate that all options except deadly force were closed. This is the concept called *preclusion*. Of note, officers are instructed that in many deadly force situations, they will not have time or the ability to try other options.²⁹ The manual recommends giving a verbal warning before firing, but acknowledges that, “this is not always possible, and in some cases may not be desirable.”

The DAAT manual also addresses the question: “[c]an an officer legitimately use deadly force to stop a fleeing suspect who has committed a serious, violent crime, and who is armed?”³⁰ Because Officers Ross and Hoffer believed that the person they shot was involved in the felonious conduct taking place inside EN, their perception that this man was now looking to flee renders training standards on this issue relevant. Officers are instructed on two criteria for the use of deadly force in stopping a fleeing felon; imminence and preclusion:

If not apprehended, is there an imminent danger that the suspect will kill or severely injure someone? Are all other options for capturing the suspect unworkable or have they already failed? If the answer to both questions is yes, deadly force is an option. The justification for deadly force is based not on the nature or seriousness of the crime, but on the imminent danger to others.

²⁸ The manual provides this example: A person armed with a baseball bat, having stated his or her intention to kill you, does not meet the criteria for imminent threat if he or she is standing 50 yards away from you on the other side of a fence. There is no delivery system. The same person standing 10 feet away from you does meet the criteria.

²⁹ The example provided is a subject pulling a gun on an officer within shooting range and threatening to shoot.

³⁰ The law does not permit the automatic use of deadly force to stop a fleeing suspect, especially if the suspect is not dangerous. *Tennessee v. Garner, supra*.

Officers are trained that their judgment in deadly force situations is based on the totality of circumstances known to them at the time. The manual provides this example; if a suspect points a pistol at you with the clear intent to shoot; you are justified in using deadly force. Even if the suspect's gun is later found to be unloaded, that does not render the decision unjustified as the perception of the threat was reasonable, under the circumstances.

Because the purpose of this review is to assess the viability of criminal charges, not civil liability, the DAAT training manual provides the standards by which a jury would be asked to determine the reasonableness of the officers' beliefs at the time they utilized deadly force. What would a reasonable law enforcement officer, trained in the use of deadly force and with specialized SWAT team training, have believed in the positions of Officers Hoffer and Ross under the circumstances that existed at the time?

B. Application of Law to Facts

The ultimate issue is whether either Officer Hoffer or Officer Ross should be criminally charged for the shooting death of Michael Funk. The question is not whether the State could prove that the officers intentionally shot and killed Mr. Funk, but rather, whether the State could prove, beyond a reasonable doubt, that their beliefs, though mistaken, were *unreasonable* under the facts and circumstances that then existed.

Thus, whether criminal charges should be filed requires answers to all of the following questions, applying the law to the facts:

1. Did Officer Hoffer and Officer Ross reasonably believe that there was an actual or imminent unlawful interference with their person, or the person of another?
2. If so, was the amount of force used necessary to prevent or terminate the interference?
3. Did the officers reasonably believe that the force used was necessary to prevent imminent death or great bodily harm to themselves or others?
4. Would a person of ordinary intelligence and prudence *in the position of the officers, under the circumstances that existed at the time,*³¹ have believed what the officers believed when they acted?

³¹ And from the standpoint of the officers at the time they acted and having been trained as

5. If Officer Hoffer and/or Ross were criminally charged for their actions, could the State prove, beyond a reasonable doubt, that the officer(s) in question did *not* act lawfully in self-defense?

The facts established in this extensive investigation:

- The original 911 dispatch information regarding the gunman's threats to start shooting hostages on a contingent timeline presented a critical and imminently lethal situation.
- The situation required a SWAT team response and immediate action.
- The physical description of the gunman provided to the SWAT team (a white male with long hair and a beard) was not inconsistent with the appearance of Michael Funk.
- When the five officers comprising the Hasty Team attempted entry, the gunman fired rounds directly at them, attempting to kill all five of the officers.
- Officer Craig Hoffer took a bullet to his forehead and while his ballistic helmet absorbed the projectile, the impact of the bullet threw Officer Hoffer backwards and to the ground; and caused a significant injury to his forehead.³²
- Immediately after the five officers escaped, the gunman directed another seven shots at the open back door, where officers were still present.
- After clearing the open alleyway, based upon their collective observations and radio communications, Officers Hoffer, Ross and Kuffel believed they had been ambushed, that there were no actual hostages inside EN, and that the hostage call was a disguised attempt to bait them into target range.³³
- The SWAT team members had information of only one firearm in the hands of one shooter inside EN.
- Two minutes and 32 seconds after the gunman fired his last rounds at the officers outside the rear door, they heard additional shots fired from the same location.
- Within seconds of those shots, they observed a man outside moving suspiciously with his arms raised and outstretched, who appeared to be scoping for a target in a northwesterly direction.

they were trained, not from the viewpoint of a jury later.

³² Officer Hoffer's forehead injury from the bullet's impact, ultimately resulted in blood pooling around his eye to the extent he could no longer see.

³³ See footnote 10, *supra*.

- Officers Hoffer and Ross knew that the other three SWAT team members had run in a northwesterly direction to the back of Gord's Pub.
- Officer Hoffer saw that the man had a gun in his right hand.
- Nine seconds elapsed between the time when Mr. Funk was seen coming out the back of EN and Officers Hoffer and Ross firing their first shots.
- No officer fired at the man until he began to move backwards and pivot, turning towards Vicky's Beauty Shop and them.
- Neither Officer Hoffer nor Officer Ross knew the identity of the shooter (Brian Flatoff) or of the man they shot (Michael Funk) until significantly *after* the fatality.³⁴
- Officer Hoffer, Officer Ross and MPD Officer Berna believed that the man they shot was the suspect gunman and they and others in the area were at risk of imminent death or great bodily harm.
- Based upon the fact that the man was armed and the officers believed he was scoping for police targets to shoot, officers did not issue verbal commands for fear that by identifying themselves, they too would be targeted and shot.
- Officers Hoffer and Ross believed that lethal force was necessary to prevent the imminent death or great bodily harm.
- MPD Officer Raymond Berna, who was holding a marked police shield near the shooting officers, also believed that he and others were at risk of death or great bodily harm and that lethal force was necessary to stop that risk.

With these facts established, the questions posed on pages 41 - 42 can be answered. Officer Hoffer and Officer Ross reasonably believed that there was an actual or imminent unlawful interference with their person, or the person of another and that the amount of force they used was necessary to prevent or terminate the interference. The officers reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to themselves or others. A person of ordinary intelligence and prudence *in the position of the officers, under the circumstances that existed at the time*,³⁵ would have believed what the officers believed when they acted. Finally, and perhaps most significantly, if either officer were charged with a crime, the

³⁴ Several statements made by the officers immediately after the shooting, picked up in SWAT radio traffic and body camera recordings, corroborates that the officers involved did not know the person they'd shot and in fact thought he was the "suspect."

