

Exhibit 28  
(Waller Deposition)

Robinson v City of Madison, et al.

15CV502

Transcript of the Testimony of:

**Dennis K. Waller**

August 8, 2016



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

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The Estate of TONY ROBINSON, JR.,  
ex. rel. Personal Representative  
ANDREA IRWIN,

Plaintiff,

vs.

Case No. 3:15-CV-502

THE CITY OF MADISON, WISCONSIN,  
and MADISON POLICE OFFICER  
MATTHEW KENNY,

Defendants.

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Deposition of DENNIS K. WALLER

Monday, August 8, 2016

10:00 a.m.

at

Crivello Carlson, S.C.  
710 North Plankinton Avenue  
Milwaukee, Wisconsin

Reported by Dawn M. Lahti, RPR/CRR

1 Deposition of DENNIS K. WALLER, a witness  
2 in the above-entitled action, taken at the instance  
3 of the Plaintiff, pursuant to the Federal Rules of  
4 Civil Procedure, before Dawn M. Lahti, RPR,  
5 Certified Realtime Reporter, and Notary Public,  
6 State of Wisconsin, at 710 North Plankinton Avenue,  
7 Milwaukee, Wisconsin, on the 8th day of August,  
8 2016, commencing at 10:00 a.m. and concluding at  
9 4:25 p.m.

10 A P P E A R A N C E S:

11 LOEVY & LOEVY, by  
12 Mr. Anand Swaminathan  
13 311 North Aberdeen Street, Third Floor  
Chicago, Illinois 60607  
Appeared on behalf of Plaintiff.

14 CRIVELLO CARLSON, S.C., by  
15 Mr. Samuel C. Hall, Jr.  
16 710 North Plankinton Avenue, Suite 500  
Milwaukee, Wisconsin 53203  
Appeared on behalf of Matthew Kenny.

17 BOARDMAN & CLARK LLP, by  
18 Ms. Amanda J. Kaiser  
19 1 South Pinckney Street, Fourth Floor  
20 P.O. Box 927  
Madison, Wisconsin 53701  
Appeared on behalf of the City of  
Madison.

21 CITY OF MADISON, by  
22 Ms. Patricia Lauten  
23 210 Martin Luther King, Jr. Boulevard  
Room 403  
24 Madison, Wisconsin 53703  
Appeared on behalf of the City of  
Madison.

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E X A M I N A T I O N

BY MR. HALL	4
BY MS. KAISER	148
BY MR. HALL	195
BY MR. SWAMINATHAN	196

E X H I B I T S

EXHIBIT	PAGE IDENTIFIED
Exh. 181 Fee Schedule	5
Exh. 182 List of Prior Testimony	9
Exh. 183 Curriculum Vitae	13
Exh. 184 Report of Dennis K. Waller	28
Exh. 185 Letter of 1/3/13	165

(Original exhibits attached to original transcript.  
Copies of exhibits attached to copies of transcript.)

1 TRANSCRIPT OF PROCEEDINGS  
 2 DENNIS K. WALLER, called as a witness  
 3 herein, having been first duly sworn on oath, was  
 4 examined and testified as follows:  
 5 EXAMINATION  
 6 BY MR. HALL:  
 7 Q Good morning, Mr. Waller. My name is Sam Hall. I  
 8 represent Officer Matthew Kenny in a lawsuit that's  
 9 been filed by the Estate of Tony Robinson, and it's  
 10 my understanding that you've been retained as an  
 11 expert by the Estate of Tony Robinson, correct?  
 12 A Yes, by the Loevy firm.  
 13 Q I know you've been through a number of depositions  
 14 before, so I'll spare you all of the formalities.  
 15 But the one thing I do like to just remind all  
 16 witnesses is that if you don't understand one of my  
 17 questions, that's perfectly acceptable to raise  
 18 that to my attention, and I'll try to rephrase it  
 19 so that I can make sure that we're on the same  
 20 page. Is that understood?  
 21 A That's acceptable, yes.  
 22 Q If you need a break at any point in time, I don't  
 23 go on and on and on, but at some point we'll need a  
 24 break, just let us know, and we'll be happy to do  
 25 that. Okay?

1 so it would have been within a few days of that.  
 2 Q So the last bill that you've sent to the Loevy firm  
 3 included all of your work to prepare your Rule 26  
 4 report?  
 5 A Correct.  
 6 Q And as of the time of that billing after your  
 7 report was prepared, do you know how many hours  
 8 you've spent on this case?  
 9 A Roughly seven or eight in getting ready for the  
 10 deposition.  
 11 Q My question wasn't clear. What I'm interested in  
 12 knowing is how many hours you spent on this case --  
 13 A Total?  
 14 Q -- leading up to preparing your report. And  
 15 leading up to and including preparing your report.  
 16 A 59 and a half hours.  
 17 Q And again, just so that I'm clear because my  
 18 question was poorly asked, that 59 and a half hours  
 19 includes the time that it took to prepare your Rule  
 20 26 report, correct?  
 21 A Correct.  
 22 Q And then since that time, you've spent  
 23 approximately seven or eight hours?  
 24 A Yes.  
 25 Q And most of that's preparing for today's

1 A Sure.  
 2 (Exhibit 181 was marked for  
 3 identification.)  
 4 BY MR. HALL:  
 5 Q I'm showing you what's been marked as Exhibit 1.  
 6 MS. KAISER: Do we want to use numbers  
 7 consecutively?  
 8 MR. HALL: Oh, shoot. That's right.  
 9 Let's go off the record.  
 10 (Discussion off the record.)  
 11 BY MR. HALL:  
 12 Q Now that we're back on the record, in this case  
 13 we've been sequencing our exhibits consecutively  
 14 with all witnesses, so we've remarked what was  
 15 Exhibit 1 now as Exhibit 181. Can you identify  
 16 that document?  
 17 A Yes, it's my fee schedule.  
 18 Q And this fee schedule is current as of today's  
 19 date?  
 20 A It is.  
 21 Q Have you issued any bills to the Loevy firm yet for  
 22 your work on this case?  
 23 A I have.  
 24 Q Do you know when your last bill was issued?  
 25 A Shortly after the report which was June 16th, 2016,

1 deposition?  
 2 A Well, and I had received some additional materials,  
 3 so I had to review those, so both --  
 4 Q When were you first retained by the Loevy firm in  
 5 this case?  
 6 A I believe it was April or May when I was first  
 7 contacted.  
 8 Q That's of 2016?  
 9 A Correct.  
 10 Q Prior to being retained by the Loevy firm, were you  
 11 aware of the shooting?  
 12 A Yes. I mean, from the news at the time of -- it  
 13 occurred, both the newspaper and some television  
 14 coverage.  
 15 Q What specifically to the best that you can recall  
 16 did you hear about the case before you were  
 17 retained?  
 18 A That it was the shooting of an unarmed individual,  
 19 that he was, to the best of my recollection, under  
 20 the influence of some substance and exhibiting some  
 21 bizarre behavior, that he was unarmed at the time  
 22 he was shot, and it was going to be investigated by  
 23 an outside agency.  
 24 Now I don't remember whether I knew  
 25 it was DCI then or subsequently learned that that

1 was the outside agency, but it was I think  
 2 relatively shortly after the legislation had been  
 3 enacted in the state.  
 4 Q Specifically did you see the district attorney's  
 5 press conference when the decision was made not  
 6 to -- or when the decision was announced not to  
 7 charge Officer Kenny?  
 8 A I don't recall whether I did or not. It wouldn't  
 9 make any difference. That was just a determination  
 10 for criminal charges, so it really had no impact on  
 11 what I was evaluating.  
 12 Q Prior to your being retained in this case by the  
 13 Loevy firm, did you review any investigative  
 14 documents either from the Madison police or the DCI  
 15 that may have been publicly available?  
 16 A I don't believe so. None that I recall.  
 17 Q So as best as you can recall to the extent that you  
 18 learned anything about this case before you were  
 19 retained, it was through the media?  
 20 A And I probably read something in the  
 21 Journal/Sentinel. So however they referred to  
 22 those documents, that would be the -- pretty much  
 23 the sum total of my knowledge.  
 24 (Exhibit 182 was marked for  
 25 identification.)

1 MR. SWAMINATHAN: Objection to form. Go  
 2 ahead.  
 3 THE WITNESS: I generally don't give out  
 4 that information, but it's -- there's been a few  
 5 times where I've reviewed cases and not testifying.  
 6 BY MR. HALL:  
 7 Q And I want to be very clear. I'm not asking about  
 8 a specific case, and I'm not going to ask you about  
 9 specific information about those cases but just in  
 10 terms of a sum total of how many times you've  
 11 provided consulting expertise to the Loevy firm. I  
 12 don't want to put words in your mouth, but it  
 13 sounds like a few times being three or --  
 14 A Well, several times. I don't have a clear  
 15 recollection because we've had a long relationship  
 16 year-wise. So I would say maybe three to five, and  
 17 that's just a guess.  
 18 Q Do you recall approximately what year it was when  
 19 you were first retained by the Loevy firm?  
 20 A I'm trying to figure out from where my office was  
 21 at the time. It was probably 15 years or more.  
 22 Q And besides this case, how many other cases are you  
 23 currently working on or that you have an open file  
 24 on for the Loevy firm?  
 25 A This and two others that I'm -- three others that I

1 BY MR. HALL:  
 2 Q I'm now going to show you what's been marked as  
 3 Exhibit 182. Can you identify that document for  
 4 us?  
 5 A It's a list of prior testimony, both trial and  
 6 deposition, that was effective June 1st, 2016, and  
 7 it goes back to the last four years.  
 8 Q And so we're clear, you've obviously testified in a  
 9 number of other cases that predate June of 2012,  
 10 but this disclosure is intended to provide only  
 11 your testimony from the last four years; is that  
 12 correct?  
 13 A Yes. I've been doing this since 1988, so it would  
 14 get a little --  
 15 Q Long?  
 16 A -- long and prohibitive.  
 17 Q How many times have you been retained as a  
 18 testifying expert as opposed to a consultant -- a  
 19 testifying expert by the Loevy firm?  
 20 A My guess would be somewhere between 10 to 20 times,  
 21 probably 20 being closer to accurate.  
 22 Q And the same question but with respect to serving  
 23 as a consultant. How many times have you worked as  
 24 a consultant and not provided testimonial expertise  
 25 for the Loevy firm?

1 know are active, and there was one that went to  
 2 appellate never-neverland, so I have no idea what  
 3 the status is on that. So probably at the most  
 4 five and for sure four.  
 5 Q And the three others that are active, I know one is  
 6 the Armstrong case that also involves the City of  
 7 Madison in some respect, is that correct?  
 8 A Yes.  
 9 Q Besides the Armstrong case, what other cases  
 10 specifically do you recall that you're working on?  
 11 A Pikrun versus Milwaukee and Hurt versus -- Hurt, et  
 12 al. versus Evansville -- City of Evansville.  
 13 Q In your career as a testifying expert, have you had  
 14 cases where your opinions have been excluded by the  
 15 Court?  
 16 A Yes.  
 17 Q Do you know how many times that's occurred?  
 18 A Well, partial opinions, probably quite a few.  
 19 Q Let me -- I'm sorry for interrupting. Let me back  
 20 up. Let's start with -- you're familiar with  
 21 Daubert, I assume?  
 22 A Yes.  
 23 Q And in your experience you know that sometimes  
 24 courts will entirely exclude an expert based on  
 25 Daubert, and in other scenarios the Court will in

1 some respects limit the testimony of an expert; is  
 2 that fair?  
 3 A Correct.  
 4 Q Let's start with the category of when the Court  
 5 completely excludes an expert. Have you ever been  
 6 excluded as an expert by a court?  
 7 A One that I know of or recall was in the northern  
 8 District of Illinois, the judge said I was well  
 9 qualified as an expert, but he would not allow my  
 10 opinions to be heard, and I think he also chastised  
 11 the attorney for not defending the opinions. It is  
 12 what it is.  
 13 Q Is that the only case that you can recall that  
 14 you've been completely excluded?  
 15 A Yes, off the top of my head.  
 16 Q And that particular case in the northern District  
 17 of Illinois, can you give me a snapshot of that  
 18 case? Was it a civil rights use of force case,  
 19 some other case?  
 20 A It was a police shooting case involving the Chicago  
 21 Police Department. My primary opinion was that  
 22 some of it related to the shooting, and some of it  
 23 related to the fact that research shows that where  
 24 you have strong training, strong policy, the number  
 25 of officer-involved shootings goes way down, and

1 there was research involving the New York Police  
 2 Department, et cetera and other places. The judge  
 3 said that I couldn't testify to that.  
 4 Q What about cases where your opinions have been  
 5 limited or partially thrown out, do you have any  
 6 estimate as to how many cases that's occurred in?  
 7 A No. I mean, you've heard the adage that the law is  
 8 what the judge says it is on any given day, and  
 9 that -- you know, sometimes the issues have been  
 10 refined or limited between the time that I write  
 11 the report and the time that it comes before either  
 12 a deposition or -- well, before trial, and so it  
 13 could be limited on that basis. But otherwise if  
 14 the judge says, no, you can't testify according to  
 15 this for whatever reason, but never questioning my  
 16 credentials as an expert.  
 17 Q So is it fair to say that you don't recall any  
 18 court opinions either barring or limiting your  
 19 testimony on the basis of your qualifications or  
 20 your credentials?  
 21 A Correct.  
 22 (Exhibit 183 was marked for  
 23 identification.)  
 24 BY MR. HALL:  
 25 Q I'm now going to show you what's been marked as

1 Exhibit 183. Can you identify that for us?  
 2 A It's a copy of my curriculum vitae, and it's  
 3 current.  
 4 Q So it's current as of today's date as well?  
 5 A Yes.  
 6 Q Generally can you explain what Waller & Associates  
 7 does?  
 8 A Twofold. It's a forum for me -- I have a private  
 9 detective agency and also a forum for me to conduct  
 10 consulting in the area of police practices, and  
 11 within that I sometimes testify as an expert  
 12 witness in the area of police practices.  
 13 Q In terms of your background, training and  
 14 education, you don't have any medical training or  
 15 background; is that correct?  
 16 A CPR/first aid was as far as I went.  
 17 Q So you don't intend to offer any pathology opinions  
 18 in this case, correct?  
 19 A Not from a medical perspective. From the  
 20 application of certain principles using that  
 21 information in the consideration of trying to  
 22 recreate a crime scene or a shooting scene, then  
 23 yes.  
 24 But the case in point would be  
 25 during an autopsy, they frequently use shooting

1 sticks to show the path of a bullet that enters the  
 2 body. So information like that is helpful in  
 3 recreating or determining what actually happened,  
 4 so that information I'm not opining. It's not  
 5 mine, but it's information that I would use.  
 6 Q So that I'm clear here, you're not intending to  
 7 offer any opinions as to cause of death, correct?  
 8 A Correct.  
 9 Q And from reviewing your report, it doesn't appear  
 10 that you offer any opinions regarding ballistics or  
 11 bullet trajectory; is that correct?  
 12 MR. SWAMINATHAN: Objection to form.  
 13 THE WITNESS: The actual trajectory, I  
 14 believe so, that's correct.  
 15 BY MR. HALL:  
 16 Q In terms of medical training or education regarding  
 17 toxicology, do you have any medical background or  
 18 training related to toxicology or the impact that  
 19 drugs can have on the body?  
 20 MR. SWAMINATHAN: Objection to form.  
 21 THE WITNESS: Rudimentary. I had to  
 22 teach a course at one time, a college-level course  
 23 on controlled substances. I also have attended a  
 24 number of training seminars put on by the Milwaukee  
 25 County Medical Examiner's Office.



1 So through my prior training and my  
 2 background, I have some knowledge, also from my  
 3 experience as a police officer. But certainly I'm  
 4 not a pharmacologist. I'm not offering experts --  
 5 I'm not an expert in drug investigations per se.  
 6 BY MR. HALL:  
 7 Q Just so that I'm clear, in terms of -- strike that.  
 8 You've reviewed the autopsy in this  
 9 case, correct?  
 10 A Yes.  
 11 Q And so you know that Mr. Robinson had drugs in his  
 12 system at the time of death, correct?  
 13 A Yes.  
 14 Q You don't have any expertise that would allow you  
 15 to render an opinion as to the effect of those  
 16 drugs on Mr. Robinson's behavior; is that correct?  
 17 A Not the effect. Mine would only be anecdotal as  
 18 his behavior -- his bizarre behavior was being  
 19 caused by the consumption of those drugs or would  
 20 be one explanation for that.  
 21 Q But what education or training do you have that  
 22 would allow you to render an opinion as to the  
 23 cause and effect of drugs and someone's behavior?  
 24 A Well, for example, training and dealing with  
 25 excited delirium if you know that the person has

1 A I think it was a -- somewhere between the last 10  
 2 to 15 years when there was a study and a focus on  
 3 in-custody deaths or sudden custody deaths. And  
 4 the more and more research -- so I know it's  
 5 probably within the last -- more likely where it  
 6 was refined and more -- I don't really pay  
 7 attention to the dates, but I'd say within the last  
 8 eight to 10 years.  
 9 Q In looking at Exhibit 183, you list your  
 10 publications on the last page of that exhibit.  
 11 It's accurate that you have not been published  
 12 since 1990, correct?  
 13 A Yes.  
 14 Q And of the publications that you have for many a  
 15 time period, none of those publications were on  
 16 excited delirium, correct?  
 17 A Correct.  
 18 Q And none of those publications were on the use of  
 19 deadly force, correct?  
 20 A Yes.  
 21 Q Your speaking engagements, which I think are listed  
 22 at the top of page 2 of your curriculum vitae, it's  
 23 true that you've not presented or spoke on the  
 24 topic of deadly force, correct?  
 25 A Well, it would be included in the presentation in

1 consumed some drugs. It could be also extreme  
 2 intoxication from alcohol. It could be mental  
 3 aberrations. But for whatever reason, this guy --  
 4 this person is acting in a bizarre manner.  
 5 So then you look at, okay, he's  
 6 hostile, he's not responsive, he can't communicate  
 7 with him, he's overheating because his core is hot,  
 8 and so he's attempting to deal with that by  
 9 removing clothing.  
 10 Okay. So am I saying that that was  
 11 specifically caused by the ingestion of certain  
 12 types of drugs? No. But it's indicative and  
 13 consistent with the use of drugs, and so I'm  
 14 looking more at dealing with the behavior than the  
 15 actual cause.  
 16 Q And that's based on your anecdotal experiences as a  
 17 law enforcement officer?  
 18 A And training. I attended a seminar put on by -- I  
 19 forget his name now, but the guy that wrote the  
 20 book Excited Delirium at the Milwaukee County  
 21 Medical Examiner's Conference, and I've done a  
 22 considerable amount of research in learning more  
 23 about that.  
 24 Q As long as we're on it, do you know when the term  
 25 "excited delirium" first came to be?

1 2007 to the National Police Accountability Project.  
 2 It would also be included in a presentation in 2006  
 3 to the Defense Research Institute. Those are both  
 4 opposite ends of the coin but attorneys'  
 5 organizations.  
 6 And in one or more -- probably  
 7 several of the Professional Association of  
 8 Wisconsin Licensed Investigators, the discussion  
 9 was in -- about use of force, how to investigate it  
 10 and at least some -- at least a portion or all of  
 11 one presentation was on deadly force.  
 12 The annual civil rights seminar to  
 13 the Wisconsin State Bar, that dealt with use of an  
 14 expert but primarily in use of force cases. The  
 15 annual Intellnat Seminar in 1997 dealt with  
 16 investigating use of force including deadly force.  
 17 Some of the training I did for the  
 18 technical colleges in Wisconsin, it was firearms  
 19 related, and obviously when to shoot is important  
 20 as is the ability to shoot. So I think that pretty  
 21 much covers it.  
 22 Q I just want to try to differentiate between -- some  
 23 of what you just described, I think, is your  
 24 description of speaking on the topic of how to  
 25 investigate use of force incidents, how to

1 investigate deadly force incidents; is that  
 2 correct?  
 3 A Yes.  
 4 Q Putting aside the times that you've spoken on the  
 5 investigation of use of force and the investigation  
 6 of deadly force cases, have you ever presented or  
 7 spoke regarding the actual use of force, standards,  
 8 procedures that govern an officer's decision to use  
 9 force?  
 10 A Certainly. In police academy settings -- do you  
 11 want me to list them all?  
 12 Q Let me start with this. When is the last time you  
 13 spoke on that aspect of use of force and deadly  
 14 force and more of the procedural when is it proper  
 15 and appropriate to use force?  
 16 A To law enforcement?  
 17 Q Correct.  
 18 A It would probably be in the early '90s.  
 19 Q What about to groups outside of law enforcement?  
 20 A Which would be the presentations to the National  
 21 Police Accountability Project of the National  
 22 Lawyer's Guild and the Defense Research Institute  
 23 conference government liability section in 2006.  
 24 Q Do you in your file still have copies of your  
 25 presentation that you gave to both of those

1 Have you attended any training  
 2 programs regarding excited delirium?  
 3 A We already discussed that. I think it was with the  
 4 Milwaukee County medical examiner's conference, and  
 5 I remembered the name. I think it was Dr. DiMaio  
 6 who wrote a book on excited delirium. He did a  
 7 day-long presentation. I also read the book  
 8 several times.  
 9 I've been in law enforcement  
 10 training programs. I still -- I average between  
 11 probably 30 to 60 hours a year of law enforcement  
 12 training. That topic has been presented a number  
 13 of times. And in the course of reviewing other  
 14 cases and reviewing the literature, I've read  
 15 dozens of articles about excited delirium and  
 16 reviewed probably a dozen or more policies and/or  
 17 state guidelines for dealing with it.  
 18 Q I want to try to unpack that a little bit, but I'm  
 19 going to take you back to what you first mentioned.  
 20 You went to a day-long presentation  
 21 by Dr. DiMaio at the Milwaukee County Medical  
 22 Examiner's Office?  
 23 A Yes.  
 24 Q Do you recall when that was, approximately?  
 25 A I'm trying to -- it was over four years ago.

1 organizations back in 2007 and 2006?  
 2 A I doubt it, but I doubt if I could find it if I  
 3 did.  
 4 Q And my understanding from looking at your CV is  
 5 that you have not presented or spoke on the topic  
 6 of excited delirium; is that correct?  
 7 A Yes.  
 8 Q And I think this might be just a different  
 9 variation of a different question. As lawyers we  
 10 do that all the time. I apologize.  
 11 I assume that you have not served as  
 12 an instructor for law enforcement on the topic of  
 13 excited delirium, correct?  
 14 A Correct. I have not been an active instructor  
 15 since that was a -- en vogue. I think I did  
 16 some -- I did some training in-custody deaths. But  
 17 it was before excited delirium -- the concept was  
 18 refined.  
 19 Q So the last time you instructed officers was  
 20 sometime in the early 1990s, and at that time  
 21 excited delirium wasn't a word that was used,  
 22 right?  
 23 A Correct. The concept hadn't been refined.  
 24 Q Speaking of excited delirium, what is your  
 25 understanding -- strike that. Let me back up.

1 Because I was -- it may have been more than five  
 2 years. I'm trying to place that from where my  
 3 office was where I remember attending that  
 4 particular conference.  
 5 Q That conference, to the extent you know, who all  
 6 attended? Who was the conference meant for?  
 7 A Primarily medical examiners, but it's open to law  
 8 enforcement, private investigators, people who  
 9 would find that information useful.  
 10 I was originally turned on to that  
 11 by another in-house private investigator for a  
 12 prominent law firm in the state.  
 13 Q If you remember, what did you learn from that  
 14 presentation by Dr. DiMaio?  
 15 A Well, the parameters of it, that you have to  
 16 recognize it and address it, that they talked about  
 17 the overheating, the lack of sensitivity to pain,  
 18 sometimes super human strength, bizarre behavior,  
 19 inability to communicate. Those are things right  
 20 off the top of my head.  
 21 Q This question is going to ask you to repeat some of  
 22 what you just did, but I just want to make sure  
 23 I've got a full grasp.  
 24 What are your understanding -- what  
 25 is your understanding of the symptoms or the signs

1 that you look for for whether an individual may be  
 2 suffering from excited delirium?  
 3 A Again, bizarre behavior. If there's some anecdotal  
 4 or other information that the person has been  
 5 ingesting foreign substances, inability to  
 6 communicate, sensitivity, or lack of sensitivity to  
 7 pain which means that the typical techniques that  
 8 officers use would be ineffective on that  
 9 individual, so, therefore, the recommendation for  
 10 the use of a taser or an electronic control device  
 11 which causes physical incapacitation, so basically  
 12 short circuits the -- in most cases the  
 13 individual's ability to function, and they go down.

14 I think this is -- Dr. DiMaio  
 15 stressed this also, getting medical assistance as  
 16 quickly as possible because this is a medical  
 17 emergency accompanied by inappropriate conduct  
 18 usually, the fact that they have a tendency to  
 19 strip down because their core temperature -- they  
 20 feel like they're burning up. So it's an attempt  
 21 to cool off, that sort of thing.

22 Q With regard to the use of a taser on somebody  
 23 that's experiencing or that may be experiencing  
 24 excited delirium, I understand your opinion to be  
 25 that that's appropriate?

1 A Yes. It's not only my opinion. It's the Law  
 2 Enforcement Standards Board recommendation that  
 3 it's probably the most appropriate technique.

4 What they're trying to avoid is when  
 5 you have a number of officers piling on to attempt  
 6 to physically control, the more excited, the more  
 7 force that's utilized, the more struggle from the  
 8 individual experiencing excited delirium, the  
 9 greater the likelihood of having some medical  
 10 mishap like a heart attack or whatever.

11 So the idea is to control him as  
 12 quickly as possible and get him medical assistance,  
 13 a tranquilizer so that he calms down, that sort of  
 14 thing.

15 Q But with your knowledge of excited delirium, you  
 16 would acknowledge that an individual who is  
 17 suffering from excited delirium does have a certain  
 18 lack of sensitivity to pain, correct?

19 A I think I said that several times.

20 Q And do you have any opinions related to how many  
 21 times a taser can be deployed on an individual  
 22 who's in the throws of excited delirium?

23 MR. SWAMINATHAN: Objection to form.

24 THE WITNESS: I think the latest  
 25 recommendations are to try to limit that, but

1 usually it's a five-second response. So I think  
 2 the recommendation is try to avoid going over  
 3 three. But still the use of the taser and the  
 4 research that I'm familiar with, it's still far  
 5 better to use multiple applications to control the  
 6 individual until you have enough officers present  
 7 to effect control and allow for medical  
 8 intervention.