³⁵ Again, the reasonable person in this case is another SWAT trained law enforcement officer, not a citizen with no training in hostage or firearms situations or from the viewpoint of a jury.

State would not be able to prove, beyond a reasonable doubt, that the officer did *not* act lawfully in self-defense.

XI. CONCLUSION

In hindsight, the facts of this case are tragic. What transpired at EN the morning of December 5, 2015, the violence and terror, was set in motion by Brian Flatoff. Officers Hoffer and Ross utilized deadly force during the approximately five seconds they shot at and killed Michael Funk because they believed he was the hostage-taker who had tried to shoot and kill them just minutes earlier. These officers risked their own lives when they entered EN to rescue hostages, and their efforts were heroic.

Officers Hoffer and Ross had no knowledge that the man with the gun was in fact an innocent hostage trying to escape, and they had many reasons to believe that this man was the homicidal active shooter. The compressed time frame within which life and death decisions were being made, combined with the officers' beliefs, resulted in an unfortunate yet justifiable use of deadly force. They saw an armed man, whom they believed had not only tried to kill them but whom (they believed) had just discharged another seven rounds, outside of EN scoping with his gun and turning towards them with a gun in his hand. The State would not be able to prove, beyond a reasonable doubt, that the officers' beliefs at the time they utilized deadly force were unreasonable.

Based upon the foregoing, I am closing this file and no further action will be taken.

Dated this 30th day of June 2016.



Shelly Rusch
Assistant Attorney General
Wisconsin State Bar 1007533

APPENDIX A

DCI prepared, assembled, and filed 136 reports consisting of approximately 1560 pdf pages documenting the hostage situation at Eagle Nation Cycles occurring on December 5, 2015, and the investigation, along with an extensive collection of media files, including recorded interviews, squad car videos, law enforcement body camera data, and call records, including radio traffic, 911 calls, and negotiator calls. Some, but not all, of the digital evidence was transcribed.

I reviewed the entire case file¹ with particular attention to the following items:

Report #3: Interview of George Fuerte

Report #14: Report of S/A Jay Yerges from autopsy and collection of items, including Fond Du Lac County Medical Examiner's Provisional Autopsy Findings

Report #15: Interview of Lt. Shaun O'Bre

Report #42: Winnebago County Sheriff's Department Documents (specifically phone calls and radio traffic)

Report #43: Interview of LT. Tyron Thompson

Report #51: Interview of Steven V. Erato

Report #52: Report summary of dispatch contact with Steven Erato

Report #72: Report summarizing content of Negotiator telephone calls to Eagle Nation Cycles with Michael Funk and Brian Flatoff

- Listened to and documented recordings of negotiator calls

Report #73: Report summarizing Surveillance Video footage from inside Eagle Nation Cycles

- Watched DVR footage discs 5, 6, and 7 (of 20 discs capturing 15 and ½ hours)

Report #75: Report summarizing radio traffic related to incident

¹ As of April 26, 2016, DCI had not received a final autopsy report from the Fond du Lac Medical Examiner's Office or the body diagram requested, documenting the bullet wounds and trajectories. As of April 26, 2016, the WSCL has not provided DCI with a ballistics report. ***This report is incomplete without these final reports.***

- Report #76: Report summarizing Winnebago Communication Center call with Vance Dalton reporting to 911 while talking to his brother Ryan Modorsen and listening to Modorsen's open line from inside Eagle Nation Cycles
- Listened to digital recordings (three WMA files)
- Report #77: Report summarizing Menasha Police Department Officer Raymond Berna's external microphone (audible from inside his squad car)
- Listened to and transcribed relevant audio from five VLC media files with corresponding time stamps (8:57 – 10:00 a.m.)
- Report #83: Interview of Neenah Police Department Officer Jonathan Kuffel
- Report #84: Interview of Neenah Police Department Officer Craig Hoffer
- Report #85: Interview of Neenah Police Department Officer Robert Ross
- Watched and listened to Officer Ross's body camera and transcribed statements relevant to investigation and review
- Report #89: Examination of Neenah squad car video 1
- Listened to and transcribed relevant radio traffic documenting time stamps and notable visual images recorded from squad car vantage point
- Report #106: Interview of Neenah Police Department Sgt. Angela Eichmann
- Watched and listened to Officer Eichman's body camera and transcribed statements relevant to investigation and review
- Report #107: Release of Report from Town of Menasha Police Department which includes Detective Christopher Anderson's Interview with Michael Petersen, Detective Jason Feucht's Interview with Ryan Modorsen, and Ryan Modorsen's handwritten statement and sketches
- Report #111: Neenah Police Department Training Records for Officers Hoffer, Kuffel and Ross
- Report #112: Criminal Complaint and Amended Information filed in State of Wisconsin v. Brian T. Flatoff, Winnebago County Case No. 15-CF-589
- Report #113: Transmittal of Evidence to Milwaukee Crime Lab; DCI Property Release and WSCL Receipt
- Report #115: Wisconsin State Crime Lab Crime Lab Response Team Report
- Report #116: Crime scene photos and video: PDF of 370 images and a DVD containing video

Report #124: Receipt of Wisconsin State Patrol Diagrams received May 2, 2016

Report #125: Follow-up Interview with Officer Craig Hoffer received April 28, 2016

Report #128: Case Summary Report Special Agent Kyra Schallhorn dated May 3, 2016

Report #129: Receipt of Final Autopsy Report received May 11, 2016

Report #132: DCI Receipt Inventory of Evidence from WSCL, Milwaukee

Report #133: DCI Receipt/Return of Property from WSCL, Milwaukee

Report #134: Receipt of Confidential Report of Laboratory Findings: WSCL firearms report received May 18, 2016

APPENDIX B

805 PRIVILEGE: SELF-DEFENSE: FORCE INTENDED OR LIKELY TO CAUSE DEATH OR GREAT BODILY HARM — § 939.48

[INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.]

Self-Defense

Self-defense is an issue in this case. The law of self-defense allows the defendant to threaten or intentionally use force against another only if:

- X the defendant believed that there was an actual or imminent unlawful interference with the defendant's person; and
- X the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and
- X the defendant's beliefs were reasonable.

The defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

[IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE — SEE WISJI-CRIMINAL 810.]

[IF THERE IS EVIDENCE THAT THE DEFENDANT PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE — SEE WISJI-CRIMINAL 815.]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in self-defense.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all _____ elements of _____ have been proved and that the defendant did not act lawfully in self defense, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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810 PRIVILEGE: SELF-DEFENSE: RETREAT

[ADD THE FOLLOWING TO WIS JI-CRIMINAL 800, 801, OR 805 WHEN SUPPORTED BY THE EVIDENCE.]

Retreat

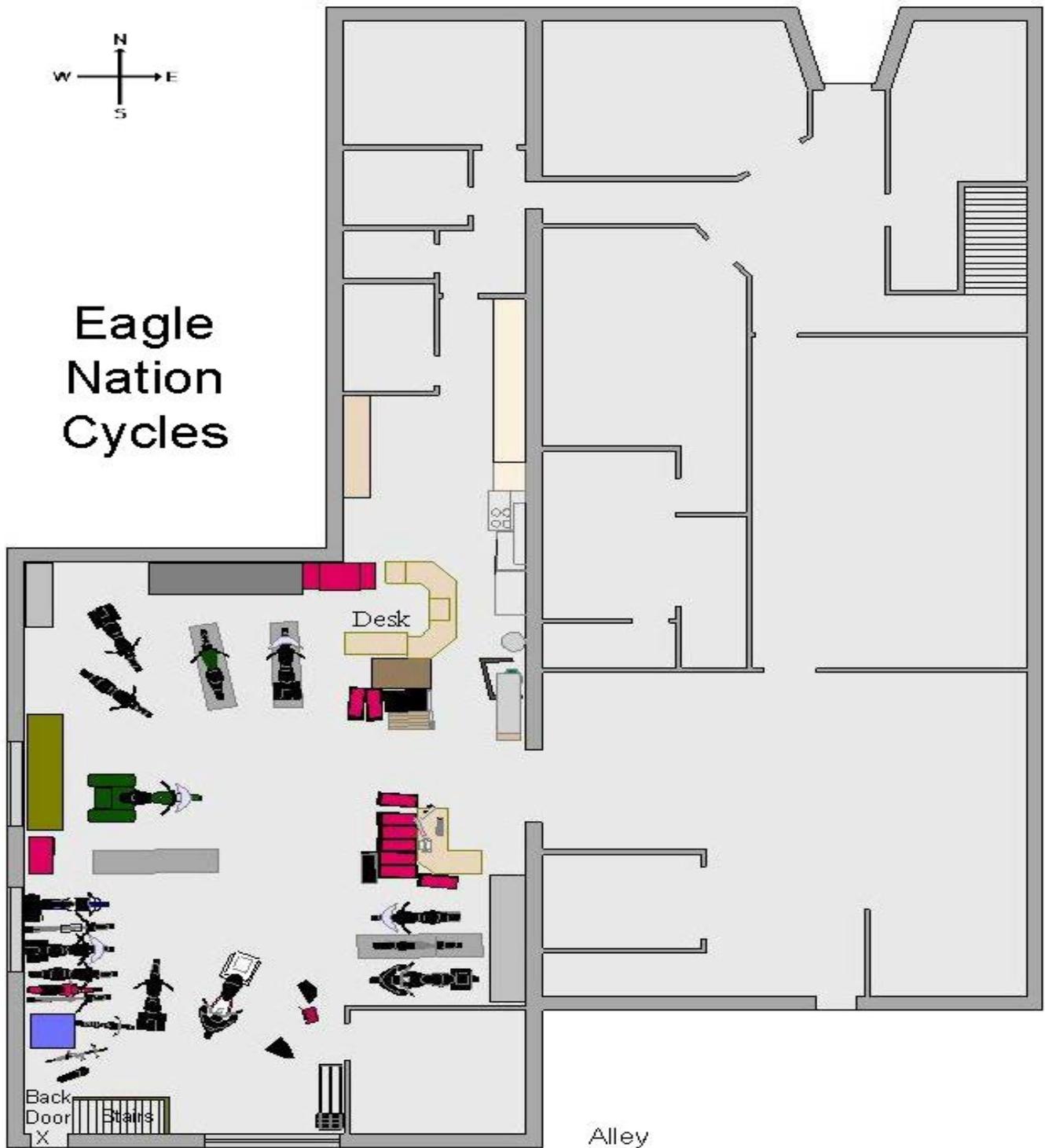
[There is no duty to retreat. However, in determining whether the defendant reasonably believed the amount of force used was necessary to prevent or terminate the interference, you may consider whether the defendant had the opportunity to retreat with safety, whether such retreat was feasible, and whether the defendant knew of the opportunity to retreat.]

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APPENDIX C: Outside



APPENDIX C: Inside



APPENDIX D



12/05/2015 09:42:06



12/05/2015 09:42:08



12/05/2015 09:42:15



12/05/2015 09:42:24



12/05/2015 09:42:29



12/05/2015 09:42:33



12/05/2015 09:42:56



12/05/2015 09:43:04



12/05/2015 09:43:06



12/05/2015 09:43:08



APPENDIX E

STATE OF WISCONSIN

CIRCUIT COURT

WINNEBAGO COUNTY

STATE OF WISCONSIN,

Plaintiff,

AMENDED CRIMINAL COMPLAINT

vs.

BRIAN T FLATOFF, D.O.B. 12/26/1969,

Case No. 15-CF-589

Defendant.

CRIMINAL CHARGE

Count 1: SECOND DEGREE RECKLESSLY ENDANGERING SAFETY

The above-named defendant on or about Saturday, December 05, 2015, in the City of Neenah, Winnebago County, Wisconsin, did recklessly endanger the safety of E.M.L.-K., contrary to sec. 941.30(2), 939.50(3)(g) Wis. Stats., a Class G Felony, and **upon conviction may be fined not more than Twenty Five Thousand Dollars (\$25,000), or imprisoned not more than ten (10) years, or both.**

Count 2: POSSESSION OF A FIREARM BY A FELON

The above-named defendant on or about Saturday, December 05, 2015, in the City of Neenah, Winnebago County, Wisconsin, did possess a firearm, having been convicted of a felony in this state, contrary to sec. 941.29(1m)(a), 939.50(3)(g) Wis. Stats., a Class G Felony, and **upon conviction may be fined not more than Twenty Five Thousand Dollars (\$25,000), or imprisoned not more than ten (10) years, or both.**

Count 3: POSSESSION OF A FIREARM BY A FELON

The above-named defendant on or about Saturday, December 05, 2015, in the City of Neenah, Winnebago County, Wisconsin, did possess a firearm, having been convicted of a felony in this state, contrary to sec. 941.29(1m)(a), 939.50(3)(g) Wis. Stats., a Class G Felony, and **upon conviction may be fined not more than Twenty Five Thousand Dollars (\$25,000), or imprisoned not more than ten (10) years, or both.**