9 So I think the jury is still out as  
 10 far as an exact number, but they recommend probably  
 11 no more than two or three, if possible, but that's  
 12 still much more effective than the alternative.

13 BY MR. HALL:

14 Q And just so that I'm clear, and I think I am; but  
 15 the two or three that you've referenced, that's two  
 16 or three deployments of the taser as opposed to two  
 17 or three seconds?

18 A Correct. A normal deployment is a five-second  
 19 burst.

20 Q And so if somebody's in the throws of excited  
 21 delirium, your understanding of the research that's  
 22 out there is that the number of deployments of a  
 23 taser of a five-second duration should be limited  
 24 to two or three?

25 A That's some of the research that I recall. I'm

1 not, again, an expert on the use of a taser.

2 Q And you've never been certified on the use of a  
 3 taser?

4 A Correct.

5 Q And you've not been certified as a taser  
 6 instructor, correct?

7 A Correct.

8 Q Have you ever rendered an opinion in a case that  
 9 someone suffering from excited delirium should not  
 10 be tasered at all?

11 A Not that I recall.

12 Q Have you ever rendered an opinion in a case where  
 13 you've opined that someone who's suffering from  
 14 excited delirium should not be tasered more than  
 15 one time?

16 A I don't recall that.

17 Q And I apologize if some of this seems rehashing.  
 18 You were at some point certified as a DAAT  
 19 instructor, correct?

20 A Yes.

21 Q And you were last certified as a DAAT instructor  
 22 around that same period in the early 1990s when you  
 23 stopped being an instructor of law enforcement; is  
 24 that correct?

25 A Yes.

1 Q Do you routinely read any law enforcement  
2 periodicals these days?

3 A Yes.

4 Q Which periodicals do you read?

5 A PoliceOne, which is internet, The Police Chief, Law  
6 and Order. There's a couple others that escape me  
7 right now.

8 Q This is a difficult question, but do you -- how  
9 often do you read these publications? Do you have  
10 a habit of doing it weekly or monthly or just --

11 A Most of them -- well, the internet one is probably  
12 more frequently than monthly, but the other  
13 journals are monthly.

14 (Exhibit 184 was marked for  
15 identification.)

16 BY MR. HALL:

17 Q I'm now going to show you what's been marked as  
18 Exhibit 184. Can you identify that document for  
19 us?

20 A It's the report that I submitted in this matter.

21 Q Previously you testified, I believe, that you were  
22 retained sometime in April or May of 2016 in this  
23 case.

24 A Not correct. I was contacted, I think, and then  
25 subsequently retained.

1 I did, they would have been referenced.

2 Q You anticipated my next question. In your report  
3 at various times you refer to the LESB standards.  
4 If you would have gone to any other source, you  
5 would have cited to it in your report, correct?

6 A If it was different or unusual from what was  
7 already included in the LESB materials but the LESB  
8 materials are a reflection of nationally accepted  
9 standards of practice, and those are the -- how law  
10 enforcement officers are trained in this case and  
11 from everything that I reviewed -- at least -- I  
12 don't recall any aberrations, that they're  
13 consistent with other materials that I have  
14 reviewed on excited delirium.

15 Q Let me ask my question a little bit differently.  
16 At the points in your report that you cite to  
17 the -- strike that.

18 For aspects of your report that  
19 there is no citation to materials like the LESB,  
20 your sources for that information or that data that  
21 you're noting in your report, are you just going  
22 off of your recall and your practice and your  
23 experience?

24 A It would be on the totality of my training,  
25 education and experience in law enforcement as a

1 Q In reviewing your materials, is there a way for you  
2 to determine when you were first contacted  
3 regarding the case?

4 A Sometime in April.

5 Q And with regard to the materials that you have, is  
6 there a way for you to determine when you were  
7 formally retained in this case?

8 A That would probably be May.

9 Q And I assume you're looking at a bill, perhaps?

10 A Yes.

11 Q From your billing or any other source within your  
12 file, are you able to identify the exact date that  
13 you first started to work on the case?

14 MR. SWAMINATHAN: Objection to form.  
15 THE WITNESS: May 4th.

16 BY MR. HALL:

17 Q Since the date that you were first -- strike that.

18 Since the date you first started to  
19 work on this case, have you done any specific  
20 research related to your opinions that you're  
21 offering here?

22 A Probably the only thing I did is refer to various  
23 LESB, Law Enforcement Standards Board, for the  
24 State of Wisconsin training guides. I don't recall  
25 reviewing -- specifically going to any others. If

1 trainer, as a college educator and as a consultant  
2 having reviewed those materials in some other frame  
3 of reference.

4 Q And then for the portions of your report where you  
5 actually do cite the LESB materials, for those  
6 statements you're not only relying on your own  
7 background and experience and training for those  
8 elements of your report, you actually went back and  
9 looked at the LESB materials and then cited to them  
10 there in your report; is that correct?

11 A Yes.

12 Q My understanding is that since you prepared this  
13 report, you've reviewed some additional materials  
14 that were not provided to you and couldn't be  
15 provided to you before you completed your report?

16 A Correct.

17 Q What materials are those?

18 A The depositions of Kathleen Bufton, B-U-F-T-O-N,  
19 and Edward Greengrass, and also I reviewed the  
20 expert witness reports of Dr. Jonathan Arden,  
21 A-R-D-E-N; Samuel Marso or Marso, M-A-R-S-O, and  
22 David Owens, O-W-E-N-S.

23 MR. SWAMINATHAN: Sorry, David McKay.  
24 David Owens is my colleague. I think you mean  
25 David McKay. I'll represent that that's the --

1 that was David McKay's report.  
 2 THE WITNESS: Okay. That's correct. I  
 3 highlighted that when I wrote it down. Excuse me  
 4 for that.  
 5 MR. SWAMINATHAN: David just thinks he's  
 6 an expert in everything.  
 7 BY MR. HALL:  
 8 Q To be clear now, you have not reviewed the  
 9 deposition of Javier Limon, correct?  
 10 A Lymon, or Limone, or how do you pronounce it?  
 11 Q Limon, L-I-M-O-N.  
 12 A I had no idea. But no, I did not.  
 13 Q And same question with Anthony Limon, you have not  
 14 reviewed Anthony Limon's deposition?  
 15 A Correct.  
 16 Q And you have not reviewed Kelly Austin's  
 17 deposition, correct?  
 18 A Correct.  
 19 Q From your review of these additional materials that  
 20 you just described for us that you did review after  
 21 you completed your report, did your review of those  
 22 materials change any of your opinions or  
 23 conclusions in this case?  
 24 A No. I thought it basically added support to them  
 25 or were consistent with them.

1 Q In reviewing these additional materials, did you  
 2 form any new opinions or conclusions that are not  
 3 already contained in your Rule 26 report?  
 4 A No.  
 5 Q And my next question is a little bit broader than  
 6 that. Exhibit 184, your Rule 26 report, does this  
 7 written report contain all of your opinions and  
 8 conclusions in this case?  
 9 A Yes. With the caveat if you asked me other  
 10 questions, then I may have additional opinions, but  
 11 those are all that I expressed at that point and  
 12 have at this time.  
 13 Q As you sit here today in your opinion, have you  
 14 completed all of your work in this case subject to  
 15 getting any additional information from plaintiff's  
 16 counsel?  
 17 A Correct.  
 18 Q And as we sit here today, have you requested any  
 19 additional materials or documents from plaintiff's  
 20 counsel that you had not received yet?  
 21 A Not that I recall.  
 22 Q And in totality, do you believe that you've  
 23 obtained and reviewed all the information in this  
 24 case that's necessary for you to form opinions and  
 25 the issues that you've been asked to address?

1 A Certainly with the opinions that I presented in my  
 2 report, yes.  
 3 Q Have you ever personally visited 1125 Williamson  
 4 Street?  
 5 A No, not knowingly. My son went to school there. I  
 6 doubt that I have.  
 7 Q I want to take you through some questions regarding  
 8 your understanding of the factual background of the  
 9 case and what happened on March 6th.  
 10 When Officer Kenny was outside of  
 11 1125 Williamson Street before he entered the  
 12 stairwell, you agree that Officer Kenny could not  
 13 visually observe or see Tony Robinson, correct?  
 14 A That's my understanding, yes.  
 15 Q You'd also agree at that moment when Officer Kenny  
 16 is outside of the apartment, there was no way for  
 17 Officer Kenny to know whether or not Mr. Robinson  
 18 was armed while he was upstairs, correct?  
 19 A Correct. It had been reported that he was not. It  
 20 was also reported that any antisocial conduct or  
 21 batteries, assaults that he had been involved in  
 22 were based hands-on type of thing, no indication  
 23 that there were any weapons involved.  
 24 Q But from your background as a law enforcement  
 25 officer while that may be relevant, you also

1 understand that you can't -- that Officer Kenny  
 2 could not have known for certain that Mr. Robinson  
 3 wasn't armed upstairs?  
 4 A Oh, correct.  
 5 Q And in fact, there was a large knife or sword  
 6 upstairs, correct?  
 7 A I recall something to that effect. Never  
 8 associated in the hands of Tony Robinson, but there  
 9 was one located.  
 10 Q In your report you note that there's been testimony  
 11 in this case that one voice was heard coming from  
 12 the upstairs apartment. Is that generally correct?  
 13 A Subsequently there was an acknowledgment there was  
 14 one voice. Initially Officer Kenny indicated that  
 15 he heard more than one voice and that he since  
 16 recanted that.  
 17 Q In your training and experience, you acknowledge  
 18 that it's possible for an individual to be the  
 19 victim of a battery or the victim of an attack and  
 20 for that to be occurring in real time and that  
 21 victim not making any noise or not yell for help?  
 22 MR. SWAMINATHAN: Objection to form.  
 23 THE WITNESS: Certainly. It's possible.  
 24 BY MR. HALL:  
 25 Q There's a number of scenarios where that could play

1 out, a victim could have a gun pointed at his or  
 2 her head and said to keep quiet while an assault is  
 3 occurring --  
 4 MR. SWAMINATHAN: Objection to form and  
 5 foundation.  
 6 BY MR. HALL:  
 7 Q -- correct?  
 8 A Certainly. That could be a possibility.  
 9 Q It's also possible that a victim could already be  
 10 rendered unconscious while a battery is continuing  
 11 against that individual, correct?  
 12 MR. SWAMINATHAN: Objection to form and  
 13 foundation.  
 14 THE WITNESS: Certainly a possibility,  
 15 but you would need a frame of reference for all  
 16 those suppositions.  
 17 BY MR. HALL:  
 18 Q In your training and experience and your own  
 19 professional background, do you acknowledge that  
 20 it's unusual for an individual to be yelling and  
 21 screaming when they're by themselves?  
 22 A Not necessarily. If they're exhibiting some form  
 23 of psychotic or drug-induced behavior, it's not  
 24 unusual at all.  
 25 Q But for the population as a whole, it's unusual for

1 have you read? What have you been instructed that  
 2 provides you with a basis to make that opinion?  
 3 MR. SWAMINATHAN: Objection to form.  
 4 THE WITNESS: Anecdotally prior  
 5 interactions that I've reviewed or materials that  
 6 I've read where that was one of the behaviors.  
 7 BY MR. HALL:  
 8 Q From anecdotal experience from cases that you  
 9 reviewed in the past --  
 10 A Plus articles that related to excited delirium that  
 11 talk about what the individual was doing at the  
 12 time that they were experiencing.  
 13 I think, if I remember correctly,  
 14 there was a video initially by the Appleton Police  
 15 Department that showed how to appropriately and  
 16 successfully deal with somebody who was  
 17 experiencing excited delirium. If I'm not  
 18 mistaken, he was yelling and carrying on. So  
 19 you're talking about irrational behavior. So that  
 20 would certainly be one aspect of it or could be.  
 21 Q And these are anecdotal experiences we're talking  
 22 about. This is the experience that Appleton had in  
 23 their case, and I think you're talking about other  
 24 cases that you've reviewed and you've rendered  
 25 opinions on.

1 somebody to be experiencing psychotic or strange  
 2 psychological behavior, right?  
 3 A Well, let's get this straight. Based on what was  
 4 presented over the radio, Officer Kenny, Officer  
 5 Christian, Officer Martinez and Sergeant Gary all  
 6 considered this potentially as excited delirium.  
 7 If you have somebody excited --  
 8 experiencing the medical emergency of excited  
 9 delirium, it would not be unusual for them to  
 10 exhibit bizarre behavior including yelling and  
 11 screaming to themselves or at imaginary objects or  
 12 potentially other people.  
 13 Q And that statement that you just made, where did  
 14 you learn that? What basis do you have to opine  
 15 that an individual suffering from excited delirium,  
 16 it would not be unusual for them to be screaming at  
 17 an inanimate object or at themselves?  
 18 MR. SWAMINATHAN: Objection to form.  
 19 THE WITNESS: Because they're exhibiting  
 20 bizarre behavior, talking to themselves, yelling,  
 21 having whatever, that's not an unusual aspect of  
 22 someone experiencing excited delirium.  
 23 BY MR. HALL:  
 24 Q And I understand that's your opinion. What I'm  
 25 asking is, what do you base that opinion on? What

1 Taking aside anecdotal experiences,  
 2 can you point me to any peer reviewed published  
 3 literature or other standards that you've reviewed  
 4 that have stood for the proposition that it's not  
 5 uncommon for somebody experiencing excited delirium  
 6 to yell and scream at themselves or at an inanimate  
 7 object?  
 8 A No, it's from my general review. I couldn't quote  
 9 you a specific -- I'd have to go back and reread  
 10 Dr. DiMaio's book, but that is certainly my  
 11 understanding.  
 12 Q And is it your understanding also that individuals  
 13 who -- at least some individuals who are  
 14 experiencing excited delirium can be violent?  
 15 A Certainly a potential.  
 16 Q That individuals suffering from excited delirium  
 17 can sometimes exhibit super human strength?  
 18 A Yes.  
 19 Q Going back to the home at 1125 Williamson Street.  
 20 Do you have any understanding or did you have any  
 21 understanding at the time you prepared your report  
 22 of the dimensions of that stairwell that go up to  
 23 the second floor?  
 24 A My understanding is it was relatively narrow.  
 25 Q Besides the general concept of it being relatively

1 narrow, do you know exactly how wide that stairwell  
2 is?  
3 A That was my frame of reference. I could pull up  
4 the reconstruction by the Wisconsin State Patrol  
5 reconstruction unit and see if there's a  
6 measurement; but my understanding, it was  
7 relatively narrow.  
8 Q In forming your opinions, did that play a role at  
9 all?  
10 MR. SWAMINATHAN: Objection to form.  
11 MR. HALL: Strike that. Let me reask the  
12 question.  
13 BY MR. HALL:  
14 Q The relative narrowness of the stairwell, did that  
15 play any role in your developing of opinions in  
16 this case?  
17 A In general, yes.  
18 Q How so?  
19 A That it would be a relatively exposed position, and  
20 it was incongruous or inconsistent with Officer  
21 Kenny going halfway up, so five or six steps from  
22 the top and yelling out "Madison Police." I  
23 couldn't imagine a more exposed position than from  
24 that point. So either go all the way to the top,  
25 look for if truly there are exigent circumstances

1 which require police -- immediate police  
2 intervention or announce at the bottom where you  
3 have cover and concealment and a flat area where  
4 you could have a variety of force options.  
5 But to go halfway up in a confined  
6 stairwell, it just -- I couldn't imagine taking a  
7 worse position and a more tactically unsound  
8 position.  
9 Q Are you aware of the concept of a fatal tunnel?  
10 A Fatal tunnel or fatal funnel?  
11 Q I suppose it might be -- I suppose it might be  
12 called different things, and we might be referring  
13 to the same thing. Have you heard of the concept  
14 of fatal funnel?  
15 A Yes.  
16 Q Generally what is that?  
17 A That in a high-stress situation you limit your  
18 field of vision, and you're looking at a relatively  
19 narrow perspective.  
20 Q Then we are talking about two different things.  
21 A Fatal funnel would be if you didn't have any room  
22 to operate or move, which you could use to enhance  
23 your position. It would just be -- for example, if  
24 Tony Robinson had been armed, you're extremely  
25 exposed because you have no place to move right or

1 left. It's kind of like a fish in the barrel.  
2 So fatal funnel, you've eliminated  
3 your option. Fatal funnel would be as you're  
4 coming through a doorway. You're backlit, and  
5 you're exposed. Tunnel vision would be just a  
6 narrow perspective of things.  
7 Q So fatal funnel, that concept is when an officer  
8 enters a doorway or does something that they're now  
9 placed in a position where there's a very narrow  
10 targeting of that officer possibly?  
11 A Correct.  
12 Q Entering fatal funnels is something that law  
13 enforcement officers sometimes need to do, correct?  
14 A Yes.  
15 Q That's why they get paid to run in, right?  
16 A Well, they're trained to do it in a smart manner  
17 and to limit their exposure. And so in something  
18 like the stairwell, which would be a fatal funnel,  
19 you would want to achieve a position of advantage  
20 either at the top or the bottom, not announce and  
21 cause attention to yourself halfway or partway up.  
22 Q In reading the depositions in this case, are you  
23 aware of why Officer Kenny asserts he announced  
24 himself at the time he announced himself?  
25 A I'd have to look specifically, but my understanding

1 is that it was 18- to 20-some-odd seconds between  
2 the time he entered and the time he announced.  
3 If indeed he was using the rationale  
4 of an exigent circumstance, a potentially life  
5 threatening circumstance, he had two smart options:  
6 Get up the stairs as fast as he could, and then it  
7 would be a more advantageous position for him to  
8 intervene or remain at the bottom, announce his  
9 office where he had cover, he had concealment, he  
10 had a relatively flat surface, he could have had  
11 time to -- if the person upstairs came down, he  
12 would have time to assess, do they have weapons,  
13 what's the situation, and then go to various force  
14 options, and Officer Kenny explained that.  
15 But instead it was like he -- you  
16 know, the concept of almost pregnant. You go up in  
17 the worst possible position and announce. It was  
18 more like he was attempting to create a situation  
19 where he may have to use deadly force rather than  
20 do everything he could to preclude that.  
21 Q Do you know what prompted Officer Kenny to announce  
22 his presence --  
23 MR. SWAMINATHAN: Objection to form.  
24 BY MR. HALL:  
25 Q -- at the time that he did?

8/8/2016

Dennis K. Waller

Page 14 (44 - 47)

Page 44

Page 46

1 A I would have to look specifically.

2 Q Does that matter to you in forming your opinions?

3 A The thing that mattered the most to me was his  
4 delay in intervening if he has to go in without  
5 backup, and use of backup is concept one in law  
6 enforcement training.

7 If you're going to have a  
8 disturbance call, you go in with backup; a domestic  
9 disturbance, with backup; dealing with a mental,  
10 backup. So he's going in without a backup.

11 He wants to create or should  
12 create -- and you have somebody who has much more  
13 training than the average officer. Create the best  
14 potential for successfully intervening if you truly  
15 believe there are exigent circumstances which  
16 require immediate intervention before a basic  
17 police concept is put into place.

18 So you either intervene from the  
19 bottom -- and if you recall, Sergeant Gary before  
20 he went in, "Madison Police, Madison Police," or  
21 you work your way up to the top quickly because you  
22 really believe somebody might be in a bad  
23 situation. He didn't either.

24 He took a relatively long period of  
25 time without backup by going up the stairs but not

1 Misstates his testimony. Objection to form.

2 THE WITNESS: What I said is the need for  
3 intervention. He already decided he needed to  
4 intervene immediately. He did not intervene  
5 immediately. He took the -- waited until he was in  
6 the worst possible position, the most indefensible  
7 position, and then he said he intervened.

8 Now, other witnesses who say they  
9 can hear things, everything that's going on on the  
10 stairwell never heard him announce "Madison  
11 Police." He said he announced. Okay. If he did,  
12 it was the worst possible timing and position that  
13 could have happened. But nothing changed  
14 significantly as far as the need to intervene. If  
15 you need to intervene because it's a life  
16 threatening situation, then you take immediate  
17 action.

18 Now, Officer Christian testified in  
19 his deposition when you intervene in matters of  
20 exigent circumstances, you announce your presence,  
21 and you keep announcing your presence so that the  
22 people inside are not going to mistake you for a  
23 bad guy. They're going to know the police are  
24 here. So he certainly could have done that.

25

Page 45

Page 47

1 all the way up. He was halfway, two-thirds of the  
2 way up when he announced his presence, and that was  
3 inexplicable to me.

4 Q You would agree that when an officer announces his  
5 or her presence, that that can be a diversion, it  
6 can be a distraction; the subject will be paying  
7 attention to that?

8 A Nothing changed that Officer Kenny -- that I recall  
9 Officer Kenny saying between the time he decided he  
10 had to intervene without backup and the time that  
11 he went up the stairs.

12 What I find extremely unusual is the  
13 length of time before he intervened. He already  
14 made the decision, I've got to do something -- I  
15 mean if you believe Officer Kenny, I have to do  
16 something right away before I can get -- before my  
17 backup arrives, which would be within a matter of  
18 seconds. Okay, then why wait before you intervene  
19 if you've already made the decision to intervene?  
20 That's what's incomprehensible to me.

21 Q So that I'm clear, your understanding of the facts  
22 of this case is that nothing changed from the time  
23 that Officer Kenny entered the stairwell until the  
24 time that Officer Kenny announced his presence?

25 MR. SWAMINATHAN: Objection. Foundation.

1 BY MR. HALL:

2 Q So you would agree that an officer announcing his  
3 or her presence is going to divert the attention of  
4 the bad guy to them?

5 A It could. And if it does, be in a position of  
6 advantage.

7 Q Can that be used, that -- creating that diversion,  
8 can that be used to an officer's advantage?

9 A If he's in a position to effectively intervene and  
10 assess what the threat level is, certainly. But  
11 just like you said, could it be used to an  
12 officer's advantage, yes, if he's downstairs or  
13 upstairs. But if he does it right halfway up or  
14 two-thirds of the way up, then it's the worst  
15 possible thing he could have done.

16 Q And in your opinion, it's the worst possible thing  
17 he could have done from a perspective of the  
18 officer's safety; is that correct?

19 A From a tactical perspective, yes.

20 Q Creating a diversion through announcing police  
21 presence can be used to help a potential victim,  
22 could it not?

23 A Why not do it from the bottom?

24 Q That's not my question.

25 A And why not do it from the top? Why take the worst



1 possible position? That's what doesn't ring true  
2 or make sense in this case.  
3 Q Again, back to my question is that creating a  
4 diversion through the use of announcing your  
5 presence can be of assistance to a victim, correct?  
6 A If there was a victim, yes. But again, officers  
7 are trained if you let the bad guy take you out,  
8 then you can't do the person you're trying to help  
9 any good.

10 So to me it was the worst possible  
11 thing and didn't -- worst possible thing,  
12 tactically unsound. And why would you wait before  
13 doing it? I mean that's what I can't follow is the  
14 illogic of moving up as quickly as you can to the  
15 top of the stairs or announcing at the bottom of  
16 the stairs where you have a position of advantage  
17 but to do it in the worst possible place.

18 Q And again, as you sit here today, can you tell me  
19 why Officer Kenny claims that he announced his  
20 presence at the time that he did?

21 A I'd have to look. I seem to recall something about  
22 all of a sudden it got quiet.

23 Q And in any event, whatever the stated reason was  
24 for why Officer Kenny claims that he announced his  
25 presence, was that of any relevance or consequence

1 capital letters, so like A through I believe F, are  
2 your opinions in this case and that what follows  
3 below each one of those capital letters is more of  
4 your analysis and kind of unpacking of those  
5 primary opinions?

6 A Yes.

7 Q Turning to what I'll then describe as your first  
8 opinion, A, my understanding of this opinion and  
9 that related to Officer Kenny entering the  
10 apartment without backup, that this opinion is  
11 based on the assumption that there is no exigency.

12 In other words, if there was an  
13 exigency, you would not be critical of entering the  
14 apartment without assistance or backup; but if  
15 there is no exigency, then you would be critical of  
16 entering without assistance or backup? Am I  
17 understanding that correctly?

18 A That I basically went by what Officer Kenny said,  
19 and he said he thought there was an exigent  
20 circumstance. Now opinion B deals with the  
21 criticism of the manner in which he handled it if  
22 there was an exigent circumstance.

23 But again, A -- opinion A talks  
24 about the problems with handling somebody who they  
25 already identified as probably excited delirium and

1 to you in developing your opinions in this case?

2 A Well, what was of consequence to me is if it  
3 required immediate intervention, he didn't  
4 intervene immediately, and he didn't do it from a  
5 position of advantage.

6 Q That wasn't my question. My question is Officer  
7 Kenny's stated reason for why he announced at the  
8 time that he did, was that of any consequence to  
9 you in developing your opinions?

10 A No. Because if he had to go in, he couldn't wait a  
11 matter of seconds for backup and do it right, then  
12 it would have required immediate intervention, and  
13 then you do it from the best position possible.

14 Whenever you get to a moment, can we  
15 take a break? I don't want to interrupt you.

16 MR. HALL: Let's take a break. That's  
17 fine. Thank you.

18 (A recess was taken from 11:11 a.m. to  
19 11:16 a.m.)

20 BY MR. HALL:

21 Q In looking at Exhibit 184, your Rule 26 report in  
22 this matter, and specifically with regard to your  
23 opinions just very broadly and generally in terms  
24 of the layout of your report, is it fair to assess  
25 this report in that the sections that are the large

1 in the manner in which he dealt with it.

2 Q Let me try to unpack this then. If there truly was  
3 an exigency, if there was somebody being victimized  
4 upstairs in that apartment and putting aside the  
5 manner of going in, just the decision to go in and  
6 enter the apartment without backup or without  
7 assistance, is that something you would be critical  
8 of?

9 A Yes.

10 Q So even if there is an exigency, you would be  
11 critical of an officer entering that apartment  
12 without backup or other assistance?

13 A Based on how he described -- now, initially he said  
14 he thought he heard voices. Then he recanted that  
15 and said he only heard one voice. What else did he  
16 know? He knew that initially when this bizarre  
17 behavior was exhibited by Tony Robinson on the  
18 streets, it did not involve any weapons other than  
19 his -- basically his hands. He knew basically by a  
20 lack of request for ambulance or medical treatment  
21 that the assaults or the batteries were very minor  
22 in nature created by the hands.

23 So he kind of waffled about somebody  
24 could have been up -- a patron could have been  
25 upstairs in the -- at 1125 apartment being

1 strangled because, you know, he subsequently  
2 acknowledged that a patron would indicate somebody  
3 visiting a business.