Count 4: ATTEMPT FIRST DEGREE INTENTIONAL HOMICIDE

The above-named defendant on or about Saturday, December 05, 2015, in the City of Neenah, Winnebago County, Wisconsin, attempted to cause the death of CRAIG HOFFER, with intent to kill that person, contrary to sec. 940.01(1)(a), 939.50(3)(a), 939.32 Wis. Stats., a Class B Felony, and **upon conviction may be sentenced to a term of imprisonment not to exceed sixty (60) years.**

Count 5: ATTEMPT FIRST DEGREE INTENTIONAL HOMICIDE

The above-named defendant on or about Saturday, December 05, 2015, in the City of Neenah, Winnebago County, Wisconsin, attempted to cause the death of JONATHAN KUFFEL, with intent to kill that person, contrary to sec. 940.01(1)(a), 939.50(3)(a), 939.32 Wis. Stats., a Class B Felony, and **upon conviction may be sentenced to a term of imprisonment not to exceed sixty (60) years**

Count 6: CONSPIRACY TO COMMIT FIRST DEGREE INTENTIONAL HOMICIDE

The above-named defendant on or about Saturday, December 05, 2015, in the City of Neenah, Winnebago County, Wisconsin, conspired to cause the death of VANCE R. DALTON, with intent to kill that person, contrary to sec. 940.01(1)(a), 939.50(3)(a), 939.31 Wis. Stats., a Class B Felony, and **upon conviction may be sentenced to a term of imprisonment not to exceed sixty (60) years**

Count 7: TAKING HOSTAGES - RELEASE WITHOUT BODILY HARM

The above-named defendant on or about Saturday, December 05, 2015, in the City of Neenah, Winnebago County, Wisconsin, by force or threat of imminent force, did seize, confine or restrain RYAN W. MODERSON, without that person's consent, with intent to use the victim as a hostage in order to influence a person to perform some action, and released the victim without bodily harm before being arrested, contrary to sec. 940.305(2), 939.50(3)(c) Wis. Stats., a Class C Felony, and **upon conviction may be fined not more than One Hundred Thousand Dollars (\$100,000), or imprisoned not more than forty (40) years, or both.**

Count 8: FALSE IMPRISONMENT

The above-named defendant on or about Saturday, December 05, 2015, in the City of Neenah, Winnebago County, Wisconsin, did intentionally confine or restrain MICHAEL L. PETERSEN, without that person's consent, and with the knowledge that he had no lawful authority to do so, contrary to sec. 940.30, 939.50(3)(h) Wis. Stats., a Class H Felony, and **upon conviction may be fined not more than Ten Thousand Dollars (\$10,000), or imprisoned not more than six (6) years, or both.**

Count 9: FELONY MURDER

The above-named defendant on or about Saturday, December 05, 2015, in the City of Neenah, Winnebago County, Wisconsin, did cause the death of MICHAEL L. FUNK, while committing or attempting to commit False Imprisonment (940.30), contrary to sec. 940.03 Wis. Stats., a Felony, and **upon conviction may be fined not more than Ten Thousand Dollars (\$10,000), or imprisoned not more than six (6) years, or both. And furthermore, because the defendant caused the death of another while committing or attempting to commit this crime, the defendant may be imprisoned for not more than 15 years in excess of the maximum term of imprisonment provided by law for this crime.**

Count 10: FAILURE TO COMPLY WITH OFFICER'S ATTEMPT TO TAKE PERSON INTO CUSTODY

The above-named defendant on or about Saturday, December 05, 2015, in the City of Neenah, Winnebago County, Wisconsin, did intentionally refuse to comply with an officer's lawful attempt to take him into custody and retreats or remained in a building or place and, through action or threat, attempted to prevent the officer from taking him or her into custody and while doing each of the above, remained or became armed with a dangerous weapon or threatened to use a dangerous weapon regardless of whether he or she had a dangerous weapon, contrary to sec. 946.415(2), 939.50(3)(i) Wis. Stats., a Class I Felony, and **upon conviction may be fined not more than Ten Thousand Dollars (\$10,000), or imprisoned not more than three (3) years and six (6) months, or both.**

Count 11: FELONY BAIL JUMPING

The above-named defendant on or about Saturday, December 05, 2015, in the City of Neenah, Winnebago County, Wisconsin, having been charged with a felony and having been released from custody under Chapter 969 Wis. Stats., did intentionally fail to comply with the terms of his bond, to wit: committed the crime of Felon in Possession of a Firearm, contrary to sec. 946.49(1)(b), 939.50(3)(h) Wis. Stats., a Class H Felony, and **upon conviction may be fined not more than Ten Thousand Dollars (\$10,000), or imprisoned not more than six (6) years, or both.**

Count 12: FELONY BAIL JUMPING

The above-named defendant on or about Saturday, December 05, 2015, in the City of Neenah, Winnebago County, Wisconsin, having been charged with a felony and having been released from custody under Chapter 969 Wis. Stats., did intentionally fail to comply with the terms of his bond, to wit: Failure to Maintain Absolute Sobriety, contrary to sec. 946.49(1)(b), 939.50(3)(h) Wis. Stats., a Class H Felony, and **upon conviction may be fined not more than Ten Thousand Dollars (\$10,000), or imprisoned not more than six (6) years, or both.**

Count 13: FELONY BAIL JUMPING

The above-named defendant on or about Saturday, December 05, 2015, in the City of Neenah, Winnebago County, Wisconsin, having been charged with a felony and having been released from custody under Chapter 969 Wis. Stats., did intentionally fail to comply with the terms of his bond, to wit: Committed the Crime of Attempted First Degree Intentional Homicide, contrary to sec. 946.49(1)(b), 939.50(3)(h) Wis. Stats., a Class H Felony, and **upon conviction may be fined not more than Ten Thousand Dollars (\$10,000), or imprisoned not more than six (6) years, or both.**

Count 14: FELONY BAIL JUMPING

The above-named defendant on or about Saturday, December 05, 2015, in the City of Neenah, Winnebago County, Wisconsin, having been charged with a felony and having been released from custody under Chapter 969 Wis. Stats., did intentionally fail to comply with the terms of his bond, to wit: committed the crime of Taking Hostages, contrary to sec. 946.49(1)(b), 939.50(3)(h) Wis. Stats., a Class H Felony, and **upon conviction may be fined not more than Ten Thousand Dollars (\$10,000), or imprisoned not more than six (6) years, or both.**

Count 15: FELONY BAIL JUMPING

The above-named defendant on or about Saturday, December 05, 2015, in the City of Neenah, Winnebago County, Wisconsin, having been charged with a felony and having been released from custody under Chapter 969 Wis. Stats., did intentionally fail to comply with the terms of his bond, to wit: committed the crime of False Imprisonment, contrary to sec. 946.49(1)(b), 939.50(3)(h) Wis. Stats., a Class H Felony, and **upon conviction may be fined not more than Ten Thousand Dollars (\$10,000), or imprisoned not more than six (6) years, or both.**

Count 16: FELONY BAIL JUMPING

The above-named defendant on or about Saturday, December 05, 2015, in the City of Neenah, Winnebago County, Wisconsin, having been charged with a felony and having been released from custody under Chapter 969 Wis. Stats., did intentionally fail to comply with the terms of his bond, to wit: committed the crime of Failure to Comply With Officer's Attempt to Take Person Into Custody, contrary to sec. 946.49(1)(b), 939.50(3)(h) Wis. Stats., a Class H Felony, and **upon conviction may be fined not more than Ten Thousand Dollars (\$10,000), or imprisoned not more than six (6) years, or both.**

AFFIDAVIT IN SUPPORT OF CRIMINAL COMPLAINT

J. Curtis/ J. Venne/ J. Goggins, of the Winnebago County District Attorney's Office, being first duly sworn on oath and in that capacity has knowledge of the following:

Your affiant is informed from the reports of the Winnebago County Sheriff's Department kept in the normal and ordinary course of business in which your affiant believes to be truthful and reliable and have proven so on numerous occasions in the past that on or about December 5th, 2015, at approximately 9:30 am, Lieutenant Lara Vendola-Messer of the Winnebago County Sheriff's Office was paged out to assist the city of Neenah with a hostage situation. The ongoing incident was occurring at Eagle Nation Cycles, located at 206 Main St. in the city of Neenah, Winnebago County, Wisconsin. Upon arriving at that location, Lieutenant Vendola-Messer made contact with E.M.L.-K.. E.M.L.-K. said that she believed her very good friend, Brian Flatoff, was involved in the hostage incident. E.M.L.-K. further positively identified Brian Flatoff as **BRIAN T. FLATOFF, DOB 12/26/1969** (herein referred to as the defendant). E.M.L.-K. stated that the defendant had been at her home at 212 S. Lake St., city of Neenah, Winnebago County, Wisconsin, overnight as a friend and guest. E.M.L.-K. said she had been up all night with the defendant and that the defendant had been drinking Vodka or Rum throughout the course of the night. E.M.L.-K. said that the defendant was so intoxicated early in the morning hours, that at one point when he stood up, he fell over and hit his head.

E.M.L.-K. told Detective Craig Quick that she stayed up with the defendant until he fell asleep in her living room at around 7:00 am. E.M.L.-K. said that she then went to bed and sometime later, she woke up to the defendant stumbling around in the living room. E.M.L.-K. said that she yelled at the defendant that she thought he had a concussion and that she was going to call 911 to get an ambulance to come to the house. E.M.L.-K. said that the defendant then ran into the bedroom with a .45 caliber pistol in his hand and started to yell at her. E.M.L.-K. said that the defendant crawled onto the bed and pulled a pillow from the corner of the room and held it like he was going to put it over her face. E.M.L.-K. stated she said something to the effect of, "really Brian", and the defendant responded, "you know I can't handle going back there, to prison". E.M.L.-K. said that the defendant was straddling her and he then pointed the gun at the wall behind her, above her head, and pulled the trigger. E.M.L.-K. said the gun fired and put a hole in the wall. E.M.L.-K. told Lieutenant Vendola-Messer that she probably had gunpowder from the shot on her face, but she had since wiped her face off.

E.M.L.-K. said that after the defendant calmed down, he set the .45 caliber pistol down. E.M.L.-K. said she then put the gun away in its case. E.M.L.-K. said that she and the defendant then had a discussion in which the defendant said he was going to go to Eagle Nation to talk to Vance. E.M.L.-K. said that the defendant had been having an ongoing issue over a motorcycle with employees at Eagle Nation Motorcycles, specifically Vance Dalton. E.M.L.-K. said that the defendant felt that Vance Dalton and his friends at Eagle Nation had stolen his motorcycle and the defendant said that he was going to go to Eagle Nation this morning to try to talk about what was going on. E.M.L.-K. said initially she believed that the defendant was going to go there to beat Vance up and try to take his motorcycle back. However, E.M.L.-K. said that the defendant assured her that he was going to be good and that he wasn't going to do anything other than talk to Vance like men and see what they could work out. E.M.L.-K. said she wasn't concerned about the defendant's decision to go to Eagle Nation Cycles this morning because the defendant was being reasonable and was going to Eagle Nation to speak like an adult about the issues he was having with his motorcycle.

E.M.L.-K. said that after the defendant left in her old work truck, she went back to bed. E.M.L.-K. said that at approximately 9:00 am, she received a call from her husband who told her that there was a S.W.A.T. call at Eagle Nation. E.M.L.-K. said she immediately got up and walked out into the living room/dining room area and saw the case for her Mac-10 open and on the table with the Mac-10 handgun missing. E.M.L.-K. said she had left the Mac-10 9mm handgun sitting on the counter in a case with several loaded magazines. E.M.L.-K. described herself as a gun collector and said the 9mm Mac-10 was a new purchase for her.

Detective Quick next escorted E.M.L.-K. back to her house where he observed the open gun case for the Mac-10 on the dining room table and the hole in the wall in the bedroom where the defendant fired the .45 caliber pistol over E.M.L.-K.'s head. E.M.L.-K. then provided Detective Quick with the handgun the defendant fired in her bedroom. Detective Quick identified the handgun as a Taurus .45 caliber model 1911 with a skull in the white grip. Detective Quick also found a large duffel bag containing the defendant's personal belongings. In E.M.L.-K.'s bedroom, detectives located a shell casing from a .45 caliber handgun laying in a laundry basket.

Lieutenant Shaun O'Bre of the Neenah Police Department was also dispatched to the hostage situation at Eagle Nation Cycle Shop. Shortly after arriving, Lieutenant O'Bre was advised by dispatch that the suspect, later identified as the defendant, inside Eagle Nation Cycles was giving five (5) minutes to speak with someone or the defendant would start shooting hostages. Lieutenant O'Bre decided to form a "Hasty Team," which is a group of officers that could respond hastily to an active threat situation when potential loss of life was at risk. Lieutenant O'Bre was then informed by dispatch that the defendant was now giving one (1) minute to speak with someone or the defendant would start shooting hostages. At that time, the decision was made for the Hasty Team to make entry into the business.