4 So only one voice, not bothering to  
5 check with the witness if anybody else had gone up  
6 with him. When I say "witness," the unidentified  
7 person that pointed that he went into that  
8 apartment and basically what he was hearing, loud  
9 noises. To me that didn't amount to an appropriate  
10 intervention by one officer in the manner in which  
11 Officer Kenny entered.

12 Q What is your definition of an exigency?

13 A Something that required an immediate response  
14 that's in this case that would be potentially life  
15 threatening or likely to cause serious injury.

16 Q Would you agree in the abstract that knowledge that  
17 an officer may have that someone is in the process  
18 of being victimized in some sort of a battery  
19 constitutes an exigency?

20 MR. SWAMINATHAN: Objection to form.

21 THE WITNESS: Not necessarily. It would  
22 have to be what made you believe that it was -- and  
23 this would have to be a rational thought -- that it  
24 might lead to serious bodily harm or be life  
25 threatening and all that occurred beforehand was

1 neither. I mean it was inappropriate behavior, it  
2 was obnoxious behavior, but nobody was seriously  
3 hurt. And now you only hear one voice and you hear  
4 the sound of him punching something, or as he said,  
5 someone.

6 Now if you're punching someone,  
7 there's usually another response like a scream or a  
8 grunt or whatever, but he couldn't differentiate  
9 that.

10 BY MR. HALL:

11 Q Again, I'm asking this question in the abstract.  
12 Putting aside this case, if an officer had a  
13 reasonable belief that there was an ongoing battery  
14 and that there was a victim of a battery that was  
15 ongoing, would that constitute an exigent  
16 circumstance -- an exigency?

17 MR. SWAMINATHAN: Objection to form.

18 THE WITNESS: I would have to have more  
19 information.

20 BY MR. HALL:

21 Q What more information would you need?

22 A What was the nature of the battery? What did the  
23 officer know? What was the basis for the officer's  
24 knowledge?

25 Q I want you to assume that it was a reasonable

1 determination that somebody was being battered. I  
2 want to take that out of the equation that let's  
3 say there's already been a determination made that  
4 the officer's belief that there was an ongoing  
5 battery was a reasonable belief, would that  
6 constitute an exigency?

7 A What's the extent of the battery? This is a  
8 battery. Is he going to say, oh, stop it? I just  
9 touched Anand. That's a battery because it wasn't  
10 invited to, it was unwelcome, whatever, but I could  
11 do that all day. It wouldn't justify an  
12 intervention by law enforcement under the excuse of  
13 exigent circumstances.

14 Q What level does a battery have to reach in order to  
15 constitute an exigent circumstance in your mind?

16 A What's the knowledge that the officer has, and how  
17 did he get it?

18 Q No. My question is what level of battery does --  
19 has to occur for it to reach the level of an  
20 exigent circumstance?

21 A I already told you, life threatening or threatening  
22 of serious bodily injury.

23 Q So if an officer reasonably believes that there's  
24 an ongoing battery where the victim's life is in  
25 danger or the victim faces risk of serious bodily

1 harm, in that circumstance I assume you would not  
2 be critical of a single officer entering based on  
3 that exigency; is that correct?

4 A It depends how the officer learned of that  
5 situation and what the officer, he or she, learned  
6 of that situation.

7 Q If it's already been determined that the officer  
8 was reasonable in determining the fact that there  
9 was an ongoing battery, why does it matter how the  
10 officer came about that knowledge and information?

11 A Because you're giving me a hypothetical. I mean an  
12 officer could use that any time to make an unlawful  
13 entry and use it as an excuse, well, I thought  
14 somebody was being beaten or somebody was being  
15 hurt. So you'd have to say and be able to justify  
16 how you obtained that knowledge.

17 Q But doesn't that go to the reasonableness? If an  
18 officer makes something completely up to enter your  
19 home based on an exigent circumstance, that's an  
20 unreasonable action by the officer, right?

21 MR. SWAMINATHAN: Objection to form and  
22 foundation.

23 THE WITNESS: It could be, yes.

24 BY MR. HALL:

25 Q And if an officer reasonably determines that

8/8/2016

Dennis K. Waller

Page 17 (56 - 59)

Page 56

Page 58

1 there's an exigent circumstance because of an  
2 ongoing battery that the victim is in risk of great  
3 bodily harm or death, the officer -- even if the  
4 officer is responding by himself or herself may  
5 appropriately enter the apartment? Let me strike  
6 that question.

7 (Discussion off the record.)

8 MR. HALL: Back on the record. Strike my  
9 last question.

10 BY MR. HALL:

11 Q Would you be critical of an officer's decision to  
12 enter an apartment, a stairwell, a home by himself  
13 or herself without the assistance of backup in a  
14 scenario where an officer reasonably believes that  
15 there is an ongoing battery and that the victim of  
16 that ongoing battery is at risk of death or serious  
17 bodily harm?

18 A And the caveat remains the same. It would depend  
19 on how that officer came to learn of that, and that  
20 is what I would need specifically.

21 In a general sense, if the officer  
22 could justify it with specifics, then, no, I think  
23 that's what -- that's why they pay him the big  
24 bucks, to protect life and property, primarily  
25 life.

1 BY MR. HALL:

2 Q Can you point me to any training standards, other  
3 law enforcement standards or peer reviewed  
4 published literature that would stand for the  
5 proposition that an officer may not enter a home by  
6 himself or herself in the face of an exigent  
7 circumstance?

8 MR. SWAMINATHAN: Objection to form.

9 THE WITNESS: I didn't say that he  
10 couldn't or she couldn't. I said that they would  
11 have to justify it with great specificity, and  
12 their actions I would expect would be consistent  
13 with the need for such a response. So best  
14 practice is to wait.

15 Best practice is to intervene in a  
16 manner in which you can then gain control. But  
17 setting yourself up for failure or injury may not  
18 necessarily -- if you go up and you're taken out of  
19 the equation, how can you help your alleged victim?  
20 You can't.

21 So if you're going to do this  
22 exception, you need to do it smart.

23 BY MR. HALL:

24 Q Let me ask the reverse of that question. In the  
25 absence of an exigency, can you point me to any law

Page 57

Page 59

1 So if -- but the officer would have  
2 to give specifics, can't just use it as an excuse,  
3 and the subsequent behavior of the officer would  
4 have to be consistent with intervening in an  
5 exigent circumstance. Exigent circumstances are  
6 extremely unusual, extreme and allow for an  
7 exception to the normal pattern of operations.

8 Q So is it your opinion that if an officer acts  
9 inconsistent with an exigent circumstance after  
10 deciding to enter a home, that that somehow means  
11 that there wasn't an exigent circumstance to begin  
12 with?

13 MR. SWAMINATHAN: Objection to form.

14 THE WITNESS: It takes away the rationale  
15 and the need for the extreme response by a solo  
16 officer instead of the waiting and to do it right.

17 So unless you can explain in great  
18 detail why, and that's -- you know, and your story  
19 is consistent all the way through, then -- you  
20 know, so the failure to do that, A, explain the  
21 rationale for going in, and B, acting in a manner  
22 inconsistent would take away the rationalization  
23 for a solo entry -- a precipitous solo entry by one  
24 officer. Solo entry and one officer, that was  
25 redundant.

1 enforcement standards or peer reviewed published  
2 literature that would prohibit an officer from  
3 confronting a subject or suspect without backup or  
4 other assistance?

5 A Officer Survival, The Tactical Edge.

6 Q Are these publications?

7 A Those are publications by Calibre Press that have  
8 been dealing with officer -- the officer survival  
9 concept for years.

10 Q So what is the name?

11 A One is Officer Survival -- let's see -- I think  
12 it's Street Survival, and Calibre Press is  
13 C-A-L-I-B-R-E. Another one is -- I'm terrible  
14 about the titles. Tactical Encounters, that's in  
15 the -- there's three or -- at least three or four  
16 of those publications by Calibre Press that deal  
17 with and -- a variety of issues such as not waiting  
18 for backup. And Pierce R. Brooks publication 20 or  
19 30 years ago.

20 Officer Down, Code Three talks about  
21 the 10 deadly errors that officers -- cause  
22 officers to get killed or seriously injured, and  
23 one of those is not waiting for backup. And Pierce  
24 R. Brooks was a -- before he became a police chief  
25 was a homicide captain for LAPD and studied a

8/8/2016

Dennis K. Waller

Page 18 (60 - 63)

Page 60

1 number of situations in which officers were killed  
2 or injured.

3 You have publications from Police  
4 Marksman that had about a 20-year run, and they did  
5 the best of Police Marksman. There's probably two  
6 dozen or more specific articles dealings with  
7 waiting for backup.

8 When you have the LESB training for  
9 dealing with disturbances or domestic disturbances,  
10 it's whenever possible, wait for backup. When I  
11 was trained as a police officer a long time ago in  
12 the '70s, the issue was if you have a disturbance  
13 particularly a domestic disturbance or a mental  
14 issue, you wait for backup to intervene.

15 The concept of excited delirium, the  
16 Law Enforcement Standards Board training guide that  
17 dealt with critical incidents, it says multiple  
18 officers. So I'm just giving you things right off  
19 the top of my head, but it's a common knowledge and  
20 understanding, and I think even Officer Kenny  
21 acknowledged that he should have -- the protocol is  
22 to wait for a backup.

23 Q And just getting back to my original question, all  
24 of those publications that you just listed and that  
25 you just went through, none of those are peer

Page 61

1 reviewed, correct?

2 A Police Marksman was. The Calibre Press books were  
3 used as the basis for a national training program  
4 that has gone on for the last 15 or 20 years. So  
5 to say -- those obviously were peer reviewed  
6 because they're still in use and still the basis  
7 for an ongoing training program.

8 Pierce R. Brooks I told you in the  
9 Police Marksman was a monthly publication, and then  
10 there were two publications, The Best of Police  
11 Marksman. His books -- I think that there was --  
12 I've probably -- I probably read 15 to 20 or more  
13 articles in which the 10 deadly errors are  
14 referenced in which Pierce R. Brooks gets credit or  
15 mention.

16 So that's the best I can do off the  
17 top of my head. I think if you talk to any law  
18 enforcement trainer, it's one of those things that  
19 is so basic, where do you go to the bible for such  
20 a basic concept, and I gave you several.

21 Q And of the examples that you listed off for us and  
22 described, you'd agree that none of those serve as  
23 constitutional legal standards that govern law  
24 enforcement conduct, correct?

25 MR. SWAMINATHAN: Objection to form.

Page 62

1 THE WITNESS: Well, I'm not giving an  
2 opinion on constitutional legal standards. I'm  
3 giving police practices standards, and those are  
4 definitely a basis for police practices.

5 Now, that's beyond my realm to make  
6 a determination. It's up to the judge and/or jury  
7 to make a determination if it was a constitutional  
8 violation. But those are designed as procedures,  
9 protocols for ensuring the effectiveness of a law  
10 enforcement response and a safe law enforcement --  
11 maximize the safety of the law enforcement response  
12 in certain types of incidents.

13 BY MR. HALL:

14 Q But they don't mandate law enforcement activity,  
15 correct?

16 A They mandate smart law enforcement response unless  
17 you can articulate an extreme or exigent  
18 circumstances requiring abandoning that basic  
19 premise.

20 Q With regard to the second opinion you have, which  
21 is on the bottom of page 5 of your report, "Officer  
22 Kenny stated necessity for entering the apartment  
23 without backup was contradicted by his actions upon  
24 entering and his subsequent statements."

25 Did I read that right?

Page 63

1 A Yes.

2 Q And this opinion -- in this opinion are you  
3 essentially saying that Officer Kenny's actions  
4 taken after he decided to enter the apartment call  
5 into question whether or not there was an exigency?

6 A Yes.

7 Q And what you articulate in opinion B, and as you've  
8 mentioned earlier today in your deposition, is if  
9 an exigency actually did exist, you would have  
10 expected Officer Kenny to have gone about things in  
11 a different way; is that right?

12 A To deal with it immediately. Otherwise, why are  
13 you making an entry without backup?

14 Q And one of the scenarios or suggestions that you  
15 include in your report and that you described  
16 earlier is the concept of whether Officer Kenny  
17 should have just gone to the top of the stairs  
18 immediately and announced his presence once up at  
19 the top of the stairs; is that correct?

20 A Well, I think he had two options that would have  
21 maximized his effectiveness. Either go up to the  
22 top where he was no longer in an exposed position,  
23 and we talked about a fatal funnel concept and  
24 that, or stay at the bottom, which is even better  
25 yet, announce his office.

1 If he's worried that somebody is --  
 2 truly worried and -- but then he has a position of  
 3 cover, he has a position of concealment, he's no  
 4 longer in a fatal funnel, he has, as Officer Kenny  
 5 went to great lengths to explain, the ability to  
 6 then use different force options including other  
 7 less lethal force making the assessment that if  
 8 Tony Robinson came down the steps, he could make a  
 9 determination if he was armed, if he was and that  
 10 was appropriate for a deadly force response; or if  
 11 he wasn't, he could have reholstered and -- or  
 12 holstered his firearm and then gone to a less --  
 13 while he was backing up or disengaging on flat  
 14 ground go to a less lethal force option.

15 Q I want to start with the -- where I started with  
 16 the option of going up the stairs immediately.

17 In your opinion, if Officer Kenny  
 18 would have gone that route, would you have wanted  
 19 him to announce his presence once up at the top of  
 20 the stairs or not announce his presence at all?

21 A I think after he can make an assessment of what's  
 22 going on, certainly then it may have been  
 23 appropriate. You know, there are a lot of what ifs  
 24 there. If he made a determination that you have  
 25 Tony Robinson who is upstairs and he's punching the

1 walls, is there a real reason to -- and nobody else  
 2 is up there and nobody is injured or being injured,  
 3 then it begs the question of what he's doing there.  
 4 So then you have to go to plan B. But definitely  
 5 you need to announce at that point.

6 Q So just -- if you go the route of going directly up  
 7 the stairs immediately, we know that you're  
 8 critical of Officer Kenny making the announcement  
 9 when he did, when should he have made the  
 10 announcement?

11 A If he's at the top of the steps and in a reasonable  
 12 position, he's no longer in a position of extreme  
 13 disadvantage, he's in a position of -- that he can  
 14 respond on a relatively equal manner.

15 Q What does that look like?

16 MR. SWAMINATHAN: Objection to form.

17 THE WITNESS: Flat surface. He's not  
 18 exposed. He's not below the subject. So, you  
 19 know, here is an officer that's highly trained. So  
 20 he has a number of options. The way he did it  
 21 pretty much excluded everything except deadly  
 22 force. Being at the top to make an assessment he  
 23 would have had potentially other options.

24 BY MR. HALL:

25 Q So again, for when you would propose making the

1 announcement, you would want Officer Kenny to be up  
 2 at the top of the stairs and on the same level as  
 3 Tony Robinson; is that correct?

4 A Don't get me wrong. I don't think he should have  
 5 gone. I'm just saying the manner in which he  
 6 responded was not consistent with an intervention  
 7 based on exigent circumstances.

8 Q But in your report, Subsection B2A, not even  
 9 Subsection B2A, Officer Kenny could have ascended  
 10 to the top of the stairs quickly without announcing  
 11 his presence thereby gaining an advantage before  
 12 confronting or being confronted by Tony.

13 A Correct.

14 Q So is that an option, or is it not an option?

15 MR. SWAMINATHAN: Objection to form.

16 THE WITNESS: That was a better option --  
 17 obviously a better one than being in a position  
 18 where you're totally vulnerable in the manner that  
 19 he did it. I'm not saying it's a good one, but  
 20 it's a better one.

21 BY MR. HALL:

22 Q In your work in providing expert testimony in law  
 23 enforcement cases, have you ever rendered an  
 24 opinion critical of an officer for failing to  
 25 announce his or her presence in a timely manner?

1 A I can't think of any case where that was an issue  
 2 off the top of my head.

3 Q So you don't recall rendering an opinion in a case  
 4 where you maintained the opinion that the officer  
 5 should have announced his or her presence sooner  
 6 than the officer did?

7 A I don't recall a particular fact of circumstances  
 8 where that was an issue. Everything is basically  
 9 fact specific.

10 Q I understand that. But generally rendering the  
 11 opinion that an officer should have announced his  
 12 or her presence at a time period sooner than when  
 13 the officer did, you don't recall ever rendering an  
 14 opinion related to that?

15 A No, not off the top of my head.

16 Q In this case we know that Officer Kenny drew his  
 17 firearm just before he entered the stairwell,  
 18 correct?

19 A The second version, correct.

20 Q But your understanding of the facts of this case  
 21 that you used to form your opinions is that Officer  
 22 Kenny drew his firearm just before he entered the  
 23 staircase?

24 A That's what the video indicates. He since recanted  
 25 what he initially told Sergeant Gary. He initially

1 told Sergeant Gary that he only pulled the firearm  
2 out or drew his firearm after he was attacked by  
3 Tony Robinson.

4 Q Well, you considered facts in making your opinions  
5 in this case, correct?

6 A Yes.

7 Q Did you consider the fact -- did you consider it a  
8 fact that Officer Kenny pulled his firearm just  
9 before entering the staircase, or did you think  
10 some other scenario played out?

11 A No. I was just pointing out another inconsistency,  
12 what Officer Kenny said initially and what he later  
13 acknowledged and what was reinforced by the video.

14 Q Have you ever known officers to not get things  
15 100 percent right when describing a critical  
16 incident in the immediate aftermath of that  
17 incident?

18 MR. SWAMINATHAN: Objection to form and  
19 foundation.

20 THE WITNESS: I think for the most part  
21 they do get it right. I think that there may be  
22 certain things that are so stressful or traumatic  
23 that -- but those are few and far between, not the  
24 overall situation, but I think certainly the  
25 justification for going up, what you did while you

1 were going up, the rationale for why you did what  
2 you did going up, that's not something that's going  
3 to be impacted by the traumatic event.

4 BY MR. HALL:

5 Q So in your experience you're not aware of any  
6 officers not getting something 100 percent right  
7 after a critical incident?

8 MR. SWAMINATHAN: Objection to form.

9 THE WITNESS: I'm aware of officers  
10 misrepresenting. I'm aware of officers who were  
11 involved in extreme critical events and trauma that  
12 may have it confused at the time.

13 But as a general rule of thumb, I  
14 think at least the things that lead up to a  
15 situation that the actions that you take before a  
16 traumatic event should be fairly solid and  
17 consistent.

18 BY MR. HALL:

19 Q I've got a couple of questions specific to that you  
20 having an opinion as to an officer's statements  
21 being consistent after a traumatic incident.

22 Do you have any medical or  
23 psychological training or experience that gives you  
24 any level of expertise to offer that opinion?

25 A No, not medical or psychological.

1 Q In your description you referenced extreme critical  
2 events and trauma. What would you constitute  
3 extreme critical events and trauma?

4 A If an officer was involved in a fight for his life,  
5 if officers had -- or an officer had been injured  
6 or -- that's physical trauma, if an officer, say,  
7 shot an innocent third party by mistake, so there's  
8 a number of factors. But what you did leading up  
9 to it should be fairly consistent and fairly clear.

10 Q And again, you don't have any scientific or medical  
11 training or expertise to support your opinion that  
12 leading up to -- the events that led up to a  
13 critical incident should be subject to perfect  
14 recall even after a critical incident?

15 A I'm not talking about perfect recall. I'm talking  
16 about something where you change a number of  
17 specific facts. I've reviewed well over 650 cases  
18 the majority of which there was some form of use of  
19 force, many of which were officer-involved  
20 shootings.

21 So where I'm not a psychologist, I'm  
22 looking at patterns of behavior and responses, and  
23 I'm looking at the subsequent officer-involved  
24 shooting investigation to make those statements.

25 Q In cases where there is an extreme critical event

1 and trauma, in your mind is it excusable that an  
2 officer may not have complete recollection or may  
3 misremember what happened?

4 A I think that that's a possibility. I think -- and  
5 it would be situational, and you would have to,  
6 again, explain that. In other words, I'd have to  
7 have the fact scenario.

8 Q You're aware of the fact that Officer Kenny was  
9 punched by Tony Robinson in the head?

10 MR. SWAMINATHAN: Objection to form.

11 THE WITNESS: I'm aware that that's what  
12 Officer Kenny said, yes.

13 BY MR. HALL:

14 Q Well, in reviewing this case and in rendering your  
15 opinions in this case, are you aware of any  
16 evidence that contradicts Officer Kenny on that  
17 point?

18 A That he was punched at least once?

19 Q Yes.

20 A That particular aspect, no.

21 Q So in preparing your report and preparing your  
22 opinions in this case, you have operated with the  
23 understanding that prior to the shooting, Officer  
24 Kenny was punched in the head once by Tony  
25 Robinson?

8/8/2016

Dennis K. Waller

Page 21 (72 - 75)

Page 72

Page 74

1 A That's what he said, and there was observation that  
2 he had an injury to his head.

3 Q So you assumed that to be true for purposes of  
4 developing your opinions in this case?

5 A That's what I considered, yes.

6 Q With regard to Officer Kenny drawing his firearm  
7 before entering the stairwell and having his  
8 firearm drawn as he entered the stairwell, putting  
9 aside your overall criticism of Officer Kenny  
10 entering the stairwell by himself without  
11 assistance, if we assume that for whatever reason  
12 Officer Kenny was justified to enter that stairwell  
13 without assistance or without backup, are you  
14 critical of him doing so with his firearm drawn?

15 A In the manner in which he did that, yes, because he  
16 stopped partway up, so that left him without any  
17 other viable force option. So that's my criticism  
18 there.

19 Q What I'm asking about is the decision, the action  
20 of pulling his firearm from his holster and having  
21 his firearm out when he entered the stairwell and  
22 as he was going up the stairs.

23 Are you critical of that? Again,  
24 putting aside your more general criticism of him  
25 entering without backup.

1 can't answer that because he shouldn't have gone  
2 in.

3 And if he's going in, the problem  
4 with going in in that manner in which somebody --  
5 which he considered somebody and all the other  
6 officers considered somebody experienced excited  
7 delirium, he's setting it up to use deadly force in  
8 a situation where deadly force is not called for.

9 Q All right. Well, again, we've beat this horse  
10 dead. I think everybody understands crystal clear  
11 your opinion that Kenny should not have entered by  
12 himself. If I have to ask the question as a  
13 hypothetical, I will, but I don't think we really  
14 need to do that.

15 Putting aside your criticism --  
16 which I understand is overarching all of this --  
17 but putting aside your criticism of Kenny entering  
18 him by himself, if it would have been appropriate  
19 for Kenny to enter by himself, are you critical of  
20 his decision to enter with his firearm drawn as  
21 opposed to another weapon or no weapon at all?

22 A If we're making the assumption it was legitimate to  
23 intervene, then the firearm.

24 Q Then it was appropriate to have the firearm drawn?

25 A If you have a legitimate exigent circumstance that

Page 73

Page 75

1 A Let me explain it this way. Based on what he  
2 subsequently acknowledged that he knew, one voice,  
3 not two, that he didn't bother to go up, that this  
4 guy was experienced, excited delirium, then yes, I  
5 do in the sense that he could not effectively  
6 provide assistance in a medical emergency, and he  
7 had no other force option other than deadly force.

8 Q So what weapon would you propose that Officer  
9 Kenny, if any, have out and drawn as he entered the  
10 stairwell? Again, putting aside you're critical of  
11 him entering the stairwell himself. But if we  
12 assume he enters it by himself, besides his  
13 firearm, which weapon do you propose he ought to  
14 have out, if any?

15 MR. SWAMINATHAN: Objection. Form.

16 THE WITNESS: Well, based on what he  
17 subsequently acknowledged that he knew, he  
18 shouldn't have made entry.

19 BY MR. HALL:

20 Q I'm pretty sure we've beat that horse till it's  
21 completely dead.

22 A So assuming that he shouldn't have gone in, but if  
23 he's going in, he limited his force options to  
24 deadly force, and that's one big reason why he  
25 shouldn't have gone in all by himself. I guess I

1 involves a belief that you have substantial  
2 battery, life-threatening situation, then yes.

3 Q In terms of Officer Kenny's decision and action to  
4 announce his presence while he was halfway up the  
5 stairs or partway up the stairs, I understand  
6 you're critical of that, the timing of his  
7 announcement?

8 A Very.

9 Q Can you point me to any peer reviewed published  
10 literature or law enforcement standard that would  
11 have prohibited Officer Kenny from announcing his  
12 presence at the time that he did?

13 A Sure. Pierce R. Brooks, the officer -- Street  
14 Survival books, The Tactical Edge, any number of  
15 articles. You're talking about a position in  
16 advantage to the officers.

17 And so what he did I don't think you  
18 could have taken more of a position of disadvantage  
19 based on the timing of his announcement and his  
20 actions.

21 Q Are you aware of any standards or peer reviewed  
22 published literature that would stand for the  
23 proposition that it's inappropriate to use the  
24 announcement of your presence to create a diversion  
25 to assist the potential crime victim?

8/8/2016

Dennis K. Waller

Page 22 (76 - 79)

Page 76

1 MR. SWAMINATHAN: Objection. Asked and  
2 answered.

3 THE WITNESS: No. I think you just need  
4 to do it from a position of advantage or relative  
5 advantage.

6 BY MR. HALL:

7 Q But you would acknowledge that there is nothing  
8 that would have prohibited Officer Kenny from  
9 announcing his presence in an effort to create a  
10 diversion to potentially assist a victim?

11 A Assuming that he had to take an immediate  
12 intervention and considering the position of  
13 disadvantage going up the steps particularly by  
14 himself without a cover officer, I don't have a  
15 problem if he would have intervened by announcing  
16 his presence at the bottom of the steps and  
17 maintaining a position of cover and concealment and  
18 having the ability then to assess the situation,  
19 and if it was necessary for him to intervene.

20 Look at Sergeant Gary. As soon  
21 as -- before he went up the steps and while the  
22 thought was there was potentially a victim up  
23 there, "Madison Police, Madison Police."

24 Look at Officer Christian in his  
25 deposition, if I go into a residence and based on

Page 77

1 exigent circumstances I'm going to announce my  
2 presence right at the start, and I'm going to keep  
3 announcing it.

4 So if that was truly necessary for  
5 him to announce his presence, then he should have  
6 done it from a position of advantage. And the best  
7 advantage would have been from the base of the  
8 steps.

9 MR. HALL: Can you repeat my question?  
10 (Record read.)

11 MR. HALL: Let me rephrase that question.

12 BY MR. HALL:

13 Q You would acknowledge that there is no peer  
14 reviewed published literature or law enforcement  
15 standard that would have prohibited Officer Kenny  
16 from announcing his presence in a manner in which  
17 to try to create a diversion to protect a potential  
18 crime victim, correct?