Lieutenant O'Bre reports that a stack of five (5) officers assembled and made entry in the rear door of the Eagle Nation Cycle shop. Upon entry, Lieutenant O'Bre, who was the second officer through the door, and the lead officer stepped to the right once inside of the rear door and immediately fell down a stairwell, landing on the cement basement floor. Looking back up the staircase, Lieutenant O'Bre could see the vapor trails from bullets being fired at the entry team crossing above his head. Lieutenant O'Bre reports that an officer on the entry team returned fire from the rear doorway while he and the lead officer were extracted back outside. During this exchange, one of the entry team officers, Craig Hoffer, was shot by the defendant in the head. Lieutenant O'bre reports that the bullet struck Officer Hoffer's ballistic helmet.

Neenah Police Officer Jonathan Kuffel was also a member of the entry team that entered the rear door of Eagle Nation Cycles in an attempt to rescue the hostages. Officer Kuffel said that the first two officers through the door were the shield team. Officer Kuffel observed upon entry, the shield team officers fell down the stairs to the right. Officer Kuffel said that someone inside of the room fired numerous, rapid shots at the officers while Officer Kuffel was still in the doorway. Officer Kuffel said that Officer Hoffer was next to him and was shot in the helmet and went down. Officer Kuffel said he then returned fire in the direction of the shots that were being fired at the officers while the officers who had fallen down the stairs were extracted from the building through the rear doorway.

Menasha Police Department Officer Raymond Berna was in position monitoring the back door of Eagle Nation Cycles when the Hasty Team made entry. Officer Berna observed the entry team immediately take gunfire before Officer Hoffer yelled, "I'm hit". Officer Berna saw Officer Hoffer fall backwards out of the doorway onto the ground. Shortly after the entry team

was cleared from the alley behind Eagle Nation Cycles, Officer Berna heard several gun shots from that direction then observed a man, later positively identified as Michael L. Funk, exit the rear door of Eagle Nation Cycles. Officer Berna saw that Funk had a silver handgun in his hands. Officer Berna heard officers yell, "Police, show me your hands," or, "police drop the gun". Officer Berna said Funk moved while still holding the gun in a manner that caused officers to fear for their safety. Officer Berna said that the police officers behind him then fired at Funk. Officer Berna observed Funk fall to the ground.

Deputy Kyle Schoonover of the Winnebago County Sheriff's Office stated that while assisting Neenah Police Department with securing the perimeter, he observed Michael Funk on the ground and in the alley. Deputy Schoonover reports that based on Funk's positioning, he appeared to be deceased. Deputy Schoonover reports that deputies re-positioned their tactical armored vehicle, called a "Bearcat", in order to recover Funk. Once in position, deputies found a handgun lying next to Funk's body. Deputies then placed Funk's body into the interior of the Bearcat and exited from the area. Deputies transported Michael Funk to an ambulance crew who took custody of the body. Funk was transported to Theda Clark Medical Center where he was pronounced deceased upon arrival.

Special Agent (SA) Carl Waterstreet from the Wisconsin Department of Criminal Investigations (DCI) reports that during the standoff, Crisis Negotiators from the Neenah Police Department placed a number of calls to the defendant inside Eagle Nation Cycles. During these calls, the defendant told the remaining two hostages to leave the building. These hostages were met outside by deputies of the Winnebago County Sheriff's Office and were identified as Ryan Moderson and Michael Peterson. Eventually, after continued contacts with the negotiators, the defendant agreed to put his gun down and come outside. At that time, deputies of the Winnebago County Sheriff's Office took the defendant into custody without incident.

Detective Christopher Anderson of the Town of Menasha Police Department obtained a statement from Michael Petersen who stated that at approximately 9:00 a.m. he walked over to the Eagle Nation motorcycle shop and entered the business through its rear door in the alley. Petersen said that there was a mechanic working on a motorcycle and Michael Funk was sitting in a chair behind the counter. Petersen said that there was a third man standing next to Funk who was later identified as the defendant. Petersen said that Funk was "very quiet" and was not really saying anything. Petersen said that after several moments he made a comment that he was going to leave, and that is when he noticed that the defendant had a gun pointed at him. Petersen said that the defendant told him, "you're not going anywhere". Petersen said the defendant then put the gun back in his waistband and offered him a seat. Petersen said that Funk "looked really scared" and that the mechanic working on the bike also looked afraid.

Petersen said that a short time later the rear door of the shop opened, and at least two police officers, with the front one having a shield, entered. Petersen said the officers were yelling over and over at the defendant to drop his weapon and to get onto the floor. Petersen said that the next thing he knew, gun shots were being exchanged between the officer and the unknown male. Petersen said he immediately got off the stool and dropped to the floor.

Petersen said that after the police retreated out the door, the defendant was telling the police over the phone to shut the door and that he did not want to be shot at anymore. Petersen said that the defendant then told Funk to close the rear door. Petersen said that after the defendant told Funk to close the door, he heard more gunshots being fired from inside of the workshop. Petersen said that he believes Funk made a run for it out the back door as he was sent there to close it.

After that, Petersen said the defendant was on the phone with the police and that he was telling them no one else was inside. Petersen said that he yelled out, "what about me". Petersen said that the defendant then told him and the mechanic to get out of there. At that time, Petersen and the mechanic exited the shop through the back door.

Detective Jason Feucht of the Town of Menasha Police Department made contact and obtained a statement from the mechanic, who was identified as Ryan Moderson. Moderson stated both he and his son arrived at Eagle Nation Cycles between 8:15 and 8:30 A.M. Moderson said that he gave Michael Funk a Christmas card and spoke with him for a bit before he went to work on a motorcycle. Moderson stated approximately twenty minutes or so later he heard what he thought was a truck pull up to the back garage door. Moderson said that he observed Funk walk to the back door and then almost immediately begin backing up with his hands in the air. Moderson then observed the defendant coming through the door with a gun and backing Funk up to his desk.

Moderson heard the defendant say he was looking for Vance Dalton and the defendant then told Moderson to call Dalton and get him down here. Moderson said he called Dalton three times before Dalton picked up the phone. Moderson said that he made it seem like he was having a conversation with Dalton, however, he was able to quietly tell Dalton to call the police and that the defendant had a gun.

Moderson said that the defendant told all of them that he had a "Mac-10 with 75 rounds of ammo." Moderson also observed the defendant had a large knife on his side and a second magazine for the gun sticking out of his front pants pocket. Moderson said that the defendant then fired one round from the gun into the ceiling right near Funk's desk. Moderson heard Funk then tell the defendant, "We know you're serious, we are scared to death." The defendant then replied, "You ought to be scared." Moderson said that within a minute of the defendant's entering the shop, his son was able to escape out the front door.