19 A Certainly. But if he was -- assuming that he's in  
20 a position of relative advantage.

21 Q So that maybe takes us to the heart of this. Is it  
22 your opinion that an officer should only announce  
23 his or her presence when they are in a position of  
24 advantage over the subject or suspect?

25 A I think if -- it depends on what you're trying to

Page 78

1 accomplish. If you're entering and trying to make  
2 sure that the people inside know that it's a police  
3 officer coming in, you should announce early and  
4 often, ala Sergeant Gary and Officer Christian.

5 If you are attempting to intervene  
6 in a legitimate exigent circumstance in that you  
7 have a strong basis to believe that somebody's  
8 being severely injured or likely to be, then you  
9 make a tactical response and decide when it's to  
10 your advantage to announce.

11 I mean it's analogous to when you  
12 use deadly force whenever possible and appropriate  
13 give a warning, stop or I'll shoot, or do whatever.  
14 Now, is that a hard and fast rule? No. There can  
15 be situations where you shoot because to announce  
16 or give warning would be more dangerous to you  
17 and/or potential victims.

18 Q When, if ever, would it be appropriate to  
19 announce -- for an officer to announce his or her  
20 presence without the position of advantage?

21 A Well, when you say "without the position of  
22 advantage," we're looking at -- so that the officer  
23 could maximize his options to respond to the  
24 situation. You may drive up and use your lights  
25 and siren to announce your presence to stop a

Page 79

1 particular type of activity that's going on.  
2 Sometimes the mere fact that an officer shows up in  
3 uniform will stop aberrant behavior.

4 So it would be entirely fact  
5 specific. But it goes back to can the officer do  
6 the potential victim any good by risking being  
7 taken out before the officer can effectively  
8 intervene? Then it kind of negates the rationale  
9 for the intervention to begin with.

10 Q So is it ever appropriate for an officer to  
11 announce verbally his or her presence if they are  
12 not in a position of advantage but are simply  
13 trying to assist a potential battery victim?

14 A It would be fact specific. There may be.

15 Q Can you think of any scenario in which it would be  
16 appropriate for an officer to verbally announce his  
17 or her presence in an effort to assist a crime  
18 victim even though the officer is in a position of  
19 disadvantage?

20 A I suppose if the officer can articulate that there  
21 was no other option.

22 Q No other option for what?

23 MR. SWAMINATHAN: Objection to form.  
24 THE WITNESS: To intervene.  
25



8/8/2016

Dennis K. Waller

Page 23 (80 - 83)

Page 80

1 BY MR. HALL:

2 Q But at this point we're already past the point of  
3 the decision to intervene. This is now just a  
4 question of announcing presence.

5 A Well, are we talking in general terms, or are we  
6 talking about this case?

7 Q I'm talking about in general terms.

8 A Well, in general terms if the other person -- if  
9 the subject you are attempting to encounter isn't  
10 aware of your presence, then you pick the time to  
11 announce. If you're going to announce, you should  
12 do it smart, and you should do it to maximize your  
13 safety and the safety of the individual or  
14 potential victim.

15 Q And in deciding when to make the announcement,  
16 because that is the decision of the officer at that  
17 point, is it inappropriate for an officer to  
18 announce himself or herself verbally in an effort  
19 to attempt to protect the potential victim even  
20 though the officer is in a position of disadvantage  
21 and may be placing himself or herself at greater  
22 risk in announcing?

23 A And we go back to if it's a single officer and the  
24 officer is taken out, then he can't help the  
25 victim, so you have two victims.

Page 81

1 Q So is your --

2 A So then it would be inappropriate, I think.

3 Q In any scenario?

4 A Well, there could be some, but you'd have to give  
5 me a lot more facts.

6 Q As you sit here today, you can't think of a  
7 scenario in which it would be appropriate for an  
8 officer to announce his or her presence verbally in  
9 an effort to protect a potential crime victim when  
10 in doing so the officer is at a position of  
11 disadvantage and may be risking his own life or her  
12 own life?

13 A Let me refine that a little bit. What I talked  
14 about was you couldn't have put yourself in more of  
15 a disadvantageous position. If you alter the facts  
16 in general, you may do that. You may do it with  
17 coming in lights and sirens so they're aware of the  
18 police rather than the police coming. You may be  
19 exposed upon your arrival, so that may be what you  
20 do to try to scare away or stop or intervene in a  
21 substantial battery or worse.

22 But you'd have to have a lot more  
23 facts. If you're going to intervene like that and  
24 you're going to put yourself in a position of  
25 disadvantage, then I would expect you would do it

Page 82

1 as quickly as possible because speed then could be  
2 helpful to the officer.

3 Q But previously you suggested that one appropriate  
4 way of handling this would be to not announce until  
5 the officer was already upstairs and on the same  
6 level as Tony Robinson, correct?

7 A And can make an assessment of what's going on. I'm  
8 saying he had two basic options if he's going to  
9 intervene. He did not -- I mean two smart -- well,  
10 two much more intelligent options than what he  
11 used.

12 Q But one of those scenarios would involve the  
13 officer not verbally announcing himself until much  
14 later than when Officer Kenny announced himself,  
15 correct?

16 A Not much later. Officer Kenny delayed responding  
17 up the steps immediately. There were somewhere  
18 between 15- to 20-some seconds where he was on the  
19 stairs where he only went up to within five or six  
20 steps of the top. Now that's inconsistent with him  
21 needing to immediately intervene in an exigent  
22 circumstance.

23 So if he came in, he went to the top  
24 as fast as he could and then looked in and decided  
25 to announce, okay. But my point was why would you

Page 83

1 put yourself in the worst possible scenario while  
2 you take your time doing it and then announce?  
3 That's inconsistent with sound police practice and  
4 tactics.

5 Q Even if you believed doing so could help a  
6 potential crime victim?

7 A Well, I'm not assessing credibility. I just think  
8 that if you have a potential crime victim, you're  
9 going to intervene without backup. You do it as  
10 quickly as possible. He did not do that as quickly  
11 as possible.

12 I would feel a lot better about it  
13 if he had intervened immediately, but he didn't.  
14 So the delay, the bad position, those are all  
15 factors that I took into account.

16 Q But turning specifically to the verbally announcing  
17 his presence as an officer, the timing of that if  
18 it's done to protect a victim or with the mindset  
19 of protecting a victim, even if it's being done at  
20 a position of disadvantage, can you point me to  
21 anything, any law enforcement standards, any peer  
22 reviewed published literature that would say that  
23 is inappropriate?

24 MR. SWAMINATHAN: Objection to form.

25 THE WITNESS: I already have that they

8/8/2016

Dennis K. Waller

Page 24 (84 - 87)

Page 84

1 would submit to you that, A, if he's going to put  
2 himself in a position where he's going to be taken  
3 out, then he can't do the victim any good. Taking  
4 a bad position is a primary consideration and a  
5 fatal error, and officers are trained to avoid that  
6 whenever possible.

7 I'm just saying that if he felt it  
8 necessary, then it should have been an immediate  
9 intervention and then take the best of two bad  
10 options, but he didn't do that.

11 BY MR. HALL:

12 Q At various points in your report you reference that  
13 you've reviewed video, right?

14 A Yes.

15 Q What video have you reviewed in terms of the audio  
16 and video syncing because there's a couple of  
17 versions out there?

18 A The one I relied most on was the sync between  
19 Officer Kenny's squad video and Sergeant Gary's  
20 audio.

21 Q And was that the version of video prepared by the  
22 DCI?

23 A Yes.

24 Q Have you reviewed the audio and video  
25 synchronization done by Mr. McKay, one of the

Page 85

1 plaintiff's experts?

2 A No. But he concurred that that was a valid way to  
3 do it according to standards in the industry and  
4 was very consistent with what he would have  
5 expected.

6 Q Yet his video recreation was different than what  
7 DCI did, correct?

8 A Not substantively as far as I know. I didn't see  
9 it. That's not what I gleaned from reading the  
10 report.

11 Q When you testified earlier that you believed that  
12 15 to 20 seconds went by as Officer Kenny was going  
13 up the stairs, what do you base that on?

14 A 15 to 20 plus seconds. Based on when he said he  
15 was going in, there would be a short delay and then  
16 when we know when the shots started to be fired.  
17 So I can't give you an exact amount of time.

18 I just think that there was an  
19 extensive delay because the independent witnesses  
20 did not hear Tony making comments that they could  
21 understand like, oh, the police is here or  
22 whatever, and they did not hear "Madison Police"  
23 shortly before shots were fired.

24 So there was a delay in the  
25 announcement. Exactly how much of a delay, I don't

Page 86

1 know. But if you have an exigent circumstance  
2 which requires immediate intervention, there was a  
3 substantial delay in seconds being able to go up  
4 the steps and/or responding at the bottom of the  
5 steps verbally.

6 Q All right. I'm confused. What does Kathy Bufton  
7 and Edward Greengrass, what do they have to do with  
8 their being a potential delay in Officer Kenny  
9 announcing his presence?

10 A Well, they didn't hear an announcement of his  
11 presence.

12 Q At all?

13 A Right, and we can't ask Tony Robinson because he  
14 was shot and killed.

15 Q To be fair, they also didn't hear Tony allegedly  
16 respond, "The police are here"?

17 A Correct, but that's something that we rely entirely  
18 on Officer Kenny. So we rely on him to say that he  
19 went to the top -- five to six steps from the top.  
20 We rely on him to say he made -- announced his  
21 presence, and there was a response from Tony.

22 We rely on him to say that he was  
23 attacked at the top of the steps. We got different  
24 versions about when he drew his firearm and when he  
25 shot. He says he shot initially toward the top of

Page 87

1 the steps.

2 He later acknowledged that if you  
3 look at the synchronization of his video and  
4 Sergeant Gary's audio, that it would appear that  
5 all the shooting took place at the bottom of the  
6 steps, but he didn't think the synchronization was  
7 right.

8 So you have a verification from an  
9 independent expert that that synchronization by DCI  
10 was pretty solid, pretty fair and an accurate  
11 representation.

12 So what you have is Officer Kenny  
13 saying I fired the first three shots on the top of  
14 the stairs, and he then acknowledged he may have  
15 fired the last four at the bottom of the stairs,  
16 but that's not what he said necessarily before, if  
17 I recall correctly, before he viewed the video. He  
18 said -- he had a different story before he viewed  
19 the videos. So basically we're going on the basis  
20 of what Officer Kenny said after he changed his  
21 statement several times. And then says, well,  
22 that's not how I recall it, but I agree if the  
23 video is accurate, then it means that all the shots  
24 were fired at the bottom, and the district attorney  
25 acknowledged that all the shots were fired at the

8/8/2016

Dennis K. Waller

Page 25 (88 - 91)

Page 88

1 base of the stairs.  
 2 MR. HALL: I'm going to move to strike as  
 3 nonresponsive.  
 4 BY MR. HALL:  
 5 Q What do Kathy Bufton and Edward Greengrass'  
 6 testimony have anything to do with Officer Kenny's  
 7 alleged delay in announcing his presence?  
 8 MR. SWAMINATHAN: Objection. Asked and  
 9 answered.  
 10 THE WITNESS: That they didn't hear  
 11 anything before the shots were fired --  
 12 BY MR. HALL:  
 13 Q So --  
 14 A -- any verbal responses. Now -- and Officer Kenny  
 15 said that he gave -- he announced his presence a  
 16 very short time before he fired the shots and that  
 17 he was five or six steps from the top.  
 18 Q Again, you agree, though, Kathy Bufton and Edward  
 19 Greengrass did not hear Officer Kenny announce his  
 20 presence, correct?  
 21 A That's what they gave sworn testimony to.  
 22 Q So there's no delay there. That's just them saying  
 23 they didn't hear him make the announcement.  
 24 A Well, they didn't hear it, but Officer Kenny  
 25 indicated -- he made the announcement, he got the

Page 89

1 response, and then he was suddenly attacked.  
 2 Q You have the timing at 15- to 20-plus seconds for  
 3 Officer Kenny to ascend the stairs; is that  
 4 accurate?  
 5 A Yes.  
 6 Q And you have this 15- to 20-plus seconds from what  
 7 time to what time? What occurred at the beginning  
 8 of the clock, and what occurred at the end of the  
 9 clock? What exactly are you saying?  
 10 A I'm trying to find my specific reference to that,  
 11 but what I looked at was the radio responses, what  
 12 time he went in and what time the shooting started.  
 13 There was a time on there.  
 14 Q So that the time period that we're talking about or  
 15 that you're talking about when you say 15- to  
 16 20-plus seconds, your recollection is that the  
 17 clock essentially starts with the radio  
 18 transmission of -- I'm paraphrasing, "I'm going  
 19 in," and ends with the radio transmission of "shots  
 20 fired;" is that correct?  
 21 A Well, that was the sync of the audio which was also  
 22 time stamped on Sergeant Gary's vehicle. So we see  
 23 the -- they did the synchronization of the audio  
 24 and the video -- audio from Sergeant Gary, the  
 25 video from Officer Kenny's squad.

Page 90

1 There was a time stamp in there  
 2 which showed him announcing that he was going in.  
 3 I assumed there would be a second or two or several  
 4 delay and then moving up the steps.  
 5 The significance of that is he  
 6 decided that he couldn't wait the matter of seconds  
 7 before backup, that he had to immediately  
 8 intervene. And then we know at the time the shots  
 9 started and the shots were about a three-plus  
 10 second period of time between the first three and  
 11 the last four.  
 12 Q So your factual understanding of this case is that  
 13 you've got somewhere between 15- and 20-plus  
 14 seconds from the time Officer Kenny says "I'm going  
 15 in" until the time that you can hear the first  
 16 shots being fired; is that your testimony?  
 17 MR. SWAMINATHAN: Objection to  
 18 foundation. I think that misstates his testimony.  
 19 MR. HALL: I'll ask this open-ended.  
 20 BY MR. HALL:  
 21 Q You've talked about 15- to 20-plus seconds in a  
 22 number of your answers. You talk about that length  
 23 of time in your report. I just want to know when  
 24 you start the clock and when you stop the clock to  
 25 come up with that number.

Page 91

1 MR. SWAMINATHAN: Are you talking about  
 2 for announcing or for the period of the shots?  
 3 MR. HALL: I don't know what I'm talking  
 4 about, 15- to 20-plus seconds --  
 5 THE WITNESS: I was looking in the wrong  
 6 place. In the understanding of the facts, at 6:38  
 7 and 18 seconds, p.m., Officer Kenny advised he was  
 8 going to enter. At 6:38 and 45 seconds, Sergeant  
 9 Gary advised shots fired.  
 10 So that indicated to me, give a few  
 11 seconds either way, that Officer Kenny had been in  
 12 the stairway approximately 23 seconds or  
 13 thereabouts before exiting the stairwell while  
 14 still firing shots at Tony Robinson.  
 15 BY MR. HALL:  
 16 Q Well, we don't like to approximate in court. So  
 17 let's get this exactly right. 6:38 and 18 seconds  
 18 Officer Kenny advises he's going to enter, and at  
 19 6:38:45 Sergeant Gary advises "Shots fired."  
 20 That's exactly 27 seconds, right?  
 21 A Yes.  
 22 Q Now, you've not been to 1125 Williamson Street?  
 23 A No.  
 24 Q Do you know how many stairs are in the stairwell?  
 25 A I think I recall either 11 or 13.

8/8/2016

Dennis K. Waller

Page 26 (92 - 95)

Page 92

1 Q Are you aware of whether or not that stairwell was  
2 lit at the time Officer Kenny entered it?

3 A I believe that the door was open at the top, so  
4 there was I believe some ambient lighting.

5 Q How do you know that?

6 A I just recall that from the hundreds, if not  
7 thousands, of pages of material that I read.

8 Q You recalled that the door upstairs was open, or  
9 you recall that the door upstairs was open and that  
10 there was ambient light?

11 MR. SWAMINATHAN: Objection to form.

12 THE WITNESS: I think the source of  
13 ambient light was both from the street and from the  
14 top so that -- my recollection was that it was not  
15 lit, but there was some lighting that -- it wasn't  
16 totally black, that you could see somewhat.

17 BY MR. HALL:

18 Q I assume since you've never been to this house,  
19 you've never timed yourself or tested to see how  
20 long it would take a normal person to climb the  
21 stairs -- strike that.

22 Let me back up. If an officer is  
23 going to be entering an apartment and going  
24 upstairs in a tactical situation, there's a lot of  
25 things you don't want to happen, but I assume one

Page 93

1 of them is that you don't want the officer to trip  
2 and fall and make a bunch of noise that alerts  
3 everybody that, hey, I'm on the stairwell?

4 MR. SWAMINATHAN: Objection to form.

5 THE WITNESS: I guess you wouldn't want  
6 to do that anymore than you wouldn't want to advise  
7 while you're halfway up that you were there. I  
8 mean if one isn't appropriate, then the other one  
9 shouldn't be either. One would be accidental. The  
10 other would be intentional.

11 BY MR. HALL:

12 Q Sure. If there's a potential victim that an  
13 officer is attempting on purpose to distract the  
14 attacker from, I suppose that would present a  
15 different scenario as well, wouldn't it?

16 A So you would want to move up as quickly as you  
17 could. And --

18 Q Okay. So that takes me to my next question. How  
19 quickly can an officer safely ascend those stairs?

20 MR. SWAMINATHAN: If you wanted to finish  
21 your answer, I'd like you to be able to do that.

22 THE WITNESS: I can do that and respond  
23 to this one. Officer Kenny had a light on his  
24 firearm. He had his firearm out. If necessary, he  
25 could have done a quick light and peek and see what

Page 94

1 condition the stairway is. Now my understanding,  
2 there was objects or debris on the steps.

3 So he would want to move up so that  
4 he would not be in a position of disadvantage so  
5 that he could properly intervene. He had the means  
6 to do that.

7 BY MR. HALL:

8 Q But again, can you tell me how long it should have  
9 taken to safely but quickly ascend those steps?

10 A Apparently less time than it would take for the  
11 backups to arrive and to do it the right way. So  
12 that's --

13 Q Now you're being sarcastic. I asked a very simple  
14 question. Can you tell us how long it would take  
15 to safely and quickly ascend those steps?

16 In your report here there's 27  
17 seconds between the time that Kenny advises that  
18 he's going to go in to the time that Sergeant Gary  
19 announces "Shots fired." If you think that's too  
20 long, I want to know what you think would be an  
21 appropriate amount of time. How many seconds?

22 A I think my report says 23 seconds. You said 27. I  
23 think that certainly if it required immediate  
24 intervention that a SWAT team member could access  
25 those steps -- 11 or 13 steps in obviously

Page 95

1 somewhere -- less than 10 seconds, probably far  
2 less.

3 Now, as old as I am, and I'm  
4 certainly not on the SWAT team anymore, I know that  
5 I could make it up the steps in less than 10  
6 seconds. Now if I thought this required a life or  
7 death intervention, then -- or life -- extreme  
8 injury intervention, then I would get up there as  
9 fast as I could.

10 Now -- so I'm talking about that  
11 length of time, which I can't give you an exact  
12 period, I know only when he said he was going to  
13 enter and we know at what time the shots were  
14 fired. That's why I gave an approximation. Now --

15 Q Let's --

16 A Let me finish, please. If you know he could get up  
17 there faster than, say, 10 seconds and you know it  
18 took him longer than 10 seconds, it's really  
19 inexplicable that he would take the worst possible  
20 position assuming he went up at all to make his  
21 announcement.

22 Q Correct me if I'm wrong, Kenny said that he was  
23 going in at 6:38 and 18 seconds. Gary advises  
24 "Shots fired" at 6:38 and 45 seconds.

25 A Correct.

8/8/2016

Dennis K. Waller

Page 27 (96 - 99)

Page 96

Page 98

1 Q That's 27 seconds.

2 A Yes.

3 Q You estimate 23 seconds in the stairwell?

4 A Well, you have to -- I said until he exited while  
5 shooting. And we know that the shots were fired in  
6 about three-plus seconds, so it started at 6:30 and  
7 42 seconds and ended at 6:38, 45 seconds.

8 Q And where do I see that in your report?

9 A Bottom of page -- second paragraph from the bottom  
10 on page 4.

11 Q Second paragraph to the bottom reads, "Sergeant  
12 Gary advised dispatch at 6:38:25 that he's at the  
13 scene. At 6:38:45 p.m. Sergeant Gary advised,  
14 "Shots fired."

15 A And then go up to the one, the last two sentences  
16 of the preceding paragraph above that.

17 Q The last two sentences read, "At 6:38:18 Officer  
18 Kenny advised that he was going to enter," and the  
19 last paragraph doesn't have any time on it at all.

20 MR. SWAMINATHAN: Aren't you talking  
21 about this -- I'm sorry, aren't we talking about  
22 this paragraph here?

23 THE WITNESS: We're talking about -- you  
24 have to look at the preceding one at 6:38:18 to get  
25 that time frame. So we know that roughly that's

1 exiting the stairwell while shots -- while firing  
2 shots at Tony.

3 BY MR. HALL:

4 Q Again, there's 27 seconds between when Kenny  
5 advises he's going in and when Gary radios, "Shots  
6 fired." I want to know how you got from 27 to what  
7 I'm now understanding your testimony to be less  
8 than 23 seconds.

9 A I approximated a little bit of time for him to  
10 enter after he said he would. He should at least  
11 peek around and see, and then you subtract three  
12 seconds from the time that the shots were  
13 advised -- that the shots were fired. And there  
14 was another document, and I'll dig it up if it's  
15 important to you, that indicated that that shots  
16 ended at approximately 6:38:45.

17 Q Let me try to do it this way. You say that Officer  
18 Kenny was in that stairwell for less than 23  
19 seconds, right?

20 A Before shooting.

21 Q Before shooting?

22 A Yes.

23 Q And it may have been less than 23 seconds as  
24 opposed to 23 seconds exactly, right?

25 A Or more, yes.

Page 97

Page 99

1 about the time that he said he was about to enter.

2 We know that the last shots that were fired were at  
3 6:38:45.

4 BY MR. HALL:

5 Q No. We don't know that. We know at 6:38:45  
6 Sergeant Gary advised, "Shots fired;" is that  
7 right?

8 A According to -- that's my understanding, yes.

9 Q So we have a 27-second period from the time that  
10 Officer Kenny states, "I'm going in" until the time  
11 that Sergeant Gary radios, "Shots fired," right?

12 A Yes.

13 Q And that's 27 seconds. From those two events, you  
14 deduce that Kenny is in that stairwell for 23  
15 seconds?

16 MR. SWAMINATHAN: Objection to form and  
17 foundation. I think he said that that ensuing  
18 paragraph explains the reason.

19 MR. HALL: Well, it doesn't, and you're  
20 not testifying.

21 MR. SWAMINATHAN: I'm sorry.

22 THE WITNESS: I indicated that he went  
23 into the stairwell or said he was going in at  
24 6:38:18. I said that Officer Kenny had been in the  
25 apartment stairway less than 23 seconds before

1 Q How could it have been more than 23 seconds?

2 A He said, "I'm going in," and he went right in. I  
3 mean would that -- I mean I thought going in was  
4 tactically unsound. Going in without peeking  
5 around or looking would be even more so.

6 Q And this also assumes that Sergeant Gary is  
7 advising of "shots fired" ended or happened  
8 immediately when the shots fired?

9 MR. SWAMINATHAN: Objection to form.

10 THE WITNESS: There was another document  
11 that indicated I think 6:38:45.

12 BY MR. HALL:

13 Q What other document was that?

14 A I think that was from the sync as I told you  
15 before.

16 Whenever you get in a good place to  
17 stop, could I take a break?

18 MR. HALL: Yeah. We can take a break.

19 (A lunch recess was taken from 12:40 p.m.  
20 to 1:34 p.m.)

21 BY MR. HALL:

22 Q I want to take you back and ask you a couple of  
23 hypothetical questions.

24 Obviously had Officer Kenny waited  
25 outside the doorway for backup to arrive, you'd

8/8/2016

Dennis K. Waller

Page 28 (100 - 103)

Page 100

1 agree that none of us can say for sure what would  
2 have happened, what the end result would have been;  
3 is that fair?  
4 A Yes.  
5 Q Putting that aside, assuming that there are two  
6 officers and assuming then that they were going to  
7 enter the stairwell, do you have any opinions as to  
8 what the proper approach would have been for two  
9 officers entering that stairwell?  
10 A Well, I think two is not necessarily the right  
11 scenario because there were multiple officers  
12 coming. But if you had two officers, you could  
13 have, as Officer Kenny indicated, lethal cover and  
14 one could use the recommended force option for  
15 dealing with excited delirium, and that would be  
16 the electronic control device or taser.  
17 Q Now you say potentially waiting for more officers  
18 than just two. Is there a --  
19 A Well, we talked about backup and the need for  
20 backup, and you asked me for a treatise or  
21 something. But I think it's such a basic concept  
22 and I think even Officer Kenny said, when I said I  
23 was coming in, I knew that they would be coming,  
24 and I needed another officer. He already knew  
25 about two officers coming, Martinez and Christian.

Page 101

1 He said I asked for another officer, and I think it  
2 was Officer Christian who said I heard something or  
3 Martinez, I heard something in his voice and I knew  
4 so --  
5 But my point is, you know that when  
6 an officer's in that situation and they call for  
7 backup, the backup's going to be there quickly, and  
8 it's going to be multiple.  
9 Q We're missing each other on my question. Is there  
10 an ideal number of officers that you would want  
11 when you're going to confront this type of  
12 situation? Because you said there could be two,  
13 but maybe there would be more.  
14 Is there an ideal number of officers  
15 that you'd want in a situation to go up those  
16 stairs to confront Tony Robinson?  
17 A Because it's excited delirium, then you would want,  
18 I'd say, a minimum of four, maybe six.  
19 Q And you would want -- and again, in a perfect  
20 world, you'd want those four to six officers to all  
21 go up the stairs to be where -- in this case it was  
22 Tony Robinson?  
23 A Well -- and you may have not all go up at the same  
24 time, but you may have lethal cover down as the  
25 officers are going up. There are different ways to

Page 102

1 effect it.  
2 But because it's suspected, excited  
3 delirium, the protocol is multiple officers, and  
4 you want to end any resistance or interaction as  
5 quickly as possible.  
6 Q Let's say hypothetically that there's four officers  
7 that are there and ready to go into the home.  
8 We've talked about this concept of having the less  
9 lethal taser with lethal cover. And you agree that  
10 in this type of a scenario, if a taser is going to  
11 be out, you would want lethal cover as well,  
12 correct?  
13 MR. SWAMINATHAN: Objection. Form.  
14 THE WITNESS: Ideally you want the  
15 ability to do that. Now, the only prohibition  
16 against is you don't take a taser to a gun fight.  
17 So if you think that the individual  
18 is armed, you would not -- with a knife or gun, you  
19 would not consider interacting with anything less  
20 than a firearm unless you had lethal cover. It  
21 wasn't the case here because they had no indication  
22 at that point that he was armed and using any other  
23 weapons than his hands.  
24 BY MR. HALL:  
25 Q But you would also agree that there was no

Page 103

1 indication that he was unarmed. At this point it  
2 was not known to the officers or was not known to  
3 Officer Kenny whether or not Mr. Robinson was armed  
4 upstairs or had armed himself?  
5 A Well, you never know, but by all indications and  
6 all the information they had to that point, he had  
7 not been armed or used a weapon. He had only used  
8 hands and fists.  
9 Q But that does not necessarily mean or that does not  
10 necessarily allow for an officer to believe that  
11 the person is not armed, correct?  
12 A You always plan for the worst.  
13 Q So in that type of scenario, if the officers are  
14 going to confront the subject and are going to go  
15 up the stairs, you would expect if there were four  
16 officers, that one or more of them would have their  
17 taser out, correct?  
18 A Yes.  
19 Q You wouldn't expect all four officers go out with  
20 their guns drawn?  
21 A No.  
22 Q In addition to officers -- at least one officer and  
23 maybe more officers with their tasers out, you  
24 would also expect that there would be lethal cover  
25 provided as well, correct?

8/8/2016

Dennis K. Waller

Page 29 (104 - 107)

Page 104

1 A Yes.

2 Q In terms of -- I've never been a police officer,  
3 but in terms of the tactics of going up the stairs  
4 with that type of a scenario with two different  
5 types of force out and available, one being a taser  
6 and one being lethal cover, how would those  
7 officers go up the stairs? In other words, does  
8 the taser go first and the gun is behind, or does  
9 the gun go first with the taser behind?

10 MR. SWAMINATHAN: Objection to  
11 foundation.

12 THE WITNESS: If there's room, you may go  
13 up side by side.

14 BY MR. HALL:

15 Q You recall here the stairway is pretty narrow. Do  
16 you have any understanding as to whether two  
17 officers could have gone up that stairway shoulder  
18 to shoulder?

19 A There's different ways to do it. Again, it would  
20 depend on what you were -- you would have to have  
21 the details at that time.

22 Was he -- if you hear the noise from  
23 the back of the apartment and you can go up  
24 quickly, you don't really worry about it. If  
25 there's no noise or you hear something toward the

Page 105

1 top of the stairs, then you go in a more protected  
2 manner.

3 Q So if you hear a noise that you think is coming  
4 from the back of the house when you say that you  
5 wouldn't worry about it, you wouldn't worry about  
6 the lethal cover or --

7 A You wouldn't worry as much about -- you'd move up  
8 quickly and deal with it from a position of  
9 advantage.

10 Q So in this case if two officers or more are going  
11 to be going up that stairwell, those officers would  
12 not have been able to go up shoulder to shoulder,  
13 correct?

14 A I would have to look at the measurements before I  
15 make that. Now I would think that it was  
16 relatively narrow. I think that would be  
17 difficult, but could they -- you know, you have  
18 one -- you have the shorter officer go first, you  
19 have the other officer to one side behind him or  
20 her. There are different ways of doing it.

21 Q That's relying on the physical characteristics of  
22 the officers, which is fine. But is there any  
23 protocol that would govern the type of weapon that  
24 the officer has? In other words, is there a  
25 protocol that would say in this type of a scenario

Page 106

1 that the taser would be out in front and the  
2 officer armed with the gun would be behind or vice  
3 versa, or is it dependent on things other than that  
4 like the officer's size and the characteristics of  
5 the officers?

6 A I think unless the sergeant was there, the first  
7 officer would make that determination and say we're  
8 going to go with the taser; so and so, you're  
9 lethal cover; or if the sergeant was there, then he  
10 would decide or she would decide. So it would be  
11 then you use the resources that you have the most  
12 effectively.

13 Q So you assign to the officer, okay, you officer so  
14 and so, you're providing lethal cover; and you,  
15 officer so and so, you're going to be the one armed  
16 with the taser. That's fine then. But when they  
17 actually go in -- as the tactical situation when  
18 they go into the stairwell, does it matter which  
19 officer or which weapon is first or second?

20 A Well, wherever your lethal cover is, you want to  
21 have that officer have the ability to use it if  
22 necessary. So obviously he wouldn't be directly  
23 behind the first officer if the first officer had  
24 the electronic control device, but there's ways to  
25 move up.

Page 107

1 I mean if you and I -- for example,  
2 we're a pretty good size. If we tried to go up  
3 shoulder to shoulder, we couldn't. Now is going up  
4 shoulder to shoulder advantageous? Probably not  
5 because we're exposing more. But if we're going up  
6 one step at a time like stomp/drag, stomp/drag and  
7 you know, we can go up much more effectively in a  
8 confined space.

9 So, again, you use the resources  
10 that you have. If you have an officer that's 6'3  
11 or 6'4 and you have Officer Kenny who's 5'10, you  
12 may have Officer Kenny go up first with the taser  
13 and the other officer being able to stay in close  
14 proximity, maybe have his hand on his collar or his  
15 vest or his belt and move him up so that they know  
16 they're moving up in sync.

17 Q So I guess as a matter of best practices, is  
18 there -- and if the answer is there's nothing that  
19 governs this, that's fine.

20 But what I'm curious is, is there a  
21 best practice as to what should get to the top of  
22 the stairs first, the taser or the gun? Or if  
23 there's -- like I said, if there's no standard on  
24 this, that's fine too.

25 A Well, I said the factors that you would consider

8/8/2016

Dennis K. Waller

Page 30 (108 - 111)

Page 108

Page 110

1 individually, the size of the officers, have they  
2 worked together, who's in charge, and does the  
3 lethal cover have a clear shot at all times to  
4 defend the other officer using less lethal, and so  
5 you move up.

6 It would be -- you're using basic  
7 principles and -- to make it happen at the same  
8 time because you can't do a cookie-cutter approach.  
9 You can't say, okay, this officer would be -- this  
10 officer would take a step and this officer and this  
11 officer. That would probably go together. They  
12 would be coming up simultaneously, and they'd have  
13 to modify how they came up based on the physical  
14 parameters of the stairway.

15 Q So in this case had Officer Kenny waited for backup  
16 and had Officer Kenny and one other officer gone up  
17 the stairwell together and let's say Officer Kenny  
18 has his firearm drawn but the other officer had his  
19 or her taser drawn as they proceeded up the steps,  
20 it is possible that Officer Kenny would have been  
21 the lead officer going up the stairs first slightly  
22 ahead of the officer that was armed with the taser?

23 A I couldn't tell you that. It would be entirely  
24 situational.

25 Q If that were to have occurred on its face, there

1 A What?

2 Q That that -- those were your words. Is your  
3 testimony that all four officers believed that  
4 there was a strong possibility of excited delirium  
5 here?

6 A Yes.

7 MR. SWAMINATHAN: Sorry, I just --

8 THE WITNESS: But you interrupted when I  
9 was giving you my reasons. So Martinez decided to  
10 add on because multiple officer requirements. Then  
11 you had Sergeant Gary. He wasn't assigned the  
12 call. The reason he continued onto the call is  
13 because he thought it was a strong possibility, it  
14 was excited delirium.

15 You had Officer Kenny who said, oh,  
16 yeah, he stripped down. So it sounds like excited  
17 delirium, he got there. And see, this is  
18 problematic for me also. He did a bizarre thing.  
19 He said, I know that the bright lights will attract  
20 somebody who is experienced excited delirium, so I  
21 cut off my emergency lights.

22 So he's thinking about it at the  
23 point where he got out of his patrol car about  
24 excited delirium. You have Sergeant Gary who pulls  
25 up and turns on his emergency lights so the other

Page 109

Page 111

1 would be nothing against standards or protocols  
2 with proceeding in that way; is that correct?

3 A It would be however they felt the most comfortable  
4 and the biggest advantage to them.

5 Q And if they believed that that was the best  
6 advantage to them combined, there's nothing that  
7 would have been counter to that that would have  
8 been against protocol?

9 A Right. I mean there is no absolute.

10 Q Now, I understand from reading your report that you  
11 make some commentary regarding the officers,  
12 Officer Kenny and other officers' awareness of  
13 excited delirium, correct?

14 A Yes.

15 Q You understand the facts of this case to be that no  
16 officer actually diagnosed Tony Robinson with  
17 excited delirium, correct?

18 A Well, that's not true. I mean diagnosed, not as in  
19 a doctor would. As a strong possibility, that's  
20 what they're facing, I think they all did. You had  
21 Christian indicate that he did. He sent a message  
22 on the computer over to Martinez.

23 Q Strong possibility?

24 A Huh?

25 Q Strong possibility?

1 backup officers will know where -- exactly where  
2 they are and can quickly find them.

3 So you have Kenny doing something  
4 counterintuitive turning his lights off and  
5 justifying that because he thinks this guy is a  
6 strong possibility being in a medical emergency of  
7 excited delirium, so he turns it off, and then he  
8 forgets all about excited delirium according to  
9 him.

10 BY MR. HALL:

11 Q Where in the record have you seen all four  
12 officers, let's start with Officer Kenny, saying  
13 that there was a quote/unquote strong possibility  
14 of excited delirium?

15 MR. SWAMINATHAN: Are you asking him if  
16 Kenny used the words "strong possibility"?

17 MR. HALL: Yeah.

18 MR. SWAMINATHAN: That's not what he's  
19 saying. He's saying --

20 MR. HALL: You're not testifying. He  
21 just got done testifying "strong possibility."

22 THE WITNESS: I'm saying it was a strong  
23 possibility, not that they said that specifically.

24 BY MR. HALL:

25 Q Let's get that clear. I'm just talking about the



8/8/2016

Dennis K. Waller

Page 31 (112 - 115)

Page 112

1 officers. I'll talk about you in a minute. Your  
2 understanding of the facts of this case, you  
3 understand that none of these officers diagnosed  
4 Tony Robinson with excited delirium, correct?

5 A I'm not going anywhere with diagnosed anything.  
6 I'm saying they strongly suspected --

7 Q That's different than what you just got done  
8 saying. Answer my questions as I ask them and  
9 we'll get through this.

10 Number one, do you agree that none  
11 of these officers diagnosed Tony Robinson with  
12 excited delirium, correct?

13 MR. SWAMINATHAN: Objection to form.  
14 Objection. Asked and answered. I think he's noted  
15 an effort to address a question about the use of  
16 the term "diagnosed" the best way he can, but go  
17 ahead.

18 THE WITNESS: The officers don't  
19 diagnose. They're not medical doctors. What they  
20 are is trained in recognizing characteristics  
21 associated with excited delirium. They all  
22 indicated Madison PD had trained them. They were  
23 aware of what to look for, and they felt at one  
24 time or another, all four of them, there was a  
25 strong possibility, my words, not theirs.

Page 113

1 BY MR. HALL:

2 Q Okay. Well, you can't say that they felt and then  
3 add in words and say, well, these are my words.

4 MR. SWAMINATHAN: He's just  
5 characterizing --

6 MR. HALL: Hang on.

7 BY MR. HALL:

8 Q This is a simple leading question that can be  
9 answered with a yes or no. You agree that none of  
10 these officers diagnosed Tony Robinson with excited  
11 delirium? And yes, diagnosed is a medical term.  
12 And you agree that they're not doctors, correct?

13 MR. SWAMINATHAN: Hold on. Is the  
14 question just you agree they're not doctors?

15 MR. HALL: Strike that.

16 BY MR. HALL:

17 Q Do you agree that none of these four officers are  
18 trained medical doctors, correct?

19 A To the best of my knowledge, that is correct.

20 Q You agree that none of these four officers  
21 diagnosed Tony Robinson with excited delirium,  
22 correct?

23 MR. SWAMINATHAN: Objection to form. The  
24 witness has stated multiple times he's not --

25 MR. HALL: I don't want a speaking

Page 114

1 objection.

2 MR. SWAMINATHAN: We've done this a whole  
3 bunch of times. I have not made speaking  
4 objections in this deposition, but I'm going to  
5 make it this time because I got a problem.

6 The witness has said multiple times  
7 the use of the word "diagnosis" is problematic when  
8 he's being asked to use that word to describe the  
9 testimony of officers. But you want to use that  
10 word. So that is my objection, but you can go  
11 ahead.

12 THE WITNESS: First of all, officers  
13 don't diagnose, but they considered that there was  
14 a strong possibility that he was suffering from a  
15 medical emergency, specifically excited delirium,  
16 because he fit a number of the activities or  
17 behavioral -- forums that they were to look out for  
18 in that regard.

19 BY MR. HALL:

20 Q And your answer when you use the term "strong  
21 possibility" just so that we're crystal clear, even  
22 though you're attributing it to officers, you're  
23 not claiming that officers claimed that there was a  
24 strong possibility; the provision strong  
25 possibility are actually your words?

Page 115

1 MR. SWAMINATHAN: Objection to form.

2 THE WITNESS: I've repeatedly said that  
3 those were my words, and I don't know of any  
4 particular point where they said that.

5 You have Officer Kenny admitting on  
6 page 291 that excited delirium was one possibility.  
7 And page 289 he had a concern that it was excited  
8 delirium because the subject had stripped off his  
9 garments in an attempt to cool off and a tendency  
10 to engage in violent acts and that he wanted time  
11 and distance to gather more information. So to me  
12 that's a strong possibility.

13 BY MR. HALL:

14 Q But the officers never said strong possibility,  
15 they just said possibility?

16 A I don't have a specific cite where any of them said  
17 strong possibility. I just gave you a background  
18 on Officer Kenny. And I could do the same with  
19 Officer Christian, Officer Martinez and Sergeant  
20 Gary.

21 Q And again, you're not a trained doctor, correct?

22 MR. SWAMINATHAN: Objection. Asked and  
23 answered.

24 THE WITNESS: I'm not even an untrained  
25 doctor.

8/8/2016

Dennis K. Waller

Page 32 (116 - 119)

Page 116

1 BY MR. HALL:  
 2 Q So you're not going to offer any opinion that Tony  
 3 Robinson had excited delirium?  
 4 A The only thing that I would say based on the  
 5 information that was provided to the officers, it  
 6 was a very strong possibility that he was suffering  
 7 from excited delirium, and the protocol would have  
 8 been to treat him accordingly.  
 9 Q And the very strong possibility is your words as  
 10 opposed to the officer's words, correct?  
 11 A I think for the 15th time, I agree with that.  
 12 Q Turning to page 8 of your report under Subsection  
 13 C-1, you outline A through F as the procedure to be  
 14 used if circumstances allow for addressing somebody  
 15 that's experiencing excited delirium, correct?  
 16 A Yes.  
 17 Q First one is attempt to calm the subject, correct?  
 18 A Right.  
 19 Q Where do you get that from? Let me back up. Are  
 20 all of these, A through F -- earlier in this  
 21 paragraph you refer to the Crisis Management, A  
 22 Training Guide for Law Enforcement Officers. I  
 23 assume that's where you got it from, but I'm not  
 24 sure.  
 25 A Yeah, I'm pretty sure that that is.

Page 117

1 Q In order to be able to calm a subject down, you  
 2 would agree with me that it's best to have some  
 3 sort of face-to-face interaction with the subject.  
 4 That's the easiest way to try to calm a subject  
 5 down, correct?  
 6 A Well, no. Not necessarily. You could have an  
 7 attempt from a safe location, i.e, at the bottom of  
 8 a stairway, make contact with Tony; hey, Tony,  
 9 we're here to help you, we want to give you -- we  
 10 want to help you out, we understand that you're in  
 11 a bad spot right now and so we're here to help you.  
 12 So try to calm him down that way. It doesn't  
 13 necessarily require face-to-face. You can do the  
 14 same thing over the phone, whatever.  
 15 Q Well, as you're testifying here in the deposition,  
 16 you weren't yelling, but your voice was definitely  
 17 raised as you were saying, hey, Tony, we're here to  
 18 help you.  
 19 You would agree if an officer is  
 20 going to give or have that type of a discussion  
 21 with a subject that's somewhere upstairs, that the  
 22 officer is going to have to raise his or her voice  
 23 and yell at the subject?  
 24 A Maybe not yell per se but try to make verbal  
 25 contact and would have to elevate their voice, yes.

Page 118

1 Q Loud enough so that it can be heard by the subject  
 2 upstairs; otherwise what's the point, right?  
 3 A Correct. But there's a difference between  
 4 communicating in a loud voice and yelling and how  
 5 that's interpreted. One could be communicating to  
 6 calm the person. The other could be yelling to --  
 7 giving commands or potentially provoking the  
 8 person.  
 9 Q Either way, they're going to have to speak at a  
 10 high level of volume. My understanding of the  
 11 distinction that you're drawing is there's a  
 12 distinction between a communicative type of  
 13 discussion versus standing on the base of the  
 14 stairs and yelling out commands and yelling out  
 15 orders?  
 16 A Right. And you'd have to do it loud enough that  
 17 that person could hear, because if you speak the  
 18 same voice that we're doing to communicate, and  
 19 that's what I was trying to illustrate. So yelling  
 20 is not an accurate description. Speaking in a loud  
 21 enough voice that you can communicate back and  
 22 forth is.  
 23 Q Have you ever given your work on cases -- have you  
 24 ever given an opinion critical of law enforcement  
 25 officers for the level of volume or the tone of

Page 119

1 their voice when they've given commands to  
 2 subjects?  
 3 A I can't really respond to that. I've probably  
 4 opined formally or informally over 650 times. I  
 5 don't recall any specific incident where that was  
 6 an issue.  
 7 Q Do you acknowledge that when an officer raises his  
 8 or her voice to try to make contact with the  
 9 subject that they can't see, that sometimes that  
 10 doesn't have the effect of calming, and that  
 11 sometimes it actually agitates an individual?  
 12 A Let me give you an example. I have a dog named  
 13 Buddy. If I say, "Buddy, come here," he responds  
 14 differently. "Dammit, Buddy, get over here," so  
 15 it's the inflections. There's a lot of different  
 16 things. But simply to raise my voice and say,  
 17 "Buddy" so he can hear me is different.  
 18 And he will respond to -- I'm not  
 19 sure, he might understand a few simple words. But  
 20 he understands when I say "Dammit, Buddy" and speak  
 21 in a loud, forceful tone that he screwed up. And  
 22 sometimes he'll bow his head and come back.  
 23 Sometimes he'll -- he's funny, he'll roll over on  
 24 his back and put his four legs up in the air. But  
 25 we're talking about a dog.

8/8/2016

Dennis K. Waller

Page 33 (120 - 123)

Page 120

1 The same thing applies when you're  
2 interacting or communicating with individuals.  
3 There's a lot that goes into the communication.  
4 Cops spend most of their time when  
5 they're interacting with people trying to  
6 communicate effectively. So they know. A loud  
7 voice or a friendly voice can be loud and friendly.  
8 Hey, Tony, we're here to help you. Hey, Tony, are  
9 you the only one up there? Hey, Tony, we'd like  
10 you to come down.

11 Q So, again, if a subject and an officer can't make  
12 face-to-face or eye contact, your testimony is that  
13 an officer standing on the porch can elevate their  
14 voice and speak in a loud voice to the suspect or  
15 subject that they cannot see and that that would  
16 have a calming effect on the subject?

17 A It may have. I mean, you could sometimes smile and  
18 give a friendly greeting to somebody and they'd get  
19 totally annoyed and aggravated with you. Now, you  
20 attempted to do this the best you can. Their  
21 response, you can't say absolutely, but you can  
22 still elevate your voice and say, you know -- and  
23 make contact and try to give the person an  
24 indication of your intent.

25 Q Would you agree that an officer would be more

Page 121

1 likely to have a calming effect on an individual if  
2 they're able to have face-to-face contact and  
3 face-to-face interaction as opposed to being unseen  
4 and speaking in a loud volume so that they can hear  
5 the officer?

6 A That's not necessarily true. In some cases that  
7 may be and in some cases bringing a cop in uniform  
8 could be like bringing fuel to a fire, not a good  
9 thing because it depends on the person's frame of  
10 reference.

11 We've already established that he's  
12 not acting rationally. So does he have former  
13 associations with officer friendly or school  
14 resource officers that were totally positive, then  
15 that may be.

16 If his frame of reference was, you  
17 know, he had been -- they piled on some charges,  
18 they arrested him when he really wasn't doing  
19 anything, his opinion or whatever, then it may be  
20 totally negative. So I don't think you can make  
21 that generalization.

22 Q But certainly having face-to-face contact and being  
23 able to have a dialogue between a subject and a  
24 police officer, that certainly can have the effect  
25 of calming a situation down?

Page 122

1 A It can, and it can be converse to that too.

2 Q I understand that, but you didn't answer my  
3 question.

4 A I did answer it, but I didn't --

5 MR. HALL: Can you read back the  
6 question?

7 (Record read.)

8 BY MR. HALL:

9 Q You started the sentence with "or." That's a yes  
10 or no question. Having face-to-face interaction  
11 between a law enforcement officer and a subject,  
12 that can have a calming effect on the situation,  
13 correct?

14 A That's a yes or no question just like, do you beat  
15 your wife often? It can, or it may not. And  
16 that's totally situational based on the  
17 individual's perception and his prior experience.

18 Q In terms of D and E, D reads, "Have the paramedics  
19 administer a tranquilizer," and E, "Contain the  
20 subject without restraints until he or she is  
21 calm."

22 In cases of excited delirium, do you  
23 propose paramedics administering a tranquilizer  
24 before a subject is restrained?

25 A Well, I think when they're talking about restraint,

Page 123

1 they're talking about cuffing him up. I think what  
2 you want to do is get him to the point where the  
3 individual is under control, have them administer  
4 tranquilizers and then resort to the medical  
5 protocol as soon as possible and eliminate that  
6 handcuffing adversarial-type thing, if possible.

7 Now, you may have to -- you may not  
8 be able to do it situationally. You may have to  
9 handcuff the individual to allow for the medical  
10 intervention. And generally the EMTs or paramedics  
11 aren't going to get involved until you have the  
12 person under control.

13 Q I want to move forward to opinion E where there is  
14 some discussion of officer-created jeopardy. But  
15 before we get to that, you've read Officer Kenny's  
16 deposition in great detail, I assume?

17 A Yes.

18 Q If you were to assume that everything that Officer  
19 Kenny detailed in his deposition regarding what  
20 occurred in that stairwell is true and putting  
21 aside your criticisms of Officer Kenny entering by  
22 himself, Officer Kenny entering by himself with his  
23 firearm drawn, putting aside those criticisms,  
24 because we've already talked about them, are you  
25 critical of the use of deadly force in response to

8/8/2016

Dennis K. Waller

Page 34 (124 - 127)

Page 124

1 Tony Robinson's punching of Officer Kenny and the  
2 events that followed that punch down the stairs?  
3 MR. SWAMINATHAN: Objection to form and  
4 foundation.  
5 THE WITNESS: Well, I think that there's  
6 a dispute, and the dispute is that Officer Kenny --  
7 a dispute of facts. Officer Kenny contends that he  
8 was towards the top of the stairs when he was  
9 punched. He says he fired because he feared losing  
10 his firearm or being knocked unconscious.  
11 The shots were -- entry points were  
12 all at a downward angle, three of them on a lesser  
13 angle, and four of them apparently at a more  
14 pronounced angle.  
15 Now, the problem I have with that  
16 fact scenario with Officer Kenny is that he  
17 indicated he was shooting from the inside or number  
18 three position which basically is the gun held here  
19 close to your chest.  
20 And you have Tony Robinson who is  
21 6'3, and you have Officer Kenny who is 5'10. So  
22 the entry wounds and wound tracks should be lower  
23 to upper. Now, since they go in a downward -- the  
24 wound tracks are downward, you would have to have  
25 Tony Robinson at a level lower than Officer Kenny,

Page 125

1 or you would have to have Officer Kenny shooting  
2 from the gangster style holding the gun up and  
3 shooting downward. Otherwise you're dealing with  
4 physical evidence that's hard to explain.  
5 The other thing is that Officer  
6 Kenny stuck with it -- that testimony, but he  
7 acknowledged that if the video synchronization was  
8 accurate, then all the shots as the district  
9 attorney also stated came at the base of the  
10 stairway, which is inconsistent with the testimony  
11 of Officer Kenny.  
12 So when you say take his testimony,  
13 you got to be specific about when and what  
14 testimony and his acknowledgment that the best  
15 evidence, the physical evidence is inconsistent  
16 with his testimony.  
17 MR. HALL: I'll move to strike as  
18 nonresponsive.  
19 BY MR. HALL:  
20 Q My question is, if you take his deposition  
21 testimony -- you reviewed his deposition.  
22 A Okay. Specifically -- that was a lot of ground  
23 covered. Which -- and I've got it here, and I can  
24 pull it out, and we can go chapter and verse, page  
25 by page, but I'm asking you -- he acknowledged a

Page 126

1 lot of different things in his deposition  
2 testimony.  
3 Q And you read it, right?  
4 A I did.  
5 Q It's an important piece of this case, right?  
6 A Correct.  
7 Q If you accept as true his description of events in  
8 that stairwell, the description that he testified  
9 to, my question is, are you critical of the use of  
10 deadly force?  
11 MR. SWAMINATHAN: Objection to form and  
12 foundation.  
13 THE WITNESS: And I would like you to  
14 specifically tell me which ones that you are  
15 considering because he testified to a lot of  
16 different things.  
17 BY MR. HALL:  
18 Q His deposition.  
19 A His deposition covered hundreds of pages. So tell  
20 me what factors you are considering that he  
21 testified to because he testified to a bunch of  
22 different things.  
23 Q Did you review Officer Kenny's description from his  
24 deposition of what occurred in that stairwell?  
25 A It varied.