Moderson said that after the defendant fired the shot off into the ceiling, the defendant ordered him to start putting his motorcycle back together. Moderson said that that he was aware there was at dispute between the defendant and Dalton over this particular motorcycle in the shop. Moderson observed the defendant shut and lock the front door then stay close to Funk by his desk while Moderson worked on assembling the motorcycle in question. Moderson said at some point during this timeframe, Steven Erato, who was in the basement, came upstairs and made eye contact with Michael Funk. Moderson said that Erato immediately went back downstairs and he never saw him again after that.

Moderson said that while he was working on the motorcycle, an individual he knows as "Old Mike", later identified as Michael Petersen, entered the shop through the back door. Moderson said that he tried to tell him to leave; however, he didn't understand what he was saying. Moderson said that "Old Mike" wanted to leave once he saw that the defendant had a gun, however, the defendant told him, "You're not going to leave."

Moderson said that approximately 45 minutes into this he saw the back door by the alley open. Moderson watched a police shield come through the door and heard an officer repeatedly yell, "Police put the gun down." Moderson stated that there was then an exchange of gunfire. Moderson said that a heavy smoke-type fume filled the air, which he described as a yellowish powdery substance. Moderson said that he thought the police had thrown in a smoke grenade or something; however, it was later determined that a fire extinguisher had been hit by a bullet.

Moderson said that after a delay, he heard another round of shooting that sounded like it was coming from the defendant inside. Moderson said the next thing he observed was the defendant on the phone saying, "Shut the back door," and, "I don't want to be shot by anyone."

Moderson said that he did not where Michael Funk had gone and that he didn't see him inside anymore. Moderson said that he heard the defendant say, "Nobody else is in here," while he was still on the phone. Michael Petersen then said, "I'm still here," and then Moderson acknowledged that he was still inside as well. Moderson said that the defendant then told both of them to "get out of here." Moderson stated he went around the counter and helped Old Mike up to his feet and they both went out the back door.

After the defendant was taken into custody, he was transported to Mercy Medical Center in Oshkosh where he was interviewed by DCI SAs Carroll and Novak. The defendant, after being advised of his Miranda Rights, which he freely and voluntarily waived, admitted that the dispute today was as a result of his motorcycle being stolen from him. The defendant said that Vance Dalton posted a \$3000 bond for him in his open Outagamie County case and then told the defendant that he would have to pay him \$8000 to get his motorcycle back. The defendant stated that he considered this a theft of his motorcycle and that, "I have every intention of killing him," referring to Dalton. The defendant said that when he went to recover his motorcycle from Eagle Nation Cycles on this day he "snapped" when he saw his motorcycle on a lift, partially disassembled and partially re-painted. The defendant said that "M.L." was there, who has been identified as Michael Funk, as well as a shop mechanic, earlier identified as Ryan Moderson. The defendant said that some "old guy" then came in and he told him that he couldn't leave. The defendant said that he told the mechanic to get the motorcycle off the lift, put it by the overhead door and to get all of the parts together. The defendant admitted that he went to the shop with a gun that he described as a 9mm pistol with a long magazine. The defendant said the he might have told someone in the shop to call "Hillbilly", who the defendant identified as Vance Dalton, and tell him to get down there. The defendant said that he was going to cut Dalton's throat and then he was going to kill himself. The defendant admitted that he was pointing the gun at everybody inside the shop during this time.

The defendant said that at one point he believed a flash bang had been set off and that "there may even have been a shoot-out". The defendant said that after the "bang", he hit the floor and then began firing over the counter. The defendant said that after he came up above the counter, Funk was behind the desk and he thought that the mechanic ran out the door. The defendant said he then told the "old guy" to get out. The defendant said that he remembered Funk running out of the door.

The defendant stated that if Dalton had shown up at the shop, that "I would have probably killed him". The defendant then asked the agents if anyone had died during the standoff. The defendant said, "I hope nobody died," and, "with all the gunfire and shooting, that can happen". The defendant then stated, "with no blood on the floor I'm pretty sure no one died".

DCI SA Jed Roffers reviewed surveillance video footage recovered from inside the garage portion of Eagle Nation Cycles. The surveillance video was captured on Saturday, December 5th, 2015. SA Roffers reports that the following events are referenced by the time/date stamp displayed by the video surveillance system, which are approximate:

09:42:51:

The rear access door opens and the law enforcement personnel make entry into the garage. Funk is seated behind the desk and turns to look over his left shoulder towards the rear access door. Four (4) police officers make entry, and the first two (2) officers fall down the stairwell

near the rear access door.

09:42:57:

The defendant hunches down behind the computer desk and directs his firearm with his left hand and left arm fully extended. Funk simultaneously lays face down on the concrete floor, appearing to take cover.

09:43:04:

Gunfire is exchanged between the defendant and police officers. As a result, a fire extinguisher behind the desk area gets punctured, which saturates the room with a large cloud of white dust, primarily the area near the desk occupied by the defendant and Funk. Officers then begin to retreat out the building through the rear access door through which they had just entered. The rear access door remains open.

09:46:20:

Funk approaches the threshold of the rear access door. Funk then grabs the door with his right hand and attempts to slam the door shut behind him as he quickly exits the building. The defendant appears to discharge multiple rounds directed towards Funk as Funk exits the building. The door remained open after Funk attempted to slam it shut.

Your affiant states that per the Wisconsin Circuit Court Access Program, the defendant, Brian T. Flatoff, is a convicted felon following a conviction of Felony Bail Jumping on September 10th, 2003 in Waupaca County Case Number 2003CF000174, which conviction remains of record and unreversed.

Further, your affiant states that per the Wisconsin Circuit Court Access Program, the defendant, Brian T. Flatoff, was released from custody on August 28th, 2015, after posting a cash bond in Outagamie County case 2015CF000661 wherein the defendant is charged with Felony Operating a Motor Vehicle While Intoxicated, 5th/6th Offense. The conditions of the defendant's bond, which were in effect on December 5th, 2015, include that the defendant shall not commit any crime; shall maintain absolute sobriety - no alcohol, and shall not operate a motor vehicle.

Your affiant believes the statements of Michael Petersen, Ryan Moderson, and Eva Lawson-Kranski to be truthful and reliable in that they are based upon their own personal knowledge, observations, and beliefs. Further, your affiants states that based upon information and belief, at no time did anyone give the defendant consent to seize, confine or restrain them.

It is believed the statements of Brian Flatoff are made contrary to his penal interest.

All of the above incidents occurred in Winnebago County, Wisconsin.

WHEREFORE, as said affiant verily believes and prays that the said **BRIAN T FLATOFF** might be arrested and dealt with according to law.

Complainant

Subscribed and sworn to before
me and approved for filing
this _____ day of December, 2015.