Page 127

1 Q In your mind in terms of just his deposition  
2 testimony, I'm not interested in if you perceive  
3 there's a conflict between what he testified at his  
4 deposition versus what he may have said at the  
5 snapshot. I'm not interested in that.  
6 If you think that he's varied within  
7 his testimony just in the deposition, I'm  
8 interested in knowing what exactly you feel where  
9 he conflicted himself.  
10 A I just told you. I think that he testified that if  
11 you accept the video synchronization as accurate,  
12 then all the shots were fired at the base, but  
13 that's not how he recalled it.  
14 Now, if you're talking --  
15 Q Is that it for purposes of my question --  
16 MR. SWAMINATHAN: He's still answering  
17 the question.  
18 MR. HALL: I'm not sure that he is.  
19 BY MR. HALL:  
20 Q For purposes of my question where -- if he's  
21 conflicted himself within the deposition, if he  
22 said two different things within the deposition,  
23 that's what I'm interested in knowing.  
24 MR. SWAMINATHAN: I think -- let the  
25 record reflect that you've cut off the witness. He

8/8/2016

Dennis K. Waller

Page 35 (128 - 131)

Page 128

1 was continuing to answer your question. Go ahead.  
 2 THE WITNESS: I believe I forgot what I  
 3 was responding to now.  
 4 BY MR. HALL:  
 5 Q The --  
 6 A Just a second, please. I would ask you again what  
 7 specific things. Because he did make a bunch of  
 8 inconsistent statements, and some of those are he  
 9 pulled his gun out at the time he was attacked by  
 10 Tony. He admitted that that was not factually  
 11 correct, that Tony Robinson was yelling and  
 12 swinging. It was not correct because he since said  
 13 that he was not yelling.  
 14 He said the information he gave in  
 15 the snapshot is inconsistent with what he now  
 16 remembers. He also gave the caveat, which I've  
 17 said before, was that if -- as the video shows,  
 18 then all the shots were fired at the base of the  
 19 steps.  
 20 So I think there's a lot of  
 21 inconsistency, and I'm asking you to clarify  
 22 specifically those points which you want me to  
 23 consider.  
 24 Q I want you to consider what he testified to, the  
 25 testimony that he gave at his deposition. To the

Page 129

1 extent that there are any inconsistencies between  
 2 what he testified at the deposition and what he may  
 3 or may not have said at the snapshot, for example,  
 4 resolve those consistencies in favor of what he  
 5 said at the deposition.  
 6 I'm just interested in his testimony  
 7 at the deposition which you've reviewed very  
 8 carefully in forming your opinions. If you take  
 9 that factual synopsis that was outlined by him in  
 10 his deposition about what occurred in that  
 11 stairwell, are you critical of the use of deadly  
 12 force?  
 13 MR. SWAMINATHAN: Objection. Asked and  
 14 answered. He's identified --  
 15 MR. HALL: This is another speaking  
 16 objection.  
 17 MR. SWAMINATHAN: He has a problem with  
 18 the question that's being asked. So I have an  
 19 objection to the form of this question and  
 20 foundation of this question.  
 21 THE WITNESS: Which initially you said if  
 22 I had a problem with the question, you would do  
 23 your best to clarify. I'm asking you and I've  
 24 repeatedly asked you to clarify what factors --  
 25

Page 130

1 BY MR. HALL:  
 2 Q Let me try this. In one of your prior answers you  
 3 talked about how his deposition testimony you felt  
 4 was different compared to what he said in the  
 5 snapshot, right? Do you remember saying that?  
 6 A Yes.  
 7 Q That's an example of the deposition testimony  
 8 saying one thing and your belief that the record or  
 9 other materials outside of the confines of the  
 10 deposition say something else.  
 11 What I'm asking you to do is focus  
 12 solely on the deposition, solely on the testimony  
 13 in that deposition, and I want you to assume it's  
 14 all true putting aside the fact that in your  
 15 opinion there may be inconsistencies with prior  
 16 statements. Just take the deposition testimony as  
 17 it is.  
 18 MR. SWAMINATHAN: Objection.  
 19 BY MR. HALL:  
 20 Q Do you understand that?  
 21 A I understand that, but I think that's patently  
 22 unfair because you have almost 400 pages of  
 23 deposition that covers a wide range of subject  
 24 matter.  
 25 Q But we're only interested in what happened in the

Page 131

1 stairwell.  
 2 A Well, then I'm asking you to point out what he said  
 3 when. I'm glad to go over with you and then I  
 4 can -- I can respond to that. But there is so much  
 5 in here. He may have said one thing at one point  
 6 and another thing at another point, which in my  
 7 opinion he did.  
 8 So if you can tell me -- I've  
 9 reviewed this. I got a summary of it, and I'll be  
 10 glad to do my best to answer the question. But as  
 11 you've asked it in these broad and general terms, I  
 12 find it very difficult, if not impossible.  
 13 Q Is your testimony that you are unable to offer an  
 14 opinion as to the -- as to whether Officer Kenny's  
 15 use of deadly force was appropriate if you accept  
 16 what's in his deposition transcript?  
 17 MR. SWAMINATHAN: Objection to form.  
 18 That's not what he's saying, but you can answer the  
 19 question again.  
 20 THE WITNESS: I'm asking for a  
 21 clarification of specifically what you are talking  
 22 about because there are a number of instances in  
 23 his deposition where in my opinion he clearly  
 24 admits the use of deadly force was not appropriate.  
 25

8/8/2016

Dennis K. Waller

Page 36 (132 - 135)

Page 132

Page 134

1 BY MR. HALL:

2 Q Are you done?

3 A I'm asking for clarification and to much more  
4 specifics, and I've told you what I can do.

5 Q Where in Officer Kenny's deposition do you believe  
6 that he suggests that the use of force was  
7 unreasonable?

8 A Page 113, "I fired the final shot as Robinson  
9 appeared to be getting up." And page 115 he said,  
10 "I fired at the base of the stairs because it  
11 appeared Robinson was getting up."

12 If the subject is down and you're at  
13 the base of the stairs and you have the ability to  
14 disengage and you fire because they appear to be  
15 getting up, they're not -- you're not facing an  
16 imminent threat of death or great bodily harm which  
17 is the standard which would allow him to use deadly  
18 force.

19 Q When you say, "subject down" in that regard, what  
20 do you mean?

21 A On page 113, "What I remember is seeing my handgun  
22 in my hands for that final shot, and I can see the  
23 front sight, and I can see Robinson who appears to  
24 be getting up off the stairs."

25 Page 115, "What was -- was Tony

1 position on the stairwell?

2 A Yes. Why else would he be getting up?

3 Q And do you have an understanding from Officer  
4 Kenny's deposition testimony as to whether or not  
5 he knew whether the prior shots that were fired  
6 struck Tony Robinson at the time that he fired the  
7 last four shots?

8 A I don't recall that specific question. I'll see if  
9 I addressed it. The only thing I can say about  
10 that -- you're saying the last four shots.

11 At one point Officer Kenny indicated  
12 that if he had a flat surface, that he could move  
13 backward, disengage, holster his weapon and move to  
14 a less lethal force option which would indicate to  
15 me if Tony Robinson was in -- was down, meaning in  
16 a prone or semi-prone position on the stairway, he  
17 would have had the opportunity to back away at that  
18 point in time.

19 Q On the issue of officer-created jeopardy, are you  
20 aware of any legal support, or law enforcement  
21 standards, or peer review published literature that  
22 prohibits an officer from placing themselves in  
23 officer-created danger?

24 MR. SWAMINATHAN: Could you read back the  
25 question?

Page 133

Page 135

1 Robinson doing the same thing at the time you fired  
2 shots A, B and C on this exhibit?"

3 "Yes."

4 Question: "What was he doing?"

5 Answer: "It appeared to me that he was  
6 getting up. If he's getting up, he's not an  
7 imminent threat."

8 BY MR. HALL:

9 Q When you say "subject down," are you just referring  
10 to the subject being on the ground? Are you  
11 referring to the subject already being shot? What  
12 does that term mean?

13 A It would be -- well, it would be seeing his feet  
14 projected out of the bottom of the stairway. And  
15 according to my understanding of Officer Kenny's  
16 description, it would be that he was in a prone or  
17 semi-prone position on the stairway.

18 Q So your understanding of Officer Kenny's testimony  
19 is that at the time that the last shot was fired,  
20 that Tony Robinson was in a prone or somewhat prone  
21 position on the stairwell?

22 A Last four shots by his testimony.

23 Q So your understanding of Officer Kenny's testimony  
24 in this case is that for the last four shots, Tony  
25 Robinson's body was in a prone or somewhat prone

1 (Record read.)

2 MR. SWAMINATHAN: Objection to form and  
3 foundation.

4 MR. HALL: What's wrong with the form?

5 MR. SWAMINATHAN: You're asking him about  
6 legal standards which is a vague concept.

7 BY MR. HALL:

8 Q Are you a police practices expert?

9 A Yeah, but I'm not a legal expert. I will give you  
10 the police practices perspective, and we already  
11 talked about a number of publications that were  
12 peer reviewed and widely used and widely accepted  
13 in law enforcement circles and widely used as a  
14 basis for such things as the Wisconsin Law  
15 Enforcement Standards Bureau training guides, and  
16 one of those is taking a bad position. Officers  
17 are trained not to do that.

18 So you say a prohibition or  
19 something absolute. I mean there's no legal --  
20 you're not violating the law. You're violating a  
21 policy or training or accepted best practice, and  
22 that's widely accepted.

23 I mean there's prohibitions from  
24 shooting at or from a moving vehicle because of the  
25 threat to others and the ineffectiveness of

8/8/2016

Dennis K. Waller

Page 37 (136 - 139)

Page 136

1 stopping the vehicle. Officers are encouraged to  
2 get out of the way now. So that would be a general  
3 prohibition. Could there be a specific exception  
4 to that? Yes. But in general, officers are  
5 trained not to be fool-hearty, not to get in the  
6 way.

7 A simple example of that is traffic  
8 stops. Do not stand in front of or -- the person's  
9 vehicle that you stop because if they go forward,  
10 they could hit you. Do not stand between the  
11 person's car that you stopped and your vehicle  
12 because if they go in reverse, they could squash  
13 you.

14 So I think the training and the  
15 concept is extremely common and very consistent.  
16 And yes, there is a best practice, a common sense  
17 prohibition of that.

18 Q And --

19 A Do they violate a law if they do it? Not -- I'm  
20 not aware of that. I'm not giving a legal opinion.

21 Q In terms of a best practices standpoint, the  
22 publications that you gave us earlier today in your  
23 deposition, do you have anything to add? Are there  
24 any other publications that you're aware of?

25 A Well, in Wisconsin the LESB training guides are

Page 137

1 replete with that, the one on traffic stops or  
2 motor vehicle stops. I'm sure the one on the basic  
3 concepts, DAAT concepts, put yourself in the best  
4 position. So you go on and on.

5 Q And I just want to make this crystal clear. This  
6 might be one of the few things we're on the same  
7 page on.

8 What you're just describing are a  
9 series of best practices and maybe used in training  
10 and developing protocols and policies, but that  
11 none of this imposes an absolute duty on behalf of  
12 officers to do certain things or not do certain  
13 things; is that correct?

14 MR. SWAMINATHAN: Objection to form.

15 THE WITNESS: Well, I would expect if  
16 there's an adverse result because they did that  
17 knowing what they should have done, there should be  
18 an adverse consequence if the department was doing  
19 its job because you have training, you have policy,  
20 you have supervision, and then you have discipline  
21 if they act outside of their training and policy.

22 Now, I've commented, I believe in  
23 the last opinion, that Madison Police Department  
24 was deficient in holding officers accountable for  
25 acting outside of their policy and training.

Page 138

1 MR. HALL: Can you repeat my question?

2 (Record read.)

3 MR. HALL: I'll restate that question.

4 BY MR. HALL:

5 Q Do any of these things impose an absolute duty, any  
6 of these training guides, whether they come from  
7 the LESB, the books that you referred to, would you  
8 agree that none of those impose absolute duties on  
9 behalf of officers?

10 MR. SWAMINATHAN: Objection to form.

11 Objection to relevance. Go ahead.

12 THE WITNESS: I think if they've been  
13 codified to the point where it's in their training  
14 and within the policy, if they act outside that  
15 with a legitimate explanation of why, then they  
16 should be held accountable for violating policy.

17 BY MR. HALL:

18 Q In your work as a law enforcement officer, have you  
19 ever been accused of misconduct?

20 A Yes.

21 Q How many times?

22 A I don't know, different times.

23 Q Can you recall which departments or agencies you  
24 were with at the time that you were accused of  
25 misconduct?

Page 139

1 A Metro-Dade. I used to -- I arrested an individual  
2 a number of times, and he would file a complaint  
3 every time I arrested him. None of them were  
4 found -- founded. They were all considered  
5 unfounded.

6 When I was chief of police in Ripon,  
7 the mayor was trying to get rid of me, and the city  
8 of attorney who he appointed specially, who's a  
9 local crank, developed I think 25 different  
10 charges, eight of which eventually went before  
11 the -- all 25 went before the Police & Fire  
12 Commission. They arbitrarily dismissed 17, and  
13 then the eight that they held a hearing for and  
14 with testimony, they were all subsequently found to  
15 be unfounded.

16 And then the -- I made a complaint  
17 against the city attorney, and he was subsequently  
18 disbarred. Unfortunately he died before that  
19 occurred.

20 Q Any other agencies where you've been accused of  
21 misconduct?

22 A I was involved in a shooting incident where the  
23 shooting board determined that I failed to use due  
24 care and caution in effecting an arrest.

25 Q And that was South Miami?

8/8/2016

Dennis K. Waller

Page 38 (140 - 143)

Page 140

1 A Yes.

2 Q Any other jurisdictions that you were an officer  
3 where you received complaints of misconduct?

4 A Not that I recall. Oh, when I was a lieutenant  
5 with the State Fairgrounds Police, there was a  
6 complaint that I smiled too much.

7 Q I trust that was found to be unfounded.

8 A No. I was told I didn't have to smile anymore.

9 Q Who was the city attorney back in Ripon?

10 A Temporarily it was Eugene Bitters.

11 Q And the complaint that was made to the City that  
12 eventually worked its way to the Police & Fire  
13 Commission, you're certain that that complaint was  
14 filed by the city attorney?

15 A Well, he drafted it. It was subsequently  
16 determined by I think the Board of Attorneys  
17 Professional Responsibility, the OLR's predecessor.

18 Q He was the one making the complaint against you?

19 A He was appointed by the mayor. If -- unless there  
20 was sculduggery involved, nobody would appoint him  
21 to do anything or would have.

22 Q With regard to the shooting in South Miami, you  
23 shot and killed a man?

24 A Yes.

25 Q That was 1974 or what year?

Page 141

1 A I think so. It's been a long time.

2 Q What was the name of the man that was shot and  
3 killed?

4 A I don't recall.

5 Q You don't recall the name of the person you shot  
6 and killed?

7 A No.

8 Q That individual was unarmed, correct?

9 A Yes. He was trying to get armed.

10 Q And my understanding of that incident is that you  
11 had observed somebody who you knew that there was  
12 an active arrest warrant for?

13 A Yes.

14 Q And at the time that you observed the individual,  
15 you were by yourself, correct?

16 A Yes.

17 Q You called for backup, though?

18 A I did.

19 Q But you engaged the individual before your backup  
20 arrived, correct?

21 A No. As he arrived, I engaged. First of all, let  
22 me say this. I was on the SWAT team at the time.  
23 The SWAT team was basically assigned en masse with  
24 maybe one exception to the midnight shift.  
25 We were -- it was a long, hot

Page 142

1 summer, and we had had a lot of problems the summer  
2 before, and the chief ordered us to crack down on  
3 all types of crime in our high crime area. We were  
4 out to do that.

5 This guy had an outstanding warrant.  
6 I recalled -- and it had been for a week or so and  
7 we were -- somebody we had arrested before. So I  
8 observed him. I called for backup. I saw the  
9 backup coming down the street. I engaged the  
10 individual.

11 When I arrested him previously, he  
12 never really resisted. He resisted that day. The  
13 other officer and I took him to the ground. We  
14 were in the process of handcuffing when the other  
15 subject came up from behind. He was recently  
16 released from state prison. He attacked us from  
17 behind, lost control of the original guy. I was  
18 fighting with the latest person to join in the  
19 fray, the other officer was fighting with the  
20 original subject.

21 A small crowd had gathered and  
22 started approaching and throwing rocks and bottles.  
23 The other officer and I both went for our firearms,  
24 and I attempted to push the subject back. Instead  
25 of backing off, he grabbed for the barrel of my

Page 143

1 gun, and I fired a shot, and it killed him. The  
2 other guy ran into the crowd and escaped, again  
3 temporarily, and that was the nature of that.  
4 Subsequently found to be justifiable in  
5 self-defense.

6 Q The individual that you engaged, had the open  
7 arrest warrant, do you know what the arrest warrant  
8 was for?

9 A You mean the first subject?

10 Q Correct.

11 A I don't recall after all these years, but it wasn't  
12 anything major, but he was -- I knew it was  
13 outstanding, and they were looking for him, and  
14 those were the type of crimes that the chief had  
15 told us that he wanted dealt with.

16 Q When you engaged the subject, you knew that your  
17 backup had arrived, but he was not yet there, he  
18 was walking towards you, is that correct?

19 A When I went hands on with the first subject, he was  
20 there, and we both took him to the ground, so it  
21 was -- I mean it was contemporaneous.

22 Q So your -- you would disagree with testimony that  
23 indicates that you engaged the subject before your  
24 backup arrived?

25 A Yeah. I could see my backup. He was there, and



1 as -- when I went hands on, he was there, when I  
 2 went hands on with this individual.  
 3 Q He wasn't still walking over to you?  
 4 A Well, you're asking me to -- let's see, 42 years  
 5 ago. He and I had worked together. I knew his  
 6 responses. He knew my responses. As soon as I  
 7 went hands on, he was there, and we took him to the  
 8 to the ground. So there were two officers, one  
 9 subject.  
 10 Q So again, if there's testimony that you engaged the  
 11 subject before your backup arrived or before your  
 12 backup arrived at your side, you would disagree  
 13 with that?  
 14 MR. SWAMINATHAN: Object to the form  
 15 using the term "engaged."  
 16 THE WITNESS: 42 years ago, my  
 17 recollection is I observed him -- I observed my  
 18 backup officer. And as he was approaching, I  
 19 exited my vehicle, and I made contact with -- when  
 20 I say "contact," verbal contact in close proximity  
 21 with the subject who -- the subject of the warrant.  
 22 BY MR. HALL:  
 23 Q And you had a review board in South Miami that  
 24 concluded that -- or determined that you lacked due  
 25 care and caution in making an arrest?

1 A In following the chief's orders, yes.  
 2 Q My understanding is that you received but did not  
 3 serve a 30-day suspension as a result of that  
 4 finding; is that correct?  
 5 A Yes, and I was very upset about it and wanted to  
 6 fight it publicly. My boss who, in the meantime I  
 7 had been promoted to detective, indicated that I  
 8 would probably win the battle but I would lose the  
 9 war and to keep my mouth shut, so I did.  
 10 Q After this incident occurred, your backup  
 11 officer -- strike that.  
 12 You were the only officer to fire a  
 13 shot that night, correct?  
 14 A Yes.  
 15 Q But after this incident occurred, your backup  
 16 officer believed that he fired his firearm,  
 17 correct?  
 18 A Well, I mean one of the tests is what would a  
 19 trained experienced officer in the same situation  
 20 do. And he had already decided he was going to  
 21 shoot the subject who was attempting to grab my gun  
 22 and so had started to pull the trigger when I fired  
 23 the shot, and he initially thought that he was the  
 24 one who had shot him.  
 25 They showed forensically that his

1 gun -- he did not fire the shot. Now, we had about  
 2 a dozen eyewitnesses half of whom said I knocked  
 3 this guy to the ground while he was in a prone  
 4 position. The other officer stood over him and  
 5 basically assassinated him. The other half a dozen  
 6 testified within a reasonable variation of what  
 7 actually happened.  
 8 Q But the bottom line is your backup officer at the  
 9 time of the shooting or immediately after the  
 10 shooting thought that he fired his gun, correct?  
 11 A Yes.  
 12 Q And that ended up not being true, he did not fire  
 13 his gun, correct?  
 14 A Correct.  
 15 Q And he wasn't lying, right?  
 16 A And he never testified to that -- he testified that  
 17 he thought he had -- he realized he did not.  
 18 Q But immediately after the shooting, he thought he  
 19 did fire, right?  
 20 A Yes.  
 21 Q We can say this on the record. I'm done with  
 22 questions for now. Attorney Kaiser is going to  
 23 have some questions. She represents the City of  
 24 Madison.  
 25 As part of the notice of deposition,

1 we asked you to bring your file materials, and I  
 2 know that you did that. And since we have -- we  
 3 have different areas of emphasis while Attorney  
 4 Kaiser is asking you questions, I'd like the  
 5 opportunity to review your file, but I don't want  
 6 to do anything or review anything that you might  
 7 need.  
 8 So are there any materials that  
 9 aren't in front of you that I can go off in the  
 10 corner and just peruse?  
 11 A Well, I'll allow you to do that with the caveat  
 12 that if I need to get something -- and that you  
 13 will not take it out of order.  
 14 Q Absolutely.  
 15 A I'm not accusing you because you've been very  
 16 respectful and very diligent, but I've had some  
 17 people who practice cute lawyer tricks and let me  
 18 mix and match your file.  
 19 MR. SWAMINATHAN: Let me make one other  
 20 note too. I have no problem with you looking at  
 21 that, and I have taken a quick peek too because I'm  
 22 concerned whether there's any work product  
 23 privileged information or anything that would be  
 24 subject to normal disclosure under Rule 26. I have  
 25 not seen anything.

1 What I would ask is that if we  
2 ultimately come to learn that there's such material  
3 in the documents, that needs to be -- we'll call  
4 back and we'll reserve --  
5 MR. HALL: We'll do a call back.  
6 Absolutely. Let's go off the record for a second.  
7 (Discussion off the record.)  
8 EXAMINATION  
9 BY MS. KAISER:  
10 Q Just in terms of your review, your report lists  
11 that you reviewed MPD policies and SOPs, and I'm  
12 just wondering if you can tell me specifically what  
13 policies and SOPs you actually reviewed.  
14 A MPD policies were use of deadly force, use of  
15 nondeadly force, and then there were some SOPs that  
16 dealt with critical incidents and officer-involved  
17 critical incidents. If you want more than that --  
18 those are my primary focus.  
19 Q Is there actually a list -- if we're going to  
20 get -- is there like a table of contents? I  
21 haven't looked at your file.  
22 MR. SWAMINATHAN: Are you talking about  
23 which years of versions of policies? I can send  
24 you that exact list. If he's not able to pull it  
25 up right now, I can tell you an exact list.

1 opinions?  
2 A Well, I think that those are reflective and a basis  
3 for my opinions, yes.  
4 Q Let me ask you this. Are you still expecting to  
5 receive more information that may change your  
6 opinions?  
7 A I don't know; and if I do, I will advise the  
8 attorney, and he can -- and I'm sure we'll make you  
9 aware.  
10 Q Are there specific items you've asked for?  
11 A No.  
12 Q Exhibit 183, which is your CV lists at page 3 your  
13 professional designations. Can you tell me what  
14 institute or organization has provided the  
15 certified internal affairs investigator designation  
16 that you've listed at page 3?  
17 A Public agency training council.  
18 Q What was required in order for you to obtain that  
19 certification?  
20 A I guess in addition to having attended a number of  
21 other courses, I attended a week-long seminar on  
22 internal affairs investigations and then had to do  
23 a position paper and then they evaluated your  
24 experience, and training, and background, and they  
25 provided me with that certification.

1 THE WITNESS: The MPD policies primarily  
2 were 6-100 and 6-200. Somewhere there was the  
3 SOPs. And my understanding from the testimony, it  
4 may have been Sergeant Gary, was that they were  
5 just put in a different format.  
6 So those were the primary ones, and  
7 I think there was one on maybe critical incidents  
8 which covered excited delirium.  
9 BY MS. KAISER:  
10 Q At the end of your report, the last paragraph  
11 number three it says, "I have requested and expect  
12 to receive additional information related to MPD  
13 officer-involved shootings."  
14 Have you requested specific items in  
15 that regard?  
16 A No. So I based my opinions on the three shootings  
17 that I had the most information on. I haven't  
18 received that, and so I don't know whether it's  
19 been provided or -- but I have not received any  
20 additional information in that regard.  
21 Q Do you still feel you need more information in  
22 order to give your opinions, or can I go with what  
23 you've put into the report based on those three  
24 officer-involved shootings that we'll get into a  
25 little bit later in terms of completeness of your

1 Q Where was the week-long seminar that you attended?  
2 A Las Vegas.  
3 Q Was it conducted by a number of different trainers,  
4 or was there one person that was presenting?  
5 A No, a number of different ones. Lou Ryder, Jack --  
6 I'll think of his last name in a minute. There was  
7 also a Virginia police chief, and he was retired.  
8 I think a major or something from the Baltimore  
9 Police Department. And there was an individual  
10 from the University of Chicago, a law professor.  
11 There may have been one or two others.  
12 Q It's listed as 2013. I take it that that's the  
13 year that you obtained the certification; is that  
14 correct?  
15 A Yes. I believe it was either November or December  
16 when I went.  
17 Q Is that a certification that needs to be renewed,  
18 or once you've got it, it's good for life?  
19 A I think it's good for three or four years.  
20 Q Have you ever worked in any law enforcement  
21 agency's professional standards or internal affairs  
22 department?  
23 A Assigned to it, no. Assigned to do investigations  
24 on alleged misconduct, yes.  
25 Q Tell me about that experience, where it was, when

8/8/2016

Dennis K. Waller

Page 41 (152 - 155)

Page 152

Page 154

1 it was, the extent of it, please.

2 A South Miami. I was a sergeant filling an acting

3 lieutenant slot assigned to investigate complaints

4 on at least two officers. I don't even recall the

5 details. I know -- it wasn't any major issues. It

6 was just alleged -- minor alleged misconduct.

7 Q This was while you were a detective there?

8 A No. I was a sergeant filling an acting lieutenant

9 slot.

10 Q So that was for a limited period of time?

11 A It was just an adjunct assignment to my regular

12 duties. And then as police chief, obviously I

13 directed a number of investigations.

14 Q Did the Ripon Police Department have a division

15 known as the internal affairs unit, or how in the

16 Ripon Police Department when you were its chief

17 were complaints of misconduct handled?

18 MR. SWAMINATHAN: Objection to form.

19 THE WITNESS: In general if there was an

20 issue that I wanted investigated, I would assign it

21 to the captain or one of the sergeants.

22 BY MS. KAISER:

23 Q At the time you were the chief of the Ripon Police

24 Department, how many sworn officers were there?

25 A 16.

1 A No.

2 Q In either the adjunct position in Florida or as

3 chief of police in Ripon, did you ever have any

4 role investigating a complaint of the use of deadly

5 force?

6 A No. You're talking about internally?

7 Q Correct.

8 A I've done homicide investigations.

9 Q I'm limiting it to when you were the chief of

10 police or in the role where you had a couple of

11 investigations assigned to you when you were acting

12 to fill in that role?

13 A Correct. No.

14 Q Obviously you've been involved as a consultant for

15 a number of years where I assume many, many of the

16 cases involve reviewing allegations of improperly

17 using deadly force?

18 A Yes.

19 Q Have you been involved in establishing policies and

20 procedures for the investigation of complaints

21 about law enforcement personnel actions?

22 A Yes.

23 Q What has your involvement been and with what

24 agency?

25 A Well, with Ripon as the chief of police I developed

Page 153

Page 155

1 Q For how long were you the chief of police there?

2 A I think almost four and a half, something like

3 that, years. I didn't want you to think it was

4 minutes or weeks.

5 Q While you were the chief of police for that four

6 and a half years and as such, I assume you --

7 strike that.

8 When you were the chief of police in

9 Ripon, you were the ultimate decision maker on

10 matters of discipline; is that true?

11 A Well, as you're aware, we have a Police & Fire

12 Commission system. So ultimately if it was

13 relatively minor offenses, we handled it within the

14 department. If it was major chronic or ongoing, I

15 would draft charges and address it to the Police &

16 Fire Commission, and they would hold a hearing.

17 Q Can you estimate the number of times you actually

18 had to take something to the PFC in terms of

19 officer misconduct?

20 A Twice that I can think of.

21 Q Did either of those situations involve an incident

22 of deadly force?

23 A No.

24 Q Did either of those situations involve allegations

25 of the use of excessive force?

1 a policy and guidelines for investigating -- a

2 protocol to investigate.

3 While I was an outreach coordinator

4 at the criminal -- for the criminal justice

5 department at University of Wisconsin-Platteville,

6 I did a series of policy development seminars, and

7 some of those dealt with the development of a

8 complaint review or investigation of misconduct

9 protocol or policy, and we were involved in the

10 development of an internal affairs investigation.

11 I think it was either a four- or five-day program.

12 Q That ties back to when you were at UW-Platteville?

13 A Correct.

14 Q For whom did you present that seminar? For other

15 agencies or for internal --

16 A It was law enforcement agencies throughout the

17 state, and I think we had a couple of really pissed

18 off sergeants from Minneapolis that were going to

19 go to a similar program with their wives in Florida

20 and so instead of -- ended up in sunny Green Bay in

21 February. Not happy campers.

22 Q What year was that, do you remember?

23 A It was either '88 or '89, I believe. It could have

24 been between '88 and '90.

25 Q The seminar was held at UW-Green Bay?

8/8/2016

Dennis K. Waller

Page 42 (156 - 159)

Page 156

1 A No, it was held in Green Bay. We provided programs  
2 and training throughout the state.

3 Q Slightly different question. As a consultant since  
4 you had your consulting business, have you been  
5 retained specifically by any law enforcement  
6 agencies to develop policies and procedures for  
7 investigation of complaints about law enforcement  
8 misconduct?

9 A Specifically for that?

10 Q Right.

11 A No.

12 MR. SWAMINATHAN: Are we at a good  
13 stopping point? I could use a quick bathroom  
14 break.

15 MS. KAISER: We can take it right now.  
16 (A recess was taken from 3:01 p.m. to  
17 3:06 p.m.)

18 BY MS. KAISER:

19 Q What is API?

20 A Attorneys Process Investigation.

21 Q That was a private investigation business you had?

22 A It was an existing business that I went to work  
23 for, yes.

24 Q Just to wrap up the policies and procedures  
25 involvement you had, you described your input on

Page 157

1 policies and procedures when you were the chief of  
2 the Ripon Police Department and also the  
3 involvement you had when you were with  
4 UW-Platteville.

5 Is that the last point in time in  
6 which you were personally involved in actually  
7 drafting policies and procedures for law  
8 enforcement use?

9 A Well, Ripon was the last time I actually drafted  
10 them. In Platteville we did a series of seminars.  
11 And part of what I did was say -- we'd cover the  
12 areas that the local agencies were interested in,  
13 and so if -- on more than one occasion it was  
14 investigation of misconduct or handling complaints.

15 So I would give them a number of  
16 points that the policy should include, and  
17 frequently they would go back and draft their  
18 policies and then come and meet with me or send me  
19 a draft copy and get my input, and then I would  
20 review it and give commentary and whatever.

21 So I never gave out -- I sometimes  
22 gave out sample policies, but I tried to guard  
23 against people just having a policy in the book  
24 which is meaningless. It has to be kind of -- you  
25 have to train the officers in it. You have to hold

Page 158

1 them accountable for it, and you have to make them  
2 aware of it and take ownership of it for it to be  
3 meaningful.

4 Q Once you left the position associated with  
5 UW-Platteville, is it correct, though, that that  
6 was the end of your involvement with either  
7 training or providing input or drafting policies  
8 and procedures?

9 A Pretty much. I probably did it a few times for  
10 agency-specific policy areas on an informal and  
11 probably one or two on a contracted basis. That  
12 was it.

13 Q Have you ever written any peer reviewed articles  
14 relating to investigation of officer-involved  
15 shootings?

16 A No.

17 Q Ever written any peer reviewed articles relating to  
18 disciplining officers involved in shootings?

19 A No.

20 Q Have you participated in any specialized research  
21 regarding the investigation of officer-involved  
22 shootings?

23 A Participated in research, not review research?

24 Q Correct. No, actually been the researcher or the  
25 person going out to gather data.

Page 159

1 A I understand. No.

2 Q This is just a basic question. Are you in  
3 association with any other folks in your LLC? Do  
4 you have associates or other people with you that  
5 do the type of work you do?

6 A Not really consulting; on occasion for  
7 investigations, private investigations.

8 Q So, for example, I was just going to ask you, the  
9 title of your business is Waller & Associates, LLC,  
10 and I can't tell from your letterhead if you've got  
11 partners or other people on staff that are part of  
12 the & Associates.

13 A My wife is a named partner, and she sometimes will  
14 do medical records review; but other than that, no,  
15 I'm it.

16 Q Looking at your report then, which is Exhibit 184,  
17 the opinion that I'm most interested in is the  
18 city's attorney is at page 12 or begins at page 12  
19 under subcategory F where you state, "Through its  
20 failure to hold MPD officers accountable for not  
21 following policy and training, the practice of the  
22 City of Madison has led to and/or caused the  
23 shooting deaths of Tony Robinson and others."

24 Is it -- am I reading your -- and  
25 understanding your opinion correctly that you

8/8/2016

Dennis K. Waller

Page 43 (160 - 163)

Page 160

1 haven't identified any particular policy or SOP  
2 which you have concluded on its face is not  
3 constitutional?  
4 A Right. That would be a legal thing, and I'm not a  
5 legal expert.  
6 Q I'm just trying to rule out what you're not saying.  
7 So in that regard sometimes people in your position  
8 look at a municipality's policies and procedures,  
9 and they focus on the policy itself and identify  
10 things that are wrong on the face of the policy  
11 itself.  
12 A I think that for the most part the policies are  
13 pretty competent, and they reflect LESB standards  
14 and training. They're just not necessarily  
15 followed.  
16 And so the continuum is you train  
17 the officers, you have policy that's supportive or  
18 reflective of the training, you supervise the  
19 officers. When they violate policy or training,  
20 then you may discipline them and discipline not  
21 necessarily in the negative concept but as a  
22 corrective process and then that continues.  
23 And in this case you had three  
24 different shootings where the officers really were  
25 not held accountable for their actions. Obviously

Page 161

1 they weren't charged criminally, and that's a  
2 different standard; but were there policy and  
3 training violations which were very obvious, yes,  
4 there were.  
5 Q At the bottom of page 12 of your report, you say  
6 that, "This opinion is based upon my review of the  
7 records and history of prior shooting incidents in  
8 the City of Madison where other alternatives were  
9 available and appropriate."  
10 And then you go on to discuss three  
11 specific shootings. And my question is just as a  
12 preliminary matter, is your opinion based solely on  
13 these three officer-involved shootings that you've  
14 outlined and which we'll get into?  
15 A Yes.  
16 Q Were you provided information about additional  
17 officer-involved shootings besides these three that  
18 are specifically outlined in your report?  
19 A No. Other than there were a number of others that  
20 had occurred, so I don't have the details on the  
21 others.  
22 Q What information do you have about the other  
23 shootings that occurred? In what kind of a time  
24 frame are we talking? Do you understand what I'm  
25 asking you?

Page 162

1 A I believe so, that there were maybe 10 shootings --  
2 and again, don't hold me to that number -- over the  
3 last 10 years and none of which -- they've all been  
4 determined to be within policy.  
5 So I don't really know enough about  
6 the others to say anything other than I'm aware  
7 that they exist, and I don't know the results other  
8 than they haven't -- none of the officers were  
9 found to have violated policy which was a  
10 department standard, not a criminal standard.  
11 Q Do you know how it came to be that you were  
12 provided the more detailed information that you did  
13 receive regarding these three shootings that are  
14 set forth in your report?  
15 A That information was made available to me by  
16 counsel, and I think I asked him -- and obviously I  
17 think that there was -- scratch that.  
18 My understanding is that counsel  
19 developed an awareness of the 2007 shooting of  
20 Ronald Brandon by Officer Kenny through the media.  
21 And apparently there was some coverage of that at  
22 the time of the -- when Officer Kenny shot  
23 Mr. Robinson, so they knew how apparently to  
24 request that information, and it was provided  
25 apparently in discovery.

Page 163

1 And the shooting death of Paul  
2 Heenan, they gave me that information. I don't  
3 know what the basis for that was other than it was,  
4 again, inappropriate conduct, very preventable and  
5 no apparent accountability.  
6 Q Let me just ask you this. Is it correct that you  
7 were not given the investigative files that were  
8 developed on all -- let's say it's 10, I don't know  
9 the number either exactly, but you didn't get 10  
10 officer-involved shooting investigation files and  
11 then narrow it down to these three to focus on?  
12 A Correct, I did not.  
13 Q You were just given these three?  
14 A I was given the investigative file of Ronald  
15 Brandon OIS and the video, and I was given detailed  
16 information on the death -- the 2012 death of Paul  
17 Heenan and obviously a massive amount of material  
18 on the 2015 shooting death of Tony Robinson.  
19 Q On page 13 of your report in discussing the Ronald  
20 Brandon shooting in 2007, your report indicates at  
21 the end of paragraph sub 1, sub A, "Immediately  
22 before, during or shortly after Officer Kenny  
23 exhibited his reckless behavior which resulted in  
24 the death of Mr. Brandon, dispatch was being  
25 advised that the gun possessed by Mr. Brandon was

8/8/2016

Dennis K. Waller

Page 44 (164 - 167)

Page 164

1 actually a pellet gun."  
 2 Do you see that?  
 3 A Yes.  
 4 Q Do you have an understanding of exactly -- strike  
 5 that.  
 6 Do you understand that the officers  
 7 did not have that information from dispatch?  
 8 A Yes. Had they followed protocol, that they  
 9 certainly could have or should have within a  
 10 particular -- within a very short time.  
 11 Q What's the protocol that you believe they should  
 12 have followed that would have given them that  
 13 information?  
 14 A Isolate, contain, communicate. There was no need  
 15 to do -- to take immediate action, particularly one  
 16 within seconds where Officer Kenny left cover and  
 17 unnecessarily exposed himself and used that as an  
 18 excuse to shoot and kill Mr. Brandon.  
 19 Q You're aware that the Dane County district attorney  
 20 investigated this shooting and concluded that  
 21 Officer Kenny was justified in using legal force?  
 22 A That's a criminal standard.  
 23 Q He did determine that there was no criminal  
 24 violation here?  
 25 A Yes.

Page 165

1 Q In subparagraph B you then discuss the Paul Heenan  
 2 shooting.  
 3 Similar question, you are aware that  
 4 the district attorney investigated that shooting,  
 5 correct?  
 6 A I believe so, yes.  
 7 Q You're aware that the DA found no basis upon which  
 8 to criminally charge Officer Heimsness in that  
 9 shooting?  
 10 A Correct.  
 11 Q Are you aware that in addition to the DA's review  
 12 in that Heenan shooting, the Madison Police  
 13 Department sought and received a review by the  
 14 Department of Justice for a review of whether that  
 15 shooting complied with LESB policies and training?  
 16 A I don't recall. I don't believe so. I don't  
 17 believe I reviewed that.  
 18 (Exhibit 185 was marked for  
 19 identification.)  
 20 BY MS. KAISER:  
 21 Q She's marked as Exhibit 185 a January 3, 2013  
 22 letter from the State Department of Justice to  
 23 Chief Noble Wray who was the chief at the time, and  
 24 I would just direct your attention to the third  
 25 paragraph, "Ms. Pederson and Mr. Rehberg found that

Page 166

1 force used by Officer Heimsness to stop the threat  
 2 and control the subject falls within the training  
 3 dictated by the LESB approved curriculum. I have  
 4 reviewed their use of force report and concur with  
 5 their findings."  
 6 Did I read that correctly?  
 7 A You did. But --  
 8 Q And take a minute if you want to take a look at it.  
 9 I'm just going to ask you if that changes your  
 10 opinion in any way.  
 11 A Well, I can tell you, no, it won't because at the  
 12 time he used deadly force, again, it was  
 13 preventable. He violated the concept of contact  
 14 and cover, so he needlessly exposed himself or  
 15 created a situation which justified the use of  
 16 deadly force which was totally unnecessary. By  
 17 definition that's officer-created jeopardy. They  
 18 didn't address that.  
 19 Q The concept of contact and cover is part of the  
 20 LESB curriculum, isn't it?  
 21 A Yes. But what they said the use of force report  
 22 and concur with their findings, and I don't believe  
 23 that that was addressed in the use of force report.  
 24 So this was basically not what he  
 25 did up to the point but what he did after Officer

Page 167

1 Heimsness was careless or reckless and got too  
 2 close. And instead of using back up and consistent  
 3 with the concept of contact and cover, do it  
 4 properly before you make contact with an  
 5 individual, you should have your firearm holstered.  
 6 Certainly there was at least one  
 7 other officer present and others coming at the time  
 8 of the shooting. So in my mind, again, it was  
 9 preventable. He didn't do what he was trained to  
 10 do. He was reckless. Somebody died because of  
 11 that. Was it justified criminally? Yes. Was it  
 12 justified by adherence to or was Heimsness held  
 13 accountable for violating his policy and training?  
 14 My understanding, no, he was not.  
 15 Q And my only point is that at least according to the  
 16 State Department of Justice reviewers who are  
 17 charged with implementing the LESB standards, they  
 18 concluded he had not violated those standards,  
 19 correct?  
 20 A They addressed the use of force. They didn't  
 21 address the circumstances surrounding it or why the  
 22 situation was created. In my experience as a  
 23 police chief with DOJ/LESB is that they're not  
 24 going to stir up -- they're not going to say  
 25 anything that may be controversial or create

8/8/2016

Dennis K. Waller

Page 45 (168 - 171)

Page 168

Page 170

1 problems for an agency unless -- they're just not.  
2 Q What was your experience with DOJ and LESB when you  
3 were the police chief that leads you to state what  
4 you've just stated?

5 A I had an officer who had been grandfathered in and  
6 been on the department for 16 years, and I tried a  
7 number of corrective actions. His performance was  
8 always subpar, so I decided to send him to recruit  
9 school because he had never been to recruit school.

10 And recruit school, the director of  
11 the academy called up and was complaining, why did  
12 you send this guy here, he's nothing -- he's  
13 nothing but a problem, he's not getting along with  
14 the program. I said, write him up. I said, if  
15 he's not following what he's supposed to at the  
16 academy or disobeying any of your orders, that's  
17 insubordination because he's directed to go down  
18 there and conduct himself appropriately and  
19 perform. Well, I can't do that.

20 So then I get the contact guy from  
21 Law Enforcement Standards Board. And he was  
22 saying, why did you send that guy down there? I  
23 administered the test to him, and he called me an  
24 asshole. And I said, put it in writing. I said,  
25 you know, that violates a number of our policies

1 action retraining, counseling, whatever, in the  
2 Ronald Brandon shooting, it may have been  
3 prevented.

4 Q And in that regard specifically focusing first on  
5 the Ronald Brandon shooting, I take it you're of  
6 the opinion that once MPD concluded their internal  
7 review of what happened in that shooting, the PSIA  
8 person should have recommended a sustained finding  
9 of a violation?

10 MR. SWAMINATHAN: Objection to form.

11 THE WITNESS: What they didn't address  
12 was that he deliberately and intentionally left  
13 cover and exposed himself which created a  
14 justification for him to shoot and kill Ronald  
15 Brandon.

16 Had he attempted to contain the  
17 situation, allow for communication both between the  
18 officers present -- and there were four officers  
19 present at that time -- and Mr. Brandon and/or  
20 Mr. Brandon's ex-wife and dispatch, she was on the  
21 phone at that time and was attempting to tell them  
22 that he had a pellet gun.

23 Now, would I expect them to  
24 arbitrarily leave cover and approach him because  
25 somebody else said it was a pellet gun if it looked

Page 169

Page 171

1 including disrespect to the public and so forth and  
2 so on. Oh, we can't do that. We don't get  
3 involved in it.

4 Now, eventually the guy was such a  
5 problem that I wrote -- I had a notebook probably  
6 two inches thick of various violations, and I  
7 submitted it to the Police & Fire Commission  
8 without recommendation, and I said, you decide, and  
9 he decided to resign.

10 Q Was that one of the two PFC proceedings you had  
11 referenced earlier?

12 A Yes.

13 Q When you say "recruit school," what are you talking  
14 about?

15 A The basic academy that was being run by Milwaukee  
16 Area Technical College at the time. My point was  
17 the guy from LESB was complaining to me about the  
18 officer's conduct but refused to do anything about  
19 it because it's not what we do.

20 Q Would you agree with me that whatever happened in  
21 terms of the City of Madison's internal review of  
22 the Tony Robinson shooting could not have had any  
23 effect in causing the shooting since the shooting  
24 had already occurred?

25 A That's correct. But had they taken appropriate

1 realistic? No. But it would preclude them from  
2 taking precipitous action. There was no exigent  
3 circumstance requiring Officer Kenny to leave his  
4 position of cover.

5 I know he was in a position of cover  
6 behind his vehicle because I looked at it and  
7 looked at the video, and I was trying to determine  
8 if he was right-handed or left-handed. He carries  
9 his side arm on the right-hand side.

10 As he approached Brandon, he was  
11 aiming his rifle over his left shoulder. That told  
12 me that he had assumed cover, anything capable of  
13 stopping a bullet, behind his vehicle and was  
14 leaning out with his rifle in the left side rather  
15 than if it had been the right side, he would have  
16 had to expose himself this way or above the hood  
17 and -- as he got up and approached.

18 So he deliberately left a position  
19 of relative security, exposed himself. And when  
20 Mr. Brandon moved, moved the pellet gun, he was  
21 shot and killed. Had he waited and let the  
22 situation stabilize, you know, they basically had  
23 the situation isolated, could contain it and then  
24 open up communications, they would have found that  
25 this guy had mental issues and was attempting

1 officer-involved suicide or officer-assisted  
2 suicide or suicide by cop, but they didn't. He  
3 didn't have a chance to do that.

4 That was very similar to Officer  
5 Kenny's response in the Tony Robinson shooting.

6 BY MS. KAISER:

7 Q And I don't want to cut you off, but my question is  
8 a little bit simpler than that. It's my  
9 understanding that with regard to your criticism  
10 against the City, you're critical that after they  
11 concluded the review of the Ron Brandon shooting,  
12 they didn't find that Matt Kenny had violated any  
13 policies and procedures; is that right? Is that a  
14 criticism you have?

15 A Yes, that's my understanding.

16 Q And my next question then is, what policy or  
17 procedure is it that you believe they should have  
18 found Officer Kenny violated in the Ron Brandon  
19 shooting?

20 A Leaving cover unnecessarily, creating a situation  
21 which would justify a shooting where that didn't  
22 have to be. You know, use of deadly force is a  
23 last resort. Officer Kenny's action moves that up.

24 Q So would you have found if you were doing the  
25 review of the Ron Brandon shooting on behalf of the

1 City of Madison, that Officer Kenny failed to  
2 conform to the policy on use of force, use of  
3 deadly force?

4 A Failed to conform to policy and training. Now, his  
5 training, when you're exposed to a deadly force  
6 threat, which the situation with Mr. Brandon was,  
7 would be to assume cover, then try to isolate,  
8 contain and then communicate. There was no attempt  
9 at containing and communicating.

10 Q So in your opinion, what would an appropriate level  
11 of discipline have been for that violation that you  
12 would have found based on a review of the Ron  
13 Brandon shooting?

14 A At the very least, counseling, probably retraining,  
15 reinforcing. I mean discipline doesn't have to be  
16 the negative connotation that you just suspend  
17 somebody forever or fire them or whatever, but you  
18 make it known that, look, that's not what we do,  
19 that's not what we're here for. You violated our  
20 basic mission statement, which is to protect life,  
21 and we give you this awesome authority, and we  
22 expect you to use it appropriately. That wasn't  
23 appropriate. This whole thing could have been  
24 avoided.

25 Now, if you had done that with

1 Brandon and it sunk in, you may not have had  
2 Robinson.

3 Q That was my next question. Assume that Officer  
4 Kenny had been counseled and required to do  
5 retraining with regard to the appropriate contact  
6 cover principles that you talked about --

7 A No, that was Heimsness. Just leaving cover.

8 Q Leaving cover and the circumstances under which it  
9 is appropriate or not appropriate to leave cover.  
10 Assume that he got retraining and counseling about  
11 that issue, do you have an opinion as you sit here  
12 today to a reasonable degree of certainty that had  
13 that counseling and retraining occurred, the Tony  
14 Robinson shooting would not have occurred?

15 MR. SWAMINATHAN: Objection to form.

16 THE WITNESS: If Officer Kenny had  
17 followed his training and his procedures -- and  
18 established procedures, then I can say that that  
19 shooting would not have occurred in the manner in  
20 which it did. That's all I can say assuming he had  
21 done that. Now, that's the best you can do as an  
22 agency, but you're required to do that.

23 The fact that it's so similar, he's  
24 acting recklessly and precipitously which justifies  
25 a use of deadly force in both the Brandon case and

1 the Robinson case.

2 Now I've noted that he's not back on  
3 the road. Now, he has views why he's not, and  
4 apparently the chief has some views why he's not,  
5 but he's not back on the road in a position where  
6 he can do something reckless and maybe result in  
7 another shooting.

8 BY MS. KAISER:

9 Q As you sit here today, is it fair to say you can't  
10 say to a reasonable degree of certainty that if  
11 Matt Kenny had had retraining in 2007, that eight  
12 years later when he's responding to Tony Robinson's  
13 incident, the outcome would have been changed at  
14 all?

15 MR. SWAMINATHAN: Objection to form.

16 THE WITNESS: I can say -- I can't say  
17 with certainty because you can't predict the  
18 behavior or what goes on in somebody's mind. I  
19 could say that the department acted reasonably and  
20 appropriately in addressing that situation instead  
21 of ignoring it.

22 Now, if you showed that same clip to  
23 trainers from other law enforcement agencies, him  
24 being there approximately 15 seconds, leaving it  
25 and rushing up and explain there are no other



1 exigent circumstances, I can't imagine that any of  
2 those trainers would be anything less than appalled  
3 by that behavior.

4 So if you don't address it, you're  
5 encouraging that cowboy-type action.

6 BY MS. KAISER:

7 Q With regard to the shooting of Paul Heenan, am I  
8 understanding correctly that the policy violation  
9 should have been found as a result of the internal  
10 affairs review of Officer Heimsness' actions in  
11 violation of the contact cover principles you  
12 talked about?

13 A When you say "violation," he didn't adhere to it.  
14 He was trained to do that and for the specific  
15 reason that it would not unnecessarily expose the  
16 firearm -- his firearm to being grabbed.

17 So he could have done a number of  
18 things. He could have waited until there was an  
19 additional officer present. My understanding was  
20 there was at least one officer present and others  
21 coming. So do your job right, which reduces the  
22 likelihood that these unnecessary situations will  
23 occur.

24 Now, if you had lethal cover and he  
25 approached -- first of all, if this firearm was

1 Q Koval.

2 A Chief Koval that should be a critical analysis -- a  
3 comprehensive and critical analysis. That wasn't  
4 done in Kenny -- or the Robinson shooting.

5 Q I want to focus on the Paul Heenan shooting for  
6 now. I want to know what you believe an  
7 appropriate conclusion should have been to the  
8 internal affairs review of Steve Heimsness'  
9 actions.

10 A A critical assessment of why he made contact with  
11 his firearm out. And you only get that from  
12 interviewing him and having him answer some very  
13 tough questions. Why did you do it? This isn't  
14 how you were trained, is it? No. Okay. Why did  
15 you do it?

16 Q And you understand that that was done, correct?

17 A No, I don't.

18 Q There was an interview done of Steve Heimsness as  
19 part of the internal review process. You're not  
20 aware of that?

21 A Was that addressed? I don't recall now that that  
22 was addressed. I don't believe it was from my  
23 recollection.

24 Q So it's your understanding that Steve Heimsness was  
25 not asked as part of the internal affairs review

1 holstered, it would be relatively secured and  
2 Officer Heimsness could have done -- acted to  
3 protect it. Then you had another officer present,  
4 and if necessary, for whatever reason Officer  
5 Heimsness lost his firearm, you had somebody that  
6 could protect Officer Heimsness.

7 It was available. All it took was  
8 doing it the right way, doing it consistent with  
9 your training. They didn't do it. And when they  
10 didn't do it, somebody was killed.

11 Was it legally justified? It's from  
12 a criminal perspective. Yes. Was it justified  
13 morally or -- you know -- no, because it was  
14 reckless conduct, and somebody died unnecessarily,  
15 a drunk. Somebody that was totally intoxicated  
16 died because an officer didn't do his job right,  
17 and he was not held accountable for it.

18 Q And my question is, you understand that in the  
19 internal review process, the inquiry is here's what  
20 happened, how does that match up with our policies  
21 and procedures and training, and did the officer's  
22 actions violate any of those policies and  
23 procedures? Is that what the inquiry is in an  
24 internal affairs review?

25 A Yes. And according to Chief Koval or Koval?

1 why he approached Paul Heenan with his gun out?

2 A I don't remember that specifically, but I -- from  
3 the facts that I recall, it wasn't consistent with  
4 his training.

5 Q So fast forward to the outcome of the internal  
6 affairs review. In your opinion, what should have  
7 been the conclusion?

8 A They addressed the use of force. At the time he  
9 used force, he shot Heenan, was he justified? Yes.  
10 What about his conduct up to that point?

11 Q And it's your understanding that that was not part  
12 of the review?

13 A Correct.

14 Q And if it had been part of the review, you think --  
15 do you think some kind of discipline should have  
16 been issued to Steven Heimsness?