Assistant/Deputy District Attorney
Winnebago County, Wisconsin

Prosecuting Attorney: Scott A. Ceman /krb

APPENDIX F

Negotiator calls: Kathy, NEPD - 10 calls marked 72a – 72j

1. 72a. 9:40:01 a.m. (1:42 duration)

Mike from Eagle Nation answered the phone and said “he’s got a gun on us”. Mike said “he said if the cops get involved he is going to shoot us all”. Mike could not identify the suspect other than by the name “shotgun”. Mike then began talking as if the negotiator was a customer. Mike quickly said, “I have one (1) bad guy, three (3) of us and one (1) innocent in the basement.” Mike said “he has a MAC 10 with an extra mag.” Mike quickly told the negotiator it has to be Monday before he can service the bike, and hung up the phone

2. 72b. 9:42:54 a.m. (1:19 duration)

No one answered. A voice mail was left

3. 72c. 9:44:22 (27:12 duration)

Mike from Eagle Nation answered the phone.¹ Negotiator asked to speak to the suspect. Mike says “She wants you on the phone” and Flatoff answers. The negotiator identifies herself as Kathy from the Neenah Police Department. There is some problem with hearing each other and Flatoff says “turn off that radio!” Someone in the background can be heard saying “I have to go over there to do it.” Flatoff is heard saying, “if you fucking move...” “*Close that back door!*” Flatoff says, “close the back door” twice more. Flatoff then says (15 seconds after instructions to close the back door at 9:45:23), “hold on, he’s closing the back door right now”. Flatoff then immediately says, “if you fucking run out that back door I am going to fucking unload on you.”

There are then seven (7) loud bang noises that appear to be gun shots fired (first shot fired at 9:45:30). Kathy then says, “Sir, sir, can you please talk to me.” Flatoff says nothing. About 17 seconds later (9:45:39), the sound of more distant gunfire can be heard.

Flatoff then identifies himself as Brian Flatoff. Flatoff tells the negotiator someone stole his motorcycle two (2) weeks ago. Flatoff tells the negotiator he is going to set the gun down. Flatoff agree’s to come out with his hands up but wants to talk to Vance about stealing his motorcycle first. Flatoff tells the negotiator the building is empty and he is the only one there now. Flatoff said no one is hurt. Flatoff talks about wanting the back door shut and putting a bullet in his head. Flatoff is adamant about having someone to close the back door otherwise he is going to put a bullet in his head. Flatoff said no one is shot inside. Flatoff told an old guy to get the hell out of here and a young guy to get the hell out of here. Flatoff said “if they throw one more flash bang in here I am putting a bullet in my head”. Flatoff said “there is only one outcome to this. That is if they don’t get off of my shit and get my motorcycle back I am going to put a bullet in my head.” Small

¹ Identifies himself only as “Mike”.

APPENDIX G

12/05/2015 09:45:28



12/05/2015 09:45:29



12/05/2015 09:45:30



12/05/2015 09:45:31



12/05/2015 09:45:32



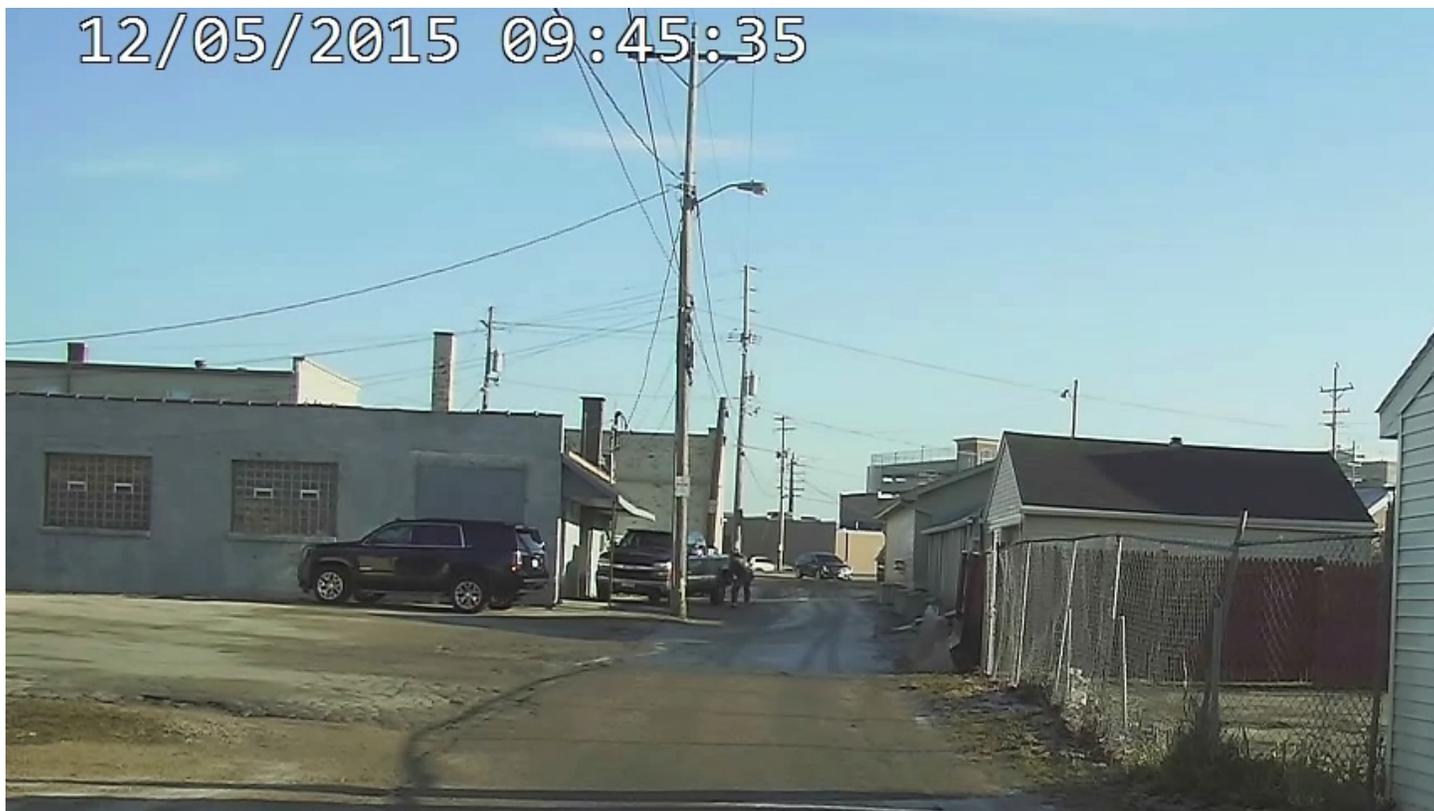
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12/05/2015 09:45:38



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12/05/2015 09:45:40



12/05/2015 09:45:41



12/05/2015 09:45:42



12/05/2015 09:45:43