17 A At least counseling, possibly retraining,  
18 definitely awareness. You know, officers -- humans  
19 are trained to a certain level or get to a certain  
20 level. If they're not constantly supervised, they  
21 tend to backslide. So was this an example of a  
22 failure to supervise?

23 Now, if you couldn't have prevented  
24 that because there's no supervisor there and nobody  
25 had seen him being sloppy before, that's one thing.

8/8/2016

Dennis K. Waller

Page 48 (180 - 183)

Page 180

1 But if it's something they saw that he was being  
2 sloppy, nobody addressed it, and this time it  
3 resulted in a person getting shot and killed, then  
4 that's a problem with the department.

5 Now, the department is on notice at  
6 the point where somebody was shot and killed that  
7 they need to investigate the total circumstances,  
8 and that's far different -- that's -- there's a  
9 dual track investigation. One is, was there  
10 criminal liability? The other is, did he follow,  
11 or were his actions consistent with department  
12 training and department policy?

13 The most obvious problem or concern  
14 that I recognized is he just ignored the concept of  
15 contact and cover, which is a basic contact --  
16 concept that goes way back.

17 Q It's your opinion that had the MPD done a more  
18 thorough investigation to include not just the  
19 deadly force issue but also what led up to it, at a  
20 minimum Steve Heimsness should have received  
21 retraining and counseling?

22 A I'm not saying at a minimum. Depending on what the  
23 results were, it should have been addressed. And  
24 it may be addressed department wide. So, look, you  
25 guys are getting sloppy. Contact and cover was a

Page 181

1 contributing factor or the failure.

2 So you go that continuum: Training,  
3 policy, supervision, discipline. And that's  
4 ongoing. And it seems to be ignored when you have  
5 a serious situation like a shooting death.

6 Q As you sit here today, do you have an opinion to a  
7 reasonable degree of certainty that had Officer  
8 Heimsness been subject to retraining, counseling,  
9 something along the lines of what you just talked  
10 about, the outcome on March 6, 2015 with Matt Kenny  
11 responding to Tony Robinson, the outcome would have  
12 been any different?

13 MR. SWAMINATHAN: Objection to form.

14 THE WITNESS: I think that if the City of  
15 Madison had addressed these issues more  
16 comprehensively and addressed the total situation,  
17 not just, okay, it wasn't a criminal violation but  
18 it wasn't the outcome that we're looking for and  
19 here's what you did or here's what the officer did  
20 in this situation that allowed this to occur.

21 Now, you're trained better than  
22 that. You have policies to guide you that talk  
23 about that, you ignored them, and this is what  
24 occurred.

25 Now, Lieutenant Skenandore, he

Page 182

1 indicated that he had been involved -- in one  
2 capacity or another -- not involved in as a shooter  
3 but involved in the investigation of seven  
4 officer-involved shootings. He thought that this  
5 one -- that Officer Kenny's actions were consistent  
6 with policy and training. Well, clearly they were  
7 not. Clearly Kenny will tell you or has told you  
8 they were not.

9 But the department isn't looking to  
10 hold the officers accountable at least formally in  
11 that he said there was never any disciplinary  
12 action and never any -- okay, never any  
13 disciplinary action in any of the seven shootings.  
14 It doesn't have to be a negative discipline. It  
15 should be an analysis of what happened and how can  
16 this be prevented in the future.

17 MR. HALL: Can you just read back what my  
18 question was?

19 (Record read.)

20 MR. SWAMINATHAN: Same objection.

21 THE WITNESS: I think I answered it. I  
22 think that if he wasn't -- the problem wasn't  
23 addressed, and they're not held -- the officers are  
24 not held accountable.

Page 183

Page 183

1 BY MS. KAISER:

2 Q You can't say as you sit here today whether  
3 anything would have changed on March 6, 2015 if  
4 either one of these officers had been given  
5 retraining?

6 MR. SWAMINATHAN: Objection.

7 THE WITNESS: You said March 6, 2013?

8 MR. HALL: I meant to say 2015.

9 MR. SWAMINATHAN: Objection. Form and  
10 foundation. Go ahead.

11 THE WITNESS: I thought it was a trick  
12 question. No, I don't think anybody can. I think  
13 that they're -- the actions -- it was more likely  
14 than not that the actions of the officers would be  
15 in conformance to their training and to policy if  
16 they're held accountable.

17 I don't think they were held  
18 accountable. So I think the likelihood of  
19 additional events such as this, it's likely that  
20 there are going to be more situations like this  
21 which -- and my sense, and I was in law enforcement  
22 for a lot of years, was that the department chose  
23 to excuse the behavior and not address it. In  
24 other words, was he in technical compliance because  
25 he didn't violate the criminal law? Yes. Did he

1 make a number of mistakes? Yes. Did they look at  
2 this in a comprehensive manner? Hell no.

3 Officer Kenny was never interviewed  
4 by professional standards. Officer Kenny  
5 acknowledged changing his statement and the  
6 justifications --

7 BY MS. KAISER:

8 Q And I don't -- I don't mean to cut you off. But  
9 really, that wasn't my question at all.

10 MS. KAISER: Can you just go back to my  
11 last question?

12 (Record read.)

13 BY MS. KAISER:

14 Q Sir, are you aware of any literature that discusses  
15 the value of allowing officers who have been  
16 involved in critical incidents to have an  
17 opportunity to go through a couple sleep cycles  
18 before giving a statement?

19 A Yes.

20 Q What's your -- what literature are you aware of?

21 A There's a number of articles from Force Science and  
22 a number of other studies.

23 Q Are those studies generally regarded as  
24 authoritative in the law enforcement profession?

25 A I think there's consideration in a lot of circles

1 the opportunity to do a walk-through of the scene  
2 before giving a voluntary statement?

3 A A walk-through I have issues with unless it's done  
4 rather contemporaneously with -- before the contact  
5 with the attorneys. I think that a walk-through in  
6 many cases is done with a snapshot or public safety  
7 statement, and I think that that's appropriate and  
8 probably necessary.

9 I think in this case you had a  
10 change of versions between what happened initially  
11 and what actually happened after the viewing of the  
12 numerous video segments.

13 Q Do you know whether other law enforcement agencies  
14 besides the City of Madison allow a walk-through in  
15 the same kind of time period as happened in this  
16 case?

17 A Some do.

18 Q Would you say it's a common practice?

19 A I'm not sure -- you mean after consultation with  
20 union and attorneys?

21 Q Yes.

22 A No, I don't think so. I think consultation with an  
23 attorney, consultation with union rep -- or having  
24 a union rep present while they're being  
25 interviewed, but I think you carry that too far in

1 that they are and others that they're kind of --  
2 some of them are a bit questioned.

3 Q And before I go on here, I just want to go back.  
4 When you were talking about spending a lot of years  
5 in law enforcement and departments wanting to  
6 excuse behavior rather than acknowledge it, you  
7 were talking in general about your experience in  
8 law enforcement, correct?

9 A And the Madison Police Department in this  
10 situation.

11 Q In that regard, the sole basis for your  
12 understanding or opinions are the three shootings  
13 that are included in your report, correct?

14 A Yes.

15 Q Are you aware of whether other law enforcement  
16 agencies allow officers to consult with an attorney  
17 before giving a voluntary statement?

18 A Some do. That's a wide practice. A more -- a  
19 wider practice.

20 Q So it's widely accepted within the law enforcement  
21 communities with which you're familiar?

22 A It's accepted in some circles and not in others;  
23 but yeah, it's more common.

24 Q Are you aware whether other law enforcement  
25 agencies besides the City of Madison offer officers

1 the protectiveness of the officer for the sake of  
2 determining the truth.

3 An investigation should determine  
4 the truth. It shouldn't be designed necessarily to  
5 protect or justify the officer's actions, and  
6 that's a problem that I had with it, that there  
7 should be protocols.

8 But if you arrest somebody at the  
9 scene of a shooting and you take them in, police do  
10 not give that person the opportunity to sit back  
11 and go through some sleep cycles before they give  
12 their story. They're interviewed right away.

13 Certainly if it's a criminal  
14 situation, they have a right to seek counsel, but I  
15 think that there's a double standard, and part of  
16 that impacts the credibility of the law enforcement  
17 agency to seek out and determine the truth, at  
18 least a perception of that.

19 Q You understand that with regard to the  
20 investigation of the Tony Robinson shooting, DCI  
21 was in charge of that investigation, correct?

22 A Yes, the criminal investigation.

23 Q Which occurred before the internal affairs  
24 investigation, correct?

25 A Well, for the most part, yes. They're completely

8/8/2016

Dennis K. Waller

Page 50 (188 - 191)

Page 188

Page 190

1 separate; and unfortunately, there wasn't a  
2 comprehensive internal affairs.  
3 Q Was there a comprehensive investigation by the  
4 Department of Criminal Investigation in your  
5 opinion?  
6 A But only to determine criminal liability. They  
7 developed the facts, and then they turned it over  
8 to the DA's office for a determination of criminal  
9 responsibility. That's completely and separately  
10 from a determination did the officer violate  
11 policy? Were his actions consistent or  
12 inconsistent with his training? Could this  
13 incident have been prevented? How can we prevent  
14 this sort of thing from happening in the future?  
15 How can we be a better department and follow our  
16 mission statement?  
17 That's what the internal  
18 investigation or the administrative investigation  
19 should have handled. Instead, they didn't even  
20 interview and hold Officer Kenny responsible for  
21 all the inconsistencies. They didn't question him  
22 about that. They just said, okay, and then they  
23 put him on ice.  
24 Q Is it your opinion that it was inappropriate for  
25 the internal affairs department for the city to

1 Q I understand that.  
2 A Apparently not.  
3 Q Both -- both of those investigations gather a lot  
4 of overlapping data, correct?  
5 MR. SWAMINATHAN: Objection to form.  
6 THE WITNESS: Well, you can't say that  
7 both investigations develop overlapping data when  
8 the administrative investigation wasn't conducted.  
9 BY MS. KAISER:  
10 Q What information do you have with regard to  
11 in-service training that the Madison Police  
12 Department has provided to officers over the years  
13 with regard to mental health issues and responding  
14 to subjects that may be suffering from a mental  
15 health crisis?  
16 A I think fairly comprehensive, consistent with LESB  
17 standards based on the responses of the officers  
18 and their awareness, but not based on their -- the  
19 actions.  
20 Q I'm not sure what you mean.  
21 A Excited delirium is a mental health issue or  
22 medical issue. They were all aware of it, yet  
23 Officer Kenny ignored it completely when he took  
24 action even though he turned off his lights so it  
25 wouldn't agitate somebody who is probably or could

Page 189

Page 191

1 rely on the evidence that DCI had developed in its  
2 investigation?  
3 A Yes, because one is criminal, the other is not, and  
4 you can't rely on that. And if you have questions  
5 and if you have inconsistencies, you can't rely on  
6 that if you don't bring in the people and question  
7 them.  
8 Sergeant Gary wasn't interviewed.  
9 Officer Kenny wasn't interviewed. That would have  
10 been important. You know, when Sergeant Gary was  
11 asked, do you think that shooting was justified?  
12 Well, that wasn't my decision to make. Oh, that  
13 told me a lot. That told me a lot.  
14 Q You're talking about in his deposition in the  
15 context of a lawsuit?  
16 A Yes.  
17 Q And when you say Sergeant Gary wasn't interviewed  
18 and Matt Kenny wasn't interviewed, you're talking  
19 about --  
20 A The professional standards, internal affairs.  
21 Q Both of them were interviewed at length by DCI,  
22 correct?  
23 A For the criminal case, not the administrative  
24 investigation. Entirely different. One does not  
25 supplant the other.

1 have been or most likely have been involved in an  
2 excited delirium incident.  
3 Sergeant Gary responded without  
4 advising anybody, which is fine. Why did he  
5 continue to respond? Because he suspected Tony  
6 Robinson might be suffering from excited delirium,  
7 yet Sergeant Gary didn't do anything in an  
8 affirmative manner.  
9 He didn't say -- tell Officer Kenny  
10 over the radio to hold on until they had sufficient  
11 officers present. None of the officers requested  
12 medical backup respond and staged nearby consistent  
13 with the policy. They all knew it, but nobody did  
14 anything to -- in an affirmative manner to carry it  
15 out.  
16 MS. KAISER: I think I'm done subject to  
17 looking at if there's anything in the binders I  
18 need to look at.  
19 MR. HALL: Let's take a break then.  
20 (A recess was taken from 4:04 p.m. to  
21 4:08 p.m.)  
22 MS. KAISER: I have one more question.  
23 BY MS. KAISER:  
24 Q In terms of the interview you believe should have  
25 taken place by MPD of Matt Kenny and the Robinson

1 investigation, what additional questions would you  
2 have asked that were not asked by DCI of Matt  
3 Kenny?  
4 A One, explain the discrepancies in what he  
5 originally gave and the --  
6 Q Snapshot --  
7 A -- the snapshot and public safety statement between  
8 his subsequent statement to DCI and then explain  
9 the -- or account for the discrepancy in his  
10 version one, version two and the video account  
11 that -- subsequent acknowledgment.

12 I don't think he -- I don't recall  
13 now if he acknowledged it in DCI, but he did in his  
14 deposition that if you look at the -- look  
15 carefully at the video that synchronized with the  
16 audio and he -- he ultimately acknowledged that it  
17 would appear that all seven shots were fired at the  
18 base of the stairway, that should have been  
19 addressed because that's totally inconsistent with  
20 his statement and never was.

21 Q Anything else?

22 A I thought that was quite a bit.

23 Q I'm not suggesting it is. I just want to make sure  
24 I'm not missing something. I want to hear  
25 everything you've got.

1 A An explanation of why he went in, an explanation of  
2 why he announced his office where he did, which as  
3 we discussed ad nauseam was probably the most  
4 undefensible, disadvantageous position you could if  
5 you were going to pick a spot.

6 Q And you don't think he explored those things with  
7 DCI, why he went in and when he announced himself?

8 A No. I mean I would have him explain that.  
9 Initially he said he thought somebody was being  
10 attacked, and he heard voices. Then he  
11 acknowledged there was only one voice.

12 There were a number of other  
13 inconsistencies. There's four or five of them.  
14 Those weren't really addressed. They were just --  
15 he got his sleep cycles. He reviewed the video.  
16 He had consultation with his attorney. So then he  
17 gave his second version.

18 I would have wanted to know what  
19 happened -- what was the disconnect between dealing  
20 with an excited delirium case to dealing with  
21 simply a justification for deadly force, how that  
22 disconnect -- why did excited delirium cease to be  
23 an issue, and then here's an excuse to go up with a  
24 justification for deadly force.

25 I guess I would question the

1 sergeant why he didn't take an affirmative response  
2 to what was -- appeared to be an excited delirium  
3 case and which appeared to be an officer about to  
4 act precipitously.

5 Q Sergeant Gary?

6 A Yes. Now, at the time I don't believe that he  
7 acknowledged that he was responding. I'd have to  
8 check on that. But at some point he did advise he  
9 was on the scene. I think that covers it in  
10 general terms.

11 Q I just had a quick question. When you were  
12 flipping through that binder, there were a couple  
13 Post-it notes on things.

14 A That's just a list of my opinions.

15 Q Okay.

16 A That says, inconsistencies, false statement.

17 Q That's the one I was looking at.

18 A Policy, practice training. The issue with the  
19 Brandon case was leaving cover. The Heenan case  
20 was contact and cover, and the Robinson case was  
21 leaving cover, not waiting for backup, ignoring  
22 excited delirium, making contact from a bad  
23 position, tombstone courage and police officer  
24 created jeopardy.

25 Q What's tombstone courage?

1 A Acting like a cowboy, taking action before and in a  
2 manner in which -- outside your training; in other  
3 words, not waiting for backup, going in, I'm going  
4 to resolve this issue right now, you know, and he  
5 had his firearm out.

6 A rational person would back off if  
7 you're threatened with a firearm. An irrational  
8 person might attack you or come at you in which  
9 case you're limited in your defense, you're limited  
10 in your other force options.

11 And if you go in with the idea, my  
12 only force option is to use deadly force, it's  
13 likely that that's what's going to happen if it  
14 doesn't turn out the way you had hoped.

15 Q So that's a shorthand --

16 A Just so I can recall the issues rather than --

17 MS. KAISER: Okay. I'm done.

18 EXAMINATION

19 BY MR. HALL:

20 Q I have one question. Thanks for the opportunity to  
21 look in your file.

22 In the forward of a couple of the  
23 depositions, I noticed that there were deposition  
24 summaries that were prepared that refer to page  
25 numbers.

1 Did you prepare those deposition  
 2 summaries, or were they prepared by anyone else?  
 3 A I did.  
 4 Q And same thing --  
 5 A Got you.  
 6 Q You did. The same thing with all of the  
 7 highlighting and the handwritten notes in your  
 8 file, those are all things that you did?  
 9 A Yes.  
 10 MR. HALL: Now I'm done.  
 11 MR. SWAMINATHAN: I just want to follow  
 12 up on a couple points.  
 13 EXAMINATION  
 14 BY MR. SWAMINATHAN:  
 15 Q You were asked some questions about your  
 16 understanding of Officer Kenny's testimony about  
 17 Tony Robinson -- strike that.  
 18 You were asked some questions about  
 19 what Officer Kenny testified to at his deposition  
 20 about Tony Robinson's positioning during some of  
 21 the shots that were fired. Do you recall that?  
 22 A I think so.  
 23 Q So I think one of the -- the word you used to  
 24 describe Tony Robinson's positioning during some of  
 25 those shots was prone or partially prone. Do you

1 have been asked or done as part of the  
 2 administrative review process into the Tony  
 3 Robinson shooting. Do you recall that?  
 4 A Yes.  
 5 Q And you identified a number of things that you  
 6 thought should be done. I wanted to also ask you  
 7 as part of that review, would you expect the  
 8 administrative review to consider past use of force  
 9 incidents or shooting incidents involving the  
 10 officer?  
 11 MR. HALL: Objection to form. Leading.  
 12 THE WITNESS: Yes, particularly if there  
 13 were some similarities.  
 14 BY MR. SWAMINATHAN:  
 15 Q Would you have expected the administrative review  
 16 in the Tony Robinson matter to have at least  
 17 considered the events and incident in the Brandon  
 18 shooting?  
 19 MR. HALL: Object to form. Leading.  
 20 MS. KAISER: Object to form.  
 21 THE WITNESS: Yes.  
 22 BY MR. SWAMINATHAN:  
 23 Q Would you have expected the administrative review  
 24 in the Tony Robinson matter to have considered  
 25 whether -- strike that.

1 recall that?  
 2 A Yes.  
 3 Q When you use the term "prone," are you referring to  
 4 someone basically being on the ground or in a  
 5 sitting position?  
 6 MR. HALL: Objection to form. Leading.  
 7 THE WITNESS: Yes. As I attempted to  
 8 explain further, like reclined, either against the  
 9 steps or on his back somewhat.  
 10 BY MR. SWAMINATHAN:  
 11 Q So certainly someone who's on the ground; is that  
 12 right?  
 13 MR. HALL: Objection to form. Leading.  
 14 THE WITNESS: Yes.  
 15 BY MR. SWAMINATHAN:  
 16 Q When you used the word "prone," I understood that  
 17 term sometimes to define somebody lying face down.  
 18 Is that what you mean by "prone"?  
 19 MR. HALL: Objection to form. Leading.  
 20 THE WITNESS: No, not in this case. It  
 21 would be reclined. My understanding based on the  
 22 position of his feet as it's shown in the video  
 23 would be he would be on his back.  
 24 BY MR. SWAMINATHAN:  
 25 Q You were asked some questions about what should

1 Would you have expected the  
 2 administrative review in the Tony Robinson matter  
 3 to have considered that Officer Kenny had violated  
 4 the Madison policy about having your body  
 5 microphone on?  
 6 MR. HALL: Objection to form. Leading.  
 7 THE WITNESS: Yeah, I think that they  
 8 would consider that. I mean if for no other reason  
 9 that there could be implication posed by some that  
 10 he deliberately turned it off to conceal his  
 11 aberrant -- or his violations of policy.  
 12 BY MR. SWAMINATHAN:  
 13 Q So it's something you would have expected to at  
 14 least be discussed as part of the administrative  
 15 review?  
 16 MR. HALL: Objection to form. Leading.  
 17 THE WITNESS: Yes.  
 18 BY MR. SWAMINATHAN:  
 19 Q You were asked some questions about -- you were  
 20 asked a lot of questions about when Officer Kenny  
 21 announced himself. Do you recall that?  
 22 A Yes.  
 23 Q And you were asked a question about whether you  
 24 knew what Officer Kenny's explanation was for why  
 25 he announced himself when he did. Do you recall

8/8/2016

Dennis K. Waller

Page 53 (200 - 203)

Page 200

1 that?

2 A Yes.

3 Q I believe you referenced that his explanation had

4 to do with the idea that things had gotten quiet.

5 Do you recall that?

6 MR. HALL: Objection to form.

7 THE WITNESS: Suddenly got quiet.

8 BY MR. SWAMINATHAN:

9 Q Now, is that testimony from Officer Kenny, his

10 explanation for why he announced what he did, is

11 that something you considered, you were aware of,

12 when you formed your opinions?

13 MR. HALL: Objection to form. Leading.

14 THE WITNESS: Yes.

15 BY MR. SWAMINATHAN:

16 Q Is it a fact that you ignored or completely

17 disregarded?

18 MR. HALL: Objection.

19 THE WITNESS: No.

20 BY MR. SWAMINATHAN:

21 Q And ultimately was it a fact that -- strike that.

22 You were asked some questions about

23 what weapon Officer Kenny should have used. Do you

24 recall that?

25 A Yes.

Page 201

1 Q I'll turn your attention to page 6 of your report.

2 There's a paragraph that starts with the number

3 three, I think it's B3, two-thirds of the way down

4 the page. Do you see that?

5 A Yes.

6 Q It says, "Officer Kenny admitted that on a flat

7 surface in a physical confrontation with Tony, he,

8 Kenny, could have disengaged, holstered his firearm

9 and used less lethal force options."

10 What would have been examples --

11 were there any examples of flat surfaces that would

12 meet this description in paragraph three in the

13 Tony Robinson matter?

14 A At the base of the stairway.

15 Q And so if events took place at the base of the

16 stairway, what other use of force option should

17 Officer Kenny have considered?

18 A If he had the ability to access it, then because

19 this was an excited delirium situation or

20 identified as most likely an excited delirium

21 situation, he should have used the electronic

22 control device or specifically the taser.

23 Q I'd like to turn your attention to page 4 of your

24 report. You spent some time in the second-to-last

25 paragraph of paragraph -- of page 4 talking about

Page 202

1 the amount of time related to events. Do you

2 recall that?

3 A Yes.

4 Q You state here in your report, "According to the

5 times established by the radio and Sergeant Gary's

6 squad reporting, Officer Kenny had been in the

7 apartment stairway less than 23 seconds before

8 exiting the stairwell while firing shots at Tony."

9 Do you see that?

10 A Yes.

11 Q So by -- would it be correct to say that you formed

12 your opinion that -- strike that.

13 Would it be correct to say that when

14 you say there were 23 seconds from the time Officer

15 Kenny entered the stairwell to the time he exited

16 the stairwell is based in part on the -- what you

17 saw and heard of the audio and video sync?

18 MR. HALL: Objection to form.

19 THE WITNESS: Yes. In my recollection

20 there was a time stamp on that that gave me that

21 perspective, and it's very hard to be precise down

22 to the exact second, but I tried to be close and

23 also give the benefit of some doubt.

24 BY MR. SWAMINATHAN:

25 Q You were asked some questions about references to

Page 203

1 15 to 20 seconds. Do you recall that?

2 A Yes.

3 Q And so those were questions about -- strike that.

4 When you were referring to 15 to 20

5 seconds, was that in reference to the time from

6 when Officer Kenny was entering the stairwell to

7 the time he announced himself?

8 MR. HALL: Objection to form.

9 THE WITNESS: Yes.

10 BY MR. SWAMINATHAN:

11 Q And what was your basis for coming up with an

12 estimate that approximately 15 to 20 seconds passed

13 before he announced himself?

14 A You had an exigent circumstance that was used to

15 justify -- let me rephrase that.

16 Officer Kenny used an exigent

17 circumstance to justify his intervention instead of

18 waiting for backup. Backup was mere seconds away.

19 He said it required immediate intervention, yet he

20 took the time to slowly go up halfway to the point

21 where he was in probably the most -- and again,

22 according to his testimony, to be five to six steps

23 from the top to be in the most disadvantageous

24 position you could imagine from a tactical

25 perspective.

Page 204

1 Q So when you say Officer Kenny took about 15 to 20  
2 seconds from the time he entered the stairwell to  
3 the time he announced himself according to him, is  
4 that based on your review of his deposition?

5 MR. HALL: Objection. Form and  
6 foundation.

7 THE WITNESS: Yes.

8 BY MR. SWAMINATHAN:

9 Q At his deposition, what did Officer Kenny testify  
10 to about the amount of time from when he announced  
11 himself to the time he fired shots?

12 A Extremely short duration. I don't think he gave a  
13 precise time, but almost immediately after he  
14 announced himself, he alleged that he was attacked  
15 near the top of the stairs.

16 Q Is that in part how you formed the estimate that it  
17 was 15 to 20 seconds before he announced himself?

18 MR. HALL: Objection. Form and  
19 foundation.

20 THE WITNESS: Yes.

21 MR. SWAMINATHAN: I have nothing else.

22 MR. HALL: I don't have anything.

23 MS. KAISER: I have nothing.

24 MR. HALL: Okay.

25 (Deposition concluded at 4:25 p.m.)

Page 205

1 STATE OF WISCONSIN )  
2 ) ss  
3 MILWAUKEE COUNTY )

4 I, Dawn M. Lahti, RPR, Certified  
5 Realtime Reporter, and Notary Public in and for the  
6 State of Wisconsin, do hereby certify that the  
7 preceding deposition was recorded by me and reduced  
8 to writing under my personal direction.

9 I further certify that said  
10 deposition was taken at 710 North Plankinton  
11 Avenue, Milwaukee, Wisconsin, on the 8th day of  
12 August, 2016, commencing at 10:00 a.m.

13 I further certify that I am not a  
14 relative or employee or attorney or counsel of any  
15 of the parties, or a relative or employee of such  
16 attorney or counsel, or financially interested,  
17 directly or indirectly, in this action.

18 In witness whereof, I have hereunto  
19 set my hand and affixed my seal of office on this  
20 15th day of August, 2016.

21  
22 DAWN M. LAHTI, RPR  
23 Certified Realtime Reporter  
24 Notary Public

25 My commission expires April 17, 2020.